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LITIGATION UPDATE

OCTOBER 2010

DEVELOPMENTS OF INTEREST IN CASE LAW

(a) Administrative Law – Standard of Review of Decisions of the HRTO – Human Rights – *Prima Facie* Discrimination on the Basis of Race: *Shaw v. Phipps*, [2010] O.J. No. 4283 (Div. Ct.), Released 6 October 2010

The applicant at the Human Rights Tribunal, a black male, was a letter carrier with Canada Post. It was his second day delivering mail in an affluent neighbourhood in Toronto. He was wearing his Canada Post coat and was carrying a satchel used by letter carriers.

In response to a number of recent break-and-enters in the area, the respondent Officer Shaw was patrolling the area with a new constable, Officer Noto. Officer Shaw alleged that when he first observed the applicant, he saw him crossing back and forth across the street in a suspicious manner. Both officers also testified that they observed the applicant approach a house, knock on the door, and speak to a woman without delivering any mail.

Officer Shaw did not recognize the applicant as the regular mail carrier in the area. He stopped the applicant, asked for identification, and ran a check of the applicant's criminal record, which revealed nothing. The applicant was the only person who was stopped and questioned that day by the officers.

The Tribunal found that Officer Shaw had discriminated against the applicant on the basis of race, contrary to the *Ontario Human Rights Code*. The Tribunal also concluded that the Toronto Police Services Board and the Chief of Police were jointly and severally liable for $10,000 in general damages to the applicant as compensation for injury to dignity, feelings and self-respect. The Tribunal declined to order future compliance remedies against the respondents.

On the respondents' application for judicial review, all three judges of the panel of the Divisional Court agreed that although the standard of review of the Tribunal's decisions is stated to be "patent unreasonableness" in the *Code*, the correct standard of review, in light of *Dunsmuir*, was the reasonableness standard. The majority of the Divisional Court went on to say that a high degree of deference is to be accorded to the Tribunal's determination whether there has been discrimination under the *Code* and what the appropriate remedy should be, given that these are questions within the specialized expertise of the Tribunal.

All judges also agreed that the Tribunal was correct to hold the Toronto Police Services Board jointly and severally liable for damages as an employer under the *Code*.

The majority agreed with the Tribunal's analysis and conclusions respecting discrimination on the part of Officer Shaw. Although the Tribunal did not specifically find that the applicant had proved a *prima facie* case on a balance of probabilities, counsel for Officer Shaw had, either implicitly or explicitly, conceded that all elements of the test were met. The majority also rejected the respondents' argument that the Tribunal essentially used the concept of "unconscious discrimination" to make a finding of discrimination in the absence of supporting evidence. The majority acknowledged that many discrimination cases do not involve direct evidence that a complainant's colour or race was a factor in the incident in question. A

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Tribunal must draw reasonable inferences from proven facts, which is what the Tribunal did in this case.

Writing for the minority, Justice Nordheimer disagreed with the majority and found that counsel for Officer Shaw had not conceded that a *prima facie* case of discrimination was met. He found that any such concession must be clear and explicit, and here it was not. He found that although the applicant, a black male letter carrier, was stopped and questioned by Officer Shaw, this fact, together with other facts before the Tribunal (i.e. that other non-black construction workers in the area and a non-black water carrier were not stopped and questioned), failed to establish a nexus between the first two elements and the third element of a *prima facie* case of discrimination (the latter being that one's race, colour or ancestry was a factor in the alleged adverse treatment). As the Tribunal did not undertake this analysis, Justice Nordheimer would have sent the case back to the Tribunal for a re-hearing.

Justice Nordheimer also took issue with a finding that the applicant's race was a significant factor, if not the predominant factor, in Officer Shaw's actions, whether consciously or unconsciously. He reasoned that our system of justice is predicated on the notion that only those who act voluntarily should be punished. He went on to say that "I do not know how a Tribunal, or any other decision-making body for that matter, purports to reach a conclusion that a person has acted unconsciously in his or her discrimination against another person." In making these remarks, the dissenting judge may not have taken into account well-established human rights jurisprudence confirming that intention is not relevant to a finding of a breach of the *Code*.

(b) Limitation Periods – Amendment of Pleadings – Deemed Undertaking: *Givogue v. Burke*, 2010 ONSC 5075, Released 23 September 2010

The plaintiffs brought a motion to amend their amended statement of claim in an action that, in ten years, had not yet proceeded to discoveries. The plaintiffs sought to add a new cause of action based on the tort of knowingly participating in breach of a fiduciary duty. The plaintiffs were given 20 days to further amend the statement of claim to properly plead this cause of action because the *Limitations Act, 2002* did not apply.

Equitable claims were not covered by the old *Limitations Act,* but they are now covered by the *Limitations Act, 2002*. However, the *Limitations Act, 2002* did not apply here because the conditions in the s. 24 transition provisions were not met. In this case, a proceeding had been commenced in respect of the claim prior to January 1, 2004. Accordingly, the old *Limitations Act* applied, with the result that there was no limitation period. The plaintiffs also sought an order confirming that the deemed undertaking rule did not apply with respect to their communications with the Office of the Superintendent of Financial Institutions (OSFI), so that the plaintiffs could meet with OSFI and seek their advice and evidence in advance of trial. The judge noted that the deemed undertaking rule does not apply to interviewing a witness in preparation for the same proceeding. The judge nevertheless refused to grant a blanket order allowing the disclosure of information to OSFI, and, instead found that it was up to the plaintiffs to ensure that this rule was not violated by ensuring that the information is not used for any collateral use.

(c) Jurisdiction – Forum Conveniens – Application of New Test Set out in *Van Breda*: *Dilkas v Red Seal Tours Inc. (Sunwing Vacations)*, 2010 ONCA 63, Released 4 October 2010

This was an appeal from a decision dismissing a motion challenging jurisdiction of the Ontario court and the convenience of the Ontario forum. The plaintiffs brought an action in Ontario for damages against Sunwing and Best Day after suffering serious injuries in Mexico on a bus tour. Sunwing cross-claimed against Best Day for contribution and indemnity, primarily based on the indemnification agreement executed after the accident to deal with claims arising out of accident.

Best Day brought a motion challenging both Ontario jurisdiction and the convenience of the Ontario forum. The motion was decided and dismissed by applying the test articulated in *Muscutt v Courcelles* (2002), 60 OR (3d) 20. Subsequent to the release of the motion judge's decision, the Court of Appeal released its decision in *Van Breda v Village Resorts Ltd* (2010), 98 OR (3d) 721. Applying the new test in *Van Breda*, the Court of Appeal dismissed the appeal.

With respect to the jurisdiction analysis, the key connecting factor identified in *Van Breda* is the connection of the claims and of the defendants to Ontario. Other considerations in the jurisdiction simpliciter analysis are no longer to be treated as independent factors, but rather as principles that bear upon the analysis, including fairness to each party of assuming or refusing to assume jurisdiction, the involvement of other parties in the action, willingness to recognize and enforce an extra-provincial judgment with similar jurisdictional connections to the forum, comity, and the standards of enforcement in the other jurisdiction.

Here, the Court of Appeal found that the vacation packages were purchased in Ontario; Best Day's transportation agreement with Sunwing was to be governed by the law of Ontario; and most significantly, Best Day entered into indemnity agreements with Sunwing following the accident, which was made in respect of any lawsuit that might be brought in Ontario by one of the tourists injured in the bus accident. Accordingly, Best Day expected and contemplated that the plaintiff's claims would be litigated in Ontario. These factors establish the necessary and real substantial connection between the plaintiff's claims, the defendant Best Day, and the Ontario forum.

Unlike the jurisdiction issue which is a question of law involving the weighing of factors and application of overarching principles, whether there is a more convenient and appropriate forum is an exercise of judicial discretion and is subject to deference on appeal. The location and convenience of witnesses is a factor relevant only to the forum *conveniens* analysis and is not to be considered when deciding whether there is jurisdiction *simpliciter*.

(d) Human Rights – Test for Discriminatory Legislation: *Ontario (Director, Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593, Released 16 September 2010

The Court of Appeal affirmed the holding of both the Social Benefit Tribunal and the Divisional Court that the prohibition on providing benefits to those disabled solely due to addiction in s. 5(2) of the *Ontario Disability Support Program Act* violated the *Human Rights Code*.

However, the Court of Appeal rejected the Divisional Court's proposed new test for when legislation would be found to be discriminatory. The new test would have required an applicant to demonstrate a *prima facie* case. The respondent would then have to demonstrate that the distinction does not create a disadvantage by perpetuating prejudice or stereotyping, on in the alternative, establish a statutory defence.

The Court held that this improperly reversed an applicant's onus and improperly ignored a key element of the test for discrimination, namely that a distinction creates a disadvantage by perpetuating prejudice or stereotyping.

While the Court disagreed with the Divisional Court, it found that here was sufficient evidence to support a finding of discrimination, as there was evidence that substance addicts and welfare recipients were subject to stigma and prejudice and there was no explanation in the legislation why those solely impaired by substance abuse could be excluded.

(e) Class Actions – Costs Awards Against Plaintiffs' Solicitors: *Attis v. Ontario (Minister of Health)*, 2010 ONSC 4508, Released 10 September 2010

The Attorney General sought an order for the outstanding costs of a class action to be paid by the plaintiffs' solicitors. Following unsuccessful appeals to the Court of Appeal and the Supreme Court, the total costs awarded against the plaintiffs were over $165,000. The plaintiffs were impecunious. The Court granted the motion and required the solicitors to bear the costs of the action.

The Court placed a special emphasis on the need for proper disclosure of costs consequences to representative plaintiffs in a class proceeding. The decision emphasizes that the absence of informed consent is equivalent to absence of consent, and given the evidence that the action would not have been brought by the plaintiffs if they were aware of the costs consequences, it was within the court's jurisdiction to hold their solicitors personally liable.

There was no documentary evidence that the solicitors advised the plaintiffs of their potential liability to pay a costs award. Given the lack of sufficient evidence to establish that the plaintiffs were advised of potential personal liability, and given the evidence of the plaintiff's complete confidence in their solicitors, the court was satisfied that it was appropriate that the costs award should be payable by the firm.

(f) Civil Trial – Jury Trial – Mistrial – Deference to Trial Judge: *Groen v. Harris*, 2010 ONCA 621, Released 29 September 2010

A jury had been convened, on the respondent/defendant's request, to assess the damages suffered by the appellant/plaintiff as a result of a motor vehicle accident for which fault was admitted. After several weeks of evidence, the appellant's counsel made impassioned pleas to the jury during the closing arguments, including asking the jury to rely on pure emotional considerations. On this basis, the respondent's counsel successfully obtained a mistrial.

There were two issues for consideration before the Court of Appeal. First, the appellant argued that the trial judge erred in finding that the closing comments compromised trial fairness and that they could not be corrected with appropriate jury instruction. Second, the appellants argued that the trial judge erred in refusing to decide on the question of damages herself.
On the first issue, the Court of Appeal emphasised prior jurisprudence on appropriate language to be used by counsel in closing statements. While the Court acknowledged that some of the errors made by counsel in closing could have been addressed by instruction to the jury, the Court also relied upon recognised deference to the trial judge to determine when fairness in the trial had been compromised. In particular, the Court held that the trial judge was able to order a mistrial on the cumulative effect of the closing statements based on emotional pleas. The Court specifically refused to address the effect of individual statements by counsel from the trial record.

On the second issue, the Court held that the trial judge had made an appropriate decision by declining to decide the issue of damages alone. Absent consent from both parties, the Court held that the respondents should not be deprived of their right to have the case decided by a jury because of the appellant's trial counsel. The appeal was dismissed.

(g) Construction Law – Statutory Trust – Breach of Statutory Trust – No Specific Intent or Knowledge of Improvements Required: *Sunview Doors Limited v. Pappas*, 2010 ONCA 198, Released 16 March 2010

The Plaintiff, Sunview Doors Ltd. ("Sunview"), manufactures supplied custom-made patio doors for contractors. Between September 2005 and October 2006, Sunview supplied doors to a subcontractor, Academy Doors and Windows Ltd. ("Academy"), which had carried on business as a manufacturer, supplier and installer of windows, doors and curtain walls in renovated and retrofitted low and high-rise buildings. The doors were supplied by Sunview on $100,000 unsecured credit. Before Sunview received any payment, Academy went bankrupt. Sunview brought an action for breach of contract against Academy on the basis of the unpaid accounts. Additionally, Sunview sought a claim for breach of trust against two directors of Academy as well as Academy's office manager. This second claim was brought pursuant to the combined operation of s. 8, the statutory trust provision, and s. 13, the pierced corporate veil provision, of the *Construction Lien Act ("Act")*.

The Superior Court had allowed the claim against Academy for breach of contract, but did not allow the claim for breach of trust to succeed. The trial judge held that Sunview was not entitled to benefit under a statutory trust. Turning on the prior decision of a panel of the Court of Appeal sitting as the Divisional Court in *Central Supply Co. 1972 Ltd. v. Modern Tile Supply Co.* (2001), 55 O.R. (3d) 782, the trial judge held that Sunview could not establish as a prerequisite that at the time it sold or supplied its doors to Academy, it had *intended* that they be used for *known* and *identified* improvements (emphasis added). In other words, Sunview was not able to identify the particular projects that the doors were used for, but that they had been requested by Academy for existing projects based on the specifications provided.

In this case, a unanimous five-member panel of the Court of Appeal upheld the Divisional Court's decision on the basis of distinguishing *Central Supply*. The decision effectively creates a lower threshold for a supplier in the construction industry to claim under the statutory trust.

Specifically, the Court stated that it is not necessary for a supplier to demonstrate an intention to supply materials to a known and specific improvement, but instead "[p]rovided that the supplier is able to link the material to the improvement for which the subcontractor was owed money or has been paid, the supplier will be entitled to the benefit of the s. 8 statutory trust in the Act."

The decision is intended to expand the statutory trust provision to accord with its previous application prior to *Central Supply*. The statutory trust under the *Act* is meant to give a supplier a separate statutory form of security for a full payout of monies received by the contractor or subcontractor beyond the limited holdback amounts available in a lien action.

While the Court recognised that *Central Supply* attempts to address a legitimate concern about an overly broad remedy, the Court provides that the threshold of demonstrating "a link" is sufficient to limit the use of the trust remedy to persons working in the construction and building repair industries alone.

In this case, Sunview established the requirements for the creation of a statutory trust: (a) Academy was a subcontractor; (b) based on the particular facts of this case, sufficient efforts had been made by Sunview to demonstrate that it had supplied materials to projects on which Academy was a contractor; (c) Academy had received monies on account of its contract price for those projects; and (d), that money was owed to Sunview from Academy. Resultantly, Sunview was a proper beneficiary under the s.8(1) trust provision of the *Act*.

Suggested content for next month's newsletter can be forwarded to either Hilary Book, Farah Malik, or Mandy Seidenberg.