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LITIGATION UPDATE

NOVEMBER 2010

LEGISLATIVE UPDATE

***Open for Business Act, 2010*; Royal Assent received October 25, 2010**

The Act amends a number of statutes. The objective of the Act is to respond to "the needs of the business community, while continuing to provide appropriate government oversight and protect the public interest." The amendments aim to save businesses time and money by "enabling a modern, risk-based approach for approvals, supporting a strong workforce, and delivering more efficient government services." Some of the significant amendments are as follows:

New Rules for Employment Standards Claims

The Act amends sections of the *Employment Standards Act*, 2000. Among other things, it establishes a process for initiating complaints that critics have compared with the "self-help" model in British Columbia.

Under the new section 96.1, a complaint will not be assigned to an employment standards officer unless the complainant has taken steps specified by the Director. If the complainant takes no steps within six months of filing the complaint, an officer is deemed to have refused to issue an order. Under the new section 101.1, employment standards officers have the authority to settle complaints that are assigned to them.

The underlying objective of this new process is to allow employees and employers to resolve employment disputes without government intervention. The new complaint process requires claimants to provide specific information and notice to their employers before the claim is assigned to an officer.

New Rules for Environmental Approval

A number of environmental statutes have been amended, including the *Environmental Protection Act* ("EPA") and the *Ontario Water Resources Act*. The Act also repeals several environmental statutes, including the *Waste Management Act*, 1992 and the *Waterfront Regeneration Trust Agency Act*, 1992.

The Act has created a new, integrated process called "environmental compliance approval" for air emissions, waste management systems, waste disposal sites or sewages. Previously, these activities required separate certificates of approvals. The new Part II.1 of the EPA sets out the details for this new environmental compliance approval regime.

The amendments also adopt a risk-based approach to the environmental approval process by establishing an online registry for "low-risk activities" while strengthening approvals for high-risk activities. The new Part II.2 of the EPA establishes the Environmental Activity and Sector Registry. Persons are prohibited from engaging in a prescribed activity unless the activity has been registered in the Registry and the activity is conducted in accordance with the rules prescribed by regulations.

Construction Liens Act

These amendments intend to clarify the lien process for condominiums and the right to cross-examine those who have registered liens.

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Notable amendments include updated definitions of "home buyer" and a broadened definition of "improvement". A new section 33.1 is added to the *Construction Lien Act* allowing owners of land intended to be registered in accordance with the *Condominium Act*, 1998 to publish notice of the intention to register in a construction trade newspaper. An owner failing to comply with this section is liable to any person entitled to a lien who suffers damages as a result.

Pursuant to the amendments, a claim for lien no longer needs to be verified by affidavit. Instead, subsection 40(1) is amended to allow cross-examinations of certain persons with respect to a claim for lien.

Under subsection 44(9), a lien claimant whose lien is sheltered under a lien that is vacated by order now may proceed with an action to enforce the sheltered lien as if the order to vacate had not been made.

Professional Engineers Act

The amendments intend to make it easier for internationally trained engineers to work in Ontario by remove unnecessary citizenship requirements for individuals applying to be a professional engineers. Subsection 14(1) of the *Professional Engineers Act* no longer requires applicants for licenses to be citizens or permanent residents of Canada. Similarly, subsection 18(1) no longer requires applicants for limited licenses and provisional licenses to be citizens or permanent residents of Canada.

Other Amendments

In addition to the above, the Act also amends the *Highway Traffic Act*, the *Drainage Act*, the *Business Corporations Act*, the *Liquor License Act* and the *Personal Property Security Act*.

DEVELOPMENTS OF INTEREST IN THE CASE LAW

(a) Recognition and Enforcement of Foreign Judgments – Sovereign Immunity: *Kuwait Airways Corp. v. Iraq*, 2010 SCC 40, Released 21 October 2010

At the time of Iraq's invasion of Kuwait in 1990 and subsequent occupation, the Iraqi government ordered its national airline, the Iraqi Airways Company ("IAC"), to appropriate the aircraft, equipment and parts inventory of the Kuwait Airways Corporation ("KAC"). KAC brought an action against IAC in the U.K. for damages as a result of the appropriation of its property. After lengthy proceedings, the U.K. courts awarded judgment against IAC for over $1 billion Canadian. KAC then had the Republic of Iraq joined as a second defendant in order to claim costs of the actions in the U.K. The U.K. High Court of Justice made a further order requiring Iraq to pay $84 million Canadian in costs.

KAC sought to have the costs order recognized in Quebec. At issue was whether the *Sovereign Immunity Act* applied, and if it did, whether or not the actions by Iraq fell into the "commercial activity" exception in that Act. The Court held that all actions by a foreign state are prima facie entitled to protection under the Act, and that the onus was on KAC in this case to show that the actions of Iraq fell within one of the Act's exceptions. The only exception argued in this case was the "commercial activity" exception.

The Court held that it was not enough to determine whether the acts complained of were authorized or desired by Iraq, but rather that the nature of the acts must be examined to carefully ensure a proper legal characterization. To do so, it is necessary that the findings of fact made by the British judge be accepted. In this case, the U.K. court found that Iraq, the sole proprietor of IAC, controlled and funded IAC's defence throughout the proceedings and participated in the commercial litigation in the hope of protecting its interest in IAC. In doing so, it was responsible for numerous acts of forgery, concealing evidence, and lies. While the initial seizure of the aircraft was a sovereign act, the U.K. litigation in which Iraq intervened concerned the retention of the aircraft, which was unconnected to the seizure of the aircraft. Therefore, the actions fell within the exception, and Iraq could not rely on the protection of the SIA.

(b) Aboriginal Law – Duty to Consult: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, Released 28 October 2010

The Kenney Dam was built in Northwest British Columbia in the 1950s. The dam and reservoir altered the water flow to the Nechako River, to which the Carrier Sekani Tribal Council First Nations ("CSTC") have a land claim. The CSTC was not consulted on the building of the dam. In 2007 B.C. Hydro, a Crown corporation, entered into an agreement with Alcan, the owner of the dam, to purchase the excess power created by the dam. This agreement required approval by the British Columbia Utilities Commission (the "Commission"). The CSTC made submissions to the Commission that the B.C. government should be obligated to consult the CSTC on the agreement as it would adversely affect its claims and rights.

The Court held that the duty to consult arises where: (1) the Crown has knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) there is contemplated Crown conduct; and (3) the contemplated conduct may adversely affect an Aboriginal claim or right. While the first two branches of the test were easily met here, the third branch was more difficult. The claimant must show a causal relationship between the proposed conduct and the potential for adverse impacts on Aboriginal claims or rights. Past wrongs, including past breaches of the duty to consult, do not suffice. Neither

will mere speculative impacts satisfy this requirement.

The fact that the B.C. government had breached its duty to consult in the 1950s did not satisfy this requirement. The duty will only be triggered where a contemplated Crown action puts current claims and rights in jeopardy. The Court rejected the argument that a failure to consult on the initial project means that any further development requires consultation. Because the water levels would not be affected by the agreement, and because Alcan would sell its excess power to another party if not to B.C. Hydro, no duty to consult arose.

(c) Privilege – Journalist-Source Privilege – Publication Bans: *Globe and Mail v. Canada* (Attorney General), 2010 SCC 41, Released October 22, 2010

This decision dealt with objections raised by the Globe and Mail to orders that would have required it to reveal a journalist's confidential source. The source provided information regarding the "Sponsorship Scandal" sought by a party in a civil action that arose out of the Scandal.

The Court affirmed the existence of journalist-source privilege. The applicability of the privilege to a given relationship is to be determined by the Wigmore test. The Court specifically affirmed that Wigmore could be applied under Quebec's Civil Code. The Court held that civil procedure in Quebec is not completely detached from the common law model and common law principles may play a "residual role."

The Court provided guidance in applying the Wigmore test in this context. Questions regarding a source must be relevant. The Court noted that the fourth stage of Wigmore, which involves considering if the benefit of revealing the evidence outweighs the harm of disclosure, is the most significant aspect of the test. Key factors to consider in this assessment include the stage of the proceedings, the centrality of the issue in dispute, the relationship of the journalist to the proceedings and other available sources of the information. The decision, however, is ultimately a contextual one. Whether the privilege applied to the journalist-source relationship at issue was remitted back to the Quebec Superior Court.

(d) Privacy Legislation – Privilege: *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681, Released October 20, 2010

The Ontario Court of Appeal affirmed the Divisional Court's holding that confidential mediation and settlement documents are not required to be disclosed pursuant to the *Freedom of Information and Protection of Privacy Act* (FIPPA). The Information and Privacy Commission ("IPC") allowed disclosure of records relating to a mediation between the LCBO and Magnotta. The IPC held that the mediation was not subject to the disclosure exemption provision in s. 19 of FIPPA, which permits a body subject to FIPPA to refuse to disclose records that are subject to solicitor-client privilege or prepared by or for Crown counsel in preparation for litigation. The IPC decision was overturned by the Divisional Court.

The Court of Appeal affirmed the Divisional Court's decision. The Court held that alternative dispute resolution is an integral part of the litigation process and that common law privilege ought not to be statutorily abrogated absent clear language. The Court of Appeal ultimately rejected the narrow reading of s. 19 of FIPPA that would have limited it to litigation privilege, and held that settlement privilege was also covered by s. 19. As such all the settlement documentation was exempt from disclosure.

This decision affirms the importance of settlement privilege and highlights the courts' continuing attempts to balance the desire to provide access to information while preserving essential privacy and confidentiality interests. WeirFoulds lawyer Jill Dougherty acted for the LCBO in its successful challenge to the IPC's ruling before the Divisional Court.

(e) Constitutional Law – Division of Powers – *Aerodomes: Quebec (A.G.) v. Lacombe*, 2010 SCC 38, Released October 15, 2010

This is the first of two decisions released concurrently by the Supreme Court of Canada assessing the constitutional authority of provincial regulation (and municipal land-use by-laws) impacting the field of aeronautics through the division of powers analysis.

In 1995, the municipality amended its zoning by-law to address aviation activity. The pre-amble of this amending by-law stated that it was passed to balance serenity for vacationers with commercial interests. The amendment divided Gobeil Lake's existing planning zone into two regions. A newly-created region, which did not include Gobeil Lake, was provided with the explicit authorization to have structures related to float planes. By contrast, the remaining zone, which contained Gobeil Lake, implicitly prohibited aerodrome activity. This implicit prohibition applied to most of the municipality through the by-law amendment.

In 2005, a properly-licensed numbered company started operating flight excursions from Gobeil Lake. In 2006, the municipality obtained an injunction based on the 1995 amending by-law ordering the numbered company to cease its activity on Gobeil Lake. The Quebec Court of Appeal overturned the lower court on division of powers grounds.

A 7-2 majority of the Supreme Court dismissed this further appeal. McLachlin C.J.C., writing for the majority, held that the municipal by-law was, in pith and substance, related to aerodromes, a matter exclusively within Parliament's

power to legislate for "peace, order and good government". The by-law was invalid as *ultra vires* provincial jurisdiction and should be read down so as to not effect aerodromes.

The Court went on to consider the application of the ancillary powers doctrine. This doctrine is applicable where a law is, in pith and substance, outside the jurisdiction of the enacting legislature but, by virtue of the rational functional connection test, a jurisdictional overhang of an impugned, invalid law may be saved because the impugned law's operation is "necessary" or "functional" to the overarching purpose of an otherwise *intra vires* legislative scheme. The degree of connection required to save a jurisdictional breach is determined relative to the degree of jurisdictional overhang.

This analysis is to begin by determining the purpose of the legislative scheme that the impugned law is said to further. In this case, the legislative scheme was land-use planning. The purpose and effect of the amendment by-law did not follow the general principles of land-use planning or further the zoning by-law for the municipality specifically. The amendment blatantly acted as a prohibition on aviation in the region. As a result, there was no redeeming connection that could be found to resuscitate the by-law through the ancillary powers doctrine.

(f) Constitutional Law – Division of Powers – Aerodomes: *Quebec (A.G.) v. Canadian Owners and Pilots Association*, 2010 SCC 39, released October 15, 2010

This case concerns an aerodrome built by two private citizens on lands zoned "agricultural" in Québec. The Province argued that the placement of the aerodrome at issue violated its planning law, namely that land designated "agricultural" by the Province had to be used for that purpose, subject to prior authorization from a provincial board for other uses.

The Court applied the doctrine of interjurisdictional immunity, even though the doctrine received much theoretical diminishment by the Court in *Canadian Western Bank v. Alberta*, 2007 SCC 22. Interjurisdictional immunity may render an otherwise valid provincial law inapplicable as the effects of its application entrench on the core of a protected power within Parliament's jurisdiction. The test is whether the impugned law comes within the "basic, minimum and unassailable content", or essential jurisdiction, of the legislative power in question.

The Majority found that the provincial laws designating agricultural land were in pith and substance intra vires provincial jurisdiction, by virtue of ss. 92(13), (16) and 95 of the *Constitution Act*, 1867, but that the incidental effects of its application impaired the well-established "core" of the federal jurisdiction over aeronautics under the POGG power, which has been identified in Supreme Court jurisprudence to include the ability to determine the location of airports and aerodromes. The provincial law was therefore deemed inapplicable, by virtue of the doctrine of interjurisdictional immunity, to the extent that it prohibits aerodromes on lands zoned agricultural.

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