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LITIGATION UPDATE

DECEMBER 2010

LEGISLATIVE UPDATE

The *Open for Business Act, 2010* was assented to on 25 October 2010. As reported previously, this Act amends a number of statutes. It also enacts the *Commercial Mediation Act, 2010* and the *Creditors' Relief Act, 2010*.

The *Commercial Mediation Act, 2010* is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation. The Act applies to mediations of commercial disputes to which Ontario law applies. The Act will be useful to parties who have not yet commenced formal court actions or applications to obtain relief.

Parties to a mediation of a commercial dispute may agree to either opt out of the Act's application altogether or modify the Act, subject to certain exceptions. Indeed, an invitation to mediate a commercial dispute will be considered rejected if no acceptance is received within 30 days. The Act does not apply to mandatory mediations prescribed under Ontario's *Rules of Civil Procedure*.

Once a mediator has been appointed by agreement of the parties, that mediator must make sufficient inquiries to determine whether he or she has a current or potential conflict of interest. The mediator must also consider whether any circumstances exist that may give rise to a reasonable apprehension of bias. This positive obligation continues until the mediation is terminated. If a conflict or potential conflict arises and is disclosed, the mediator may only continue to act with the consent of all parties. If a party to a settlement agreement fails to comply with the terms of settlement, the agreement may be enforced by any other party by application to a judge of the Superior Court of Justice for judgment in accordance with the terms of the agreement. Significantly, a party wishing to enforce the terms of settlement may apply to the Superior Court of Justice for an order authorizing registration of the agreement with the court. Once registered, the settlement agreement would have the same force and effect as if it were a judgment obtained and entered in the Superior Court of Justice on the date of registration. The Act provides a more expeditious process for enforcing settlements of out-of-court commercial disputes.

The *Creditors' Relief Act, 2010* sets out rules for determining the priority of judgment creditors and the amounts to be distributed to them when money or property is seized from a judgment debtor through proceedings to enforce payment of amounts owing under court orders and judgments.

DEVELOPMENTS OF INTEREST IN THE CASE LAW

(a) Security Interests--Priority--Competing Statutory Interests

***Bank of Montreal v Innovation Credit Union*, 2010 SCC 47 (Released 5 November 2010)**

The Supreme Court of Canada was faced with competing security interests under the federal *Bank Act* and the *Personal Property Security Act* ("PPSA") of Saskatchewan. Innovation Credit Union had taken an unsecured interest over farm equipment from the debtor pursuant to the PPSA. Subsequently, the Bank of Montreal (the "Bank") registered a security interest over the same farm equipment pursuant to the *Bank Act*.

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The application judge found that registration under the Bank Act trumped an unsecured interest under the PPSA, and thus the Bank had first priority. However, the Saskatchewan Court of Appeal unanimously overturned this decision.

The Supreme Court unanimously affirmed the Court of Appeal's decision. The *Bank Act* governs the dispute because provincial legislation cannot affect the priority of a validly created federal security interest. However, this does not mean that the PPSA is irrelevant. The *Bank Act* can only give a secured party an interest in property as great as the interest the owner of the property has at the time of the security agreement. In this case, the owner's interest in the property was subject to the Credit Union's unregistered interest. Thus, the owner could only convey to the Bank an interest that was also subject to the Credit Union's interest.

In the companion case of *Royal Bank of Canada v Radius Credit Union Ltd*, 2010 SCC 48, released 5 November 2010, both the unregistered interest under the PPSA and the *Bank Act* registration occurred prior to the purchase of the equipment, and thus theoretically attached to the equipment at the same time. However, under the PPSA, an unregistered interest is created at the time of the creation of the security agreement. As the agreement with the Credit Union was executed before the security agreement with the Bank, the Bank took its security subject to the Credit Union's interest. Again, the unregistered PPSA agreement trumped the subsequent, registered *Bank Act* security agreement.

The Court recognized that its decisions may create a commercially absurd result. The decisions make several references to the potential desirability of legislative amendments in the area, and cite (although not explicitly with approval) articles that have advocated the repeal of the Bank Act.

(b) Appeal--Jurisdiction of Ontario Municipal Board--Statutory Deadlines

***City of Toronto v WJ Holdings*, 2010 ONSC 6067 (Div Ct) (Released 12 November 2010)**

This is an appeal by the City of Toronto (the "City") from the Ontario Municipal Board's (the "Board") order directing the City to issue demolition permits to the Respondents, who owned thirteen buildings located on Bloor Street West. The Respondents wanted to demolish those buildings, and applied for permits to do so in March 2006. No decision had been made by November 2007, and the Respondents filed an appeal with the Board. The issue on appeal at the Divisional Court was whether the Board erred in law in determining that it had jurisdiction to hear the appeal brought by the Respondents.

Under s. 3 of the *City of Toronto Act, 1985* (the "Act"), where council has neglected to make a decision within one month after receipt of the demolition application, the applicant "shall" file the appeal within 20 days after the one-month period following receipt of the application has expired. In other words, to appeal from a failure on the City's part to make a decision, an applicant must file its appeal within 50 days of its application.

The City took the position that the Board lacked jurisdiction as the Respondent had not filed their appeal within the statutory deadline, and asserted that the Board lacked jurisdiction to extend the time for bringing a spent appeal.

The Court had to decide whether the word "shall" in s. 3 was mandatory or directory. If the word "shall" was mandatory, the breach of the section would result in a "total nullity" of the appeal. If "shall" was determined to be directory, the breach of the provision would have been a mere "irregularity" that could be cured. In determining whether the word "shall" in a statutory provision was mandatory or directory, the Divisional Court applied three factors:

1. The Legislature's intention in enacting the time limit in question, and specifically, whether the Legislature intended that non-compliance with the time limit was to result in loss of jurisdiction or nullification of the action. The Court is to consider the entire scope of the statute when applying this factor.
2. If the provision intends for a public duty to be performed within a certain time, the provision is more likely to be directory than mandatory.
3. The Court must compare the possible prejudice to the parties that may arise if the provision is interpreted as "mandatory" with the potential prejudice to the parties if the provision is read as "directory".

In this case, the Divisional Court held that the second factor did not apply, as the provision did not relate to the performance of a public duty. The other two factors supported reading the provision in question as directory rather than mandatory. First, the legislative purpose of the time limit in question is "to facilitate the more efficient administration of the statutory scheme governing demolition permit applications". The Court noted that, in most cases, it was effectively impossible for the City to process demolition applications within 50 days. It then held that the Legislature could not have intended to force applicants to file appeals to the Board before the City could reasonably be expected to have had time to consider their application. Furthermore, the City would not suffer any prejudice if the time limit provision was interpreted as a directory one. On the other hand, the Respondent could lose their appeal right if the appeal time limit was interpreted as mandatory.

Accordingly, the Divisional Court found that the use of the word "shall" in s. 3 of the Act is directory, not mandatory. It held that the Respondents' appeal was brought in time, and dismissed the City's appeal. This decision suggests that in some circumstances, a statutory provision stipulating an appeal deadline that appears mandatory on its face may be a mere guideline for filing such appeals.

Courts and tribunals will examine the entire statutory scheme and the legislative intent in determining whether there is jurisdiction to extend the time for bringing an appeal that is not filed within such time line.

(c) Security for Costs--*Libel and Slander Act*--Civil Procedure

***Liberty Mutual et al v. Donatelli et al*, 2010 ONSC 6318 (Released 19 November 2010)**

The security for costs provisions of the *Libel and Slander Act* do not preclude courts relying upon the similar provisions of the *Rules of Civil Procedure* unless there is a direct conflict between the provisions.

The main action in this case involved an insurance company, Liberty Mutual, suing an individual, Rose Donatelli, who held herself out as a practicing psychologist and billed the insurance company for services to several insureds. Later, criminal allegations surfaced that Ms. Donatelli was a fraud. The insurance company sued Ms. Donatelli for the cost of the billed services to its insureds. Ms. Donatelli counterclaimed for $12.5 million in defamation damages.

Ms. Donatelli repeatedly failed to provide required undertakings. Liberty Mutual received costs against Ms. Donatelli on motions pertaining to these undertakings. When these awards remained unpaid, Liberty Mutual moved to have costs secured into court on the counterclaim pursuant to Rule 56 of the Rules of Civil Procedure.

Ms. Donatelli appealed, citing the costs provisions of the *Libel and Slander Act*. Based on paragraph 3 of subrule 1.02(1) of the *Rules of Civil Procedure* and jurisprudence, the Divisional Court held that the Libel and Slander Act is not a complete code and that Rule 56 operates to the extent that there is no conflict with the express provisions of the Act. In this case, the *Libel and Slander Act* has no provisions for an order requiring security into court for the non-payment of costs in the same, or another, proceeding. The appeal was dismissed.

(d) Appellate Jurisdiction--Civil Procedure--Privy Council

***E. Anthony Ross v. Bank of Commerce (Saint Kitts Nevis) Trust and Savings Association Limited*, [2010] UKPC 28 (Released 23 November 2010)**

The plaintiff obtained a judgment in the courts of Saint Christopher and Nevis ("Nevis"). The Nevis Court of Appeal (the "Court") set the judgment aside. The plaintiff sought to appeal to the Privy Council, and asserted that he could do so as of right, without seeking leave to appeal.

Prior to changes to the Privy Council's Rules of Procedure in 2009, the plaintiff would have needed to seek leave to appeal from the Court. If leave to appeal was not obtained from the Court, it was then possible to obtain special leave from the Privy Council.

The Privy Council held that, in light of changes to the Rules, it was possible that an appeal could be heard without leave. However, the Privy Council held that a Nevis law regarding procedures for seeking leave still applied to appeals to the Privy Council from Nevis courts. As a result, the Privy Council concluded the plaintiff was required to seek leave to appeal from the Court.

However, the Privy Council also noted that the Court, in light of the rule changes, had previously held that leave to appeal had to be sought at the Privy Council itself. Furthermore, under the Nevis constitution, an appeal to the Privy Council is available as of right for claims above a certain monetary value. As such, the Privy Council considered the application as an application for special leave, and determined that the plaintiff should be granted leave to bring an appeal.

Frank Walwyn of WeirFoulds argued the case before the Privy Council on behalf of the plaintiff. The quality of his submissions were praised by the Privy Council in its judgment.

(e) Immigration and Refugee Law--Extradition--Principle of *non-refoulement*

***Nemeth v. Canada (Justice)*, 2010 SCC 56 (Released 25 November 2010)**

This appeal involved the interplay between the right of refugees not to be returned to a country where they will face prosecution (the principle of *non-refoulement*) and Canada's obligations with respect to extradition.

The appellants, who are of Roma ethnic origin, arrived in Canada from Hungary in 2001, and were given refugee status due to a well-founded fear of persecution. Two years later, Hungary issued an international arrest warrant in respect of a fraud charge against the appellants, for an allegedly fraudulent lease for $2,700 CAD. The Minister of Justice ordered the appellants' extradition to Hungary.

The principle of *non-refoulement* prohibits the direct or indirect removal of refugees to a territory where they run the risk of being subjected to human rights violations. Section 115 of the *Immigration and Refugee Protection Act* ("IRPA") incorporates this principle into statutory law. However, the Court found that the term "removed" in s. 115 of the IRPA has a specialized meaning and does not include removal by extradition. Rather, non-refoulement in the extradition context is dealt with by s. 44 of the *Extradition Act* ("EA").

Pursuant to s. 44 of the EA, the Minister must refuse to surrender an individual for extradition if the surrender would be unjust or oppressive having regard to all the relevant circumstances, or if the request for extradition is made for the purpose of prosecuting or punishing the person by reason of certain grounds such as race and religion, or if "the person's position may be prejudiced for any of those reasons". The Court held that the prejudice referred to in s. 44 is not limited to prejudice in the prosecution or punishment of the person, and that s.

44 protects a refugee against *refoulement* that risks prejudice on the listed grounds, whether or not the prejudice is strictly linked to prosecution or punishment. A person who has obtained refugee status meets the test for prejudice, and the Minister must refuse to surrender that person for extradition unless it is shown that the person has become ineligible for refugee status. In determining this issue, the refugee does not have the burden of showing that the circumstances giving rise to his refugee status continue to exist. The Minister must consult with the Minister of Citizenship and Immigration concerning current conditions in the requesting state, and owes a duty of fairness.

The Court held that the Minister's decision in this case was based on incorrect legal principles and was unreasonable. Among other things, the Minister had imposed a burden on the appellants to show a continuing risk of persecution, and failed to respond to the appellants' submission to him that they did not fall within the "serious crime exception" to refugee protection. As a result, the Court remitted the matter to the Minister for reconsideration in accordance with its reasons.

(f) Bankruptcy and Insolvency--Companies' Creditors Arrangements Act--Provincial Obligations

***Her Majesty the Queen in Right of the Province of Newfoundland and Labrador v. Abitibibowater Inc.*, et al. (SCC Docket No. 33797) (Leave granted 25 November 2010)**

On November 25, 2010, the Supreme Court of Canada granted leave to appeal in *Her Majesty the Queen in Right of the Province of Newfoundland and Labrador v. Abitibibowater Inc., et al*.

The central issue is whether a court overseeing proceedings under the *Companies' Creditors Arrangements Act* ("CCAA") has the ability to effectively extinguish regulatory obligations imposed on the restructuring company by provincial law. In this case, the Province of Newfoundland and Labrador ("the Province") issued orders under its environmental protection legislation (the "EPA Orders") several months after AbitibiBowater Inc. ("Abitibi") commenced CCAA proceedings. The provincial legislation provided that if Abitibi failed to comply with the EPA Orders, the Province could undertake the remediation work itself and then recover the associated costs from Abitibi.

Abitibi argued that these orders were monetary in nature, in that it would have to spend money to comply, and because it could not effectively comply with the orders, and therefore the Province would have to do so and seek to recover the costs.

The Province brought a motion to decide the issue. The Quebec Superior Court overseeing Abitibi's CCAA Proceedings (the "CCAA Court") had previously issued a Claims Procedure Order ("CPO") that defined "claims" as encompassing any breach of a statutory duty. Thus, all "claims" not filed before the deadline in the CPO are stayed, while any "claim" filed before it is subject to compromise along with all other such claims. Abitibi argued the EPA Orders were caught by the definition of "claim" in the CPO, and since they were not issued before the deadline, the obligation to comply was stayed. The Province requested a declaration that the orders were not barred or extinguished, and that their enforceability was not affected by the CPO in this matter.

The CCAA Court dismissed the Province's motion. The CCAA Court held that the definition of "claim" in the CCAA was broad enough to encompass statutory duties that are "financial or monetary in nature", and held that the EPA Orders were monetary in nature due to a combination of factors, such as Abitibi being required to spend money for a purpose that did not result in profit to the company, and the ability of the Province to undertake the work itself and claim resulting costs from Abitibi. As the EPA Orders were "claims" for the purpose of the CPO, and the EPA Orders were made after the deadline for filing claims, the CCAA Court held that Abitibi's obligations under the EPA orders were extinguished.

The Province moved for leave to appeal to the Quebec Court of Appeal. The Court of Appeal denied leave, holding that the CCAA Court correctly interpreted the definition of "claim" in the CCAA, and the CCAA Court's application of that definition to the EPA orders was a factual finding that could not be challenged on appeal.

The Supreme Court of Canada granted leave to appeal, though it is unusual to do so from a denial of leave to appeal in the court below. The specific issue before the Supreme Court will be whether Abitibi's duty under the environmental laws of the Province to comply with the EPA Orders can be extinguished under the CCAA like any commercial debt, though the appeal will also deal with broader issues that will have a significant impact on future insolvency proceedings across the country.

David Wingfield and Paul Guy of WeirFoulds represented the Province on the motion for leave, and WeirFoulds also represented the Province in the courts below.