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LITIGATION UPDATE

JANUARY 2011

DEVELOPMENTS OF INTEREST IN CASE LAW

(a) Class Actions – The Crown's Duty to Aboriginal Children

***Brown v. Canada (Attorney General)* (2010), 102 O.R. (3d) 493 (S.C.J.) (Released May 26, 2010)**

From 1965 to 1984, welfare authorities in Ontario removed many aboriginal children from their communities and placed them with non-aboriginal foster or adoptive parents, in what is referred to as the "Sixties Scoop". The Plaintiffs sought certification of a class action against the Federal Crown, which had entered into an agreement with Ontario to provide funding for Ontario to deliver provincial welfare programs to registered Indians with reserve status. The Plaintiffs alleged that the Federal Crown had wrongfully delegated its responsibility to aboriginal persons by entering into an agreement with Ontario that authorized a child welfare program that systematically eradicated the children's aboriginal culture, society, language, customs, traditions and spirituality. The Plaintiffs adduced evidence that loss of cultural identity caused low self-esteem, depression, anxiety, suicide, substance abuse, violence and other difficulties for aboriginal individuals, as well as problems for aboriginal communities. The Crown sought to strike the claim for failing to disclose a reasonable cause of action.

Pursuant to the Class Proceedings Act, 1992, the court is required to certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

With respect to whether the pleadings disclosed a cause of action, the proposed claim was based on five causes of action: (1) breach of the honour of the Crown; (2) the actionable wrong of identity genocide of children; (3) violation of aboriginal rights; (4) breach of fiduciary duty; and (5) negligence. The Court found that there is no independent cause of action based on the honour of the Crown, and that the identity of genocide claim was not viable as a tort because: (i) various international covenants and conventions are not part of Ontario's civil law; and, (ii) the Federal Crown's execution of the Canada-Ontario Welfare Services Agreement is not an act or omission intended to destroy, in whole or in part, an identifiable group of persons. With respect to the claim of violation of aboriginal rights, the Court found that being or identifying oneself as an aboriginal is not a right, but rather a legal status from which aboriginal rights arise. Thus, the first three causes of action disclosed no cause of action.

With respect to the claims of breach of fiduciary duty and negligence, the Court found that the pleadings did not disclose a cause of action in relation to the Federal Crown's having entered into an agreement with Ontario for the provision of child welfare programs to aboriginal children, but that it was not plain and obvious that there was no breach of fiduciary duty or negligence when the Federal Crown allegedly did nothing to stop the Ontario system from operating in a way that was harmful to aboriginal children. The Court thus struck out the claim as pleaded, but gave the Plaintiffs leave to amend the claim in respect of breach of fiduciary duty and negligence.

(b) Enforcement of Muncipal By-Laws – Injunctions – Constitutional Law – Freedom of Expression under s. 2(b)

***Vancouver (City) v. Zhang* (2010) 325 D.L.R. (4th) 313 (B.C.C.A.) (Released 19 October 2010)**

This appeal was concerned with whether a by-law prohibiting the construction of new structures on city streets without first obtaining written consent from the City of Vancouver was constitutionally valid (the "by-law").

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Falun Gong practitioners set up banners and a makeshift shelter and meditation hut in front of the Chinese Consulate in the City. The structure was primarily located on the grassy portion of a City street. The City brought a successful application for an injunction requiring the practitioners to remove the structures and prohibiting them from placing new structures on the street. The BCSC found that this method of expression was not protected by s. 2(b) of the Charter. The BCSC held that, in any event, the by-law was reasonably justified under s.1.

The British Columbia Court of Appeal overturned the lower court decision and declared the provision of the by-law of no force and effect. The Court found that public streets are spaces in which political expression takes place and the City's limitation on the use of a structure for the purpose of political expression was a violation of s. 2(b) of the Charter.

The Zhang Court further found that the City's violation of s. 2(b) of the Charter was not justified under s. 1. Although regulation of structures on public streets is a pressing and substantive objective that is rationally connected to the goal of regulating the placement of structures on public streets, the by-law did not minimally impair the practitioners' rights. The by-law was an absolute prohibition with an uncertain possibility of exception by City council on unknown grounds. The by-law did not reflect the considerations made when approval is granted and there was no scheme that considered political speech and expression. Ultimately, the Court found that regulation of commercial and artistic expression cannot justify a by-law that precludes any use of structure, however minimal, for political expression. Finally, the practitioners' inconvenience in not being able to use the structure to aid expressive activity outweighed the minimal benefit to the City.

(c) Judicial Review – Access to Information and Protection of Privacy under the *Municipal Freedom of Information and Protection of Privacy Act*

***City of Ottawa v. Ontario (Information and Privacy Commissioner)*, [2010] O.J. No. 5502 (Ont. Div. Ct.) (Released 13 December 2010)**

This case addresses the question of whether a government employee's personal e-mails are subject to freedom of information legislation when those e-mails are sent from a workplace e-mail address.

The City of Ottawa initially took the position that personal e-mails of its employees were not subject to section 4(1) of the Municipal Freedom & Protection of Privacy Act ("MFIPPA") as the e-mails were not "in the custody or under the control of" the city. On appeal, the Information and Privacy Commissioner concluded that private e-mails that are sent via a government e-mail account were subject to the legislation and ordered the City to provide the requested disclosure. The City of Ottawa sought judicial review of the Commissioner's decision.

Writing for a unanimous court, Justice Molloy concluded that the impugned e-mail correspondence was not subject to MFIPPA and was therefore not accessible by members of the public. In applying a purposive approach to the analysis, Justice Molloy determined the intent of the legislation was to enhance democratic values by providing its citizens with access to information. Justice Molloy then concluded that expanding the terms "custody and care" to include personal e-mails of an employee that are unrelated to government business would not advance the purpose of the legislation. Further, a citizen's right to participate in the democratic process would not be impinged by prohibiting access to private e-mails of government employees. In coming to this conclusion, Justice Molloy likened personal e-mails to personal documents that are physically kept in a government employee's workspace. Just as personal physical documents in a government employee's workspace are not susceptible to freedom of information legislation, personal e-mails are similarly protected.

(d) Bankruptcy and Insolvency – *Companies' Creditors Arrangement Act* – Priorities

***Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 (Released 16 December 2010)**

In the first decision of the Supreme Court of Canada considering the Companies' Creditors Arrangement Act ("CCAA"), the Court discusses the principles of interpretation for the CCAA. Apart from its importance in that respect, the decision is also of interest for its discussion of statutory interpretation, particularly with respect to statutory amendments.

In Century Services, the issue was the relationship between s. 222(3) of the Excise Tax Act ("ETA"), which creates a statutory deemed trust over unremitted GST, and s. 18.3(1) of the CCAA, which provided that any statutory deemed trusts in favour of the Crown did not operate under the CCAA, subject to certain exceptions (none of which include GST). An order made in the CCAA proceedings allowed a payment to the debtor company's main creditor, Century Services Inc.; however, the debtor company was also ordered to hold back an amount equal to its unremitted GST, and segregate it in the Monitor's trust account. The debtor company's restructuring efforts failed, and it moved for a partial lift of the stay of proceedings to allow it to make an assignment in bankruptcy under the Bankruptcy and Insolvency Act ("BIA"). The Crown moved for an order requiring the immediate payment of unremitted GST.

The motion was denied by the CCAA chambers judge, but the Court of Appeal for British Columbia allowed the appeal. The Court of Appeal held that the chambers judge had no discretion under s. 11 of the CCAA (which permits orders, inter alia, staying claims against the debtor) to continue the stay of the Crown's claim, and that the order that funds be segregated in the Monitor's account in the amount of the GST payments created an express trust in favour of the Crown.

The Supreme Court of Canada allowed the appeal. The reasons of the majority emphasized the flexibility of the CCAA. Its general language should not be read restrictively, and the requirements of appropriateness, good faith and due diligence should be considered by the court whenever exercising CCAA authority. The purpose of orders made under the CCAA, and the means they employ, should be focused on furthering efforts to avoid social and economic losses resulting from liquidation of an insolvent company. There should also be regard to a harmonious transition from the CCAA to the BIA, with the objective of a single proceeding common to both statutes. The Court held there is no "gap" between the CCAA and the BIA; they operate in tandem. Thus, the chambers judge had the discretion under the CCAA to effectively construct a "bridge" between

the CCAA proceedings and liquidation under the BIA, by staying the Crown's claim for payment of the GST monies. On the question of the express trust, the majority found that no express trust was created by the chamber judge's order; the funds were not sufficiently segregated to have a clear beneficiary, and the uncertainty of the outcome of the CCAA restructuring eliminated any certainty respecting the vesting of a beneficial interest in these funds in the Crown.

Justice Abella dissented and took the view that the ETA gave priority during CCAA proceedings to the Crown's deemed trust over unremitted GST, and that the court's discretion under s. 11 of the CCAA was circumscribed accordingly. Justice Abella examined the various amendments to the ETA, the BIA and the CCAA over the years, and concluded there was a clear inference of a legislative decision to protect the deemed trust over GST in the ETA from the operation of s. 18.3(1) of the CCAA. The chambers judge was therefore required to respect the priority scheme set out in s. 222(3) of the ETA, and neither ss. 11 or 18.3(1) of the CCAA would give him authority to deny the Crown's request of the payment of GST funds during the CCAA proceedings. Due to this finding, Abella J. held it was unnecessary to consider whether there was an express trust.

(e) Constitutional Law – Division of Powers – Federal Jurisdiction Over Criminal Law – Provincial Jurisdiction over Property and Civil Rights

***Reference re Assisted Human Reproduction Act*, 2010 SCC 61 (Released 22 December 2010)**

On December 22, 2010, the Supreme Court of Canada rendered a divided 4-4-1 decision in Reference re Assisted Human Reproduction Act. At issue was whether the impugned provisions, sections 8 to 19, 40 to 53, 60, 61 and 68 of the Assisted Human Reproduction Act, S.C. 2004, c.2, exceeded Parliament's authority to enact criminal law under s. 91(27) of the Constitution Act, 1867. The impetus for the legislation in question was the 1989 Royal Commission on New Reproductive Technologies (the "**Baird Commission**"), a report which made recommendations for federal legislation to address the concerns about certain practices in the field of assisted human reproduction. While conceding that the legislation contained certain provisions that were valid criminal law, the Attorney General of Quebec challenged the bulk of the legislation as being health legislation in pith and substance and encroaching on provincial jurisdiction. The Quebec Court of Appeal held that the impugned sections were not valid criminal law as their pith and substance, i.e. their real character, was the regulation of medical practice and research in relation to assisted reproduction.

At the Supreme Court, Chief Justice McLachlin, joined by Binnie, Fish and Charron JJ. would have upheld the entire legislation as valid criminal law. Lebel and Deschamps JJ. joined by Abella and Rothstein JJ., would have struck the entire legislation down after finding the impugned provisions were in pith and substance a matter of health law. In the end, Justice Cromwell decided the difference and allowed the appeal in part. The first question raised was whether the statutory scheme is a valid exercise within the scope of federal criminal law power under s. 91(27) of the Constitution Act, 1867. There are three requirements of a valid criminal law: prohibition, backed by a penalty, with a criminal law purpose.

The Court split on the issue of the pith and substance of the legislation. According to the Chief Justice, the dominant purpose and effect of the legislative scheme is to prohibit practices that would undercut moral values, produce public health evils and threaten security of donors, donees, and persons conceived by assisted reproduction. Parliament may validly regulate in its criminal legislation to target a legitimate criminal law purpose, with the incidental effect of producing beneficial practices by prohibiting reprehensible conduct. This does not render the law unconstitutional. If the legislative scheme is a valid exercise of federal power but some of its provisions are invalid, the invalid provisions can be severed to leave the remaining provisions intact.

According to Lebel and Deschamps JJ., the Act has the two-fold purpose of: 1) prohibition of reprehensible practices; and, 2) promotion of beneficial practices. The impugned provisions regulated assisted human reproduction as a health service. The Baird Commission report is evidence of Parliament's intent to impose national medical standards, rather than uphold morality based on a reasoned apprehension of harm. In their view, the provisions of the Act which regulate human reproduction and research activities do not fall under the federal criminal law power, but under the provincial jurisdiction over hospitals, property and civil rights, and matters of a merely local nature. Justice Cromwell held that the impugned provisions regulate virtually every aspect of research and practice of assisted human reproduction. To that end, sections 10, 11, 13, 14 to 18, 40(2), (3), (3.1), (4) and (5), sections 44(2) and (3) exceed the legislative authority of Parliament. However, he held that sections 8, 9 and 12 prohibited negative practices associated with assisted reproduction (such as donor consent and reimbursement for medical surrogacy expenses) and thus upheld them as valid criminal law. Sections 40(1), (6) and (7), 41 to 43, 44(1) and (4) are provisions implementing s. 12, and are thus constitutional. Sections 45 to 53, 60, 61 and 68 are constitutional provisions as they relate to inspection, enforcement and offences provisions.

This decision has been a long-awaited ruling on the constitutionality of the impugned provisions in the Assisted Human Reproduction Act. With many provisions of the legislation struck, it would be interesting to see how Parliament responds to regulate reproductive technologies in the future.

(f) Administrative Law – Judicial Review and Statutory Appeal – Tort Law – Practice and Procedure

***Canada (Attorney-General) v. Telezone*, 2010 SCC 62 (Released 23 December 2010)**

Telezone's application for a telecommunications licence was rejected by Industry Canada. Although Telezone did not seek to overturn or invalidate this administrative decision, it subsequently brought a related civil action for damages against the Federal Crown on a number of grounds. In its defence, the Crown asserted that an action could only be brought following an application for judicial review of the subject decision, based on *Canada v. Grenier*, 2005 FCA 348. The Supreme Court ultimately rejected the expansive reading of Grenier put forward by the Crown and held that an action for damages could be brought against the Crown in the Ontario Superior Court without an application for judicial review in the Federal Court.

The Court held that for litigants like Telezone who do not seek to overturn an administrative decision but rather seek compensation or damages flowing from that decision, requiring an application for judicial review simply imposes additional cost and delay on litigants. Imposing judicial review as a preliminary step was inappropriate. The Court emphasized the clear doctrinal distinction between the Crown's liability in tort or contract as the result of an administrative decision and the validity of the underlying administrative decision.

The Court also noted that any derogation from the jurisdiction of the Superior Courts requires clear and explicit language. The Court held that the Superior Court's jurisdiction has not been ousted by statute, and found that the Superior Court's jurisdiction was in fact affirmed by s. 17 of the Federal Courts Act, which provides for the concurrent jurisdiction of the Superior Courts and the Federal Court for claims against the Crown. The Court emphasized that the statutory scheme as a whole, and particularly the brief 30-day limitation period for seeking judicial review in the Federal Court, underscored that judicial review was not meant to be a gate keeping mechanism for civil claims against the Crown.

The Court also noted that if there are genuine concerns regarding collateral attack, the doctrine can be raised as a defence (as could the defence of statutory authority), but it held the existence of such concerns do not deprive the Superior Court of jurisdiction. The Court, furthermore, suggested a claim like that of Telezone's would be unlikely to be found to be a collateral attack given the nature of the claim and given the statutory context. The Court also rejected the argument that concerns about "artful pleading" warranted limiting the jurisdiction of the Superior Court over such claims.

A number of other cases involving actions brought against the Crown that were subject to similar jurisdictional objections were also permitted to proceed without an application for judicial review being brought to the Federal Court, based on the Telezone analysis.

See:

Canada (Attorney General) v. McArthur, 2010 SCC 63;

Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada, 2010 SCC 66;

Manuge v. Canada, 2010 SCC 67;

Nu-Pharm Inc. v. Canada (Attorney General), 2010 SCC 65; and

Parrish & Heimbecker Ltd. v. Canada (Agriculture and Agri-Food), 2010 SCC 64.

(g) Civil Procedure Discovery – Production and Inspection of Documents – Abuse of Legal Procedure or Process – Maintenance and Champerty

***Aecon Buildings, a Division of Aecon Construction Group Inc. v. Brampton (City)*, [2010] O.J. No. 5630 (C.A.) (Released 24 December 2010)**

A dispute between the City of Brampton and Aecon Buildings arose over the construction of the $46-million Brampton Performing Arts Centre. Aecon claimed damages for breach of contract arising from delays in construction.

Following Aecon's commencement of its action, the two parties came to an agreement. The City of Brampton agreed to advance claims against a third party architect on Aecon's behalf and Aecon agreed to cap its damage claims against the City of Brampton to any amounts the City recovered from the third party architect and its consultants (the "**agreement**").

A fourth party consultant appealed the decision of its failed motion for summary judgment to have the City of Brampton's third party claim against the architect dismissed on the basis that the agreement is champertous and an abuse of process.

Aecon and the City of Brampton argued, and the Court of Appeal agreed, that the agreement was in substance a legitimate means to cap liability for the City of Brampton. They further argued that there was no abuse of process as there was no prejudice; the agreement was produced before the close of pleadings.

MacFarland J.A., writing for the Court, found that there had been an abuse of process. In this case, the agreement was only produced to the other parties several months after its discovery and after specific requests. The lack of timeliness in producing the agreement to the other parties was a significant problem.

MacFarland J.A. held that there is an obligation on the parties to such agreements to disclose them to the other parties. Upon formation, a failure to produce an agreement immediately to other parties constitutes an abuse of process, as such agreements change the landscape of the litigation by altering the relationship amongst the parties. The absence of prejudice is not a consideration.

The consultant's appeal was allowed, with the result that the City of Brampton's third party claim against the architect and the fourth party claim against the consultants were stayed.