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LITIGATION UPDATE

MARCH 2011

LEGISLATIVE UPDATE

While the recent fall of the government has focused the attention of Canadians on political strategy and tactics, the government's defeat has also had a legislative impact. In total, 37 pieces of legislation (29 bills introduced in the house, and 8 that were introduced in the Senate) died on the order paper. Among the bills that died on Friday, March 25, were:

- the long-standing effort to amend the *Copyright Act*. This proposed overhaul of the *Copyright Act* has been highly controversial, as all stakeholders have different views on how copyright law should evolve in the face of technological change. Some of the copy control prohibitions in the bill, along with other rules regarding digital locks, are among those that have been heavily contested. The issue of copyright reform will not die with this bill, and in the wake of the election it will be interesting to track the next incarnation of the bill;

- certain proposed crime legislation, including legislation imposing new mandatory minimum sentences for a variety of drug offences, and an amendment to the *Criminal Code* provision in respect of citizens' arrests;

- the proposed effort to impose term limits on senators. The bill would have imposed a non-renewable eight-year term for senators, with a mandatory retirement age of 75, regardless of a senator's age at the time of appointment;

- the proposal to alter the current formula for allocating seats in the House of Commons, which is obviously a sensitive issue in certain regions of the country. If successfully passed, after the 2011 readjustment Alberta, British Columbia and Ontario would have been scheduled to receive a share of seats in the House of Commons closer to their share of the Canadian population;

- a bill that would bring oversight of the safety of drinking water on aboriginal reserves within the purview of the Department of Indian Affairs; and

- a closely watched private members' bill designed to amend the *Patent Act* and reform the current "Access to Medicines Regime". The bill was designed to make it easier to export inexpensive generic drugs to poor countries.

Finally, a number of bills received Royal Assent on Wednesday in advance of the election, including:

- legislation that amends the *Immigration and Refugee Protection Act* by creating a new regulatory regime for immigration consultants;

- a new *Freezing Assets of Corrupt Foreign Officials Act*, which permits the freezing of assets of foreign nationals whose country is in a state of turmoil or political uncertainty and was designed to address issues arising out of recent turmoil in Tunisia and Libya; and

- other crime legislation that was pushed through parliament, including the *Serious Time for the Most Serious Crime Act* and the *Standing Up For Victims of White Collar Crime Act*.

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DEVELOPMENTS OF INTEREST IN CASE LAW

(a) Trustee – Constructive Trust – Fraud – Bankruptcy

***Credifinance Securities Limited v DSLC Capital Corp*, 2011 ONCA 160 (Released March 2, 2011)**

In this case, the Court of Appeal for Ontario explained the conditions under which a constructive trust remedy can be granted in favour of defrauded creditors after the fraudster enters into bankruptcy proceedings.

After Credifinance Securities Limited ("Credifinance") made an assignment into bankruptcy, DSLC Capital Corp. ("DSLC") filed a proof of claim in the amount of $400,000 in accordance with section 81 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "*BIA*"). The proof of claim maintained that $310,500 in the possession of Credifinance was DSLC's property. The Trustee of Credifinance denied the claim. DSLC appealed the decision to the Superior Court on the basis that it was a victim of a fraud and therefore a constructive trust should be granted in its favour.

The Superior Court judge found that DSLC had been defrauded into loaning Credifinance the $400,000 and granted a constructive trust over what remained of the loan on the basis that it did not form part of the bankrupt estate. The trustee appealed the factual and jurisdictional basis for the decision to the Court of Appeal.

In its judgment, the Court of Appeal discussed the process for appeals under the *BIA*. In *obiter*, the court commented that the British Columbia approach of hearing the matter as a true appeal makes more sense than the Ontario approach of potentially hearing it as a hearing *de novo* instead of as a true appeal, the policy rationale for the B.C. approach being that trustees in bankruptcy should be regarded as having experience and expertise in the area of business financing, restructurings and insolvency. However, since the parties did not raise this issue the court did not comment on it further.

In upholding the Superior Court judge's decision, the court found that the remedy of a constructive trust is expressly recognized in bankruptcy proceedings, although the test for proving such a constructive trust is difficult to meet. The court stated that where the bankrupt and the creditors would benefit from the bankrupt's misconduct, a constructive trust may be granted to prevent an injustice. The court agreed with the Superior Court judge that DSLC met the test for a constructive trust and noted that the only creditors of Credifinance were its lawyers and the individual who controlled Credifinance. However, the court warned that the reasons of the Superior Court judge should not be interpreted as meaning that a constructive trust will always be imposed in cases where a civil fraud by the bankrupt on a claimant is proven and the funds are traceable.

(b) Judicial Review – Regulations – Renewable Energy

***Hanna v Ontario (Attorney General)*, 2011 ONSC 609 (Released March 3, 2011)**

On March 3, 2011, the Divisional Court dismissed a judicial review application challenging sections of Ontario Regulation 389/09 (the "Regulation"), made under Part V.0.1 of the *Environmental Protection Act*, RSO 1990, c E19 (the "*EPA*"). The impugned sections deal with minimum setback requirements and conformity to noise guidelines for wind energy facilities. The Regulation streamlines the approval process for green energy projects and is the culmination of the government's initiatives to reduce greenhouse gas emissions for the purpose of protecting the environment and public health.

The Divisional Court's decision finally disposes of the proceeding, which was the subject of a number of interlocutory decisions wherein the court granted intervenor status to the Canadian Wind Energy Association and struck out some of the applicant's affidavit evidence.

The applicant, a farmer, argued that the regulation was *ultra vires* because the Minister had failed to follow the process mandated by section 11 of the *Environmental Bill of Rights*, SO 1993, c 28 (the "*EBR*") before recommending promulgation of the regulation. Section 11 of the *EBR* requires the Minister of the Environment to "take every reasonable step to ensure that the ministry statement of environmental values (the "SEV") is considered whenever decisions that might significantly affect the environment are made in the ministry". One of the principles set out in the SEV requires the Ministry to use a precautionary science-based approach in its decision-making to protect human health and the environment. The applicant argued that the Minister failed to consider the "precautionary principle", as there was medical uncertainty about the impact on human health from industrial wind turbines located at the minimum setback of 550 metres from a residence.

The court prefaced its analysis by noting that the decision of the minister is protected from judicial scrutiny by two privative clauses in the *EBR*, and that the court's jurisdiction was "therefore quite circumscribed".

The court found that health concerns for persons living in proximity to wind turbines do not trump all other considerations, especially given the availability of an appeal to the Environmental Review Tribunal for an individual wishing to challenge the approval of an industrial wind turbine. The Tribunal has the authority to revoke approval if it is persuaded by evidence that the 550 metre minimum setback is inadequate to

protect human health from serious harm. The court held that this was the relevant context in which the Minister's consideration of the SEV had to be analyzed.

In dismissing the application, the court was satisfied that the Minister had complied with the process mandated by section 11 of the *EBR*, which requires the Minister to take every reasonable step to consider all 10 principles in the SEV, including the "precautionary principle" and a principle requiring the Minister to "place priority" on preventing and minimizing pollution. There was a full public consultation prior to recommending the promulgation of the regulation. The ministerial review included science-based evidence from the World Health Organization and acoustical engineering experts. The "precautionary principle" did not preclude the decision taken by the Minister.

(c) Social Law – Canada Assistance Plan – Cost-sharing – Statutory Interpretation

Quebec (Attorney General) v Canada, 2011 SCC 11 (Released March 3, 2011)

In this case, the Supreme Court of Canada held that the federal government was not obligated to share in historical costs relating to two distinct social services that were provided by the province of Quebec under the *Canada Assistance Plan*, RSC 1985, c C-1 ("*CAP*"). *CAP* was repealed by the *Budget Implementation Act*, 1995, SC 1995, c 17, ss 31-32.

The Attorney General of Quebec challenged the federal government's refusal to share in the cost of: (1) social services provided in schools ("SSS") between 1973 and 1996; and (2) support services provided to persons with disabilities living in residential resources ("SSPD") between 1986 and 1996. Quebec argued that pursuant to the agreement that was signed with the federal government in 1967, the federal government was obligated to share in the costs of programs designated as "welfare services provided in the province", which included both SSS and SSPD.

The federal government took the position that SSS were a much broader service than provided by *CAP*. SSS provided services to all students, regardless of socio-economic background, and therefore did not fit within *CAP*'s mandate to address issues of poverty and to protect the most vulnerable in society. With respect to SSPD, the federal government submitted that it was already providing funds for "adult residential care services" pursuant to the *Federal-Provincial Fiscal Arrangements and Established Programs Financing Act*, 1977, SC 1976-77 c 10, and that pursuant to *CAP*, the federal government was excluded from having to share in costs in areas in which it was already providing funding pursuant to any other act of parliament.

In dismissing the appeal, the court concluded that SSS were not established for the sole purpose of addressing poverty issues and were therefore too remote to bring their services within the ambit of *CAP*. The court additionally found that the federal government was not responsible for contributing to SSPD as it had already shared in the costs of the same targeted services pursuant to a separate act of parliament.

(d) Civil Procedure – Class Proceedings – Regulatory Negligence – Proximity

***Taylor v Canada (Attorney General),* 2011 ONCA 181 (Released March 4, 2011)**

The plaintiff was a representative of a class of persons who claimed to have suffered injury as a result of the implantation of temporomandibular joints in their jaws. The claim was brought against the Attorney General of Canada for the alleged negligence of Health Canada in the exercise of its regulatory duties, statutory powers and responsibilities.

In 2007, the class action was certified by Mr. Justice Cullity, who found that there was sufficient proximity between the parties for a finding of regulatory negligence. In doing so, Cullity J. relied on *Sauer v Canada (Attorney General)*, [2007] OJ No 2443 (CA). In *Sauer*, the court found that government regulators of cattle feed owed a *prima facie* duty of care to commercial cattle farmers.

However, in 2008 the Court of Appeal dismissed appeals in *Drady v Canada (Minister of Health)* (2008), 300 DLR (4th) 443 (Ont CA), and *Attis v Canada (Minister of Health)* (2008), 93 OR (3d) 35 (CA). In dismissing the appeals, the court found that there was no proximity between the parties. It distinguished *Sauer* as having found proximity on the basis of many public representations by the defendant. It found that where there are no such public representations, there is no proximity between the parties. Leave to appeal both decisions was refused by the Supreme Court of Canada.

In light of the decisions in *Drady* and *Attis*, the defendant in *Taylor* moved for a reconsideration of Cullity J.'s certification of the class proceeding. On reconsideration, the plaintiff's statement of claim was struck with leave to amend. A motion to amend the statement of claim was later granted.

To further complicate matters, after the dismissal of the appeals in *Drady* and *Attis*, but prior to the striking of the statement of claim in *Taylor*, the British Columbia Court of Appeal upheld a pleading against the federal crown for negligent misrepresentation and negligent development of tobacco strains for mild and light cigarettes in *Knight v Imperial Tobacco Canada Ltd* (2009), 313 DLR (4th) 695 (BCCA), and in doing so, relied on Cullity J.'s finding that proximity had been established in *Taylor*.

In *Taylor*, rather than appeal the decision allowing the amendments to the plaintiff's statement of claim to the Divisional Court, the parties chose to bring a joint motion to the Court of Appeal to request that the issue be settled as a "special case" pursuant to Rules 22.01 and 22.03 of the *Rules of Civil Procedure*.

Mr. Justice Armstrong of the Court of Appeal cautioned that it will be a "rare case" where the Court of Appeal will allow parties to leapfrog the Divisional Court. However, he agreed with the parties that the case before him was in fact one of the rare cases in which it was appropriate to do so. He found that the increased cost and delay of moving the case through the Divisional Court, and the inevitability that it would end up before the Court of Appeal in any event, favoured the exercise of the court's discretion to allow the motion. Justice Armstrong was also persuaded by the importance of the legal issue involved, and the fact that the motion was on consent of both parties. The motion was allowed.

(e) Charter of Rights and Freedoms – Equality Rights – Age Discrimination – Use of Comparator Groups

***Withler v Canada (Attorney General)*, 2011 SCC 12 (Released March 4, 2011)**

The appellants, who were representative plaintiffs in a class action against the Crown, were widows whose federal supplementary death benefits were reduced because of their husbands' ages. The appellants submitted that the age-based benefit reduction, which was part of a statutory death benefit scheme for certain federal government employees, violated section 15 of the *Charter*.

While the Supreme Court of Canada ultimately dismissed the widows' appeal, it rejected the Crown's argument that because their husbands were the actual subjects of the alleged discrimination, the widows lacked standing. The court granted the widows standing on the basis that as surviving spouses they suffered the alleged discriminatory effect. Furthermore, federal employees were unlikely to challenge the scheme of their own accord.

With respect to the widows' substantive claim, the court emphasized that section 15 only prohibits substantive discrimination on the grounds set out therein, or on an analogous ground. Substantive discrimination can be made out by showing that the impugned law, in purpose or effect, perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics caught by section 15(1), or by showing that the disadvantage perpetuated by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group. The court emphasized that the focus of a section 15 analysis is the actual impact of the differential treatment, and therefore the analysis requires a contextual consideration of the impact of the legislation or state action.

After canvassing recent jurisprudence, the court cautioned against the formalistic use of comparator groups as part of this contextual assessment. The court noted that the probative value of a comparative analysis varies depending on the nature of the claim and, as a result, such an analysis is not always required in considering whether substantive discrimination is made out.

In the claim at issue, the court concluded that the focus must be on the nature of the benefit. A contextual assessment revealed that the age-based benefit reduction did not breach section 15. The scheme was designed to benefit a number of different groups, and the benefit reductions reflected the reality that different groups of survivors have different needs. In support of its conclusion, the court noted that the impugned benefit was not meant to provide a long-term income scheme for older surviving spouses, as such a scheme is provided by a distinct pension benefit. The court explicitly rejected the dissenting opinion of Rowles J.A. of the British Columbia Court of Appeal, whose narrower comparative analysis failed to consider the impugned benefit reductions within the context of the entire package of available benefits.

Having found that section 15(1) was not breached by the benefit scheme, the court did not perform a section 1 analysis.

This decision is part of a trend, reflected in earlier decisions such as *Kapp*, toward a more contextual analysis of the existence of substantive discrimination in assessing whether a legislative scheme is discriminatory.