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LITIGATION UPDATE

APRIL 2011

LEGISLATIVE UPDATE

Labour Law – Essential Services – Toronto Transit Commission

***Toronto Transit Commission Labour Disputes Resolution Act,* 2011, SO 2011, c 2.**

Ontario introduced new legislation to ban strikes and lockouts by the Toronto Transit Commission ("**TTC**"). On Wednesday, March 30, 2011, Legislature passed bill 150 by a vote of 68-9.

The preamble of the *Toronto Transit Commission Labour Disputes Act, 2011* (the "**Act**") states that the disruption of transit services gives rise to serious public health and safety, environmental and economic concerns. It goes on to state that the public interest requires that a "dispute resolution mechanism be introduced that encourages and respects the process of collective bargaining to resolve impasses between the TTC and its bargaining agents."

The Act provides for binding arbitration by a neutral third party when collective agreements cannot be reached through bargaining. The appointment of an arbitrator is not subject to judicial review, if made under the provisions in the Act.

The Act is a response to the City of Toronto's request to make the TTC an essential service. Section 15 of the Act outlaws strikes and lockouts, despite anything in the *Labour Relations Act, 1995*.

The Act provides for a review of the legislation after a five-year period.

DEVELOPMENTS OF INTEREST IN CASE LAW

(a) Constitutional Law – Division of Powers – Securities Regulation

***Reference Re Securities Act (Canada),* 2011 ABCA 77 (Released 8 March, 2011)**

A unanimous Reference decision of the Alberta Court of Appeal held that Parliament's proposed *Securities Act* ("**Act**") to establish a national securities regulator is unconstitutional; specifically, the five-member panel found that the proposed Act is ultra vires Parliament's authority pursuant to the Constitution Act, 1867.

Both the federal and Alberta governments agreed that the proposed *Act* is, in pith and substance, the regulation of the participants in the public market and transactions relating to the raising of capital. At its core, the purpose of the *Act* is the regulation of particular investment contracts and property. Existing case law provides that the provinces have historically regulated the securities industry within provincial jurisdiction over "property and civil rights".

The federal government argued, however, that it holds a concurrent jurisdiction in the area of securities regulation and that it is therefore also able to create valid law on the subject pursuant to the "double aspect doctrine". Any conflicting provincial legislation would then be rendered inoperable to the extent of the conflict with valid federal law on application of the paramountcy principle.

The federal government argued that the *Act* was valid pursuant to its authority over criminal law,

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and, more significantly, under the general branch of the trade and commerce power, sections 91(27) and 91(2) of the *Constitution Act, 1867* respectively.

The Court of Appeal disagreed: the *Act* is not criminal law as the raising of capital has not traditionally been seen to be criminal and the focus on the statute is not the creation of prohibitions followed by penalties.

Further, under the general "trade and commerce" power, the *Act* failed to meet three of the five indicia used to assess valid law enacted under this power, as recognised by the Supreme Court of Canada in *General Motors v. City National Leasing* ([1989] 1 S.C.R. 641).

Of the failed indicia, the Court held that, first, the proposed *Act* did not apply to trade as a whole but only a particular segment of the economy. Second, the Court held that the provinces have successfully regulated the securities industry for decades; the provinces are not incapable of regulating this industry. Third, as the *Act* contemplates that some provinces could "opt-out" of the national regulatory scheme, it fails to demonstrate the essential need for a national regulator over trade across the country for the scheme to operate.

After determining that the proposed legislation is unconstitutional, the Court highlighted that although the federal government sought to regulate what it considers to be in the national interest, several provinces had objected to the federal legislation on the basis that regional autonomy, diversity and priorities would be sacrificed. The Court recognised that one of the fundamental principles of the Canadian federal state is the preservation of local powers and local diversity to enable a promotion of local interests.

End Note: On April 14, 2011, the Supreme Court of Canada completed hearings and reserved its decision, with written reasons to follow, with respect to the federal government's Reference on the same proposed Securities Act (In the Matter of a Reference by Governor in Council concerning the proposed *Canadian Securities Act, as set out in Order in Council P.C. 2010-667, dated May 26, 2010, 33718, (S.C.C.)).*

(b) Class Action – Consumer Contract – Arbitration Clause

***Seidel v TELUS Communications Inc,* 2011 SCC 15 (Released 18 March 2011)**

In this case the Supreme Court of Canada permitted a proposed representative plaintiff ("**Seidel**") to proceed with a class action against TELUS Communications Inc. ("**TELUS**") despite an arbitration clause in the parties' contract.

The cellphone contract between Seidel and TELUS purported to require the parties to settle any dispute by arbitration and purported to prevent Seidel from participating in a class action. This did not stop Seidel from commencing an action alleging that TELUS had misrepresented its formula for calculating air-time usage and had thereby engaged in deceptive and unconscionable practices contrary to the *Business Practices and Consumer Protection Act*, SBC 2004, c 2 ("**BPCPA**") and the *Trade Practice Act*, RSBC 1996, c 457 ("**TPA**"). TELUS had charged consumers for phone calls from when their phone began to ring rather than from when they answered it.

The B.C. Court of Appeal had stayed the action, in reliance on the Supreme Court decisions in *Dell Computer Corp. v Union des Consommateurs*, 2007 SCC 34 ("**Dell**") and *Rogers Wireless Inc. v Muroff*, 2007 SCC 35 ("**Rogers Wireless**"). These decisions out of Québec stayed class actions which had sought to proceed in the face of arbitration clauses.

By a majority of 5-4 the Supreme Court in *Seidel* allowed the claim under section 172 of the BPCPA to proceed on the basis that the BPCPA provided a cause of action to a person regardless of whether that person had a contractual relationship with the defendant. In contrast, the Court upheld the stay of the common law and TPA claims. In effect, the Supreme Court extended the *Dell* and *Rogers Wireless* decisions to common law Canada, except insofar as legislation, such as the BPCPA, prevents the enforcement of arbitration clauses.

Section 172 of the BPCPA allows consumer activists or others, whether or not they are personally "affected" by a "consumer transaction", to bring an action in the B.C. Supreme Court. As Justice Binnie stated for the majority, the "clear intention" of the BPCPA is to "supplement and multiply" the government's ability in "an era of tight government budgets" to implement fair consumer practices. The BPCPA seeks to achieve that goal by "enlisting the efforts of a whole host of self-appointed private enforcers".

This means that Seidel is able to advance her claim by "sheltering" under section 172. In effect, she brings the claim under this section as a consumer advocate and not simply as a wronged party to a contract. The majority further held that the competence-competence principle (arbitrators have power to rule on their own jurisdiction) did not apply because the issue of jurisdiction was raised on undisputed facts and an authoritative judicial interpretation was appropriate.

In dissent, Justices LeBel and Deschamps characterized the legal issue as the determination of the proper role and status of arbitration, and stated that the majority decision was "hostile" to that role and status. They held that the BPCPA does not foreclose, by means of sufficiently explicit language, the use of arbitration as a means to resolve disputes. In their view, because arbitrators can provide the same remedies as the BPCPA contemplates and because arbitral awards would have an impact beyond the immediate parties, arbitration would preserve access to justice.

Ontario, Alberta and Québec already prohibit mandatory arbitration clauses in consumer contracts. In those provinces the impact of this decision will be felt where persons rely on other remedial legislation, such as franchise protection legislation, to circumvent arbitration clauses.

(c) Judicial Independence – Compensation of the Judiciary

***Masters Association of Ontario v Ontario*, 2011 ONCA 243 (Released 30 March, 2011)**

In August 2010 Platana J. of the Superior Court held that certain provisions of the *Courts of Justice Act* ("**CJA**")

governing the tenure and compensation of Case Management Masters were unconstitutional because they violated the principle of judicial independence. The declaration of invalidity was suspended for 12 months to allow the province to create a constitutional scheme. The Crown appealed the compensation-related elements of the decision. The Masters Association cross-appealed; it argued Case Management Masters should be read into the scheme governing the compensation and tenure of Traditional Masters (the latter's tenure and promotion are essentially the same as provincial court judges).

Under the impugned regime, compensation of Case Management Masters was set by an Order-in-Council so that their salaries would be identical to those of public servants paid at the SMG3 level (a senior classification). The Court of Appeal (the "**Court**") dismissed the appeal and concluded that this linkage mechanism was unconstitutional.

Drawing on the established jurisprudence regarding judicial independence, the Court held that for a compensation scheme to adhere to the constitutional principle of judicial independence there must be a special process for dealing with judicial remuneration, the process must be "independent, effective, and objective," and there must be an independent body involved in making recommendations regarding compensation to the executive.

In light of these principles Case Management Masters were not required to receive identical compensation as provincial court judges. However, the Court held that the absence of an independent body acting as an "institutional sieve between the judiciary and the other branches of government" meant the existing scheme was unconstitutional. The Court concluded that an external compensation metric that is ultimately set by the executive is insufficient to preserve judicial independence. The Court also noted that previous decisions have emphasized the need for a consultation between an independent body, the judiciary, and the executive in the process for formulating recommendations for compensation. The Court held that a linkage structure does not permit this process to "develop, unfold, and deliver." The Court did acknowledge that comparisons with other public sector employees can play a part in this broader process, but it concluded that such comparators cannot be the sole determinant of compensation.

The Superior Court had held that s. 53(1)(b) of the *CJA* was unconstitutional. The Court however, decided that the statutory provision, which permits the Lieutenant-Governor to make regulations regarding remuneration of Case Management Masters, is constitutionally valid. Instead, the Court held that it was the Order-in-Council that set out the compensation scheme at issue that was unconstitutional.

In dismissing the cross-appeal Court found it would be inappropriate to dictate a solution to the government by having Case Management Masters compensated in the same fashion as Traditional Masters. The Court concluded that the appropriate approach would be to extend the suspension of the declaration of invalidity originally ordered by Platana J. for an additional 12 month period, given the difficulties in developing a constitutional scheme in the face of an impending provincial election in October 2011.

(d) Companies' Creditors Arrangement Act – Pensions – Priorities – Fiduciary Obligations – Funding Pension Plans

***Indalex Limited (Re)*, 2001 ONCA 265, (Released 7 April, 2011)**

This decision considers the obligations of a company acting as both employer and pension administrator where the company becomes insolvent. Indalex Limited ("Indalex") obtained protection from creditors under the *Companies' Creditors Arrangements Act* ("CCAA"). At the time, Indalex provided two pension plans, the "Executive Plan" and the "Salaried Plan", and was the sponsor and administrator of both.

During the CCAA proceedings, the court authorized Indalex to borrow funds pursuant to a DIP credit agreement and granted the DIP lenders a super-priority charge in Indalex's property. A few months after obtaining CCAA protection, Indalex moved for approval of the sale of its assets on a going-concern basis, and for approval to distribute the sale proceeds to the DIP lenders. The result was nothing would remain to fund the deficiencies in the Plans. Representatives for the Plans' beneficiaries objected. The court approved the sale, but ordered an amount be held by the Monitor pending a determination on the rights of the Plans' beneficiaries (the "Reserve Fund"). As the sale funds were insufficient to completely repay the DIP lenders, the guarantor paid the shortfall.

In their motions, the Plans' beneficiaries claimed the Reserve Fund was subject to deemed trusts in their favour pursuant to the *Pension Benefits Act* ("PBA"), and should be paid to them in priority to the guarantor. They also claimed Indalex breached its fiduciary obligations to them during the CCAA proceedings. The motion judge dismissed the beneficiaries' motions on the basis that, at the date of sale, no deemed trust under the PBA had arisen in respect of either plan, and did not deal with the fiduciary obligation argument. The appeal to the Court of Appeal was allowed.

In respect of the Salaried Plan, the PBA Regulations permitted Indalex to make up the deficiency owed pursuant to s. 75 of the PBA over a period of years. The motion judge held that amount was not "due" and thus no deemed trust arose at the date of wind up. The Court of Appeal disagreed, holding the owed amounts were accrued to the date of wind up. The fact that the employer was given time to make the required contributions did not change their status as liabilities as at the wind-up date. The deemed trust under the PBA applied to all amounts payable under s. 75.

In respect of the Executive Plan, the fact that it had not been wound up caused both levels of court to doubt that a deemed trust arose, as the wording in the PBA appeared to require wind up for a deemed trust to arise. The Court of Appeal declined to decide whether a deemed trust applied, as it disposed of the matter on the basis that Indalex breached its fiduciary obligations.

The Court held that Indalex owed a fiduciary duty as administrator of the Plans, both pursuant to common law and s. 22 of the PBA. Indalex wore "two hats" during these proceedings: its corporate hat, and its administrator's hat. While it had the right to decide

to commence CCAA proceedings as a corporate actor, Indalex could not ignore its obligations as the Plans' administrator and make all its decisions during the proceedings on a solely corporate basis. Even were the pension beneficiaries not the beneficiaries of a deemed trust, they were unsecured creditors to whom a fiduciary duty is owed, which put them on different standing that other unsecured creditors. The Court could consider their equitable position in deciding how the Reserve Fund should be distributed.

The Court considered the recent Supreme Court of Canada decision, *Century Services*, which it distinguished on several bases, including that nothing in the CCAA expressly excluded the provincial deemed trust for unpaid pension contributions from applying in CCAA proceedings. The Court rejected the respondents' contention that *Century Services* stood for the unqualified proposition that the federal priorities under the *Bankruptcy and Insolvency Act* apply in CCAA proceedings. Where the provincial obligation was alleged to conflict with a priority granted under the federal CCAA, the facts would have to be examined to determine if the CCAA purpose was frustrated, and the doctrine of federal paramountcy would have to be invoked and determined. The Court held this would not lead to "strange asymmetry" between the CCAA and the BIA, as it would be open to the court to find the super-priority charge made under the CCAA order overrode the deemed trust, giving the CCAA court greater flexibility in considering various interests in the reorganization.

(e) Trial Fairness – Adequacy of Reasons for Decision

***Cojocaru (Guardian Ad Litem) v British Columbia Women's Hospital and Health Center,* 2011 BCCA 192, (Released 14 April 2011)**

After a 30-day trial, the trial judge awarded over $5 million to the plaintiffs for injuries caused during child birth. However, the trial judge's reasons consisted largely of a reproduction, without attribution, of the plaintiffs' written closing submissions. In this appeal judgment, the majority of the British Columbia Court of Appeal held that the reasons could not be taken to represent the trial judge's analysis of the issues or the reasoning of his conclusions. As a result, the Court of Appeal rejected the reasons and ordered a new trial.

The majority of the Court of Appeal noted the "difficult issues of principle" that arose from the format of the trial judge's reasons. The Court found that the reasons did not exhibit any sign that the trial judge had grappled with the difficult issues confronting him, but rather "one is left with page after page (84) of wholesale, uncritical reproduction of the respondents' written submissions."

Of the 368 paragraphs of the reasons, only 47 were in the judge's own words. Of the 222 paragraphs dealing with liability, only 30 were in the judge's own words. However, 20 of those paragraphs were introductory in nature, addressed uncontroversial facts, or simply summarized the plaintiffs' submissions.

The court referred to the case of *R v REM*, [2008] 3 SCR 3, where the Supreme Court of Canada explained the purpose behind reasons for judgment: (1) reasons provide public accountability; (2) reasons help ensure fair and accurate decision making – the task of articulating the reasons directs the judge's attention to the salient issues; and (3) reasons are a fundamental means of developing the law uniformly for future courts.

The Court of Appeal was particularly troubled by the fact that the trial judge did not attribute any of the passages in his reasons to the respondents' submissions. As noted by the Federal Court of Appeal in *Janssen-Ortho Inc v Apotex Inc*, 2009 FCA 212, the adoption of submissions without acknowledgment "may lead to the impression that the judge has not done the work which he is called upon to do, namely to examine all the evidence before him and to make the appropriate findings." The majority of the Court of Appeal felt that this impression had materialized in this case.

The Court was also troubled by the fact that the adoption of the submissions led the trial judge to ignore certain important pieces of information. For example, he failed entirely to deal with a cogent and uncontradicted defence argument on the issue of causation. As a result, he failed to discharge his burden of informing the losing parties of the reason for their loss.

In the result, the Court held the trial judge's reasons failed to satisfy the requirement of public accountability, and therefore could not be the subject of meaningful appellate review. The Court found that the presumption of judicial integrity and impartiality was displaced. A "reasonable and informed observer" would conclude that the appellants had not received a fair consideration of their case. Acceptance of the reasons would risk undermining the confidence of the public in the administration of justice. Of note, the dissenting judge felt that the trial judge did independently and impartially consider the law and evidence, but would have overturned the trial decision on the substantive findings of negligence and liability.