WeirFoulds LLP

LITIGATION UPDATE

MAY 2011

DEVELOPMENTS OF INTEREST IN CASE LAW

(a) Judicial Review – Canadian Radio-television and Telecommunications Commission (CRTC) – Canadian Charter of Rights and Freedoms – Voting Rights

***May v CBC/Radio Canada et al*, 2011 FCA 130 (Released April 8, 2011)**

Pursuant to the *Canada Elections Act*, the CRTC is required to issue a set of guidelines with respect to the conduct of broadcasters during a general election within four days of the election writ being dropped. The CRTC issued such a bulletin for the May 2011 election (the "**Bulletin**"), which referred to the CRTC's *1995 Guidelines* (the "**Guidelines**"). The Guidelines provided that not all party leaders need be included in the leaders' debates, as long as equitable coverage of all parties is provided during the election campaign.

The Applicant is the leader of the Green Party, and brought an application for a *mandamus* order requiring the CBC and its broadcasting partners to allow her to participate in the leaders' debates. She also sought an expedited hearing of the application. The Applicant argued that the Bulletin violated her right of effective participation in a fair electoral process under section 3 of the *Canadian Charter of Rights and Freedoms* (the "**Charter**").

The court dismissed the application for four reasons. First, the court held that the application could have been brought earlier than it was, and thus there was no need for an urgent hearing. Even though the Bulletin was issued after the election was called, the Bulletin referred to the Guidelines, which contained the same impugned rule. The Applicant could have challenged the Guidelines at any time.

Second, the court held that the Respondents, the Applicant and the public interest would be significantly prejudiced if the application were expedited. The application involved extensive expert evidence and *Charter* argumentation. The court doubted that an adequate evidentiary and argumentative record could be produced in the time before the leaders' debates were to take place, and found that it would not be in the public interest to have such a speedy determination made on such important issues.

Third, the court found that the application contained a formal defect in that it failed to name the Attorney General of Canada as a Respondent.

Finally, although on an interlocutory motion the court generally does not consider an application's merits, in this case, doing so was appropriate because the result of the interlocutory motion would have amounted to a final determination of the case. The court expressed "significant doubts concerning the applicant's ability to obtain the relief sought". Among other things, the court noted that it is unable to compel the exercise of a "fettered discretion" in a particular way.

(b) Solicitor's Negligence – Costs – Contractual Interpretation

***Gentra Canada Investments Inc v Lipson*, 2011 ONCA 331 (Released April 29, 2011)**

In this decision, the Court of Appeal affirmed that a cause of action for

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solicitor's negligence is assignable. As part of a plan of arrangement of Royal Trust, Gentra Canada Investments Inc. ("**Gentra**") was assigned a mortgage. Gentra brought an action against Lipson and his firm alleging breach of contract and negligence due to alleged deficiencies in mortgage documents prepared by Lipson while he was counsel for Royal Trust.

Gentra brought a motion for partial summary judgment to confirm its right to pursue the action. Lipson asserted by way of a cross-motion that an action for solicitor's negligence is non-assignable as a matter of public policy. The court held that a cause of action for solicitor's negligence is assignable if an assignee can show a legitimate commercial interest in the cause of action against the lawyer. It rejected the contention that such an assignment "savours of maintenance".

Lipson also argued that the cause of action was not properly assigned. The court held that there is no need for an assignment of a cause of action to be explicit and that it is sufficient if the language of the assignment is capable of identifying the cause of action as one of the things assigned. In this case, the language of the assignment was sufficient to encompass the claim against Lipson. Moreover, the court noted that the purpose of the assignment was to place Gentra in the position of Royal Trust in respect of its underperforming loans, and a consideration of this context affirmed that Gentra had a legitimate commercial interest in the cause of action.

The court also rejected Lipson's contention that Gentra could not bring the action because of non-compliance with the *Conveyancing and Law of Property Act*. In the circumstances, the court found that Royal Trust was not a necessary party to the action and that Gentra was the appropriate plaintiff.

(c) Charter – Freedom of Association – Collective Bargaining – Agricultural Workers

***Ontario (Attorney General) v Fraser*, 2011 SCC 20 (Released April 29, 2011)**

In this case, the Supreme Court of Canada upheld the constitutionality of Ontario's special labour relations regime for agricultural workers. In doing so, the court affirmed its decision in *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 ("**BC Health Services**") as to the role of freedom of association in collective bargaining.

The *Agricultural Employees Protection Act*, 2002, SO 2002, c 16 (the "**Act**") excludes farm workers from the regular provincial labour relations regime, but grants them rights to form and join an employees' association, to participate in its activities, to assemble, to make representations to the employers, and to be protected against interference in the exercise of those rights. The Act requires farm employers to give such associations the opportunity to make representations concerning employment conditions. Employers must then listen to or read those representations. The Agriculture, Food and Rural Affairs Appeal Tribunal, rather than the Labour Relations Board, would hear disputes about the application of the Act.

Justice Farley, writing at first instance and without the benefit of the Supreme Court's *BC Health Services* decision, upheld the Act. The Court of Appeal for Ontario allowed the appeal, holding that freedom of association in this context required: (1) a statutory duty to bargain in good faith; (2) statutory recognition of majoritarian exclusivity; and (3) a statutory mechanism for resolving disputes in the bargaining, interpretation and administration of collective agreements. Majoritarian exclusivity is the principle that only *one* group of employees, chosen by the majority, represents *all* employees. These became the issues before the Supreme Court.

Eight justices allowed the appeal, while Abella J. dissented. Chief Justice McLachlin and LeBel J., who together wrote the *BC Health Services* decision, wrote the majority opinion. They affirmed that freedom of association requires a process of engagement that permits employee associations to make representations to employers, and that employers must consider and discuss those representations with employees in good faith. The Act, properly interpreted, provides such a process.

The majority also held that freedom of association is infringed when it is substantively impossible for such a process of engagement to occur. Freedom of association does not, therefore, require a particular type of process, or indeed any conclusion to that process. For this reason the Act was constitutional even though it did not provide for majoritarian exclusivity, a statutory dispute resolution mechanism, or a statutory duty to bargain in good faith. Justice Abella agreed with the majority's approach but would have held that the Act unjustifiably infringed freedom of association and was unconstitutional.

The majority's judgment confirms the existence of the fine line between constitutionally protected procedural rights of collective bargaining and unprotected substantive rights. Employers must discuss and consider employee representations in good faith but need not reach agreement with employees.

(d) Fiduciary Duty – Government – Civil Procedure

***Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 (released May 12, 2011)**

In this unanimous decision of the Supreme Court of Canada, the court determined that there is no fiduciary

duty owed by the government to the plaintiffs. The plaintiffs, made up of a large class of residents of long-term care facilities in Alberta, alleged that the provincial government artificially inflated the cost of "accommodation charges" – a direct charge on residents for their housing and meals while in care – in order to subsidize the publicly funded costs of medical services. The plaintiffs claimed that this over-charging consisted of a breach of fiduciary duty, negligence, bad faith and/or unjust enrichment, and they further brought an equality claim under s. 15(1) of the *Canadian Charter of Rights and Freedoms*. The Province of Alberta challenged the plaintiffs' statement of claim as not disclosing a cause of action.

The court stated that to establish a fiduciary duty outside of the existing categories, a claimant must show: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary; (2) a defined person or class of persons vulnerable to a fiduciary's control (vulnerable in the sense that the fiduciary has a discretionary power over them); and (3) a legal or substantial practical interest of the beneficiary that stands to be affected by the exercise of control.

The court recognized that the government context necessarily refines the elements identified above. First, the requirement of an undertaking will be lacking where what is at issue is the exercise of government power or discretion; a fiduciary duty would conflict with the government's general duty to act in the best interests of society as a whole. Undertakings of loyalty to a particular group from the government will be rare.

Second, it may be difficult to establish a defined person or class of persons vulnerable to the exercise of discretionary power. Where the government duty is in effect a private duty being carried out by government, such as in the role of public guardian and trustee, this requirement may be found.

Third, the court indicated that it will be difficult for an individual to establish that government power affected a legal or significant practical interest. It is not enough that a government decision impacts on a person's well-being, property or security, but rather the affected interest must be a specific private law interest to which the person has a pre-existing, distinct, and complete legal entitlement. A government benefit scheme is an entitlement of public law, not a private law interest.

Finally, the court indicated that the degree of control that must be exercised by the government in the fiduciary relationship must be equivalent or analogous to a direct administration of the interest. Legal control that arises from the ordinary course of statutory powers is insufficient.

In this case, the court found that there was no evidence in the pleadings of an undertaking by the province to act with undivided loyalty towards the class members when setting and administering accommodation charges. Nor did the relevant provincial legislation impose any obligations on the government to account for anyone's particular interests in setting the accommodation charge.

Although the court struck out the plaintiffs' claims relating to fiduciary duties, negligence and bad faith, the pleadings were found to disclose a supportable cause of action in the remaining claims and the plaintiffs as a class were allowed to proceed on those issues.

(e) Access to Information Act – Exemptions – Personal Information – Minister's Records

***Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 (Released May 13, 2011)**

Four appeals in respect of applications for judicial review of refusals to disclose under the *Access to Information Act* (the "**Act**") by the Information Commissioner of Canada were heard together. Pursuant to section 4 of the Act, a requester has a right to "any record under the control of a government institution", subject to certain exceptions. The court, with Charron J. writing for the majority and LeBel J. concurring in the result, upheld the lower court rulings that the Prime Minister's Office and the relevant ministerial office do not form part of the "government institution" for which they are responsible for the purposes of the Act. For example, the court found that the office of the Minister of National Defence is not part of the Department of National Defence.

The court then had to determine whether the requested records at the ministerial offices in question were nevertheless "under the control" of the government institution for which they are responsible. "Control" is not defined in the Act. The majority found that to give a meaningful right of access to information, control must be broadly and liberally interpreted. Apart from physical control, a court is to consider: (1) whether the record relates to a departmental matter; and (2) all relevant factors to the determination of whether the government institution could reasonably expect to obtain a copy upon request.

In this case, one of the requests was for the Prime Minister's agendas, which were in the hands of the RCMP and the Privy Council Office. Those records were found to be in the control of the government institutions. The records constituted "personal information", and while s. 3(j) of the Act permitted disclosure of personal information where such information pertains to an individual who is an officer or employee of the government institution, the majority found that the Prime Minister was not to be treated as an "officer" of the Privy Council Office. Had that result been intended, it would have been expressed explicitly in the Act. The Prime Minister's agenda thus fell outside the scope of the access to information regime. All four refusals to disclose were upheld.