WeirFoulds LLP

LITIGATION UPDATE

JUNE 2011

LEGISLATIVE UPDATE

(a) *Better Tomorrow for Ontario Act (Budget Measures), 2011*, S.O. 2011, c. 9 (Royal Assent May 12, 2011)

This lengthy Act makes a number of amendments to, and repeals, various pieces of legislation. What follows are a few of the changes that litigators in Ontario should note.

Amendments have been made to the *Corporations Tax Act* and the *Retail Sales Tax Act* to allow the Minister to move to strike or dismiss a Notice of Appeal to the Ontario Superior Court of Justice for delay. The *Estate Administration Tax Act, 1998*, has been amended to require an estate representative to provide the Minister of Revenue with prescribed information about the deceased, which obligation will be effective January 1, 2013, or on such other date as is prescribed. A new section added to that Act makes it an offence to give false or misleading information in that regard, or to fail to give the information.

The *Act* also transfers a number of prohibitions currently in the *Ontario Lottery and Gaming Corporation Act, 1999*, to the *Gaming Control Act, 1992*. Further, the Registrar of Alcohol and Gaming is given the authority to set standards and requirements in a number of areas. The *Insurance Act* was amended to address accidents with public transit vehicles. The *Ministry of Infrastructure Act, 2011*, and the *Ministry of Energy Act, 2011*, divide the previous Ministry of Energy and Infrastructure into two Ministries, and delineate the responsibilities of each of the new Ministries. The enactment of the *Ontario Infrastructure and Lands Corporation Act, 2011*, amalgamates the Ontario Realty Corporation, the Ontario Infrastructure Projects Corporation and the Stadium Corporation of Ontario Limited.

(b) *Securing Pension Benefits Now and for the Future Act, 2010*, S.O. 2010, c. 24

Various amendments respecting jointly sponsored pension plans have been proclaimed in force as of June 1, 2001. Specifically, ss. 1(9), 3(3) and 16 of this Act have been proclaimed in force.

(c) *Occupational Health and Safety Statute Law Amendment Act, 2011*, S.O. 2011, c. 11 (Royal Assent June 1, 2011)

Various amendments are made to the *Occupational Health and Safety Act* and the *Workplace Safety and Insurance Act, 1997*. The following is not an exhaustive list of the amendments, but rather highlights some of the changes made.

The *Occupational Health and Safety Act* (the "**Act**") is amended to set out the Minister's powers in administering the Act. It is further amended to allow the Chief Protection Officer to establish standards for training programs and approve programs that meet the standards. Constructors and employers are now required to ensure health and safety representatives receive approved training to enable them to effectively exercise the powers and perform the duties of representatives.

Added to the Act is Part II.1 (Prevention Council, Chief Prevention Officer and Designated Entities). Apart from outlining duties and powers of appointment, it allows for the designation of entities as a safe workplace association or a medical clinic or training centre specializing in occupational health and safety matters. Part III.1 has been amended to give the Minister the ability to approve codes of practice respecting statutory and regulatory requirements. The Act has also been amended to allow an inspector to refer a matter to the Board, on the workers' consent, where a worker alleges that his or her employer has violated the prohibition against reprisals and where circumstances warrant, so long as it has not been otherwise dealt with by binding arbitration under a collective agreement or the worker filing a complaint to the Board.

The *Workplace Safety and Insurance Act, 1997*, has been amended to repeal Part II (Injury and Disease Prevention), though the sections dealing with payments to constructions workers and first aid requirements that may be set by the Board were re-enacted elsewhere in the Act.

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DEVELOPMENTS OF INTEREST IN CASE LAW

(a) Secured Transaction – *Personal Property Security Act* – Equity – Fraud

***i Trade Finance Inc v Bank of Montreal*, 2011 SCC 26 (Released May 20, 2011)**

The appellant i Trade Finance had advanced money to Webworx Inc., operated by a fraudster. The fraudster used the advances to the company to buy shares in a BMO Nesbitt Burns account which, in turn, were pledged to BMO to obtain additional credit. Both of the parties to this appeal were unaware of the fraud.

The appellant brought a civil proceeding against the fraudster after the fraud was discovered. This resulted in an order that imposed a constructive trust or equitable lien on all the property purchased by the fraudster through funds advanced to Webworx. The appellant was also granted a tracing order that allowed the appellant to trace assets of the fraudster. The order excluded assets in the hands of *bona fide* purchasers for value without notice. The appellant sought funds in the hands of BMO. At trial the appellant successfully claimed the funds at issue, but the trial judge's decision was overturned at the Court of Appeal. The Supreme Court dismissed the appeal. Its analysis provides insight into the interaction between the PPSA, equity, and the legal effect of fraud on a secured transaction.

The Supreme Court held that the key issue was whether BMO could be described as a *bona fide* purchaser for value, which requires a consideration of the nature of each party's interest in the funds. The court emphasized that the appellant's rights were based in the tracing order and as such, recovery is based on whether the funds can be imposed with a constructive trust or equitable lien. This is an equitable interest and is not governed by the PPSA.

BMO's interest, however, was based in a pledge by the fraudster, a transaction meant to create a security interest as defined by the PPSA. The court noted the key element is whether the fraudster had rights in the collateral. Fraud makes a transaction voidable, not void. The court found that Webworx had the consent of the appellant to use the funds at the time and, as such, the appellant bore the risk of loss. As a result, the fraudster had rights in the collateral. The court, therefore, concluded that BMO had a valid PPSA security interest. Moreover, BMO was a *bona fide* purchaser for value as its acquisition of the shares by way of the pledge falls within both the PPSA and the equitable definition of "purchaser". As a *bona fide* purchaser for value, BMO's funds fell outside the ambit of the tracing order and, as a result, BMO could retain the funds.

(b) Intellectual Property – Trademarks – Confusion Analysis – Expert Evidence

***Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 (Released May 26, 2011)**

At issue in this case was whether the trade-mark "Masterpiece Living", registered by Alavida Lifestyles Inc. ("Alavida"), was confusing with the unregistered trade-marks or trade-name previously used by another company, Masterpiece Inc. Both Alavida and Masterpiece Inc. were in the retirement residence industry.

Justice Rothstein wrote the unanimous decision of the seven-member panel of the court. He found that the trial judge (as upheld by the Federal Court of Appeal) had made several errors of law in concluding that there was not confusion between the companies' trade-marks.

The trial judge found that Masterpiece Inc. had established the use of the trade-name "Masterpiece" and the trade-marks "Masterpiece the Art of Retirement Living" and "Masterpiece the Art of Living" at the time of the application for registration by Alavida for "Masterpiece Living". However, when conducting the confusion analysis, the trial judge undertook a single composite analysis rather than comparing each of Masterpiece Inc.'s marks and trade-name separately. Justice Rothstein found that this was an error of law. In his own analysis, Rothstein J. found that because "Masterpiece the Art of Living" was most similar to "Masterpiece Living", he could conduct the analysis once. If there was no confusion between these two marks, then there would not be confusion with the other less similar marks.

The trial judge found that confusion between Alavida's "Masterpiece Living" and Masterpiece Inc.'s trade-marks and trade-name was lessened because Alavida operated predominantly in Ontario and Masterpiece Inc. operated in Alberta. Justice Rothstein found that this was an error of law. The owner of a trade-mark has the right to exclusive use of the trade-mark throughout Canada. The appropriate question was for the trial judge to ask whether there would likely be confusion between the marks if they were used in the same area.

The trial judge also erred when considering the actual use of Alavida's trade-mark. He found that Alavida used "Masterpiece Living" as a slogan. Justice Rothstein found that the trial judge must look to all of the available uses for the marks allowed by the registration, and not solely at the actual use. In this case, the application and subsequent registration were very broad, and thus Alavida could use "Masterpiece Living" in a variety of forms.

Finally, the trial judge found that because retirement living was expensive, consumers were more likely to do research after encountering these trade-marks, and thus would be less likely to be confused about the companies behind the respective marks. This too, as found by Rothstein J., was in error. While the value of the goods or wares is relevant in that a consumer will likely pay more attention when purchasing something expensive, the test focuses on a consumer's first impression of the marks. The likelihood of subsequent research after encountering the marks is irrelevant.

Justice Rothstein also criticized the use of expert evidence in the trial. He found that the experts produced by both sides were unhelpful, and that they likely contributed to leading the trial judge astray from the proper questions and factors he should have been addressing. Justice Rothstein reasoned that in a trade-mark confusion case where the goods were sold to the general public, the trial judge can put him or herself into the position of the potential consumer. As expert evidence is unlikely to be necessary, it will not be admissible under the Mohan test.

In the result, the appeal from the decisions of the trial judge and the Court of Appeal were allowed, and the registration of "Masterpiece Living" by Alavida was ordered expunged.

(c) Professional disciplinary proceeding – Adequacy of notice of charges – Adequacy of reasons – Jurisdiction to order costs

***Barrington v The Institute of Chartered Accountants of Ontario*, 2011 ONCA 409 (Released May 27, 2011)**

These appeals arise from the professional disciplinary proceedings against three members of the Institute of Chartered Accountants of Ontario ("**ICAO**") for their roles in the now defunct Livent Inc.'s ("**Livent**") 1997 audited financial statements. The Court of Appeal allowed ICAO's appeal and reinstated the ICAO's discipline committee's convictions and costs award. The members' appeals were accordingly dismissed.

In 2004, the ICAO laid charges against J. Douglas Barrington, Anthony Power and

Claudio Russo for failing to ensure that Livent's financial statements complied with Generally Accepted Accounting Principles ("**GAAP**"). The ICAO's discipline committee found the three members guilty of professional misconduct in February 2007 and imposed penalties and costs in September 2007. These two decisions were upheld by the ICAO's appeal committee in February 2009. In March 2010 the Divisional Court quashed four of the eight convictions against Power and Russo and all of the convictions against Barrington. It also quashed the discipline committee's costs order. Power and Russo appealed from the Divisional Court's decision seeking to have the remaining convictions quashed, while the ICAO appealed to have the convictions and costs award reinstated.

The issues on appeal are (1) whether the members had adequate notice in relation to the charges (2) whether the discipline committee had provided adequate reasons for finding misconduct and (3) whether legislative amendments subsequent to the Divisional Court's decision retroactively validate the discipline committee's costs order.

On the first issue of adequate notice in relation to the charges, the Court of Appeal held that the Divisional Court mischaracterized the nature of the charge as the put agreement was not a new allegation. The discipline committee had found the members guilty of misconduct for recognizing income without reasonable assurance that the significant act of construction would be completed. The put agreement was relevant evidence to the charged based upon the discipline committee's interpretation of the GAAP and Canadian Institute of Chartered Accountants handbook. The discipline committee was entitled to consider the evidence led by the members despite the fact that no concerns were raised about the put agreement by the prosecution. A trier of fact is not bound by the prosecution theory of the case but is entitled to follow a different route to liability. Furthermore, the members were neither surprised nor prejudiced by the discipline committee's reliance on the evidence surrounding the put agreement.

On the second issue of the adequacy of reasons, the Court of Appeal reaffirmed that a tribunal is not required to refer to all evidence or to answer every submission. All that is required is for the discipline committee to identify the "path" taken to reach its decision. It was not necessary to describe every landmark along the way. The discipline committee had articulated the correct test that any departure from the professional standards must be so significant that it constitutes professional misconduct. Its reasons demonstrated that the panel members had turned their minds to the proper test, the issues and key evidence relied upon, and that they had applied their expertise in articulating their conclusions.

On the final issue of costs, the ICAO challenged the Divisional Court's decision to quash the discipline committee's costs award on the basis that it lacked jurisdiction to order costs. The Divisional Court had held that s. 17.1 of the *Statutory Powers Procedure Act* ("**SPPA**") prevailed over the discipline committee's by-law adopted pursuant to s. 8 of the *Chartered Accountants Act, 1956*. The ICAO submitted that the Divisional Court's decision on costs should be overturned in light of s. 38 of the *Chartered Accountants Act, 2010*, enacted two months after the Divisional Court's decision. Section 38 provides that the discipline committee may award costs of a proceeding and that it applies despite section 17.1 of the SPPA. The Court of Appeal ultimately agreed that s. 38 expressly applies to validate orders made on or after December 6, 2000 and that it has the effect of retroactively validating the discipline committee's costs award.

Accordingly, the Court of Appeal allowed the ICAO's appeal, set aside the Divisional Court's decision and reinstated the discipline committee's decision. The appeal of Power and Russo was dismissed.

(d) Refugee – Hague Convention – Procedural Fairness – Paramountcy

***A.M.R.I. v K.E.R.*, 2011 ONCA 417 (Released June 2, 2011)**

In this decision, the Ontario Court of Appeal elaborated on its brief reasons, provided April 18, 2011, setting aside an order to return a child to her mother in Mexico pursuant to the *Convention on the Civil Aspects of International Child Abduction* (the "**Hague Convention**"). The order had been issued even though that child had already been granted refugee status as a result of abuse by her mother. In this decision, the Court provided its reasons on a constitutional paramountcy challenge and held that the child should have benefitted from heightened procedural protections pursuant to s. 7 of the *Canadian Charter of Rights and Freedoms* (the "***Charter***").

In 2008, a 12-year-old girl who lived with her mother in Cancun, Mexico, came to Toronto to visit her father. While in Toronto, the girl disclosed that she was being abused by her mother. The girl stayed in Toronto under the care of her aunts, and in 2010, she was granted refugee status due to the threat of abuse by her mother. The girl's mother subsequently brought an application under the Hague Convention alleging that the girl was being wrongfully retained in Ontario. The Court of Appeal found fault with a number of the application judge's procedural decisions, the results of which were that the hearing was uncontested by the father, the aunts, or the girl. The application judge granted an order for the girl's immediate return to Mexico.

On appeal, the girl's father argued that s. 46 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 ("**CLRA**"), which incorporated the Hague Convention, was rendered inoperative due to a conflict with s. 115 of the federal *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("**IRPA**"), which codifies the international law principle that refugees should not be returned to a country where they face certain serious threats (*non-refoulement*). The Court of Appeal found that, although the Hague Convention can require the return of children to their countries of origin without express regard for refugee status, exceptions in the Hague Convention allow for an interpretation that prevents either an operational conflict with s. 115 of the IRPA, or a frustration of its purpose. The Court of Appeal went on to posit that in Hague Convention applications, there is a rebuttable presumption that the return of a refugee child gives rise to a risk of persecution, thus requiring consideration of the Hague Convention exceptions.

The court further established that a child who is a refugee must be accorded procedural protections under s. 7 of the Charter in proceedings to return that child to her country of origin pursuant to the Hague Convention. In this context, s. 7 requires that the application judge conduct an assessment of the risks associated with returning the child, and that the child has the right to representation, notice of the application, adequate disclosure of the case for an order of return, a reasonable opportunity to respond and to state her views on the merits, a hearing in cases where credibility is a serious issue, and a right to reasons for the decision.

(e) Restitution – *Quantum meruit* – Valuation

***Consulate Ventures Inc v Amico Contracting & Engineering*, 2011 ONCA 418 (Released June 2, 2011)**

This dispute arose following work carried out by Consulate Ventures ("**Consulate**") and its principal, together with Amico Contracting ("**Amico**") and Windsor Factory Outlet Mall ("**Windsor**"), on a project that turned 22 acres of land into a thriving manufacturer's outlet mall. On the day before Phase I of the mall was

to open, Amico and Windsor took the position for the first time that they did not have a binding joint venture agreement with Consulate.

Consulate sought damages for breach of contract or restitutionary relief based on *quantum meruit*. The trial judge dismissed the claim in its entirety because: (a) there was no formal joint venture agreement and therefore no contract claim; and (b) the *quantum meruit* claim was dependent in law on a contractual relationship.

On the original appeal, the Court of Appeal rejected the idea that a *quantum meruit* claim is dependent on the existence of a valid contract, and found that Consulate was in fact entitled to such relief. The court sent the matter back for a new trial to determine damages and liability. At the new trial, Newbould J. valued the quantum meruit claim at $2.25 million, and found Amico and Windsor to be jointly liable. Amico and Windsor appealed these findings.

The appellants took issue with the trial judge's valuation approach. The court preferred the approach of Consulate's expert, who placed a value of $20 per square foot on the services rendered, though the judge reduced the figure to $10 per square foot. The appellants submitted that the proper approach would have been to cost out the services on an item-by-item basis in accordance with market rates, and that the trial judge impermissibly looked at the amount by which the services increased the value of the project.

The Court of Appeal rejected this assertion. The Court of Appeal did agree that the proper approach for valuing the quantum meruit claim was the "value received" rather than the "value added" approach, but found that the expert on whom the judge relied was keenly aware of the difference between the two. Had the expert applied a value-added approach, he would have valued the claim even higher. The Court of Appeal noted that the manner in which the "value received" is to be calculated is flexible and not mechanistic. It is possible to take a contextual approach to the valuation, particularly since the remedy is founded in equity. The trial judge correctly recognized that, in this case, any attempt to value the services on a piecemeal basis would be artificial and not in keeping with the true role of Consulate's principal. The trial judge appropriately took into account the unique experience and expertise of Consulate's principal, the scarcity of such expertise within the marketplace, and the fact that Consulate's principal did not view his services as piecemeal in nature and was acting as a co-venturer.

Another ground of appeal was that Amico should not have been held liable as it was only involved in the construction work and did not derive any direct benefit from the services provided by Consulate. The Court of Appeal rejected this argument. The trial judge found that Amico was involved in more ways than simply construction. Amico and Windsor were essentially "fingers of the same hand" and both gained directly from the successful development of the property.

(f) Administrative Law – Procedural Fairness – *Immigration and Refugee Protection Act* – Sponsorship program

***Canada (Attorney General) v Mavi*, 2011 SCC 30 (Released June 10, 2011)**

This case addresses what duty of fairness, if any, is owed to residents of Canada who have defaulted on undertakings made to the federal government to guarantee the financial security of family members that they sponsored to come to Canada when the sponsor is in default of the undertaking and the government files an application to collect on the debt.

Canadian citizens or permanent residents are entitled to sponsor their relatives to immigrate to Canada. Before a family member is sponsored, the Canadian resident is obligated to provide an undertaking of support for the sponsored relative wherein the Canadian resident assumes responsibility for the financial stability of their family member. Should the sponsored relative apply for social assistance benefits subsequent to their arrival in Canada, the government (federal or provincial by virtue of a Memorandum of Understanding), is entitled to seek to recover those payments from the resident sponsor. In this way, the government encourages family unification while ensuring that the public does not bear the cost of subsidizing sponsors.

This proceeding was initiated by eight sponsors whose relatives had received social assistance and therefore were in default of their undertakings. The sponsors put forward that the enabling legislation, the Immigration and *Refugee Protection Act*, vested discretion with the government to determine on a case-by-case basis whether or not to enforce the debt and sought to avoid payment of the debt either temporarily or permanently.

Binnie J., for a unanimous court, ruled that the undertakings are valid contracts and that there is no discretion for the government to forgive the debt. However, the contracts are controlled by federal legislation and therefore the enforcement of the contracts must import administrative law principles including a limited duty of fairness. As set out in the judgment, "the content of this duty of fairness includes the following obligations: (a) to notify the sponsor that the government will be pursuing a claim regarding the debt; (b) to afford the sponsor an opportunity within limited time to explain in writing his or her relevant personal and financial circumstances that are said to militate against immediate collection; (c) to consider any relevant circumstances brought to its attention, keeping in mind that the undertakings were the essential conditions precedent to allowing the sponsored immigrant to enter Canada in the first place; (d) to notify the sponsor of the government's decision; (e) without the need to provide reasons."

The court concluded that the duty of fairness was met with respect to all eight respondent sponsors.