WeirFoulds LLP

LITIGATION UPDATE

SEPTEMBER 2011

DEVELOPMENTS OF INTEREST IN CASE LAW

(a) Administrative Law – Natural Justice – Bias – Public Inquiries

***Gagliano v Gomery and the Attorney General (Canada)*, 2011 FCA 217 (Released June 29, 2011)**

The Honourable Alfonso Gagliano (the "**appellant**") appealed the decision of the Federal Court to dismiss his application for judicial review of a report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities (the "**Sponsorship Inquiry**"). The Sponsorship Inquiry, led by Commissioner John Gomery, was mandated to investigate allegations of corruption and mismanagement of a federal program purportedly designed to promote national unity by advertising federal programs and initiatives. The report in dispute was the Phase I Report of the Sponsorship Inquiry, entitled "Who is Responsible – Fact Finding Report" (the "**report**"). The report concluded that responsibility for the program's problems lay in part with the appellant, who had served as Minister of Public Works and Government Services Canada.

Before the Federal Court, the appellant was unsuccessful in arguing that the report's findings should be set aside on the basis that Commissioner Gomery was biased.

On appeal, the appellant argued, among other grounds, that the Federal Court erred by: (1) applying a different test for bias in his case from the test applied in a judicial review of the same report by former Chief of Staff Jean Pelletier; (2) failing to take into account various grounds raised in support of his allegations of bias; (3) applying an overly onerous burden of proof of bias; and (4) deciding that Commissioner Gomery's conduct did not give rise to a reasonable apprehension of bias.

The Federal Court of Appeal confirmed that courts must apply different standards to allegations of bias depending on the context, and in particular, that allegations of bias in a public inquiry are not to be accorded the same treatment as allegations of bias in a criminal or civil trial. The court posited that public inquiries investigate rather than adjudicate, and that the inquisitorial process cannot be held to the same standard of bias as an adversarial process; investigations must seek out information themselves, while an adversarial process allows a court to weigh evidence that is collected and submitted by the parties.

The court therefore confirmed two distinctive tests to be applied to allegations of bias during public inquiries, depending on the stage at which the challenge is launched. While the public inquiry is still underway, the commissioner will only be disqualified for bias if there is a reasonable apprehension that the commissioner's decisions are made on a basis other than the evidence. When bias is alleged against a commissioner after the report of a public inquiry has been issued, the conclusions of the report will be upheld if they are supported by "some evidence in the record of the inquiry".

The Federal Court of Appeal found that the Federal Court's decision was based on a finding that Commissioner Gomery's conclusions were supported by some evidence and the court did not disturb this finding. As this is the appropriate test for bias in a public inquiry once its report has been issued, the court found that it was unnecessary to consider other grounds raised by the appellant in support of his allegations of bias, or whether Commissioner Gomery's conduct gave rise to a reasonable apprehension of bias. The court also found that the same test had been applied to both Mr. Pelletier and the appellant, and that the outcome of their applications had differed because the fact situations in the two cases were not identical.

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With respect to the alleged unfair burden placed on the appellant, the Federal Court of Appeal found no fault with the Federal Court's assertion that the onus of demonstrating bias is high, particularly in light of the Federal Court of Appeal's earlier comments regarding the higher threshold for proving bias arising from the inquisitorial nature of public inquiries.

(b) Civil procedure – Dismissal order – Test to set aside

***Aguas v Rivard Estate*, 2011 ONCA 494 (Released July 6, 2011)**

The appellant commenced an action on October 6, 2003, against Curtis Rivard following a motor vehicle accident. On August 15, 2007, the Registrar dismissed the action because the appellant had neither set the matter down for trial within two years of the filing of the statement of defence nor obtained an order from a judge presiding at a status hearing in accordance with Rule 48.14. The order dismissing the action was mistakenly sent to the appellant's former counsel, but not to current counsel. Counsel for the appellant did not discover that the action had been dismissed until September 2009. On October 7, 2009, the appellants filed a notice of motion to set aside the dismissal.

This decision is an appeal from the order of Seppi J. dismissing the appellant's motion to set aside the dismissal order.

The majority of the Court of Appeal allowed the appeal, holding that while the motion judge identified and applied the proper test, she made three palpable and overriding errors.

First, the court held that the motion judge made an error in finding that there was no explanation for the litigation delay. In the court's opinion, although the action was not proceeding with "lightning speed", steps were being taken. Additionally, the litigation was complicated and directly affected by a second accident in which the appellant was involved, which led to a second action commenced by the appellant. In the court's decision, it was an error to say that the appellant did not give "any reason whatsoever" for the litigation delay. Moreover, once counsel for the appellant discovered the dismissal, she moved almost immediately to set it aside.

Second, the court held that the motion judge made an error in finding that prejudice to the respondents favoured dismissing the motion. The court found that the motion judge placed unreasonable emphasis on prejudice, and concluded that there was no prejudice suffered by the respondents.

Third, the court held that the motion judge erred in holding that the respondents were entitled to rely on the principle of finality. It held that the respondents did not proceed as if they were acting on the principle of finality, and continued to participate in the litigation, most obviously by attending the discoveries in the second accident.

Upon considering the facts of the case in context, the Court of Appeal determined that the dismissal order should have been set aside.

Juriansz J.A. dissented from the majority's opinion. He stated that the motion judge's decision to uphold the dismissal order involved an exercise of discretion, which should be given "significant deference from this court". An appellate court reviews a decision, not with the aim of replacing it with the decision it would have made itself, but with a view to determining whether the motion judge erred in arriving at his/her decision. He stated: "Interfering with her considered exercise of discretion will have the effect of rendering the jurisprudence of this court so uncertain that trial judges will have difficulty understanding and applying it. Uncertainty in the jurisprudence will have the result that a Court of Appeal decision will be required to determine the final status of a case administratively dismissed under Rule 48.14, which is intended to remove cases from the court's docket without any judicial involvement". Juriansz J.A. concluded that the result reached by the motion judge in this case was reasonable.

(c) Estates – Interpretation of a Will – Admissible Evidence

***Rondel v Robinson Estate*, 2011 ONCA 493 (Released July 6, 2011)**

This appeal challenged the common law position on the inadmissibility of direct extrinsic evidence of a testator's intention in the face of an unambiguous will.

The testator, who owned property in Spain, England and Canada, executed a will in 2002 intended to deal only with her European property (the "**2002 Spanish Will**"). She granted a life interest in her London flat to the Appellant, with whom she had a long relationship. In 2005, the testator sent her lawyer drafting instructions regarding a Canadian will (the "**2005 Canadian Will**"). The instructions related to the "entire residue of [her] estate". Her lawyer drafted the will according to the instructions but did not inquire to as the testator's previous wills, the location of her assets or her significant relationships. The 2005 Canadian Will included a general disposition clause and a standard revocation clause, which revoked all previous wills. The lawyer reviewed the will, clause by clause, with the testator prior to its execution.

In 2006, the testator revised the 2005 Canadian Will to make a bequest of $1 million to the Appellant (the "**2006 Will**"); no further amendments were made. When the testator died, her lawyer, who was unaware of the 2002 Spanish Will or the testator's European assets, distributed the Canadian assets per the 2006 Will. The lawyer subsequently learned of the 2002 Spanish Will and the European assets.

The Appellant and the testator's lawyer brought applications for the interpretation and rectification of the 2006 Canadian Will, which had already been probated. Both applications were supported by affidavit evidence as to the testator's intention that the 2006 Will would deal only with her Canadian property and was not intended to revoke the 2002 Spanish Will. The Appellant deposed that the testator did not intend to revoke the 2002 Spanish Will and that the 2006 Will did not reflect her intentions and was not approved prior to execution.

The application judge, after reviewing the common law position on the rectification of wills, dismissed the applications. To allow the applications would give the court the power to intervene and rectify an unambiguous will that was reviewed and approved by the testator on the basis of third party affidavit evidence that the testator did not mean what she said. The Court of Appeal found the application judge did not err by holding that the affidavit evidence as to the testator's intentions was not admissible.

The court upheld the general common law rule that the testator's intentions must be determined on the basis of the words in the will rather than direct extrinsic evidence of intent. While extrinsic evidence related to the circumstances of the testator and the making of the will may be admissible, the affidavit evidence filed in support of the applications exceeded the scope of admissible evidence. Allowing such evidence would introduce uncertainty and increase estate litigation. Disappointed beneficiaries could challenge a will based on the belief that the testator's intentions were different than those expressed in the will. To admit this evidence, other than in circumstances where there is an equivocation in a will, would raise issues of credibility and reliability. In this case, the words of the 2006 Will were clear.

(d) Constitutional Law – *Canadian Charter of Rights and Freedoms* – Discrimination

***Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 (Released July 21, 2011)**

The Respondents, Métis who also identify as status Indians, brought an application alleging that provisions of Alberta's *Métis Settlements Act* ("**MSA**") that prohibit status Indians from being members of a Métis settlement violated ss. 15, 2(d) and 7 of the *Canadian Charter of Rights and Freedoms* ("***Charter***"). The Chambers Judge dismissed the application.

The Alberta Court of Appeal concluded that the provisions breached s. 15 of the *Charter*. The Supreme Court overturned the Court of Appeal's decision. Most of its analysis focused on the application of s. 15(2) of the *Charter* to the MSA.

The court emphasized that s. 15(2) permits governments to improve the situation of members of disadvantaged groups by permitting the establishment of ameliorative programs aimed at a particular group. These programs necessarily confer benefits on certain groups and not others. Section 15(2) permits governments to "set priorities" and does not oblige governments to assist all disadvantaged groups at the same time. To be protected by s. 15(2) the distinction does not need to be essential to realizing the object of the ameliorative program. An impugned distinction simply must advance, in a general sense, the object of the program.

The court concluded that s. 15(2) protected the MSA provisions. The provisions constituted a program designed to establish a Métis land base in order to enhance and preserve the identity of Métis. In light of the relevant historical and constitutional recognition of Métis, the court found that this program should be considered to be an ameliorative program.

The court also concluded that the distinction drawn between Métis and Métis who are status Indians served and advanced the objects of the program. The court held that in order for the program to be caught by s. 15(2) the government simply had to show that it was rational to conclude that the distinction contributed to the ameliorative purpose. Following a consideration of the Métis history and the constitutional context the court concluded this test was met.

The court also held that eliminating the distinction would risk undermining the program. It noted that its conclusions were strengthened by the fact the distinction at issue was the product of consultation with the Métis community. The court acknowledged that individuals may assert multiple identities but it held that s. 15(2) permits a line to be drawn between groups in order to fulfill a valid ameliorative purpose.

The court rejected the s. 2(d) claim on evidentiary grounds. In addition, the court concluded that even if "place of residence" is a protected interest covered by s. 7 the Respondents had failed to demonstrate a breach of this section.

(e) Civil Procedure – Restore Action to Trial List – Test for Rule 48.11, *Rules of Civil Procedure*

***1351428 Ontario Ltd (Wineyard) et al v 1037598 Ontario Ltd et al*, 2011 ONSC 4767 (Released August 9, 2011)**

When a plaintiff seeks leave to restore an action to the trial list under Rule 48.11, the court will consider the same factors as though the defendant moved to dismiss the action for delay under Rule 24.01. A plaintiff in this situation must be prepared to explain any delay in prosecuting the matter and further rebut evidence of actual or presumed prejudice resulting from the delay that may be raised by the defendant.

In this case, the plaintiffs' action was commenced in September 1999, based on allegations stemming from the plaintiffs' purchase of a restaurant, the Wineyard, in or about May 1999. In 2001, the action was struck from the trial list in order for the plaintiffs to add a new defendant. No steps had been taken by the plaintiffs after 2008. The motion to restore the action to the trial list was brought in January 2011.

Rule 48.11 provides discretion to the court to grant leave to restore an action to the trial list. There is scant existing jurisprudence for this Rule. In this case, Justice Backhouse followed Master Graham's recent decision in *Ruggiero v. FN Corp.*, 2011 ONSC 3212, which held that the factors governing the court's discretion are analogous to those governing the court's discretion to dismiss for delay. These are:

1. Was the plaintiff's delay intentional and contumelious?

2. If not, is there an inordinate and inexcusable delay in the litigation for which the plaintiff or his solicitors are responsible, such as would give rise to a presumption of prejudice?

3. If so, has the plaintiff provided evidence to rebut the presumption of prejudice arising from the delays?

4. If so, have the defendants provided evidence of actual prejudice?

On the facts, Justice Backhouse found that the plaintiffs had not complied with Rule 24.01(1)(e), requiring the plaintiffs to seek leave to return the action to the trial list within 30 days of it being struck. Justice Backhouse limited the plaintiffs' default, however, as she found that the plaintiffs had not caused inordinate or inexcusable delay, such as would give rise to a presumption of prejudice. Further, she found that there was no evidence that the defendants had suffered actual prejudice and that although the plaintiffs had leisurely prosecuted the action, there was no intentional or contumelious delay. She held that it was significant that the defendants had not moved earlier to dismiss for delay.

(f) *Provincial Offences Act – Canadian Charter of Rights and Freedoms* section 11(b) – Part I Offences – Unreasonable Delay

***Her Majesty the Queen (Ex Rel City of Toronto) v Andrade*; *Her Majesty the Queen (Ex Rel City of Toronto) v Hariraj* (Ontario Court of Justice, released September 15, 2011)**

The question of constitutionally tolerable delay with respect to the prosecution of minor regulatory and human welfare offences under the *Provincial Offences Act*, R.S.O., 1990, c. P.33 ("**POA**") has been the source of much recent debate.[1] In this most recent judicial installment, Justice Libman of the Ontario Court of Justice dismissed two appeals and upheld the decisions to stay charges under the *Highway Traffic Act*, R.S.O. 1990 c.H.8 ("**HTA**") as a result of violations of the defendants' 11(b) rights under the *Canadian Charter of Rights and Freedoms* ("***Charter***").

Section 11(b) of the *Charter* provides that every person charged with an offence is entitled to be "tried within a reasonable time". The Supreme Court has found that the 11(b) *Charter* right protects both the individual interest of an accused person, including: (a) the right to security of the person by minimizing anxiety, concern and stigma, (b) the right to liberty by limiting pre-trial custody, and (c) the right to a fair trial by proceeding when evidence is fresh, and a societal interest in having matters dealt with according to law and in an expeditious manner to enhance public confidence in the judicial system.[2]

There is a long line of jurisprudence with respect to assessing the reasonableness of delay for criminal matters. As a first step, courts consider the total length of the delay and the reason for the delay to determine whether the delay should be discounted. The second step is to weigh the delay as against factors including the severity of the charge, complexity of the matter, and prejudice suffered. These factors are then weighed against a guideline for tolerable delay which, for criminal matters in the provincial court, has been determined to be 8–10 months. The guideline does not include delay as a result of the "intake period" which reflects the amount of time for a matter to be set down for trial.

There are several key differences between criminal prosecutions and prosecutions under Part I of the POA. Criminal prosecutions are typically more serious, carry greater stigma, are the source of greater anxiety to defendants, and are more complicated and time consuming to dispose of than POA proceedings. There is also a greater societal interest in having criminal matters heard on the merits. Part I of the POA, on the other hand, was devised as a mechanism for "speedy justice" for minor offences for which the defendant may, at most, receive a fine and where there is minimal, if any, stigma or prejudice caused by delay. The POA is also the place where most people will experience the justice system. In 2010, 600,000 criminal charges as compared to over 2 million POA charges were laid.

Justice Libman concluded that with respect to POA Part I prosecutions, an intake period of 30–45 days was appropriate as a result of strict legislative timelines imposed for POA matters. He then concluded that a guideline of 8–9 months for delay is constitutionally tolerable systemic or institutional delay. As both matters fell outside of this guideline, the decision of the trial judges to stay the charges was upheld.

On November 21, 2011, the Court of Appeal for Ontario will hear the matter of *R. v. Vellone*, 2009 ONCJ 150, leave to appeal granted, [2009] O.J. No. 1607 (C.A.), where the application of section 11(b) to POA Part I offences will again be considered.

1. See Ontario Law Commission, *Modernizing the Provincial Offences Act: A New Framework and Other Reforms* (*Interim Report, March 2011*) (Toronto: Law Commission of Ontario, 2011)

2. *R. v. Morin*, [1992] 1 S.C.R. 771 at paras. 27-30