WeirFoulds LLP

LITIGATION UPDATE

NOVEMBER 2011

DEVELOPMENTS OF INTEREST IN CASE LAW

(a) Libel and Slander – Hyperlinks – Publication – Innocent Dissemination

***Crookes v Newton* 2011 SCC 47 (Released October 19, 2011)**

Newton owned and operated a website containing commentary about various issues, including free speech and the Internet. He posted an article on his website called "Free Speech in Canada". The article contained several hyperlinks to other websites.

Crookes argued that two of the hyperlinks connected to defamatory material. One link was a "shallow" hyperlink, which directed the reader to a home page that contained allegedly defamatory articles. The other link was a "deep" hyperlink that connected the reader to a specific article which Crookes alleged was defamatory.

Crookes demanded that Newton remove the article containing the hyperlinks from his website. Newton refused. Crookes then brought an action against Newton in defamation. The article containing the hyperlinks had been accessed 1,788 times. However, there was no evidence with respect to how many times the hyperlinks had been accessed, if at all.

At issue was whether a hyperlink constituted "publication" for the purposes of defamation law. Justice Abella, writing for the majority of the Court, found that it did not. She reasoned that reference to an article containing a defamatory comment without repetition of the comment itself should not be found to be publication or republication of the defamatory comment. Justice Abella found that making reference to the existence or location of content by hyperlink or otherwise, without more, is not publication of the content.

Justice Abella concluded that a hyperlink, by itself, should never be seen as publication of the content to which it refers. Therefore, the hyperlinks created by Newton were not defamatory.

Chief Justice McLachlin and Fish J. wrote separate reasons concurring in the result. They parted with Abella J. on the blanket statement that hyperlinks could never be defamatory. They reasoned that if the text surrounding the hyperlink indicates adoption or endorsement of the content of the hyperlinked text, it may be defamatory.

Justice Deschamps wrote separate reasons that ultimately concurred in the result with her colleagues, although she differed significantly in her reasoning. She found that creating a hyperlink could be defamatory if it made defamatory information readily available to a third party in a comprehensible form. Justice Deschamps also referred to the defence of innocent dissemination as an existing mechanism to protect freedom of expression.

On the facts of the case, Deschamps J. was not willing to find that the "shallow" hyperlink was enough to make the defamatory material readily available. However, she found that the "deep" hyperlink, which linked directly to the allegedly defamatory article, satisfied the condition of publication. She found that the action could not succeed, however, because there was no evidence that a third party had accessed this hyperlink, and she was unwilling to draw an inference that a third party had done so.

Ultimately, the justices were unanimous in opining that the action by Crookes could not succeed. The appeal was dismissed.

(b) Municipality – Civil Contempt – Conditions on Demolition Permits

***W.J. Holdings Limited v City of Toronto* 2011 ONSC 6315 (Released October 26, 2011)**

The City of Toronto was found in contempt of an Ontario Municipal Board order requiring the City to issue demolition permits without conditions. The subject buildings remained vacant in the High Park neighbourhood for the past five years while the City refused to issue the permits. In May 2011, a fire broke out at one of the vacant buildings. This decision is the latest in a series of proceedings related to a proposed condominium redevelopment.

The applicants first applied for the demolition permits in 2006. When the City failed to respond, the applicants appealed to the Board in 2007. City Council voted in 2008 to refuse the permits application and to impose conditions on the permits even if the Board subsequently orders the permit issuance. In September 2009, the Board released written decision ordering the City to issue the permits and allowed the City

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six months to impose any conditions. The City appealed the decision, which was upheld by the Divisional Court in November 2010.

On February 24, 2011, the Board issued its final order requiring the City to issue the permits. The City continued to refuse to issue any permits until the applicants comply with certain conditions. The City had not officially filed any conditions with the Board at any time prior to the Board's final order in 2011. In March 2011, the applicants filed the Board's final order as an order of the Court then sought a declaration that the City was in contempt of the order.

The City took the position that the conditions it sought to impose had been identified by City Council in July 2008. It argued that the Board's final order did not affect the July 2008 Council Decision to impose conditions. The applicants argued that the Board's final order clearly directed the City to issue demolition permits without conditions, and that the City's refusal to issue the permits constitutes civil contempt.

Before addressing the contempt issue, the Court found no legislative basis for the City to refuse issuing the permits as directed by the Board. Nothing in the *City of Toronto Act, 1991* (which was the applicable statute) allows the City to override an order of the Board or of the Court.

The Court found the City in contempt of the Board's final order as the three-part test for contempt had been established.

First, the Board's final order, filed as an order of the Court, was clear and unequivocal that the City must issue the permits without conditions. The Court found that the Board had provided the six-month window to allow the City to impose the conditions and the applicants an opportunity to raise any related concerns. In issuing the final order, the Board had specifically noted that the City did not identify any conditions within the six-month time period of the decision.

Second, the City's disobedience of the order was voluntary and deliberate. The Court noted that it was apparent from the proceedings' history that the City had delayed its decision to issue demolition permits and taken numerous routes of appeal.

Third, there was contempt beyond a reasonable doubt as the City has continued to refuse the issuance. Accordingly, the Court imposed a 30-day deadline for the City to purge its contempt by issuing demolition permits without conditions. Failure to purge the contempt would result in a penalty of $75,000 and an additional $150 for each day that the City failed to issue the permits.

(c) Administrative Law – Human Rights – Tribunal Jurisdiction

***British Columbia (Workers Compensation Board) v Figliola* 2011 SCC 52 (Released October 27, 2011)**

This decision addressed the jurisdiction of the British Columbia Human Rights Tribunal ("**BCHRT**") to consider an application regarding a Workers Compensation Board ("**WCB**") policy, when the substance of the application had already been heard by a WCB Review Officer, who had considered the policy and determined that it adhered to the B.C. *Human Rights Code*. The respondents could have applied for judicial review of the decision but instead decided to re-litigate the matter at the BCHRT.

The WCB sought to dismiss the application pursuant to s. 27(1)(f) of the Code, which allows the BCHRT to dismiss an application if it had been appropriately dealt with in another proceeding. The BCHRT dismissed the motion, applying the issue estoppel analysis set out in *Danyluk v Ainsworth Technologies Inc.* The BCHRT decision was overturned on judicial review, but restored by the Court of Appeal.

The Supreme Court split five to four, but both decisions allowed the appeal and held that the BCHRT's decision to permit the application was patently unreasonable.

Justice Abella, writing for the majority, emphasized that the principles underlying s. 27(1)(f) are respect for the finality and integrity of other administrative processes, the importance of respecting available appeal and review mechanisms, avoiding needless re-litigation, and preventing forum shopping. She emphasized that in applying s. 27(1)(f) the BCHRT should consider the existence of concurrent jurisdiction to consider the Code if the matters at issue are the same, and if there was an opportunity to address these issues in some form.

The majority concluded that s. 27(1)(f) did not permit the BCHRT to engage in a form of judicial review and that the provision was meant to create "territorial respect" towards other tribunals.

The majority noted that this narrow reading was supported by the placement of s. 27(1)(f) among types of proceedings that ought to be dismissed and by its legislative history.

The majority found that the BCHRT's consideration of a number of irrelevant or inappropriate factors, such as the merits of the Officer's decision, the procedure used, and the expertise of the Officer, meant that its decision was patently unreasonable. The majority also noted that a strict application of *Danyluk* in this context undermined the concurrent jurisdiction of the WCB over the Code.

The majority dismissed the BCHRT application.

Justice Cromwell's concurring decision took a broad view of the discretion provided to the BCHRT under s. 27(1)(f). He noted that the WCB's jurisdiction over the *Code* had evolved over time and the Officer's jurisdiction to consider the *Code* was uncertain, indicating the difficulty in simply applying finality principles to parallel administrative proceedings. He disagreed with the majority's assessment of the statutory context as a factor that favoured a narrow reading of the provision. Instead he held that legislative history and other factors indicated that the s. 27(1)(f) discretion ought to be broad, and it permits the BCHRT to consider a broad range of factors in deciding whether or not to dismiss an application, including the merits of the decision and if the proceedings were conducted fairly.

Justice Cromwell found, however, that the BCHRT decision turned on an improper consideration of whether the Officer was sufficiently independent, failed to consider the availability of Judicial Review, and failed to consider if the Officer had addressed the substance of the application. Justice Cromwell concluded, therefore, that the BCHRT's assessment of s. 27(1)(f) was patently unreasonable as it failed to give weight to the principles of finality and instead improperly engaged in a strict application of *Danyluk*. Due to these errors he would have remitted the matter back to the BCHRT for reconsideration.

(d) Administrative Law – Remedial Jurisdiction – Canadian Human Rights Act – Legal Costs – Standard of Review – Statutory Interpretation

***Canada (Canadian Human Rights Commission) v Canada (Attorney General)* 2011 SCC 53 (Released October 28, 2011)**

The Supreme Court of Canada unanimously held that the Canadian Human Rights Tribunal ("**the Tribunal**") does not have the authority to award legal costs.

The applicant, Donna Mowatt, was compulsorily released from her position as a traffic technician for the Canadian Forces. Following her release, Ms. Mowatt filed a complaint with the Canadian Human Rights Commission ("**the Commission**"), alleging sexual harassment, adverse differential treatment, and failure to continue to employ her on the basis of her sex. In addition to awarding $4,000 plus interest for suffering, the Tribunal considered conflicting Federal Court jurisprudence and concluded that it had the authority to award legal costs pursuant to s. 53(2) of the *Canada Human Rights Act* ("**the Act**"), which allows the Tribunal

to compensate "for any expenses incurred by the victim as a result of the discriminatory practice". The Tribunal awarded Ms. Mowatt $47,000 in legal costs.

After an extended standard of review analysis, the Supreme Court concluded that the question of whether legal costs may be included in a compensation order by the Tribunal was to be reviewed on a "reasonableness" standard, since it was neither a question of jurisdiction, nor a question of law of central importance to the legal system, nor outside the Tribunal's expertise.

The Court held, however, that the Tribunal's conclusion that it had the power to award legal costs was not reasonable considering the text, context, and purpose of the provision. With respect to the text of the *Act*, the Court observed that the phrase "expenses incurred by the victim" appears in two separate remedial provisions—one citing lost wages and expenses incurred (s. 53(2)(c)), and one citing additional costs of obtaining goods and services and expenses incurred (s. 53(2)(d)). The Court concluded that the repetition of the phrase "expenses incurred" in these different contexts and the legislative presumption against tautology weighed against a finding that the phrase "expenses incurred" was intended to create a free-standing jurisdiction to award legal costs. In analyzing the text of the *Act*, the Court also noted that the term "costs" is a legal term of art, and that the legislature's choice not to use this term suggests an intention not to make such remedies available. Finally, the Court noted that the subsection providing for damages for suffering and wilful or reckless discrimination is capped at a modest amount ($5000 at the time), and contains no parallel phrasing for "expenses incurred".

In assessing the context of s. 53(2) of the *Act*, the Court observed that a predecessor bill to the *Act* includes express authority to award "costs", which was deleted from the bill which became the *Act*. Further, once the *Act* was in force, a proposed amendment that would have ordered the Commission to pay "costs" in certain circumstances was never enacted. The Court also held that the legislative history of the scheme suggested a deliberate choice to forego a scheme of legal cost awards in favour of a strong Commission which would advocate for complainants and the public interest, thereby reducing the need for independent legal representation. Finally, the Court also found some support in the Commission's many statements that the Act did not confer jurisdiction to award costs, and in the fact that provincial and territorial human rights legislation deploy the word "costs" when they intend to confer such jurisdiction.

The Court confirmed that in principle human rights legislation should be given a broad and purposive interpretation, but emphasized that this could not replace an interpretation based in the text and context of the *Act*.

(e) *North American Free Trade Agreement* – International Arbitration – Standard of Judicial Review

***Mexico v Cargill, Incorporated* 2011 ONCA 622 (Released October 4, 2011)**

Cargill, Incorporated ("Cargill") is an American company that produces high fructose corn syrup, a low-cost alternative to cane sugar, for import to Mexico through its wholly-owned Mexican subsidiary distributor, Cargill de Mexico S.A. de C.V. ("CdM"). To protect its cane sugar industry, Mexico enacted a number of trade barriers that caused CdM and Cargill to sustain significant losses, including the closure of CdM's distribution centre in Mexico.

Cargill, on behalf of itself and CdM, submitted a claim to arbitration against Mexico under Chapter 11 of the *North American Free Trade Agreement* ("**NAFTA**"). In 2009, an expert panel of arbitrators in Washington D.C. found that Mexico's trade barriers constituted breaches of NAFTA and that Cargill was entitled to both "down-stream" damages (direct lost sales and associated costs suffered by CdM in Mexico) and "up-stream" damages (lost sales to CdM of products manufactured by Cargill in the United States).

Mexico did not dispute the finding that it had breached NAFTA or the award of down-stream damages to CdM. However, it challenged the jurisdiction of the panel to award up-stream damages to Cargill. Because the parties had designated Toronto, Ontario as the "place of arbitration", the Ontario Superior Court of Justice had jurisdiction to review the award under Ontario's *International Commercial Arbitration Act*, which adopted the *UNCITRAL Model Law on International Commercial Arbitration* (the "**Model Law**").

Article 34(2)(iii) of the Model Law provides authority for a Superior Court judge to set aside a decision of an international arbitral tribunal where "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration…"

Under Chapter 11 of NAFTA the panel only had jurisdiction to award damages to Cargill for losses suffered as an "investor" "by reason of or arising out of" Mexico's trade barriers. Mexico argued that the panel exceeded this jurisdiction by awarding damages for losses suffered by Cargill in its position as producer and exporter.

The panel had directly addressed its jurisdiction on this issue and concluded that, as Cargill's business model was to produce the product in the United States for import to Mexico, losses resulting from Cargill's inability to supply its investment (CdM) with the product were just as much "investment losses" as were CdM's "down-stream" losses.

In the Superior Court, Justice Low held the proper standard of review to be "reasonableness", referring to the "powerful presumption" that international arbitral tribunals act within their jurisdiction and that courts should interfere sparingly with such decisions out of respect for international comity and the global marketplace. She went on to consider the merits of the panel's decision, determining it to be reasonable and dismissing the appeal.

The Court of Appeal held the proper standard of review to be "correctness" in that the panel had to be correct in its determination that it had jurisdiction to make the decision it made. The Court explained that the powerful presumption that courts will rarely intervene in international arbitral decisions is because their intervention is limited to true jurisdictional errors.

The Court found that the panel had correctly identified its jurisdictional limits under Chapter 11 and the terms of the submission to arbitration, and had applied the facts within this framework. Thus, Mexico's dispute was with the merits of the decision, which the Court declined to review. As such, the Court dismissed the appeal.

(f) Constitutional law – Canadian Charter of Rights and Freedoms – s. 24(2) – Exclusion of evidence

***R v Côté* 2011 SCC 46 (Released October 14, 2011)**

This majority decision considers the revised approach to the exclusion of evidence, as set out in *R v Grant* 2009 SCC 32, and marks an important development in the case law dealing with the protection of rights under s. 24(2) of the *Canadian Charter of Rights and Freedoms*.

While investigating an attack against the appellant's husband, the police committed several serious and deliberate violations of her *Charter* rights. For example, police exceeded their right to enter and search the property; detained the appellant without telling her that she was a suspect; and systematically violated her right to silence. The trial judge found the breaches had been "flagrant and systematic" and excluded both the physical evidence and the appellant's statements to police because the admission of the evidence would bring the administration of justice into disrepute. The appellant was acquitted.

The Quebec Court of Appeal overturned the trial judge's decision to exclude the physical evidence on the basis that it had been obtained without the appellant's participation, the crime was very serious and the police had not deliberately acted in an abusive manner.

The Supreme Court reviewed the *Grant* analysis. The court must consider three factors: the seriousness of the Charter-infringing state conduct; the impact of the breach on the Charter-protected interests of the accused; and society's interest in adjudication of the case on the merits. The court must then determine whether "having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute." If a trial judge has considered the proper factors and has not made an unreasonable finding, a reviewing court should show considerable deference.

The Supreme Court found the Court of Appeal had exceeded its role by re-characterizing the evidence to find that police did not deliberately act in an abusive manner, and by re-considering the impact of the seriousness of the offence. There was no reason to interfere with the trial judge's findings.

The Court of Appeal also erred in placing undue weight on the discoverability principle, to support the finding that the evidence could have been obtained legally, without the appellant's participation. Discoverability may be relevant to the first and second stages of the Grant analysis but is not determinative. In this case, a warrant could have been obtained early in the investigation and the evidence could have been obtained legally. However, "this fact would not have changed the conclusion that the second branch of the Grant analysis militated in favour of exclusion, in light of the numerous other factors highlighting the serious impact on the appellant's privacy and dignity interests."

The Supreme Court allowed the appeal and restored the acquittal entered at trial.

Deschamps J. dissented. She agreed with the conclusion that the police had shown a serious disregard for the appellant's rights but found the trial judge did not evaluate the impact of the breach. If a warrant had been issued early in the investigations, the police could have obtained the same physical evidence obtained in the unauthorized search. Deschamps J. held that the intrusion on the appellant's privacy rights would have been the same with or without a warrant, and that she did not have "the highest expectation of privacy." The trial judge also erred in failing to consider the reliability of the physical evidence. The physical evidence was crucial because the appellant's statements to police – the only other evidence – had been excluded.

In balancing the factors weighing in favour and against excluding the evidence, Deschamps J. concluded that it was possible for the Court to recognize the constitutional violations without excluding the physical evidence.

(g) Constitution Act, 1982 – Aboriginal Rights – Proof

***Lax Kw'alaams Indian Band v Canada (Attorney General)* 2011 SCC 56 (Released November 10, 2011)**

This Supreme Court of Canada decision rejected a claim by several First Nations to possession under s. 35 of the *Constitution Act, 1982*, of an Aboriginal right to fish commercially all species in the claimants' traditional territories. In doing so the Court (1) considered how a modern right can evolve from an historical practice; (2) confirmed the importance of the pleadings and of the characterization of Aboriginal rights; and (3) restated the steps for proof of an Aboriginal right while adding a further restriction in the case of commercial rights.

The Lax Kw'alaams Indian Band ("**Lax Kw'alaams**") and its ancestors have lived in and fished off the northwest coast of British Columbia for thousands of years. Before contact with Europeans, they regularly traded fish-grease extracted from the eulachon but traded other fish products only occasionally. In the present proceeding the Lax Kw'alaams sought a declaration as to their Aboriginal rights. In contrast, in previous Supreme Court decisions concerning the test for s. 35 Aboriginal rights, Aboriginal communities had claimed rights in response to a regulatory prosecution. The trial judge and a panel of the British Columbia Court of Appeal rejected the Lax Kw'alaams claim.

Justice Binnie, writing for a seven-judge panel, agreed. He held that the claimed modern right to fish commercially all fish species in the claimants' territory was not a "logical evolution" of the pre-contact trade in eulachon grease. That trade did not provide a "sufficient historical basis" for the broad commercial right. More specifically, the earlier activity and the present claim were "qualitatively different" in the sense that the Lax Kw'alaams did not trade other species "in any significant way". They were also "quantitatively different" because the relative importance to the modern Lax Kw'alaams economy of a commercial right would "lack proportionality" to the relative pre-contact importance of trade in eulachon grease.

The Court also rejected the Lax Kw'alaams' assertion that the trial judge wrongly failed to characterize the claim only after she had heard the evidence at trial. Binnie J. held that a trial judge was not required "to put together a report" on what Aboriginal rights might exist had the claimants properly pleaded their rights. Instead, judges must characterize a claim to Aboriginal rights on the basis of the pleadings. That approach is consistent with the logic that the relevance of evidence follows the pleadings, with Aboriginal rights law authority, and with rules of civil procedure. This approach meant that in past (regulatory) cases, the characterization re-defined – and limited – the claimed right to one that was simply adequate to defend against the relevant prosecution.

Finally, in setting out the steps for establishment of an Aboriginal right, Binnie J. added a new stage for commercial rights. At this stage a court must delineate the right while considering objectives which are in the interest of all Canadians, such as the pursuit of economic and regional fairness and the reconciliation of non-Aboriginal groups' historical reliance on the resource. It appears that in adding this step, the Court has brought forward from the infringement and justification stage the consideration of necessary societal limitations on Aboriginal rights. In the author's view, this makes sense to the extent that courts hearing claims for declaratory relief must be mindful of non-Aboriginal interests when formulating declarations. However, insofar as it permits courts to restrict otherwise proven constitutional rights without a proper evidentiary record for doing so, it is "unjustified".

Suggested content for next month's newsletter can be forwarded to either Richard Ogden or Jessica Eisen.