

McCarthy Tétrault Co-Counsel:
Litigation

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McCarthy
Tétrault

Co-Counsel: Litigation

Volume 3, Issue 1

Welcome to Volume 3, Issue 1 of McCarthy Tétrault Co-Counsel: Litigation.

This issue covers several new developments in the areas of class actions, administrative law, insurance and environmental litigation, search and seizure, and corporate law. As well, in this issue we provide a guide for bankruptcy and restructuring. We are also pleased to present a book published by our lawyers, [Copyright: Cases and Commentary on the Canadian and International Law](#).

There are two articles on class actions in this issue. One comments on the British Columbia Court of Appeal decision regarding the ability of an [arbitration clause in a consumer contract](#) to preclude a class action from taking place. The other discusses the important issue of [adequate notice](#).

We revisit the area of post-*Dunsmuir* administrative law with a case comment on the Supreme Court of Canada decision of [Canada v. Khosa](#), which addresses the issues of standard of review and of deference.

The article on [insurance law](#) discusses an important and long-awaited decision from the British Columbia Court of Appeal, and examines the implications of the decision for the insureds, for plaintiffs, and for the industry at large.

This issue also includes an article discussing the Québec Court of Appeal decision, which clarifies criteria that would render a [neighbourhood annoyance](#) “abnormal.”

The article regarding the issue of [search and seizure](#) concerns a Supreme Court of Canada case in which McCarthy Tétrault lawyers were involved. The case asked the court to determine the extent of an individual’s privacy interest in their household waste.

The Honourable James M. Farley Q.C., in his regular column, reflects on [elements of the case of BCE Inc. v. 1976 Debentureholders](#), including the best interests of the corporation, the business judgment rule, oppression aspects, and the arrangement approval process. He also contributes a [PostScript](#) to the previous issue’s Farley’s Reflections.

Finally, we have an article in the area of bankruptcy and restructuring that summarizes and highlights parts of [Canadian restructuring proceedings](#).

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Our goal is to provide you with items that are relevant, timely, useful and interesting. We hope we have been successful, and welcome your feedback. If you are currently not a subscriber to this publication, and would like to be added to the distribution list, please [contact us](#).

Yours truly,

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Publications

Casebook of Canadian and International Copyright Law

McCarthy Tétrault partners Barry Sookman and Steven Mason illustrate the challenges, concepts and approaches to copyright issues in their newly released casebook *Copyright: Cases and Commentary on the Canadian and International Law*. The authors draw on their experience in numerous high-profile intellectual property cases to show how copyright operates within various national legal systems and plays an important role in the creation and dissemination of valuable intellectual property assets.

Aimed at law students, law professors, librarians, and practitioners, the casebook includes extracts from leading cases in both Canadian and international jurisprudence, and explains copyright matters to a broad audience through carefully selected court opinions and insightful commentary.

“Barry’s and Steven’s casebook reaffirms our team’s international expertise and ability to understand and resolve clients’ disputes regardless of jurisdiction,” said W. Iain Scott, the firm’s Chair and CEO. “It will be a valuable resource for anyone with an interest in copyright law.”

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Administrative Law

Dunsmuir Considered by the SCC in *Khosa*

We commented on the SCC’s decision in [Dunsmuir v. New Brunswick 2008 SCC 9](#) in our [June 2008](#) edition, and again in our [February 2009](#) edition, wherein we reviewed the judicial consideration of the two-standard approach to judicial review introduced in *Dunsmuir*. We noted a trend in the judicial treatment of *Dunsmuir* toward the near abolishment of the patent unreasonable standard of review and predicted greater deference being granted to administrative decision-makers. We also noted that *Dunsmuir* had created uncertainty for the federal courts and the courts in British Columbia when reviewing decisions that were subject to subsection 18.1(4)(d) of the *Federal Courts Act*¹ and Sections 58 and 59 of the B.C. *Administrative Tribunals Act*² (ATA). Pre-*Dunsmuir*, these two acts were interpreted to essentially codify the previous standards adopted by the Supreme Court, including the standard of patent unreasonableness. Post-*Dunsmuir*, decisions out of the Federal Court and the B.C. courts were split as to whether the decision in *Dunsmuir* altered the application of these statutory provisions.

In its recent decision in [Canada \(Citizenship and Immigration\) v. Khosa, 2009 SCC 12](#), the majority of the Supreme Court of Canada (SCC) provides clarification as to the application of *Dunsmuir* to these two acts and similar

¹ R.S.C. 1985, c. F-7.

² S.B.C. 2004, c. 45.

legislation across Canada, and urges reviewing courts to grant greater deference to administrative tribunals generally.

By way of background, the administrative decision under review in *Khosa* relates to an appeal brought by the then immigrant and permanent resident Sukhvir Singh Khosa from an order that he be removed from Canada for serious criminality, having been convicted of criminal negligence causing death as a result of his “street racing.” Khosa appealed the order to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board on the basis of humanitarian and compassionate grounds pursuant to s. 67(1)(c) of the *Immigration and Refugee Protection Act (IRPA)*. The IAD denied Khosa’s appeal. The Federal Court applied the “patent unreasonableness” standard of review and dismissed Khosa’s challenge to the IAD decision. The Federal Court of Appeal disagreed with the lower court’s interpretation of s.18.1 of the *Federal Courts Act*, applied the reasonable *simpliciter* standard of review, and ultimately reversed the IAD’s decision.

The SCC agrees with the Federal Court of Appeal’s application of the reasonable *simpliciter* standard, but disagrees with the result and affirms the IAD’s decision. Writing for the majority, Binnie J. cautions that the abolition of the patent unreasonableness standard “does not pave the way for a more intrusive review by courts” (*Khosa*, at para 2, citing *Dunsmuir*, at para. 48). The SCC further states:

“This appeal provides a good illustration of why the adjustment made by *Dunsmuir* was timely.

By switching the standard of review from patent unreasonableness to reasonableness *simpliciter*, the Federal Court of Appeal majority felt empowered to retry the case in important respects, even though the issues to be resolved had to do with immigration policy, not law. Clearly, the majority felt that the IAD disposition was unjust to Khosa. However, Parliament saw fit to confide that particular decision to the IAD, not to the judges.” (*Khosa*, at para 17.)

Throughout its decision, the SCC endorses the trend for reviewing courts to grant greater deference to administrative decision-makers.

As stated above, for judicial reviews considered under the *Federal Courts Act*, the SCC clearly endorses the application of *Dunsmuir* and the two-standard approach to judicial review. The SCC found that the “language of s.18.1 generally sets out threshold grounds which permit but do not require the court to grant relief.” (*Khosa*, at para 36, emphasis added.) The SCC further states that this discretion to grant or withhold relief “must be exercised judicially and in accordance with proper principles,” which “principles include those set out in *Dunsmuir*.” (*Khosa*, at para 40.) After reviewing the particular paragraphs of s. 18.1(4) of the *Federal Courts Act*, the SCC concludes that the legislature only intended to specify *grounds* for, not *standards* of, judicial review. (*Khosa*, at paras. 41-48.)

In *Khosa*, the SCC acknowledges that “a legislature has the power to specify a standard of review ... if it manifests a clear intention to do so.” (Emphasis added.) The SCC further

notes that most jurisdictions in Canada enacted legislation like the *Federal Courts Act* that identify grounds for review but not the *standard of review*. (*Khosa*, at paras 50-51, emphasis added.) Thus, for judicial reviews commenced under such legislation, it follows that the two-standard approach applies.

Yet even where the intention appears clear – such as in the B.C. *ATA*, which specifies the standard of patent unreasonableness, the SCC suggests that *Dunsmuir* ought to guide a reviewing court’s decision. (*Khosa*, at paras 19 and 50.) For example, considering the B.C. *ATA*, the SCC states:

“Despite *Dunsmuir*, ‘patent unreasonableness’ will live on in British Columbia, but the content of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law.” (*Khosa*, at para. 19, emphasis added.)

The SCC further states that even where there is a clear intention to specify a standard of review, where the legislative language permits, the courts:

(a) will *not* interpret grounds of review as standards of review, (b) will apply *Dunsmuir* principles to determine the appropriate approach to judicial review in a particular situation, and (c) will presume the existence of a discretion to grant or withhold relief based on the *Dunsmuir* teaching of restraint in judicial intervention in administrative

matters...” (*Khosa*, at para. 51, emphasis added.)

McCarthy Tétrault Notes

It is difficult to decipher the meaning that is to be given to the two passages cited above. The SCC’s statement that the standard of patent unreasonableness “lives on” seems inconsistent with its statement that the “precise degree of deference ... will be calibrated in accordance with general principles of administrative law.” These statements appear to re-import varying degrees of reasonableness – the very thing *Dunsmuir* abolished. Regardless of this potential uncertainty for those few provincial statutes that expressly reference the “patent unreasonable” standard, the decision in *Khosa* is significant to the wide range of decisions reviewed under the *Federal Courts Act*. Moreover, the decision in *Khosa* is a clear endorsement in favour of granting greater deference to administrative decision-makers.

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Arbitration

Arbitration in B.C., Even in the Face of a Class Action

On March 23, 2009, the British Columbia Court of Appeal (B.C.C.A.) in [MacKinnon v. National Money Mart Company, 2009 BCCA 103](#) (*Money Mart*) confirmed that arbitration clauses in consumer contracts, including consumer loan agreements and service contracts, are enforceable even in the face of a proposed class action. This means that, where the parties have entered into an agreement to arbitrate, even if a proposed class action has been filed, the action should be stayed and the dispute sent to arbitration. In reaching this conclusion, the B.C.C.A. applied two decisions of the Supreme Court of Canada that had arisen from disputes in Québec. This decision has particular implications for jurisdictions, like B.C., that lack legislation prohibiting arbitration agreements with consumers.

The Supreme Court of Canada addressed this question in two concurrent appeal cases from Québec: [Union des consommateurs v. Dell Computer Corp, \[2007\] 2 S.C.R. 801, 2007 SCC 34](#) [*Dell*], and [Muroff v. Rogers Wireless Inc., \[2007\] 2 S.C.R. 921, 2007 SCC 35](#) [*Rogers*]. In *Dell*, the majority of the court held that the substantive agreement to arbitrate was to be enforced despite the fact that the case had been certified as a class action. The majority set out a jurisdictional approach to arbitration clauses in the class actions environment: arbitration is based on a substantive agreement, whereas a class action (even

once certified) is merely procedural. Where the parties have agreed to arbitrate and the requirements of the arbitration legislation are met, the court is without jurisdiction. Accordingly, in this case, Madam Justice Deschamps, speaking for the majority, set out a general rule of referral to arbitration for all but pure questions of law.

In *Dell's* companion case, *Rogers*, a mobile telephone service agreement contained an arbitration clause referring all disputes to arbitration. The plaintiff subscriber alleged overcharges on long-distance “roaming” calls and sought class action certification. Chief Justice McLachlin applied the principles in *Dell* and ruled that the matter should be sent to arbitration. The Québec courts had also determined this case was appropriate for certification.

The live question has been whether common law courts will interpret the principles from *Dell* and *Rogers* favouring arbitration broadly, or whether they will confine them to Québec.

On March 13, 2009, a panel of five justices of the Court of Appeal of British Columbia in *Money Mart* held that the principles from *Dell* and *Rogers*, including the general rule of referral, were the law in British Columbia. In so doing, British Columbia’s pre-*Dell* approach was overruled. Newbury J.A. for the court reasoned that *Dell* and *Rogers* logically extend to the law of British Columbia. She held that the various features of class proceedings are essentially

procedural and “cannot be used to overcome the exclusive jurisdiction of arbitral tribunals or to modify the substantive rights of parties to arbitration agreements. The lesson of the Supreme Court’s decisions is that a valid agreement to arbitrate “removes the dispute from the court’s purview provided one of the parties applies [for a stay of the court proceeding] within the applicable time limit.”

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In British Columbia, as in Québec, then, where parties enter into an agreement to arbitrate any dispute between them, including where the agreement to arbitrate is contained in an on-line purchase contract or a loan document, the courts cannot resolve the dispute by class action or individual action if one of the parties applies for a stay.

Some provinces, including Ontario and Québec, have already provided a legislative “fix” for this situation, forbidding arbitration agreements in certain types of consumer contracts. In other provinces, including British Columbia, no such legislation is in place, or has yet been proposed. The result is that in British Columbia, an arbitration clause in a contract – including a consumer contract – appears to be an enforceable way to require disputes with customers be resolved by arbitration rather than class action.

Bankruptcy and Insolvency

Canadian Restructuring Proceedings

In Canada, there is more than one insolvency regime available to an insolvent company that wishes to restructure its debts and operations. However, the most commonly used regime for large companies – and sometimes for smaller companies, because it is the most flexible – is the *Companies' Creditors Arrangement Act* (Canada) (*CCAA*). The most commonly used regime for smaller companies or less complicated restructurings is proposal proceedings under the *Bankruptcy and Insolvency Act* (Canada) (*BIA*).

CCAA

To qualify to use the *CCAA*, a company must be insolvent and must have outstanding liabilities of \$5 million or more. To initiate the proceedings, the company brings an initial application to court for an order imposing a stay of proceedings on creditors (*i.e.*, a freeze on the payment of indebtedness) and authorizing the company to prepare a plan of arrangement to compromise its indebtedness with some or all of its creditors.

The materials presented to the court include a proposed form of initial court order and an affidavit prepared by the company describing its background, its financial difficulties and the reasons it is seeking the protection of a court order made under the *CCAA*. After reviewing the materials and hearing submissions from

counsel, the judge exercises his or her discretion as to whether to make an initial order, and the terms. Usually, the initial order is made in the form of the order requested by the company, with little or no input from creditors and other stakeholders. However, affected parties have the right to apply to court to vary the initial order after it is made.

Typically, an initial court order does the following things:

- (a) authorizes the company to prepare a plan of arrangement to put to its creditors;
- (b) authorizes the company to stay in possession of its assets and to carry on business in a manner consistent with the preservation of its assets and business;
- (c) prohibits the company from making payments in respect of past debts (other than specific exceptions, such as amounts owing to employees) and imposes a stay of proceedings (i) preventing creditors and suppliers from taking action in respect of debts and payables owing as at the filing date, and (ii) prohibiting the termination of contracts by counterparties;
- (d) authorizes the company, if necessary, to obtain additional financing to ensure it can fund its operations during the proceedings, including setting limits on the aggregate

funding and the priority of the security;
and

- (e) authorizes the company to terminate unfavourable contracts, leases and other arrangements, as well as to shut down facilities and to make provision for the consequences (*i.e.*, damage claims) in the plan of arrangement.

The *CCAA* provides that an initial order may only impose a stay of proceedings for a period not exceeding 30 days. Once an initial order has been made, the company may apply for a further order or orders extending the stay of proceedings. The intention is to have the stay of proceedings continue until the company's plan of arrangement has been presented to the creditors and approved by the court. As a general matter, the duration of proceedings under the *CCAA* usually ranges between six to 18 months from the commencement of proceedings to the sanctioning of a plan of arrangement. The court may terminate the proceedings under the *CCAA* upon application of an interested party if it believes the achievement of a consensual arrangement is unlikely. However, such orders are rare, at least at the initial stages of the restructuring.

In recent years, the *CCAA* has also been used as a means by which a sale of particular assets of the company, or the entire company, is conducted. The sale process runs on a parallel, alternate track to the restructuring process with a view to maximizing value for the stakeholders. In some cases, a sale has been permitted prior to the formulation of a plan and vote by creditors. In such circumstances,

approval of the sale is sought from the court in a process similar to a court receivership sale.

When the plan formulation stage is reached, a *CCAA* plan of arrangement ordinarily will divide the creditors into classes and will provide for the treatment of each class (which can be substantially different). A creditor that is dissatisfied with its classification may apply to court to seek a different classification. In this regard, the *CCAA* does not provide any specific rules for determining the classes of creditors. However, the guiding legal principle applied by the courts in considering classification issues is whether there is a commonality of interest among the creditors in the class.

For a plan of arrangement to be approved by the creditors, a majority in number of the creditors representing two-thirds in value of the claims of each class, present and voting (either in person or by proxy) at the meeting or meetings of creditors, must vote in favour of the plan of arrangement. If the plan is approved by the creditors, it must then be approved by the court. In doing so, the court must determine that the plan of arrangement is "fair and reasonable." Upon approval by both the creditors and the court, the plan of arrangement is binding on all of the creditors of each class affected by the plan. If a class of creditors does not approve the plan, the plan is not binding on the creditors within that class.

Additionally, if a debt restructuring involves a reorganization of the share capital of a company and the company is governed by the *Canada Business Corporations Act* (or similar provincial legislation with equivalent, relevant

provisions), it is possible to reorganize the share capital of the company by way of the *CCAA* court sanction order without a shareholder vote. In recent years, this device has been used, in effect, to extinguish the existing share capital and issue new shares to creditors in satisfaction of their claims.

If a sale of the assets occurs before the filing of a plan and meeting of creditors, consideration would be given to the benefits of proceeding toward a plan (presumably, to distribute the proceeds of the sale) as opposed to terminating the *CCAA* proceedings – for example, by commencing bankruptcy liquidation proceedings.

BIA* Proposal – Comparison to *CCAA

As an alternative to the *CCAA*, an insolvent corporation may obtain a stay of proceedings under the provisions of the *BIA* simply by filing a notice of intention to make a proposal under the *BIA*. This is a statutory form, and its filing automatically results in a stay of proceedings on the exercise of remedies by secured and unsecured creditors (subject to some exceptions) for a period of 30 days. The insolvent debtor must then file a proposal to its creditors unless it obtains an extension of time from the court. The extensions may be given in 45-day increments for a total period of no more than six months.

Under the *BIA*, a proposal may be made to classes of creditors in similar fashion to that permitted under the *CCAA*, but the proposal must address the claims of all unsecured creditors. The requisite majority under both

the *BIA* and the *CCAA* for approval of a proposal or a plan to restructure debts is a majority in number of each class of creditors representing two-thirds of the value of such claims.³

The stay of proceedings under the *BIA* is more limited than the stay of proceedings usually found in orders made under the *CCAA*. Upon the filing of a notice of intention to make a proposal or the filing of the proposal itself, the *BIA* imposes a stay of proceedings against the exercise of remedies by creditors against the debtor's property or the continuation of legal proceedings to recover claims provable in bankruptcy. Provisions in security agreements provide that, upon insolvency, default, or the filing of a notice of intention to make a proposal under the *BIA*, the debtor ceases to have rights to use or deal with the collateral. The *BIA* also provides that, upon the filing of a notice of intention to make a proposal or the filing of a proposal, no person may terminate or amend any agreement with the insolvent person or claim an accelerated payment under any agreement with the insolvent person by reason only that the person is insolvent or the person has filed a notice of intention or a proposal. Where the agreement in question is a lease or a licence agreement, the prohibition against terminating, amending or accelerating extends to situations in which the insolvent

³ Neither the *CCAA* nor the restructuring provisions of the *BIA* contain "cramdown" provisions of the nature that we understand exist under Chapter 11, in which a plan of reorganization may be declared binding on junior ranking claimants if senior ranking but impaired creditors vote in favour of the plan of reorganization. Under the *CCAA* and the *BIA*, the plan must be approved by all classes of creditors for it to be binding upon all creditors in such cases.

person has not paid rent or royalties prior to filing.

The stay provisions under the *BIA* can be contrasted to orders made under the *CCAA* where the initial order is designed by the debtor company to meet its needs. Contracting parties are generally restrained from exercising any contractual remedy provided that the insolvent company continues to make immediate payment or on such other terms as are acceptable to the other party. While contracting parties may apply to court to vary the stay of proceedings made pursuant to the *CCAA*, the courts will generally enforce the stay if it is necessary to maintain the debtor's business and the creditor is not being unreasonably prejudiced by the stay.

The terms of a proposal under the *BIA* or a debt restructuring plan under the *CCAA* are inevitably the result of negotiations between the debtor company and the classes of creditors who are affected by it. The creditor or group of creditors who can control a class has considerable power.

Other Comments

The foregoing is a very preliminary description of restructuring proceedings under the *CCAA* and the *BIA*. By its nature, this is a general commentary and does not address exceptions to the general principles or any of the other provisions of the statutes not mentioned above.

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Class Action

WORTHY OF NOTICE

Lépine v. Canada Post Corporation and What It Says about Class Action Notice

Class action notices must be precise, unambiguous and accessible to satisfy the requirements of procedural fairness. That is just one of the key messages delivered by the Supreme Court of Canada in [*Canada Post Corporation v. Lépine*, 2009 SCC 16](#).

In September of 2000, Canada Post Corporation began marketing a lifetime Internet access service in Canada. Consumers purchased software that was sold for \$9.95, and agreed to have advertising transmitted to their computers in exchange for free Internet service. Canada Post discontinued the service on September 15, 2001. Consumer complaints and the filing of various proceedings across Canada ensued.

On February 6, 2002, Michel Lépine filed a motion to institute a class action against Canada Post with the Québec Superior Court on behalf of every natural person residing in the province who had purchased the Internet package. Class proceedings were later commenced in Ontario and British Columbia. In Alberta, a settlement was reached in December 2002. An enhanced settlement was then offered in Québec, Ontario and British Columbia. The settlement offers were accepted in British Columbia and Ontario. Mr. Lépine, the petitioner in the proposed Québec class

action, which was still pending at the time of the settlement discussions, refused to participate.

The Québec Superior Court heard the motion for authorization on November 5, 6, and 7, 2003, and the judge reserved his decision. As of November 2003, the Ontario application for certification included residents of every province in Canada except British Columbia, and included Québec residents. On December 22, 2003, the Ontario Superior Court of Justice certified the class proceeding and approved the settlement for residents of every Canadian province except for British Columbia. This was done despite a letter sent to the judge by Mr. Lépine's attorney asking that jurisdiction be declined with respect to Québec residents. The very next day, on December 23, 2003, the Québec Superior Court authorized a class action on behalf of a class composed of Québec residents only.

In June of 2004, Canada Post applied to the Québec Superior Court to have the Ontario judgment recognized and enforced. The application was dismissed on the basis that the Ontario decision was rendered contrary to the fundamental principles of procedure. The Québec Court of Appeal dismissed Canada Post's appeal and unanimously reaffirmed the decision in first instance.

In a unanimous ruling, the Supreme Court of Canada upheld the decisions in first instance

and appeal, although it disagreed with some aspects of the Court of Appeal’s reasoning. Justice LeBel explained that the basic principle articulated in Article 3155 of the Civil Code (C.C.Q.) is that any decision rendered by a foreign authority must be recognized unless one of the limited exceptions specified in that provision is found to apply. He stated that a court must limit itself to considering whether the requirements for recognizing a foreign judgment have been satisfied. A court may not review the merits of the case.

Despite the broad wording of Article 3164 C.C.Q., Justice LeBel found that it does not give Québec courts the power to refuse to recognize an external judgment on the basis that the foreign court should have declined jurisdiction because it was not the most convenient forum. To apply the doctrine of *forum non conveniens* when considering an application for recognition would be to overlook the basic distinction between *establishing* jurisdiction and *exercising* it.

In deciding to recognize a judgment, however, a Québec court must determine whether the steps leading up to the decision and its implementation are consistent with the fundamental principles of procedure.

In class actions, because any decision will affect not only the representative and the defendant, but all the members of the class, adequate information is necessary to ensure that individual rights are safeguarded. Notification is essential because it informs the class members of how the certification judgment affects them, of their rights under

the judgment – and occasionally, as here, in regards to the settlement of the litigation.

In this case, the notice approved by the Ontario Superior Court was not consistent with the fundamental rules of procedure because it did not properly explain the impact the settlement would have on Québec class members. The enforcement of the judgment in Québec was therefore precluded by Article 3155 (5) C.C.Q. Notices must be crafted to ensure relevant information will reach the intended recipients. The wording of the notice must take into account the context in which it will be published and the situation of the recipients. These requirements constitute a fundamental consideration in the class action setting and are no less compelling in a case involving the recognition of a judgment rendered by another Canadian court. Justice LeBel noted clarity was particularly important in this context, where parallel proceedings had been commenced in Québec and Ontario.

As for the question of *lis pendens*, the uncontested evidence clearly demonstrated that the motion for authorization had been filed with the Québec Superior Court prior to December 23, 2003, and that the Québec Court had been the jurisdiction first seized of the litigation. The recognition of the Ontario judgment was therefore impossible under the circumstances.

McCarthy Tétrault Notes

This decision by the Supreme Court is significant because it underscores the importance of providing adequate notice,

whether in the international or inter-provincial setting, a point already made in the common law context by the Ontario Court of Appeal in [Currie v. McDonald's Restaurants of Canada Ltd.](#), 2005 CanLII 3360. Notices that are imprecise, ambiguous, misleading or improperly distributed run the serious risk of being considered in breach of the fundamental rules of procedure (in Québec) or those of natural justice (in the rest of Canada).

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Constitutional Law

R. v. Patrick: Is Your Household Garbage Abandoned Waste, or is it a “Bag of Information”?

On April 9, 2009, the Supreme Court of Canada issued its decision in [R. v. Patrick \(2009 SCC 17\)](#), a case that asked the court to determine the extent of privacy rights with regard to household waste. The court ruled that there is indeed a privacy interest in household waste, but that the actions of the owner of that waste can amount to abandonment, which defeats this interest.

The facts of the case were relatively straightforward. Police in Calgary suspected that Mr. Patrick was involved in manufacturing illegal drugs. In an attempt to gather useable evidence, they took garbage bags (on numerous occasions) from his garbage bins, which were located in an open alcove set into his fence. After they discovered, on the seventh attempt, evidence of the manufacture of narcotics, they obtained a search warrant and Mr. Patrick was charged with various narcotics-related offences. The trial judge ruled that Mr. Patrick did not have a reasonable expectation of privacy in the items seized from his garbage, and Mr. Patrick was convicted. The conviction was upheld by the Alberta Court of Appeal and the Supreme Court.

Justice Binnie, for the majority,⁴ recognized the personal and intimate nature of household waste, describing it, in the words of the

⁴ Justice Abella wrote separately concurring in the result.

Canadian Civil Liberties Association (represented by McCarthy Tétrault LLP lawyers) as a “bag of information.” He stated that those bags, when “viewed in their entirety, paint a fairly accurate and complete picture of the householder’s activities and lifestyle” that many of us would not wish disclosed to the public or police. (See paragraph 30.)

The court therefore determined that the starting point for the analysis was the recognition of a privacy interest in household information, but that there exists a cut-off point where an individual is determined to have abandoned the items and relinquished this privacy interest. According to Justice Binnie, in this case, the abandonment occurred when Mr. Patrick “placed his garbage bags for collection in the open container at the back of his property adjacent to the lot line... The bags were unprotected and within easy reach of anyone walking by in a public alleyway, including street people, bottle pickers, urban foragers, nosy neighbours and mischievous children, not to mention dogs and assorted wildlife, as well as the garbage collectors and the police.” (See paragraph 55.)

McCarthy Tétrault Notes

The question then arises: how can an average homeowner know if they have, in the eyes of the police, abandoned their “bags of information”? According to Justice Binnie, the householder retains control, and therefore a privacy interest, in their household garbage until they have placed them at or within reach of the lot line. Once they have placed their household

waste for collection, then the “householder has sufficiently abandoned his interest and control” and therefore loses the expectation of privacy. (See paragraph 63.)

The court declined to engage in an “essay” on what behaviour would qualify as abandonment, but did provide some examples, including dumping garbage in a rural dump, down a chute in an apartment building, or in a neighbour’s garbage bin. (See paragraph 64.)

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Environmental Law

Québec Court of Appeal renders its first decision on neighbourhood annoyances since *Ciment St-Laurent*

Introduction

On February 9, 2009, the Québec Court of Appeal rendered its decision in *Entreprises Auberge du parc v. Site historique du Banc-de-pêche de Paspébiac*.⁵ This is the first time the Québec Court of Appeal has ruled on the issue of neighbourhood annoyances since the *St. Lawrence Cement* judgment. The decision merits our attention because it clarifies some of the criteria leading to a finding of abnormal neighbourhood annoyances.

Facts

The appellant operates a thalassotherapy centre. The respondent, its neighbour, is a non-profit organization managing a historical site. During the summer season, the respondent is host to outdoor musical entertainment, the noise from which disturbs the appellant's clientele. The appellant consequently filed a Motion for a permanent injunction against the respondent.

Decision and points of interest

In a unanimous decision, the Court of Appeal dismissed the appeal and confirmed the trial judge's decision that the annoyances the

appellant was complaining about were not unreasonable, intolerable or excessive.

The Court of Appeal affirmed that Article 976 C.C.Q. does not grant the appellant any vested right to expect the neighbourhood to remain unchanged or to expect the integral preservation of its environment, in spite of the precedence of its facilities. It notes, however, that the precedence of a use constitutes a relevant element that can be considered to determine if a neighbourhood annoyance is normal or not. Hence, the Court states that by deciding to live in proximity of a known source of annoyances, a person accepts, up to a certain point, the normal annoyances of the environment in which he has established himself. Conversely, a person who creates a new source of annoyances in a peaceful residential area could be blamed for the deterioration of the quality of the area in which he has established himself, as well as the abuse of his right of ownership.

The Court of Appeal also points out that the normal or abnormal nature of an annoyance must not be determined in a factual vacuum, but rather by taking into account all of the circumstances in which this annoyance occurs. In this regard, it confirms the relevance of analyzing the following elements:

- the precedence of the appellant's activities;
- the legality of the respondent's activities;

⁵ 2009 QCCA 257.

- the investments and modifications effected by the respondent to reduce the annoyances generated by its activities;
- the frequency, the duration and the time at which the annoyances occur;
- the level of ambient noise and the level reached by the respondent’s activities;
- the zoning of the appellant’s property;
- the absence of complaints from the neighbouring residential area;
- the absence of financial impact suffered by the appellant due to neighbourhood annoyances;
- the constraints on the respondent that would make it difficult to move the source of annoyances; and
- the unique features of the appellant’s facilities.

The Court of Appeal emphasizes that the annoyances must be analyzed objectively rather than according to the appellants’ subjective expectations. Furthermore, based on our article published in 2004,⁶ the Court indicates that circumstances must demonstrate the gravity of the annoyances rather than the simple deprivation of an advantage. Such

⁶ Michel Gagné, “Les recours pour troubles de voisinage : les véritables enjeux” (Recourses for Neighbourhood Annoyances: The Real Issues), in Professional Development Services, Barreau du Québec, Recent Developments in Environmental Law, vol. 214, Cowansville, Éditions Yvon Blais, 2004, 65, p. 77.

determination rests on the discretion of the trial judge.

McCarthy Tétrault Notes

In the *St. Lawrence Cement* decision, the Supreme Court of Canada recognized the existence of a no-fault liability regime for neighbourhood annoyances. However, the Court did not set criteria that would define what constitutes abnormal neighbourhood annoyances. The *Banc-de-pêche de Paspébiac* decision sheds light on some of these criteria.

We focus on this decision as it confirms the relevance of producing evidence that an industry whose activities irritate its neighbours is in compliance with legislation. Although compliance with the law is only one element among others in the analysis of the gravity of the annoyances under Article 976 C.C.Q., this acknowledgement nonetheless contributes to reducing the legal uncertainty of the neighbourhood annoyances regime.

This decision illustrates the fact that the courts are prone to dealing rigorously with injunction applications, because of the importance of the impact of a decision granting an application for injunction with respect to neighbourhood annoyances.

Finally, the Court of Appeal emphasizes that the gravity of annoyances must be analyzed objectively through the perspective of a “reasonable” neighbour, rather than through the subjective

expectations of particularly sensitive neighbours. Moreover, the courts will have to consider all of the relevant circumstances, including the respondent's behaviour and the objective gravity of the annoyances. This decision could open the door to the jurisprudential development of an objective analytical framework with respect to neighbourhood annoyances, as emphasized in our 2004 article.⁷ The development of such a framework would reduce the sometimes arbitrary and unpredictable nature of decisions in this respect.

It will be interesting to find out how justices of the Superior Court and of the Court of Québec will apply this decision of the Court of Appeal in cases brought before them.

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⁷ *Ibid.*, p. 139 to 150.

Insurance Law

Same policy, same insured, different coverage: BC Court of Appeal takes one step forward and two steps back in *Progressive Homes*

On March 26, 2009, the British Columbia Court of Appeal delivered its long-awaited decision in *Progressive Homes Ltd. v. Lombard General Insurance Co.*, 2009 BCCA 129. While this decision provides some clarity on the principles governing the interpretation of insurance policies, *Progressive* is a disappointing blow not only to participants in the construction industry but also to plaintiff homeowners. It is also likely to result in confusion over the very policies the court had hoped to clarify, since it departs from the position other courts across the country have taken. In the result, a general contractor facing a claim in British Columbia for damages arising from defective workmanship would likely find itself without the benefit of insurance coverage, while a contractor facing the very same claim in Ontario would be entitled to coverage.

Background

In *Progressive*, four separate actions (underlying actions) had been brought against the petitioner, Progressive Homes Ltd., a general contractor, with respect to four “leaky condo” developments in which Progressive had been involved. The developments had been built almost entirely by subcontractors. The insurer had initially defended the underlying actions on behalf of Progressive under a reservation of rights, but later withdrew from

the defence of the actions on the basis that it had no duty to defend because the claims were not covered under the applicable insurance policies. In a petition to the British Columbia Supreme Court, Progressive sought an order declaring that the insurer was under a duty to defend it in the underlying actions, but was unsuccessful before Mr. Justice Cohen. The decision of the British Columbia Supreme Court was discussed in an [earlier bulletin](#).

On March 4, 2008, Progressive's appeal of Mr. Justice Cohen's decision was heard. On March 26, 2009, in a decision that split the Court of Appeal panel 2-1, the Court of Appeal affirmed the decision of the court below and dismissed Progressive's appeal.

Points of clarity

Setting the outcome of the case aside, *Progressive* provides significant clarity with respect to the interpretation of insurance policies. Specifically, the Court of Appeal expressly rejected the insurer's proposal of a two-step principle of construction in examining the extent of coverage contained in an insurance policy.

The insurer submitted that the rules of interpretation required that the court must first look at the insuring clauses, determine the scope of coverage, and only then examine the exclusions to see how the scope of coverage might be narrowed.

Madam Justice Ryan, writing for herself and Madam Justice Kirkpatrick, disagreed with this approach and expressly found favour in

undertaking exactly the opposite approach in determining the scope of coverage. According to Madam Justice Ryan, "A court begins with the presumption that all sections of an agreement have meaning. Thus, the contract should be read *as a whole* to understand each of its parts." [italics added]

The court further stated that insuring clauses and exclusions cannot be read in isolation since exclusion clauses, by definition, reference the grant of coverage. They must therefore be understood as a whole, and in order to do so, must be read together.

The court also found it unnecessary to delve into other principles such as the "complex structure theory" (discussed in an [earlier bulletin](#)) in order to determine the scope of coverage under an insurance policy. Ultimately, the wording of the policy governs, and should be examined to determine whether it covers damage to one part of a building caused by defects in work or product provided by the insured.

In *Progressive*, the policies at issue excluded coverage for "property damage" to that particular part of an insured's work arising out of it or any part of it (the "Your Work Exclusion"), but the Your Work Exclusion was expressly stated not to apply if the damaged work or the work from which the damage arises was performed on the insured's behalf by a subcontractor. Given the existence of this "subcontractor exception," Progressive argued that coverage surely extended to damage from work undertaken by subcontractors or these express words would have been unnecessary.

Points of confusion

Despite the court's insistence that the wording of an insurance policy governed in determining the scope of coverage, and its own finding that the plain meaning of the words of the contract supported an interpretation that the policies in issue provided coverage for damage to one part of the building caused by defect in another, the court ultimately denied coverage to Progressive.

In so doing, Madam Justice Ryan retreated from what she considered to be the proper approach of reading and relying on the clear wording of an insurance policy, and instead relied upon an "implied assumption" of insurance law to determine the scope of coverage of the policies at issue. Citing Justice Iacobucci's view of the purpose of insurance, characterized in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 as "a mechanism for transferring fortuitous contingent risks," the court found that "the expected consequences of poor workmanship can hardly be classified as fortuitous" and that the policies in *Progressive* ultimately did not contain "clear language" that provided coverage for such damage. Little heed was paid to the meaning of the Your Work Exclusion and the subcontractor exception, which Madam Justice Ryan termed "meaningless" and "useless or inexplicable."

This finding is also in stark contrast to settled law in other Canadian jurisdictions, including Ontario, where appellate level courts, having held that the plain language of an insurance policy determined the scope of its coverage, found the identical language supported the

insured's petition for coverage. In particular, Madam Justice Ryan distinguished *Progressive* from *Bridgewood Building Corp. v. Lombard General Insurance Co. of Canada* (2006), 266 D.L.R. (4th) 182 (Ont. C.A.) – which interpreted identical provisions in a policy underwritten by the same insurer in favour of providing coverage for the insured – by noting that the Ontario Court of Appeal's analysis took into account evidence of industry practice, whereas in *Progressive Homes*, no such evidence was placed before the trial judge.

Finally, in an attempt to give meaning to the words of the policies at issue as a whole, the court accepted the insurer's argument that the insuring provisions could be read as covering damage to property caused by a distinct item, such as a boiler explosion. Thus, work performed by a subcontractor may attract coverage under the "completed operations" phase of a project since a general contractor cannot be expected to find latent defects from items such as boilers, which can cause damage after the work is completed. However, despite the fact that the latent defects in *Progressive* arose from work undertaken by subcontractors prior to the completion of the project, coverage to Progressive was nonetheless denied.

In denying coverage, the court referred to the pleadings in the underlying actions and distinguished "interior components of a building," such as boilers or electrical wiring that cause damage (and would attract coverage), from the damage caused by allegedly malfunctioning roofs and walls

(for which no coverage arises). This is, with respect, a non-distinction. It disregards the fact that the damage is the same in both instances. There is no difference, for example, between damage arising from latent defects in a boiler and damage arising from latent defects in part of the external structure, both of which arise following the completion of a project. The general contractor could not be expected to find the latent defects in either case. The defect itself, be it in an “interior component” or in a part of the external structure, must be distinguished from the damage caused by the defective part. In this case, Madam Justice Ryan conceded that the wording of the policies at issue did not cover damage for the defective part itself, but did provide coverage for the damage arising from the failure of the part. To deny coverage simply because the pleadings in the underlying actions referred only to the defective parts is to disregard the damage caused and fail to give meaning to the entirety of the policies.

Implications

For the industry at large: While Madam Justice Huddart, in her dissent, recognized the commercial importance of a uniform interpretation of a general contractor’s commercial general liability policy, the result of the decision in *Progressive* is that an identical policy purchased by an insured provides coverage in Ontario but not in British Columbia. An insurer will be therefore be obligated to defend a general contractor facing a claim of damages arising from defective work in Ontario, but not in British Columbia.

For insureds: Given the importance of evidence of industry practice, as articulated by Madam Justice Ryan, an insured should consider commencing an action rather than a petition to enforce an insurer’s duty to defend it under an insurance policy. By commencing an action, the insured can avail itself of the various rights of discovery in order to obtain evidence of industry practice to assist the court in interpreting the policy at issue. This is likely an unintended consequence of Madam Justice Ryan’s decision – and is contrary to the established “pleadings rule,” which mandates that the determination of whether an insurer’s duty to defend has been triggered rests with an examination of the claims contained within the pleadings in the underlying action. The commencement of an action will undoubtedly expand the scope of evidence examined by a court in making determinations of coverage, and likely increase litigation costs, but an insured may have little choice if it wishes to enforce its contractual rights.

For plaintiffs: Finally, persons and corporations commencing actions for damage arising from defective work must be sure to articulate clearly their claims, including any defects and all resultant damage. So long as the scope of coverage remains to be determined on the basis of the strict wording of the policy at issue and the pleadings alone, incomplete pleadings are not only to the detriment of the insured who may find itself without coverage, but also to the pleader in the underlying action, which may find itself left with an unnecessarily smaller pool of assets from which to satisfy any judgment it may ultimately obtain.

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Farley's Reflections

Do Not Ask for Whom the Bell Tolls

Six months after giving its judgment in [Bell Canada Enterprises Inc. \(BCE\) v. 1976 Debentureholders, 2008 SCC 69 \(CanLII\)](#), the Supreme Court of Canada released its reasons justifying the arrangement (pursuant to s. 192 of the *Canada Business Corporations Act* as opposed to a takeover bid) that would have turned over control of BCE to the Teachers' Pension Fund Consortium. The reasons were released immediately after the transaction terminated due to the unavailability of a solvency certificate for BCE as to its financial condition once the additional indebtedness resulting from the arrangement's significant leverage was taken into consideration. One can only speculate about the impact of the lengthy time-period involved since the bondholders having started the pitched battle, which comprised an oppression claim under s. 241 of the *CBCA* as well as a claim under s. 192 that the arrangement was not fair and reasonable to the debentureholders. However, it would seem reasonable to observe that in the deteriorating general financial situation, values certainly depreciated. On reflection, it would appear reasonable to assume the solvency condition was inserted into the transaction to minimize the risk of an oppression claim by the debentureholders that the investment grade quality of their bonds would be permanently impaired by the hefty debt addition.

One man's meat is another's poison – the shares were to realize a 40 per cent premium,

whereas the debentures' trading price slumped (the debentureholders asserted that the debentures would settle at a 20 per cent discount from their pre-arrangement level in the short term).

Fiduciary Duty of Directors is to the Corporation

Given the SCC's immediate override of the Québec Court of Appeal and the half-year delay in releasing its reasons, many observers expected that the SCC would clarify the views it had expressed in [Peoples Department Stores Inc. \(Trustee of\) v. Wise, 2004 SCC 68 \(CanLII\)](#) and provide a better insight into the area of the fiduciary duty of directors. The SCC reiterated that the directors owed a fiduciary duty to the corporation and not to any stakeholders directly; relying on *Peoples*, the SCC stated:

The fiduciary duty of the directors to the corporation originated in the common law. It is a duty to act in the best interests of the corporation. Often the interests of shareholders and stakeholders are co-extensive with the interest of the corporation but if they conflict, the directors' duty is clear – it is to the corporation.

However, the BCE reasons did not provide any bright-line analysis. The fiduciary duty of directors was characterized as being a “broad, contextual concept.” That said, the SCC did clear the murky waters somewhat – although in places it seemed that some additional mud was stirred up.

Best Interests of the Corporation

The SCC confirmed that the fiduciary duty of the directors was to the corporation alone, but it did not specify exactly what the corporation was, nor what it comprised. It did not refer to its own case of a half century ago – [Ringuet v. Bergeron, \[1960\] S.C.R. 671](#). However, in its oppression analysis, the SCC observed:

81. As discussed, conflicts may arise between the interests of corporate stakeholders *inter se* and between stakeholders and the corporation. Where the conflict involved the interests of the corporation, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen.
82. The cases on oppression, taken as a whole, confirm that the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.
83. Directors may find themselves in a situation where it is impossible to please all

stakeholders. The “fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitively available and clearly more beneficial to the company than the chosen transaction,” as in *Maple Leaf Foods*, per Weiler JA at p. 192.

84. There is no principle that one set of interests – for example, the interests of shareholders – prevail over another set of interests. Everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way.

Where a corporation is an ongoing concern, the directors should look to the long-term interests of the corporation. However, the SCC did not comment on the situation where a corporation becomes a division of an acquiring entity, either by way of a share or asset transaction, in whole or in part.

While the SCC recognized that the best interests of the corporation were not shareholder-centric, it is fair to observe that that court implicitly recognized the importance of shareholder interests in director decision-making where the corporation is an ongoing business. However, the SCC’s approach should be contrasted with the US *Revlon* case of requiring directors to maximize shareholder value when a corporation is in play.

Business Judgment Rule

Given that BCE was put into play, the directors had to have appreciated that the interests of the corporation would be affected by the various interests at stake in the context of the auction process, and that they might have to approve transactions that were in the best interests of the corporation, but benefitted some stakeholders at the expense of others. It was noted that the BCE board had acted reasonably in creating a comprehensive bidding process; perhaps this was not considered in [*Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2009 ONCA 205 \(CanLII\)](#), as in that case the process did not ensure a level playing field for the bidders. Under the Business Judgment Rule (BJ Rule), which the SCC strongly endorsed, deference is to be accorded to the business decision of directors acting in good faith if they have engaged in a process of canvassing and assessing all reasonable alternatives with due diligence, relying on advisors as necessary. In this situation, the SCC appreciated that the board had considered the situation of the debentureholders (who could have protected themselves by negotiating for a change of control or credit rating condition, given that leveraged buyouts were a known factor at the time of the debentures being issued), but it should be noted that all competing bids in BCE involved similar debt load proposals.

The SCC refers to the directors’ obligation to act “in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen (emphasis

added).” In the next paragraph, there is reference to the directors’ need “to treat affected stakeholders in a fair manner, commensurate to the corporation’s duties as a responsible corporate citizen (emphasis added).” Presumably these emphasized terms are identical. It will be interesting to see how this undefined term is treated in future cases, particularly in a similar change of control situation where one proposal is worth more dollars than another, but the latter proposal might be acceptable as being in the best interest of the corporation because, for instance, it might have less chance of prolonged litigation by a stakeholder group that might otherwise derail a favourable deal from closing.

The SCC also accepted the trial judge’s determination, given that BCE had been put into play, that the momentum of the market made a buyout inevitable. And it recognized that the corporation needed to undertake significant changes to continue to be successful and that privatization would provide greater freedom to accomplish that. Thus, the best interests of the corporation favoured the acceptance of the offer. The court should not second-guess the directors if they observe the BJ Rule.

Oppression Aspects

The decision does provide a useful analysis of the components of an oppression claim, including reviewing the aspects of conduct that (in the expansive wording of the “oppression remedy”) would be oppressive to, prejudicial to, or unfairly disregard the interests of, a

claimant. The authoritative head note is fairly succinct:

In assessing a claim of oppression, a court must answer two questions:

- (i) Does the evidence support the reasonable expectation asserted by the claimant?
- (ii) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms “oppression,” “unfair prejudice,” or “unfair disregard” of a relevant interest?

For the first question, useful factors from the case law in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicts between corporate stakeholders. For the second question, a claimant must show that the failure to meet a reasonable expectation involved unfair conduct and prejudicial consequences under s. 241.

The SCC was in agreement with the trial judge’s view that the debentureholders had not established a reasonable expectation that the directors would consider their economic interests (as opposed to their legal interests), particularly in respect of the trading value (perhaps more accurately, trading price) of their debentures. The directors’ consideration of their legal interests with regard to the contractual terms of the debentures being honoured fulfilled the duty of the directors

to consider the debentureholders' interests and did not amount to a "unfair disregard" of their interests.

In an oppression case, the SCC remarked, the claims should be looked at on the basis of business realities and not merely on narrow legalities.

The SCC also accepted the trial judge's conclusion that various statements made by BCE regarding the investment quality maintenance of the debentures were not sufficient to establish what might be characterized as a binding commitment. However, it is fair to observe that the corporate executives should be very careful in making public statements to ensure they do not unwittingly commit the corporation. Inappropriately hedged or conditioned statements may well come back to haunt the unwary in changed circumstances.

The Arrangement Approval Process

The SCC then considered the issue of the considerations invoked in approving a s. 192 arrangement. To approve a plan of arrangement as fair and reasonable, courts must be satisfied that

- (i) the arrangement has a valid business purpose (the lesser the degree of necessity *vis-a-vis* the corporation's interests, the higher the degree of scrutiny is to be applied by the court); and

- (ii) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way.

The SCC kept the door open a crack as to consideration of economic interests but observed that this would have to be in exceptional circumstances and a reduction in the trading value/price of securities would not generally qualify. Again, it was observed that the court ought not to substitute its views as to what would be the "best" arrangement. The SCC noted that no superior arrangement had been put forward and that the BCE had been assisted throughout by expert legal and financial advisers.

The SCC warned against confusing the business judgment test (BJ Test) in reviewing whether to sanction an arrangement with the BJ Rule. The BJ Test is whether an intelligent and honest business person, as a member of the voting class concerned and acting in that person's BJ Rule best interests, would reasonably approve the arrangement. The BJ Test is not a deference rule. However, I would note that the Privy Council, in *British America Nickel Corporation v. M.J. O'Brien*, [1927] A.C. 369, emphasized that those voting on an arrangement had to consider only their position as a member of the class, and not any inducement as providing a special personal advantage. It seems to me that if such ulterior motivation were shown, the votes of that party should be disregarded.

The SCC interpreted s. 192 as recognizing that major changes may be appropriate, even where such changes have a negative impact on the

rights of particular individuals or groups. However, that provision does require that the interests of those adversely affected are considered and treated fairly, and that in the result, the arrangement is one that should proceed.

The SCC queried whether it was redundant to ask the BJ Test question if affected security holders have in fact voted on the plan. However, the size of the majority will have an important influence on the determination of whether the plan is considered fair and reasonable. If no vote is taken, the SCC felt the test should be invoked. In addition:

Other [non-exhaustive] indicia of fairness are the proportionality of the compromise between various security holders, the security holders' position before and after arrangement and the impact on various securityholders' rights...The court may also consider the repute of the directors and advisers who endorsed the arrangement and the arrangement's terms. Thus, courts have considered whether the plan has been approved by a special committee of independent directors; the presence of the fairness opinion of a reputable expert; and the access of shareholders to dissent and appraisal remedies.

It will be interesting to see whether courts in the future will be invited to engage in "reputation ranking."

Interestingly enough, while the SCC took pains to distinguish between the oppression aspects and the court sanction of the arrangement aspect, and criticized the Québec Court of

Appeal for confusing and conflating same, it did cite in support of the court conducting a careful review of the proposed transaction a quote from [UPM – Kymmene Corp. v. UPM – Kymmene Miramichi Inc.](#):

Although Board decisions are not subject to microscopic examination with the perfect vision of hindsight, they are subject to examination.

UPM was an oppression case.

In the end result, the bell tolled for BCE, despite the fact that it won the case. Presumably the shareholders, especially the arbitrageurs, were disconsolate – and the debentureholders were happy – that the transaction fell apart because of the solvency certificate issue. But in a paraphrase of Southey's Battle of Blenheim: "T'was a great battle, Peterkin. I know not who won."

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PostScript to the last issue's Recent Lessons: [Fair Competition by Former Employees](#)

The Supreme Court of Canada, in its subsequently released [Shafron v. KGR Insurance Brokers \(Western\) Inc.](#) case, stroked out the blue-pencil severance concept in dealing with a restrictive covenant. This concept is only to be resorted to where the part being removed is clearly severable, trivial and not part of the main purport of the restrictive covenant. Neither did the SCC tolerate notional severance, which involves reading down a contractual provision so as to make it legal and enforceable. Finally, the SCC ruled that rectification could not be involved to resolve an ambiguity as to the geographic restriction as there was no evidence that the parties had agreed on something but mistakenly included another provision in the contract. Again, the SCC emphasized that restrictive covenants generally are restraints of trade and contrary to public policy that can only be overcome if the restriction is reasonable in the circumstances. But an ambiguous restrictive covenant is, by definition, *prima facie* unreasonable and thereby unenforceable. This decision reinforces the advice not to blindly think that an old "precedent" can be used without tailoring it to meet the circumstances.

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