KOSKIE MINSKY
JUSTICE MATTERS

Civil Litigation

This newsletter is intended to provide insight for our clients on relevant litigation issues.

Ontario Court Refuses to Hear Case Where Action More Conveniently Heard in Pennsylvania

In ***Legge et al. v. Young et al.,*** the Superior Court of Justice for Ontario determined that although Ontario had jurisdiction simpliciter to hear an action, (a breach of contract action regarding the sale of a Standardbred racehorse) Pennsylvania was the more convenient forum to hear the action and therefore ordered the Ontario proceeding stayed.

In November 2013 the defendant, Mr. Young, purchased a racehorse named Eloquent Diva from the plaintiff at an auction in Harrisburg, Pennsylvania. Eloquent Diva was sold for $67,000.00. The next day, she was shipped to New Jersey where the defendant's horses were trained. The following week it was discovered that Eloquent Diva had a heart defect. The defendant offered to return the racehorse to the plaintiff, however, that offer was not responded to. In April 2014, the plaintiff commenced the action in Ontario against the defendant for breach of contract. The defendant then brought a motion pursuant to Rules 17.06 and 21.01(3) of the Rules of Civil Procedure staying or dismissing the action on the basis the Ontario court lacked jurisdiction simpliciter over the subject matter of the claim, or in the alternative, that Ontario was not the most convenient forum for the action and that the matter should be heard in Pennsylvania.

On the motion, Justice Faieta determined that Ontario had jurisdiction simpliciter over the defendant. In doing so, His Honour analyzed whether any of the presumptive factors tying the action to Ontario were present, namely: a) was the defendant domiciled or a resident of Ontario?; b) does the defendant carry on business in Ontario?; c) was the tort committed in Ontario?; and d) was a contract connected with the dispute made in Ontario?

It was determined the defendant did carry on business racing Standardbred horses in Ontario. In addition, Justice Faieta pointed to the fact that, despite the defendant's assertions that the horseracing was merely a hobby, the evidence concluded the activity was pursued for profit and the defendant has raced

approximately 3-4 different horses around 20 times in Ontario between 2009 and 2014. The defendant failed to rebut the presumption of jurisdiction.

However, under the second branch of the analysis, Justice Faieta determined that Pennsylvania would be a more appropriate forum for the hearing of the action. In coming to this conclusion, His Honour articulated the test as requiring the alternative forum be clearly more appropriate and that when hearing an application for a stay of proceedings the Court must determine whether a forum exists that is in a better position to dispose fairly and efficiently of the litigation. In exercising the court's jurisdiction as to whether an alternative forum is more convenient the following factors are often highlighted: 1) the location of where the contract in dispute was signed; 2) the applicable law of the contract; 3) the location of witnesses, especially key witnesses; 4) the location where the bulk of the evidence will come from; 5) the jurisdiction in which the factual matters arose; 6) the residence or place of business of the parties; and 7) the laws of legitimate juridical advantage. It should be noted these factors are not exhaustive, although in practice they are the factors most typically considered.

To that end, the laws of Pennsylvania would govern the contract; the bulk of the evidence and documents would come from Pennsylvania; factual matters arose in Pennsylvania, and the parties would have reasonably expected a lawsuit to have been commenced in Pennsylvania. Justice Faieta determined: "It is my view that a court in Pennsylvania is clearly in a better position than a court in Ontario to dispose of this litigation fairly and efficiently."

As a result, in any case where the issue may arise, counsel must speak with their clients before making a determination as to which jurisdiction an action should be commenced. Not only is it expensive to commence the action in the wrong jurisdiction but it will also delay the matter significantly. For example, this proceeding was commenced in April 2014 and the motion to stay decision was not released until March 10, 2015. As a result, the plaintiff lost almost an entire year. The plaintiff also had to pay costs to the defendants along with whatever amount the plaintiff had to pay her own counsel. It is therefore imperative that litigants consult with knowledgeable and experienced cross-border counsel before making a determination as to the correct jurisdiction for commencing an action.

Supreme Court of Canada Affirms Statutory Trust and Lien Protections for Subcontractors are Distinct and Complementary

The Supreme Court of Canada very rarely weighs in on the construction lien regime. However, on appeal from the Manitoba Court of Appeal in *Stuart Olson Dominion Construction Co v Structal Heavy Steel (*2015 SCC 43), a unanimous Supreme Court confirmed the power of two important statutory protections afforded to subcontractors in the construction industry, being the lien and the statutory trust.

Facts

The appellant, Stuart Olson (the "**Contractor**") retained Structal Heavy Steel (the "**Subcontractor**") to provide structural steel work for Investors Group Field, the new CFL Football stadium in Winnipeg. The Subcontractor was not paid for some of its work, and registered a lien against the property for $15,570,974.53. The Contractor vacated the lien by posting security into court in the form of a lien bond.

The Subcontractor also asserted that the Contractor was obligated to comply with the trust provisions of the Manitoba *Builders' Liens Act*, which require that subcontractors and other workers employed by a contractor need to be paid before the contractor can appropriate any of the funds received on account of the contract for the contractor's own use (see sections 4(1) and 4(3) of the Manitoba*Act*).

The Contractor denied it had trust obligations under the Manitoba*Act* as a result of having posted security into court to vacate the Subcontractor's lien, and brought an application for a declaration to that effect.

The motion judge granted the Contractor's application. However, that decision was overturned by the Court of Appeal for Manitoba, and the decision of the Court of Appeal was upheld by the Supreme Court of Canada.

SCC Reasons

Justice Rothstein wrote for a unanimous court, and found the bond posted by the Contractor to vacate the Subcontractor's lien had nothing to do with the Contractor's statutory trust obligations. His Honour observed that the security posted to vacate a lien stands in place of the land in securing the interests of the lien claimant, as opposed to representing some form of payment to the lien claimant.

His Honour also found that even though the funds sought under each remedy may be the same, the trust provisions of the Manitoba *Act* granted rights independent and separate from lien rights. Further His Honour noted that the trust provisions applied to all funds received by a contractor, whether or not a lien was available, or properly preserved.

Still further, the Court found the trust provisions of the statute applied to create a trust until all subcontractors had been paid all amounts owed to them and that the posting of a bond to stand in place of the land pending the determination of a lien action did not satisfy such requirements.

The Contractor argued that recognizing trust and lien rights contemporaneously required it to "double" secure the single amount sought by the Subcontractor. The Court rejected this argument, finding the Contractor was not required to do so, but in this case chose to, by posting a lien bond to vacate the lien.

The Court took the view that if the trust funds themselves were posted as security to vacate a lien, a contractor would not need to hold separate cash security to satisfy its trust obligations.

Accordingly, the Contractor's appeal was dismissed.

This decision deals with Manitoba legislation. While it may be unclear how it applies in other provinces, the similarities between the Manitoban statute and Ontario's *Construction Lien Act* suggest it should have a very similar application in Ontario. In particular, in both provinces, the existence of a trust over all funds received by a contractor on account of the contract price continues until all subcontractors and other people who supply services or materials to an improvement are paid all amounts owed to them (see s. 4(3)(a) of the *Manitoba Act* and s. 8(2) of the Ontario *Act*).

While not ground-breaking, this decision should be seen as a victory for subcontractors, as it affirms the simultaneous right to secure the unpaid price of a contract through the mechanism of a lien, while still imposing a trust to all funds received by a contractor in respect of the project until the subcontractors, suppliers, and workers get paid for their work.

For contractors, the decision should serve as a reminder that trust obligations are not extinguished by a subcontractor commencing a lien action, or by a contractor posting security to vacate a lien. The decision also clearly sets out the route for securing a subcontractor claim that is being asserted by way of lien and trust without requiring "double" security is to post the trust funds themselves into Court to vacate the lien. This may raise practical challenges, as construction financing and lien litigation take place in "real time": a contractor will not always be in possession of sufficient funds at the time it needs to post security to vacate a claim for lien. A solution in some cases will be to post non-cash security as needed, and replace the security with trust funds once the necessary funds are received and/or available. Of course, the appropriate solution will always depend on the circumstances in which the issues arise, and expert legal advice and assistance should be sought out to determine the most appropriate approach for each particular case.

Court of Appeal Applies Contextual Approach to Restore a 2007 Action to the Trial List

In *Cariocas' Import and Export Inc. v. Canadian Pacific Railway Limited*, the Court of Appeal unanimously allowed an appeal restoring a 2007 action to the trial list pursuant to Rule 48.11 of the *Rules of Civil Procedure*. The decision is significant because it provides a more expansive and liberal interpretation of the test to restore actions to the trial list than the Court of Appeal's prior decision in *Nissar v. Toronto Transit Commission*, 2013 ONCA 361 (CanLII).

This case arose from a fire which took place in August 2006 on railway lands owned or occupied by the

Respondent, Canadian Pacific Railway (the "Respondent"). The fire spread to the Appellant's business, causing alleged damages. The action was issued in March 2007, alleging negligence and asserting a claim of $125,000.

The action initially moved in a timely manner with affidavits of documents and examinations for discovery being completed by September 2008. The Appellant set the action down for trial on June 11, 2009, although some undertakings remained outstanding at that time. The Respondent refused to sign the certification form to set pre-trial and trial dates because there were outstanding undertakings. As a result, the action was struck from the trial list, but was then restored to the trial list in January 2012 on an unopposed motion by the Appellant. However, the action was struck from the trial list a second time in October 2013 at "to be spoken to" court because expert reports on damages remained outstanding.

In May 2014, the Appellant again moved to restore the action to the trial list. This motion was dismissed, and the action was administratively dismissed on September 9, 2014. The appellant appealed the Court's refusal to restore the action to the trial list.

As identified by the Court of Appeal, the applicable test to restore an action to the trial list requires the moving party to establish that:

1. there has been a reasonable explanation for the litigation delay; and
2. the Respondent would suffer no non-compensable prejudice.

The Court of Appeal allowed the appeal of the motion judge's refusal to restore the action to the trial list holding that the motion judge's decision was infected by palpable and overriding errors of fact and contained erroneous application of legal principles.

It was found that the motion judge erred by focusing his analysis on the allocation of blame for delay rather than assessing whether there was a reasonable explanation for the litigation delay. Further, he decided the issue of prejudice predominantly based on a mechanized assessment of the passage of time rather than considering prejudice as a question of fact.

In assessing litigation delay, the Court of Appeal held that the Plaintiff is not required to account for delay on a month-to-month basis and that applying too exacting a standard to restore actions to the trial list undermines the efficient use of judicial resources by encouraging contested motions to restore actions to the trial list. The motions judge was also found to have erred by focusing on the Plaintiff's conduct rather than the overall dynamics of the litigation. While the Plaintiff has the primary responsibility to move the litigation forward, the Court rejected that it still remains an acceptable practice for a defendant to wait until the Plaintiff makes the next move. Rather, all parties play an important role in moving actions forward. In allowing the appeal, the Court of Appeal held the litigation delay had been adequately explained and the just order was to restore the action to the trial list for the following non-exhaustive reasons:

- the case was ready for trial at the time the motion was heard, and "keeping an action that is ready for trial off the [trial] list is punitive rather than efficient".;
- the Appellant had an unwavering intention to proceed to trial and had no motive to delay the action; and
- the Respondent expressed no concern regarding the speed of litigation until the motion to restore the action to the trial list was opposed.

The Court of Appeal reiterated that the relevant consideration in evaluating the issue of prejudice is the Respondent's ability to defend the action occasioned by litigation delay. The mere passage of time is generally insufficient to establish prejudice. While the Respondent argued that one "key" witness may not be available for trial, the Respondent only attempted to contact this witness on the eve of the motion to restore the action to the trial list, namely, approximately 7 years after the action was commenced. Further, the Court held that mere speculation in a case may depend upon oral evidence together with the assumption that witnesses memories generally fade over time, without more, is not sufficient to prevent the Plaintiff from satisfying the prejudice aspect of the test.

As the test applied in this case to restore an action to the trial list is the same as the test utilized on a status hearing, the Court of Appeal is signaling that a more liberal and contextual approach ought to be taken to avoid a mechanical application of the test to dismiss actions for delay that would otherwise result in unjust consequences and hinder, rather than enhance, the goals of providing timely, efficient, and cost-effective access to justice.

Cariocas' Import and Export Inc. v. Canadian Pacific Railway Limited, 2015 ONCA 592

It's a Global Village: the Supreme Court of Canada rules that the enforcement case of 30,000 Ecuadorian villagers may be heard by Ontario's Courts

On September 4, 2015, the Supreme Court of Canada released its long awaited judgment in *Chevron Corp v. Yaiguaje*, 2015 SCC 42. Justice Gascon, writing for a unanimous Supreme Court panel, permitted 30,000 Ecuadorian villagers to pursue the enforcement of their Ecuadorian Judgment against Chevron in Ontario. In coming to its conclusion, the Supreme Court held that there is no need to prove a real and substantial connection between the enforcement forum and either the judgment creditor or the dispute. Additionally, it is not necessary that the foreign debtor contemporaneously possess assets in the enforcing forum. Jurisdiction was established between the foreign court and the original action and between Ontario and Chevron Canada.

The oil-rich region of Ecuador, Lago Agrio, has suffered extensive environmental pollution because of the presence of global oil companies. The Ecuadorian villagers have long sought legal remedies for the harms that stemmed from the pollution. In 2013, an appellate Ecuadorian court upheld a lower court decision in favour of the villagers and set the damages owed by Chevron at US$9.51 billion. Chevron has refused to pay.

Since the Ecuadorian judgment was obtained, Chevron has implemented a "scorched earth" approach to avoid payment. Chevron commenced a proceeding in the United States alleging that the Ecuadorian judgment was the result of fraud and bribery (the Supreme Court of Canada commented that the allegations of fraud and related decisions were not before it in making its decision).

Following proceedings in the United States which were discontinued, representatives of the 30,000 villagers commenced enforcement and recognition proceedings in Ontario, which were ultimately appealed to the Supreme Court of Canada. The main issues before the Supreme Court were: 1) whether it was necessary for a real and substantial connection to exist between the defendant or the dispute and Ontario for jurisdiction to be established; and, 2) whether the Ontario courts had jurisdiction over Chevron Canada as a third party to the judgment for which recognition and enforcement is sought.

Whether it was necessary for a real and substantial connection to exist between the defendant or the dispute and Ontario for jurisdiction to be established: No!

The Supreme Court held that it is not a requirement for there to be a real and substantial connection between the defendant or the action and the enforcing court in order for jurisdiction to exist in recognition and enforcement proceedings. Justice Gascon wrote that a real and substantial connection as alleged by Chevron had never been a requirement under Canadian law in the context of recognition and

enforcement proceedings. In that context, it is only necessary that the **foreign court** had a real and substantial connection with the litigants or with the subject matter of the dispute. Since the pollution occurred in Ecuador, the Ecuadorian court had jurisdiction over the underlying dispute.

Justice Gascon provided several reasons for this conclusion. First, enforcement and recognition proceedings are different than proceedings of first instance and therefore it is logical that a different test would be applied to establish jurisdiction. Secondly, principles of fairness, order, reciprocity, and comity militate against imposing overly rigorous barriers to establishing jurisdiction. Finally, the Supreme Court recognized that the Ontario legislature has not enacted barriers to enforcing foreign judgments.

Whether the Ontario courts had jurisdiction over Chevron Canada as a third party to the judgment for which recognition and enforcement is sought: Yes!

The second issue before the Supreme Court was whether the Ontario courts had jurisdiction over Chevron Canada, which was not a named defendant in the Ecuadorian judgment. The Supreme Court found that jurisdiction had been established because Chevron Canada operates a place of business in Ontario. Justice Gascon relied on the Supreme Court's decision in *Club Resorts Ltd. v. Van Breda* to outline the ways that jurisdiction may be established, and that Chevron Canada's place of business in Mississauga established a traditional ground of presence-based jurisdiction. However, no finding of liability was made against Chevron Canada.

Implications

The Supreme Court's decision did not recognize and enforce the Ecuadorian judgment. The issue before the Supreme Court was limited to jurisdiction. The over 20 year journey of 30,000 Ecuadorian villagers for payment from Chevron for wrongs relating to pollution is not at an end. However, the judgment creditors overcame a significant hurdle.

The decision serves as a coherent review and clarification of jurisdictional principles, but the Supreme Court did not create any new principles of law. While the case is fascinating because of the amount of money at stake and the lurid facts, the Supreme Court's decision is a straightforward application of private international law principles.

**This post was co-authored by Jeff Van Bakel and Brittany Tovee*

Solicitor-Client Privilege: What the client needs to know

One of the first things a client learns when visiting a lawyer is that everything he or she tells the lawyer will remain confidential. The confidentiality of communications between client and lawyer is necessary to

ensure the client is comfortable providing candid information to their lawyer and so the lawyer can give confidential advice and legal representation. Not only do lawyers have a professional duty to maintain their client's confidence, the confidential communications are subject to solicitor-client privilege. However, clients need to know there are limits and exceptions to the confidential nature of their communications.

The concepts of confidentiality and solicitor-client privilege are often confused. Confidentiality is a duty owed by lawyers to clients; it covers all information concerning the business and affairs of the client in the course of the professional relationship. Privilege on the other hand, is an evidentiary rule of law and a protected right. Solicitor-client privilege is a type of privilege that attaches to some communications between a lawyer and a client, and is an exception to the general principle that all relevant evidence is admissible in court. It provides a legal right to withhold otherwise relevant information from the court or an opposing party.

This difference means that while all communications between a lawyer and his/her client are confidential, not all communications are privileged such that they would be protected from disclosure in a lawsuit. According to the Supreme Court of Canada in the case of *Pritchard v Ontario (Human Rights Commission)*, for solicitor and client privilege to apply, the party asserting the privilege must establish the communication meets the following criteria:

(a) the communication was between a solicitor and client;

(b) it must entail the seeking of legal advice; and,

(c) the advice sought must be intended to be confidential by the parties.

When solicitor-client privilege is challenged, the onus is on the party asserting the privilege to establish that privilege should protect the communication in question.

Protections for solicitor-client privilege are strongly enforced in Canada. The Supreme Court recently affirmed in *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, that the solicitor-client privilege is a "fundamental and substantive rule of law" given the importance to the public interest in maintaining a trusting solicitor-client relationship. However, it is important to understand there are limits to the privilege in that communications and documents cannot be arbitrarily cloaked in privilege simply by involving a lawyer.

Beyond the technical limits of the privilege, there are also limited circumstances where solicitor-client privilege will not apply. For example, where communications must be shared due to a clear, serious and imminent threat to public safety, or where the lawyer must disclose limited information about the client to defend herself from allegations of misconduct. In such instances, a lawyer may be permitted to waive privilege. As such, while most communications between client and counsel will never be revealed (unless the client wishes them to be), it is important to understand that the confidential nature of solicitor-client

communications is not all-encompassing, and is not absolute.

This post was authored by Robin Nobleman, articling student

Standing by its Decision: The Right of Administrative Tribunals to Defend their Own Decisions

Administrative tribunals derive their powers from legislation, which empowers them to oversee and adjudicate matters in what are sometimes highly complex and specialized areas. Accordingly, tribunals carry out their mandate by adjudicating matters between parties and also, when called upon, making policy and regulatory decisions.

The actions and decision of tribunals are not immune from scrutiny and their decisions are often challenged by impacted regulated entities and/or persons. A recent Supreme Court of Canada Case, *Ontario (Energy Board) v Ontario Power Generation Inc.*, **2015 SCC 44** (*Ontario Power*), dealt with the extent to which a tribunal may defend its own decision upon judicial review.

The decision in question resulted from a review by the Ontario Energy Board (the "Board") of the Ontario Power Generation Inc.'s (the "OPG") labour costs. When the OPG made its 2011-20012 utility rate application, the Board denied the recovery of $145 million in labour compensation, despite the OPG being bound by a collective agreement. The Board noted OPG's labour costs were excessive compared to other electrical utility companies.

The OPG sought judicial review of the Board's decision, and the Board was granted full-party standing before the court to defend its decision. The court found in favour of the Board, and the OPG appealed to the Supreme Court of Canada challenging the decision of the lower appeal court granting the Board full-party standing. The OPG alleged the Board "bootstrapped" additional reasons for its decision while arguing the appeal, which reasons were not set out in the original decision.

The Supreme Court of Canada held the Board was properly granted full-party status in the appeal and had conducted itself appropriately before the court. The Court noted the decision to allow a tribunal to participate in a review of its own decision is a discretionary decision. To that end, the Court articulated the following non-exhaustive principles as guidelines for lower courts to use in determining when and to what extent a tribunal should be allowed to defend and participate in the review of its own decisions:

- a reviewing court must balance "the need for a fully informed adjudication against the importance of maintaining tribunal impartiality";
- if an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing;

- if there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes; and
- whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Partiality concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding subject to review, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

This decision is a good reminder of the deference afforded by the courts towards administrative bodies in light of the specialized knowledge they are considered to possess, and the degree to which courts and legislatures are prepared to download their powers and responsibilities to these regulatory entities.

Expanded Common Law Trust obligations obstructing timely payment of construction debts

We were recently presented with a file where our client obtained judgment against a Defaulting Contractor and commenced enforcement steps, by way of issuing garnishments to various owners that employed the Contractor.

With respect to one garnishment, the Owner acknowledged that monies were due and owing under the contract but refused to pay because of sections 15 and 77 of the *Construction Lien Act* (the "Act").

The Act stipulates that a lien arises and takes effect when a party first supplies services or materials to the project. That is to say, the lien exists prior to its registration. Pursuant to s.77 of the Act, the lien will have priority over any garnishments, judgments, executions etc. which arose after the lien. On this basis, the Owner refused to abide by the Garnishment, however, the Owner withheld the funds from the Judgment Debtor, thereby preventing the debtor from paying the money to our client.

In an attempt to resolve this issue, we obtained an acknowledgment and Direction from the Judgment Debtor, directing payment from the Owner. Again, the Owner refused to pay; this time citing the controversial decision of ***Robert Nicholson Construction Company Limited v. Edgecon Construction Inc.*, 2015 ONSC 1237** ("Edgecon").

In Edgecon, during the course of a Project, the Debtor directed the Owner to make payment to a third party for work performed by the Debtor pursuant to the contract. Although this third party was not part of the construction pyramid for the project, the Owner complied with the direction.

Subsequently, a Creditor emerged and issued a garnishment on the Owner. The Owner refused to pay on the basis that payment had already been made to the Debtor by virtue of the directed payment to the Third Party.

The Court held that as the Third Party was not part of the construction pyramid, the payment was not in compliance with the trust provisions of the Act and as such, the Owner was held liable to pay the Creditor.

The difficulty with the Edgecon decision is that Justice King has effectively expanded statutory obligations of a trustee under the Act. Previously only parties with privity of contract were able to pursue breach of trust actions under the Act. However, the trust obligations in this case were expanded to parties further down the construction pyramid who did not have privity of contract with the Owner. This is a departure from prior decisions and complicates matters by creating relationships which never previously existed.

Acknowledgments and Directions are commonly used in the construction industry as simple method for securing repayment of debts. The legal commentary seems to unanimously agree that the decision in this case is the wrong one, both practically and legally. Unfortunately, we have already encountered one owner who is relying on this decision and fear that more may follow suit. It is our understanding that this decision is under appeal, and we are hopeful this matter will be corrected if that is the case.

Nonetheless, despite difficulties raised by the Edgecon decision, there are options to consider in trying to work with and around this case. For further information, please contact Daniel Resnick at Koskie Minsky LLP at 416 542 6299.

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