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Katherine Reilly and Mark Wiffen continue with overviews of the new Civil Procedure Rules in B.C. and Ontario, respectively.

Finally, Tom Hakemi and Melanie Harmer caution Canadian companies doing business in the United States against U.S. judgments that may be upheld in Canada.

The Supreme Court of Canada's *BCE Inc.* Decision: Essential Advice for Directors, Creditors and Commercial Litigators

Laura Kraft

The Supreme Court of Canada ("SCC") has recently released its reasons for overturning the Quebec Court of Appeal's ("QCA") decision in *BCE Inc. v. 1976 Debentureholders*.[1] The reasons offer guidance to corporate directors weighing stakeholders' interests in leveraged buyouts ("LBO"); corporate solicitors drafting contracts on behalf of their creditor clients; and commercial litigators pursuing the oppression remedy or challenging the court's approval of a plan of arrangement.

At issue in the *BCE* decision was a plan of arrangement that contemplated the purchase of the shares of BCE by a consortium of purchasers through an LBO. The arrangement provided for the purchasers' acquisition of all of BCE's outstanding shares at a premium of approximately 40% over the market price of BCE shares at the relevant time. Bell Canada, a wholly-owned subsidiary of BCE, was to guarantee approximately $30 billion of BCE's debt. While the plan of arrangement was approved by 97.93% of BCE's shareholders, it was opposed by a group of financial and other institutions that held debentures issued by Bell Canada. As the short-term trading value of the debentures would decline by an average of 20% and could lose investment grade status, the debentureholders pursued two legal remedies: an oppression action under s. 241 of the *Canada Business Corporations Act* ("CBCA"), and a challenge to the arrangement on the basis that it was not "fair and reasonable" pursuant to s. 192 of the *CBCA*.

In granting BCE's appeal, the SCC concluded that the QCA had erred in dismissing the debentureholders' action for oppression pursuant to s. 241 of the *CBCA* and in overturning the lower court's approval of the plan of arrangement pursuant to s. 192 of the *CBCA*. The QCA erred because it had viewed the two remedies as substantially overlapping, holding that both turned on whether the directors had properly considered the debentureholders' reasonable expectations. However, according to the SCC, the oppression remedy focuses on the reasonable expectations of stakeholders, and the onus is on the claimant to establish oppression or unfairness. In contrast, the s. 192 approval process focuses on whether the proposed arrangement, objectively viewed, is fair and reasonable, and looks primarily to the interests of the parties whose legal rights are being arranged. The onus in that case is on the corporation to establish that the arrangement is fair and reasonable.

Directors' Duties

The SCC reiterated the fundamental principle that directors owe a fiduciary duty to the corporation and only to the corporation. Affected stakeholders can reasonably expect two things: to be treated in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen; and that directors will act in the best interests of the corporation. Insofar as shareholders have a stake in the equity of a corporation by which they participate in its profits and losses, the maximization of the interests of the corporation will frequently align with the maximization of shareholder interests. However, this alignment is merely a correlation and neither suggests that directors' fiduciary duties are to shareholders nor that shareholders' interests take priority over those of other stakeholders.

Directors' statutory fiduciary duties are a function of business judgment of what is contextually in the best interests of the corporation. The courts will give appropriate deference to the directors' business decision so long as it lies within a range of reasonable alternatives. To inform their decisions, directors may look to, among other things, the interests of shareholders, employees, creditors, consumers, governments and the environment. However, there is no fixed rule that the interests of such stakeholders must be maximized or that certain stakeholders have interests that supersede those of others.

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Creditors' Rights

As stakeholders, creditors are entitled to a reasonable expectation of fair treatment by directors regarding their non-contractual interests. However, such "fair treatment" is not so extensive as to entitle, for instance, bondholders to the maintenance of the investment grade status of their debentures. The best manner in which to guarantee a legitimate expectation for the protection of such a specific stakeholder interest would be to include a specific provision in the contract (i.e. in the bondholders' case, to negotiate for change of control and credit rating covenants in the trust indenture). Otherwise, the best that creditors can hope for is that their interests are in accordance with what the board, in exercising its business judgment, deems to be in the best interests of the corporation. In the BCE decision, merely "considering" but then ultimately disregarding the bondholders' interests was sufficient for the SCC to conclude that the board was not in breach of any reasonable expectation of the bondholders.

Oppression Remedy vs. Plan of Arrangement

In assessing a claim for oppression, a court must conduct a two-part analysis: (1) does the evidence support the reasonable expectation the claimant asserts? and (2) 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? With respect to the first branch of the test, the court considers the following factors: commercial practice; the size, nature and structure of the corporation; the relationship between the parties; past practice; the failure to negotiate protections; agreements and representations; and the fair resolution of conflicting interests.

The SCC further clarified the three-part test involved in approving a plan of arrangement (s. 192(3), *CBCA*). In seeking approval of a plan of arrangement, the corporation bears the onus of satisfying the court that: (1) the statutory procedures have been met; (2) the application has been put forward in good faith; and (3) the arrangement is fair and reasonable. With respect to factor (3), the Court must be satisfied that (a) the arrangement has a valid business purpose (i.e. the burden imposed by the arrangement on security holders is justified by the interests of the corporation), and (b) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way. An important factor to consider with respect to the analysis under (b) is whether a majority of security holders has voted to approve the arrangement. Parties whose legal rights are not being arranged are generally not entitled to vote on plans of arrangement unless there exist extraordinary circumstances. The fact there is a group which faces a reduction in the trading value of its securities, but whose legal rights are left intact, is insufficient to constitute such a circumstance.

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1 December 19, 2008.

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Dramatic Changes on the Horizon for B.C.'s Civil Procedure Rules

Katherine Reilly

British Columbia's proposed new civil procedure rules (the "Proposed Rules") are targeted to come into force early in 2010. The aim of the Proposed Rules is to make the justice system in B.C. more responsive, accessible and cost effective. This goal could also be said to apply to the upcoming changes to the Ontario Rules of Civil Procedure which will, among other things, inject limits on the scope and length of the discovery process, broaden the applicability of the summary judgment rule, and introduce the principle of proportionality into proceedings (see Mark Wiffen's article, entitled *Reducing Litigation Abuse in Ontario: Rule Changes* for more about the changes coming to Ontario). By contrast, B.C.'s Proposed Rules incorporate many of these same changes, but the change in B.C. is on a much larger scale. The Proposed Rules have been called a "complete rewriting" of the current Rules of Court, representing a major shift in the province's civil justice system — a shift which will arguably require the parties themselves to engage in a more meaningful way in the litigation process.

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The New Face of the B.C. Rules

Here are some of the key elements of B.C.'s Proposed Rules:

1. Proportionality

Proportionality will be the overriding objective of the Proposed Rules, which will apply to all legal proceedings.

According to this principle, proceedings should be conducted in a manner proportionate to: (1) the amount of money at stake; (2) the importance of the issues in dispute; and (3) the complexity of the proceeding.

Parties will be expected to more actively manage the proceeding by doing things like identifying the issues in dispute at an early state, setting timetables for controlling the litigation process, and cooperating with other litigants in terms of the conduct of the proceeding.

2. Simplified Case Initiation and Response

The originating documents for starting a lawsuit will be simplified and must be signed personally by the Claimant (formerly referred to as the "Plaintiff"), who must indicate that he/she/it believes that the facts pleaded in the claim are true. The party being sued (now called the "Respondent") must file and sign a similar document in response.

Under the Proposed Rules, parties can be cross-examined on the statements in their claim and response – a feature which is intended to encourage truth in pleadings.

The timelines for filing documents will be shortened and claims must be served within 120 days of filing. This means parties will no longer have the option of filing a claim and then sitting on it for a year while they decide whether to pursue it.

3. Case-Planning

The Proposed Rules focus on upfront planning and agreement by parties on issues of pre-trial procedure. Ontario's proposed Discovery Plan is similar in intent but, again, B.C.'s Case Plan Order is wider in its application.

For every action started in B.C., a Case Plan Order must be made (either by consent, or ordered by a judge) before any steps can be taken in the litigation. If the parties cannot agree to the terms of the Case Plan Order and a Case Planning Conference is required, the parties must personally attend (with some exceptions).

In the Case Plan Order, the parties must deal with many procedural issues, including:

- whether to use dispute resolution options;
- deadlines for exchange of documents;
- deadlines and parameters for oral examinations for discovery;
- anticipated court applications (e.g. applications for summary trial);
- use of lay witnesses at trial;

- planned use of experts; and
- parameters of trial.

4. Discovery Procedures

Oral discoveries will be capped at three hours (compared with Ontario's seven-hour limit), unless the parties otherwise consent or the court so orders.

Document discovery will be limited to documents that could be used by either party at trial to prove or disprove a material fact. This is a significant change from the previous rule requiring all documents relating to *any* matter in issue in the action to be disclosed. This change is aimed at reducing the time and expense associated with the often lengthy and costly discovery phase of litigation.

5. Use of Experts

The number and type of experts that may be used at trial must be set out in the Case Plan Order – this requires that the parties agree, or a judge approve of the use of experts in each case.

The court can require parties to use a joint expert. Or, if parties use separate experts, those experts will be required to confer and produce a report which outlines the points of disagreement between them.

Experts will also be required to make available the entire contents of their file for review and photocopying prior to trial.

Will the Changes Work?

The focus of the Proposed Rules on forethought and planning is no doubt intended to force litigants to take a close, hard look at their case and determine how – and whether – to proceed with litigation.

Will British Columbia's Proposed Rules make a difference? The workability and effectiveness of the Proposed Rules has been hotly debated within B.C.'s legal community. In determining whether the planned face-lift will have the desired effect of making litigation more accessible and cost-effective, only time and experience will tell. But would-be litigants who are "in the know" about the changing face of litigation in B.C. will undoubtedly be better armed to endure the shift, whatever shape it may take.

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Reducing Litigation Abuse in Ontario: Rule Changes

Mark Wiffen

On January 1, 2010, a number of changes to the Ontario *Rules of Civil Procedure* are to come into effect that are intended to make litigation more accessible and cost effective. Those changes are not as fundamental as the proposed changes to the British Columbia rules, but they are intended to change specific troublesome aspects of litigation in Ontario. While some of the pending changes, primarily the increase in the upper limit for Small Claims Court lawsuits to $25,000 (from $10,000), have received wide publicity, a number of other important changes have been overlooked and are summarized briefly below.

Reduction of the Scope of the Discovery Process

The most substantial procedural change which will come into effect in 2010 is that the scope of both the documentary and oral discovery process will be narrowed. This is accomplished through three general areas of change:

- A limit on the length of examinations for discovery is being introduced, limiting parties to seven hours of examinations for discovery each, unless the parties consent to longer examinations or there is a court order. This is a substantial change from the current rules, which place no limit on the length of examinations for discovery.
- As in British Columbia, an emphasis on "proportionality" is being imported into the rules regarding documentary productions and examinations for discovery. The new proportionality rule provides authority for the court to limit questions and documentary productions where the cost of responding to such demands is out of proportion to the amount in dispute in the litigation. This is a change from the current system, where the rules impose identical production obligations in every case, regardless of the amount in issue (although in recent years, courts have been willing to interpret the rules in such a manner that includes some consideration of proportionality).
- The scope of examinations and documentary productions

will be changed from requiring parties to answer questions and produce documents "relating to any matter in issue" to a narrower standard of being "*relevant* to any matter in issue". While, on its face, this appears to be a small semantic change, it eliminates the current "semblance of relevance" test, which is very broad, to a test which requires a party to show actual relevance.

The most important aspect of these three changes will be to provide the courts with some leeway to enforce a more common-sense approach to discovery, and reduce the opportunity to abuse the system through overly broad examinations and documentary production demands.

A "proportionality" requirement is being imported into the rules regarding documentary productions and examinations for discovery.

While these rules will potentially reduce the amount of pre-trial discovery time in most instances, cases that fall within the Simplified Procedure rules will now change from having no examinations for discovery, to allowing each party up to two hours of examinations for discovery. This change is being made in conjunction with an expansion in the scope of the Simplified Procedure rules, which will apply to claims of up to $100,000 (an increase from the previous level of $50,000).

Summary Judgment

The current rules regarding motions for summary judgment (i.e., motions to obtain judgment without the necessity of having a trial) have been very strictly interpreted by the Court of Appeal. A party cannot currently obtain summary judgment unless it can essentially be shown that the other side lacks any possible chance of success.

A party cannot currently obtain summary judgment unless it can essentially show that the other side lacks any possible chance of success.

Under the new rules, a judge's powers will be broadened substantially:

- A judge hearing a summary judgment motion will be permitted to make assessments of credibility (i.e., based on affidavit material, without hearing witnesses) and weigh the evidence in determining the matter, as opposed to the current system, where a judge must take the evidence of the party resisting summary judgment at face value, unless it is incapable of being true.
- While summary judgment motions will still be conducted based on affidavit material, rather than based on testimony in open court, a judge hearing the motion can require a "mini-trial", involving oral evidence.
- The cost consequences for bringing an unsuccessful summary judgment motion will be less harsh, as costs will now be awarded on a "partial indemnity" basis rather than a "substantial indemnity" basis, unless the motion was brought unreasonably or in bad faith.

As a result of these changes, it is expected that summary judgment motions will become more commonplace, given the higher likelihood of a matter being decided on such a motion, and the softening of the potential negative costs consequences.

Other Changes

The new rules also provide for a number of minor changes, such as requiring the parties to agree upon a "Discovery Plan" at the outset of a case, and requiring expert witnesses to certify, in writing, that they understand their duty to be fair, impartial and non-partisan. Timelines within litigation have also been changed, such as increasing the notice period for motions from a minimum of four days to seven days, and requiring expert reports to be delivered much earlier in a proceeding.

Ultimately, time will tell whether these various changes to the *Rules of Civil Procedure* have the desired effect of reducing the cost and time involved in litigation, and increasing access to justice for litigants. Next year will likely be an active year for lawyers and the courts alike in Ontario, as everyone begins to adapt to these new rules.

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Inconvenient Jurisdictions: The Enforcement of U.S. Judgments in Canada

Tom Hakemi

Melanie Harmer

Canadian companies doing business in the United States face the ever-present danger of becoming embroiled in litigation in U.S. courts. If a judgment is obtained in the U.S. against a person with assets in Canada, the judgment may be enforced in Canada. In many cases, how easy that will be depends in large part on whether the U.S. state from which the original judgment emanates is a "reciprocating" jurisdiction with the province in which enforcement of the judgment is being sought. The term "reciprocating" refers to a designation by statute (often based on treaty) providing for the enforcement in one jurisdiction of judgments obtained in the other.

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There are two ways that a U.S. judgment may be enforced in Canada. One common way is to commence an action on the judgment in the Canadian jurisdiction where the defendant has assets. This type of action is often tried by summary proceeding. Another way to enforce a U.S. judgment in Canada – and often the easiest way to do it – is to have the judgment "registered" with a court in the province where the assets are located. This method of enforcement, however, is available only where the judgment has been given in a court in a reciprocating U.S. state. For example, the reciprocating U.S. states for B.C. are Alaska, California, Colorado, Idaho, Oregon and Washington.

One common way is to commence an action on the judgment in the Canadian jurisdiction where the defendant has assets.

In situations where a judgment creditor has obtained judgment in a non-reciprocating U.S. state, there has been some authority to suggest that the creditor could still avail itself of this simplified enforcement mechanism by first having the judgment registered (or otherwise recognized) in a reciprocating U.S. state, and then registering that judgment in the Canadian jurisdiction for enforcement. In December 2008, however, the British Columbia Court of Appeal issued a decision that casts some doubt on the availability of the two-step registration process.

In British Columbia, Part 2 of the *Court Order Enforcement Act* provides for the reciprocal enforcement of foreign judgments. Under the *Act*, a U.S. judgment may be registered in British Columbia if it is from a reciprocating U.S. state.

In a 1996 decision, the British Columbia Supreme Court (a trial level court) appeared to have approved the enforcement of a foreign judgment that had emanated from a non-reciprocating state and had been, in what the Court called a "jurisdictional convenience", registered in a reciprocating U.S. state.

In *Hickman v. Kaiser*, the debtor applied to set aside an ex parte order restraining him from dealing with his assets. The basis of that order was a $2.9 million judgment against the debtor and some of his affiliates. The basis of the judgment was that Hickman had through fraud, theft or misappropriation during his tenure as trustee of a pension fund established by one of the defendants, wrongfully removed to his own benefit substantial sums from the trust. The Texas judgment obtained was for triple damages.

Texas is not a reciprocating jurisdiction with British Columbia. In *Hickman*, the judgment creditor had registered the Texas judgment in Idaho, a reciprocating jurisdiction with British Columbia. Although the Court did not specifically consider the issue of whether registration in British Columbia was valid, *Hickman v. Kaiser* had been interpreted as sanctioning this procedure.

In December 2008, however, the British Columbia Court of Appeal cast doubt on the continuing viability of that aspect of the *Kaiser* decision in *Owen v. Rocketinfo, Inc.*

In *Owen v. Rocketinfo, Inc.*, the issue before the Court was whether a judgment obtained in Nevada (a non-reciprocating state) and entered as a sister state judgment in California (a reciprocating state) may be registered in British Columbia under Part 2 of the *Court Order Enforcement Act*. The judgment

creditor relied on *Kaiser* for its position that the registration was valid. But the Court of Appeal distinguished *Kaiser* on the grounds that, "the issue in that decision related to the setting aside of a Mareva injunction…". The Court went on to note that in *Kaiser*, "there was no judicial determination as to the validity of registration in British Columbia…[and] the decision is not considered authority on the point capable of providing assistance to this Court."

Applying principles of statutory interpretation, the Court concluded that, "the Legislature did not intend to provide for registration in British Columbia of a judgment granted by a court of another jurisdiction by an indirect method when it is not permitted to be done directly." The Court was also persuaded by commentary suggesting that laws like the *Court Order Enforcement Act* apply "only to original foreign judgments and not to judgments recognizing a foreign judgment."

The decision in *Owen v. Rocketinfo, Inc.* appears to foreclose the ability of those seeking to register a judgment in British Columbia from a non-reciprocating U.S. state by first having the judgment recognized in a reciprocating U.S. state. While not binding, the decision is likely to persuade courts in other Canadian provinces with similar statutory provisions for the enforcement of foreign judgments.

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Events

Emergency Preparedness: Best Practices and Critical Legal Issues

April 3, 2009
Ontario Bar Association Conference Centre
Toronto, ON

Lang Michener Speaker: **David Debenham**
"Emergency Response and Contemporary Crisis Communication"

The Emergency Preparedness: Best Practices and Critical Legal Issues conference allows attendees to hear from experts as they address best practices and critical legal issues for emergency and disaster preparedness management and recovery.

CCCA 2009 National Spring Conference

April 5-7, 2008
Hyatt Regency
Montreal, QC

Lang Michener Panelist: **Martin Masse**
"Achieving Optimal Results at Regulatory Hearings"

Lang Michener is proud to be a Silver Patron Sponsor of the CCCA National Spring Conference to be held on April 5-7, 2009 at the Hyatt Regency in Montreal. The theme of this year's conference is Corporate Counsel: Regulatory Advisor, Compliance Officer, Governance Gatekeeper.

Announcement

Peter Reardon has been named the new Practice Group Leader of the Litigation Group in Vancouver. Peter has extensive experience in all levels of courts including appellate litigation in the British Columbia Court of Appeal, the Federal Court of Canada, Appeal Division and the Supreme Court of Canada. His diverse practice has included commercial matters, banking litigation, conflicts of law, administrative and constitutional law and all areas of insolvency practice.

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