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Lang Michener LLP
Lawyers – Patent & Trade Mark Agents

In Brief

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In Brief: General comments on legal developments of concern to business and individuals

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In This Issue

Used when referring to the U.S. in the 1940s, the term "sleeping giant" now seems apt when referring to China. The lead article canvasses its new anti-monopoly laws and their impact on Canada. Emphasizing the Canadian perspective, there are also full-length articles about anticipated changes affecting foreign companies insuring Canadian risks and about Canada's evolving *refusal to deal* law and how federal legislation hopes to balance various interests, including those of commuters with those of air and rail carriers.

Directors and officers will be keen to read about how they are the primary targets for derivative actions and what they can do to mitigate their risks.

With the 2010 Winter Olympic Games to be hosted in Vancouver, steps are being taken to prevent businesses from using various names and symbols associated with those Olympics. Karl Gustafson discusses the strengthening of Olympic intellectual property rights. There are also articles dealing with commercial leases and how Ontario has addressed the recent wave of fraudulent real estate transactions involving identity fraud.

In LAW NOTES, we explore employment issues with respect to bullying and the expectation that dismissed employees will mitigate losses, as well as broadening of fiduciary duties for professionals, the tort of negligent investigation and new protocol to the Canada-U.S. Tax Treaty.

In the hard copy, two incredible stories and a footnote in *Life Bites*; your Letters and Comments, and a little bit about us.

Sleeping Giant Awakens: China's Anti-Monopoly Law from a Canadian Perspective

James Musgrove

François Tougas

Steve Szentesi

Late in the summer of this year, the National People's Congress passed China's long anticipated Anti-Monopoly Law of the People's Republic of China (the "anti-monopoly law"). This new antitrust law, which will come into force on August 1, 2008, is the

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result of thirteen years of drafting and debate and closely follows the announcement earlier this year that Hong Kong will also introduce comprehensive competition law.

The anti-monopoly law prohibits monopoly agreements, abuse of dominant market position and concentrations that "eliminate or restrict market competition."

China's new anti-monopoly law may have a number of significant impacts on foreign companies doing business in China, including altering the landscape for pre-merger notification and review of Chinese transactions, requiring a review of existing product distribution policies and determining whether other commercial activities in China may raise issues under the new anti-monopoly provisions.

Monopoly Agreements

The new anti-monopoly law prohibits monopoly agreements between competing undertakings (i.e., horizontal cartel-type behaviour) to fix the price of products, restrict output, divide markets or jointly boycott transactions.

On the face of these provisions, it appears that no substantial anti-competitive effects in a relevant market are required to contravene the law (e.g., a price fixing agreement between competing undertakings with relatively minor competitive effects may, at least on the face of the new provisions, be caught). The new law does, however, contain a number of exemptions from the horizontal (cartel) and vertical (price maintenance) monopoly agreement provisions, including exemptions for agreements to improve products or achieve efficiencies.

China's new anti-monopoly law may have a number of significant impacts on foreign companies doing business in China, including altering the landscape for pre-merger notification.

Unlike the approach adopted in some other major jurisdictions such as the United States and Canada, which have adopted general prohibitions on cartel activities with the types of prohibited agreements established by case law, China's new cartel rules explicitly set out the types of anti-competitive agreements that are prohibited. While expressly codifying "hard-core" types of anti-competitive agreements may seem an intuitive approach to enacting cartel rules, there has been an ongoing debate in Canada and elsewhere on the difficulty of accurately and comprehensively covering all possible forms of agreements that may contravene cartel or conspiracy prohibitions. Canada has, as a result, to date retained a general criminal conspiracy provision, with case law amplifying the types of agreements that are prohibited.

In addition to prohibitions on horizontal cartel behaviour, China's new anti-monopoly law also prohibits undertakings from fixing or setting minimum resale prices where such agreements "eliminate or restrict" competition. The new resale price maintenance provisions, which may have a number of potential impacts on foreign companies supplying products to Chinese distributors or retailers, are similar to the approach taken in the recent judgment of the U.S. Supreme Court, which held (acknowledging growing economic thinking that resale price maintenance activity can be pro-competitive or anti-competitive depending on the circumstances) that such conduct is not *per se* unlawful, but rather should be examined pursuant to the rule of reason. This is, however, in contrast with Canada, which retains a *per se* approach to price maintenance activities.

The new anti-monopoly law also contains a specific provision, added as a last minute amendment, prohibiting industry associations from organizing undertakings to engage in monopoly agreements prohibited by the new legislation. This provision, which is rather novel in that trade association activities are typically dealt with by general cartel provisions in most other major jurisdictions, appears to be the result of recent price fixing activities of the China arm of the International Ramen Manufacturer's Association, which China's National Development and Reform Commission recently found guilty of breaching China's existing price law legislation.

Abuse of Dominant Market Position

The new anti-monopoly law also prohibits undertakings from abusing their dominant market position. "Dominant market position" is defined as an undertaking that can control the price or quantity of products or block or affect the access of other undertakings into the relevant market. In that regard, the approach to dominance adopted in the new legislation appears generally consistent with conventional economic theory (i.e., the ability of a firm to exercise market power or foreclose entry).

As in Canada and the European Union, China's new abuse of dominance provisions set out illustrative examples of conduct that may be considered abusive when engaged in by a dominant undertaking. These include selling products at unfairly high prices and exclusive dealing, tying or price discrimination "without any justification."

The new abuse of dominance provisions also set out presumptive thresholds for when a firm will be considered to be dominant, which include where an undertaking has a 50% market share or where the combined market share of two undertakings accounts for two-thirds of a relevant market. These thresholds appear to be rebuttable, as the new law also provides that undertakings construed to be dominant based on the above thresholds "shall not be considered to have dominant market position provided that there is opposite evidence."

As a practical matter, these market share presumptions for dominance may mean that foreign firms with large market shares in China

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potentially face a higher burden if their activities are challenged. These presumptions were also criticized prior to the passing of the new law.

In any event, the extent to which China's new enforcement authorities will be willing to consider factors other than market share in assessing dominance remains to be seen.

Concentrations

The new anti-monopoly law also introduces a new pre-merger notification and review regime for concentrations that exceed certain thresholds. While merger review was first introduced in China in 2003 and replaced in 2006 by the *Rules on Mergers and Acquisition of Domestic Enterprises by Foreign Investors* (the "M&A rules"), the new law establishes a merger control regime that applies to both domestic and foreign transactions (whereas the current M&A rules do not apply to purely domestic transactions).

A concentration is defined to include mergers between undertakings and share and asset acquisitions resulting in an acquisition of control (though the term "control" is not defined), as well as transactions in which *de facto* control is acquired (i.e., the ability to "exercise decisive influence" over another undertaking is acquired). Unlike earlier drafts, the new anti-monopoly law does not set out any thresholds for pre-merger notification, providing instead that concentrations exceeding thresholds later stipulated by the State Council will require notification.

The introduction of China's new anti-monopoly law is a highly significant development and the culmination of more than a decade of drafting and debate.

The new anti-monopoly law provides for a two-phase review of mergers, similar to the approaches in the United States and European Union. A transaction subject to merger control under the new law may not be completed before its new antitrust enforcement agency, the Anti-Monopoly Enforcement Authority ("AMEA") has cleared the transaction or the relevant waiting periods of 30 working days (first phase) or 90 working days (second phase) have expired without AMEA having prohibited the transaction.

With respect to the substantive review of mergers, the new law provides that concentrations that "eliminate or restrict market competition" (or may have these effects) are prohibited, unless it can be shown that the advantages of the concentration outweigh the disadvantages or the concentration is consistent with the "public interest." Like the provisions prohibiting monopoly agreements, it is not clear what requisite level of competitive harm will be required to be established (i.e., for a concentration to "restrict market competition," which appears on its face to be a relatively low threshold).

National Security Review

The new anti-monopoly law also contains a national security review provision for foreign acquisitions that involve the "acquisition of domestic undertakings by foreign capital" or the "concentration of foreign capital."

The new national security provision, like the existing provision in the M&A rules, may be criticized because "national security" is not defined, so it is not clear what will be considered a national security issue (i.e., when foreign investors may be subject to a national security review when acquiring domestic Chinese companies).

The adoption of a national security provision coincides with similar recent activities in the United States and Canada.

China's new national security review provision may in reality be the result of political compromise between reformists in China, who support the adoption of competition policy consistent with other major jurisdictions and international best practices, and protectionists, who prefer to protect domestic Chinese businesses from potential new foreign entry. (That debate is not unlike that currently taking place in Canada in relation to the so-called "hollowing out" of corporate Canada and the sale of corporate crown jewels to foreign acquirers).

Future Implications

The introduction of China's new anti-monopoly law is a highly significant development and the culmination of more than a decade of drafting and debate. It also follows a trend in Asia, as major jurisdictions continue to formulate and adopt comprehensive competition laws. The recent developments in China, as well as the new or proposed competition laws in Singapore and Hong Kong, mean that foreign companies doing business in Asia will face an enhanced regulatory landscape, with potential impacts on business activities ranging from mergers and acquisitions to pricing and distribution practices. Whether the new anti-monopoly law will be effectively or evenly applied by Chinese enforcement authorities, however, and the long-term practical impacts on companies doing business in China, remain to be seen.

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Derivative Actions: Mitigating the Risks for Directors and Officers

Frank Palmay

Canadian statutory derivative actions have a 35-year history. Recent developments may make derivative actions more attractive to plaintiffs than, for example, actions for oppression. The primary targets for derivative actions are directors and officers. This paper explores derivative actions and various steps that directors and officers can take to reduce the risks of such actions and to minimize the likelihood of personal exposure should such actions arise.

Directors and Officers as Targets

While derivative actions may be brought on behalf of the corporation or its subsidiary against strangers for wrongs done to the corporation/subsidiary, the majority of actions focus on alleged wrongs by directors and officers. These have included secret profit or commission by a director, breach of fiduciary duties, negligence, issuing shares at an improper value, *ultra vires* acts, conflicts of interest and misappropriation of corporate opportunities.

Even in cases involving strangers, the directors/officers are more than likely to be targeted for failing to pursue strangers on behalf of the corporation.

Pension funds are becoming more aggressive in initiating actions, including derivative actions against directors for perceived wrongs. Recently, the Ironworkers Ontario Pension Fund filed a shareholder derivative action against Research in Motion ("RIM") for $105 million in damages. The defendants are four members of RIM's Audit and Compensation Committee who allegedly backdated stock options improperly.

While derivative actions may be brought on behalf of the corporation or its subsidiary against strangers for wrongs done to the corporation/subsidiary, the majority of actions focus on alleged wrongs by directors and officers.

The recent Ontario Court of Appeal decision, *Ford* v. *OMERS,* may also significantly increase the use of derivative actions. The court in this case (a dissent, appraisal and oppression action) held that the oppression remedy, as pleaded, did not allow recovery of damages for an improper and oppressive transfer pricing arrangement with Ford Canada's 94 percent parent, preceding the period during which the plaintiff security holders held their shares. The recovery might have been significantly increased had the plaintiffs chosen the derivative action route.

Risk Mitigation

Since the primary targets for derivative actions are directors and officers, how do they go about minimizing the risks that they face from such actions?

Due Diligence

The 2001 amendments to the *Canada Business Corporations Act* ("CBCA") and the 2007 amendments to the *Ontario Business Corporations Act* ("OBCA") enlarged the due diligence and good faith defence available to directors.

A robust compliance program which identifies issues and risks faced by the corporation and involves the appropriate professional person in advising the Board (auditor, lawyer, engineer, actuary, for example) can insulate or bulletproof the directors of the corporation by allowing them to avail themselves of the due diligence defence. The elements of an effective compliance program include an atmosphere of compliance from the top down; written procedures and policies; a compliance officer reporting to the board or to an appropriate board committee; an ongoing education program within the organization; and periodic evaluation of the policies and procedures.

While the due diligence defence is only expressly afforded to directors, one of the additional benefits of a rigorous compliance program is that, by identifying problems and issues early, it can improve the chances of having them resolved. Such resolution, of course, will also benefit the officers.

Indemnification

The next level of defence for directors and officers are the indemnification provisions provided for in the various corporate statutes. Again, the indemnification provisions of the CBCA were amended in 2001 to allow broader indemnification, including the ability to advance costs. The 2007 amendments to the OBCA are broadly similar.

Directors should at least ensure that their indemnification is as broad as the statute now permits. By-laws for CBCA corporations passed before 2001 and those currently in effect for OBCA corporations may be too restrictive and should be reviewed.

Recognizing that by-laws may be amended without the approval of a director/officer or even the involvement of a former director/officer, careful and prudent directors/officers obtain indemnity contracts from the corporation which they serve. A well-drafted contract will not only deal with circumstances where the corporation is allowed to indemnify, including the important obligation to advance costs, but will also obligate the corporation to seek court approval where it is a prerequisite to indemnification. This is crucial in the case of derivative actions.

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Insurance

Indemnities are, of course, only as good as the financial solvency of the person (corporation) that stands behind them. Insurance provides a third party (the insurance company) to stand behind the indemnity. Indeed, in the case of derivative actions, where court approval is required for directors and officers to obtain indemnity, an insurance policy may become even more important.

To ensure that your Directors' and Officers' ("D&O") Policy is sufficient to cover your exposure as a director and officer, a periodic review of your D&O Policy is important as risks, policy wordings and market availability vary over time.

Most policies insure the corporation as well as directors/officers and contain an insured *against* insured exclusion. Since a derivative action involves the corporation (an insured) suing its directors and officers, such an exclusion would preclude coverage for derivative actions. Most modern D&O policies contain exceptions for derivative actions as long as the insured directors and officers do not assist the person driving the derivative action in any manner.

Significant shareholders initiate derivative actions. Most D&O policies contain exclusions for actions by major shareholders, either direct or derivative. While the threshold varies from policy to policy, 5 percent or 10 percent is not unusual. Alternatives that you, or the corporation, might consider include obtaining indemnities from the major shareholder(s), having the D&O Policy amended to reduce or eliminate the effect of the exclusion, and looking into new products/policies (Side A, Difference In Condition, for instance) that provide protection only to directors and/or officers with narrower exclusions.

One of the most important features of D&O policies is the duty to defend. Experience shows that a well-organized and presented defence may be the best protection that a policy can provide to the directors/officers. These defences, especially for derivative actions, can become extremely expensive.

While the duty to defend is normally considered to be broader than the coverage, if it is clear from the pleadings that the policy does not cover the action, there will be no duty to defend. This is an additional reason why, in the case of derivative actions, it is so important that directors and officers have the maximum protection available to them under the circumstances. A well structured and negotiated D&O insurance program may be the ultimate and best protection.

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The Law of Refusal To Deal: Distributors as Lifetime Partners?

James Musgrove

Janine MacNeil

Since 1976, Canada has had a "refusal to deal" law that allows the Competition Tribunal to order firms to take on – or prevent them from cutting off – distributors of their products in certain circumstances.

Unlike virtually all the other reviewable vertical practices under Canada's *Competition Act*, section 75 of the Act did not have an express competitive effects test requiring that the practice led or would lead to a substantial lessening or prevention of competition. The four elements of the refusal to deal provision, between 1976 and 2002, were as follows:

(a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;

(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product; and

(d) the product is in ample supply.

During the 1976–2002 period, only five applications were brought to the Competition Tribunal respecting refusal to supply, and only three of those considered section 75 in any detail. This state of affairs existed because, despite the lack of an express competitive effects test, only the Commissioner of Competition could bring

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cases, and various Commissioners over those years only brought cases when they believed there were adverse competitive effects.

That changed in 2002, when exclusive access to the Competition Tribunal for refusal to deal was taken from the Commissioner of Competition. For the first time, those directly and substantially affected by the conduct obtained the right to bring cases in their own name, with leave to the Tribunal.

At the same time that this right to bring a private case was created, the substantive law was amended to add a fifth element; that is, the requirement that the conduct have or be likely to have an adverse effect on competition in a market. However, as noted above, this element differs from the general anti-competitive effects test found in other provisions of the Act. It does not require a substantial lessening of competition, but only an "adverse" effect.

This difference makes bringing a refusal to deal case much easier than it would otherwise have been, as virtually any refusal to supply removes one potential supplier from the marketplace and, therefore, at least *prima facie,* is likely to have some "adverse" effect on competition.

The consequences of this change have been fully predictable. Indeed, if one were to assess the importance of various aspects of Canada's competition law merely on the basis of the number of cases filed with the Competition Tribunal, one would conclude that refusal to deal is the central antitrust problem of our time. Section 75 cases overwhelmingly dominate. Since 2002, there have been 15 refusal to deal cases filed, all by private parties. Since the time that private access to the Tribunal was given for refusal to deal – as well as exclusive dealing, market restriction and tied selling cases – refusal to deal has been an aspect of each and every one of the private cases brought and, in only two of the cases were other aspects added to the refusal to deal claim.

Despite the fact that many cases have been commenced, it would be fair to note that fewer than half of those cases have been granted leave by the Tribunal to proceed, and many of those have been resolved one way or another short of a hearing. The only case that has gone to a final hearing, *B-Filer Inc.* v. *Bank of Nova Scotia*, has resulted in a dismissal of the applicant's case.

Nevertheless, the fact that cases can be brought by persons cut off from supply – or even initially refused supply – despite the fact that there is no breach of contract, has a practical impact on the willingness of product suppliers to set up third-party distribution arrangements. They can have no real confidence that those arrangements are terminable in accordance with agreed-upon contract terms. Consequently, the risks of establishing such distribution arrangements are higher than they would otherwise be and, therefore, the willingness of suppliers to enter into third-party distribution arrangements, rather than vertically integrated product distribution, is lower. This suggests a lower level of distribution efficiency than would exist but for section 75 of the Act and its enforcement by private parties.

As noted above, the only refusal to deal case which has reached the hearing stage involved B-Filer Inc. B-Filer's business offered purchasers who held bank debit cards the ability to use those cards to pay participating vendors for the purchase of goods and services over the Internet. B-Filer sought an Order directing the Bank of Nova Scotia ("BNS") to accept B-Filer as a customer on usual trade terms.

On December 20, 2006, the Tribunal dismissed B-Filer's application under section 75. The Tribunal rejected B-Filer's application for a number of reasons. B-Filer has filed an appeal with the Federal Court of Appeal and that remains outstanding.

The Tribunal was clearly sympathetic to BNS's justification for cutting off supply to B-Filer, both in finding that the reason B-Filer could not obtain supply was not due to insufficient competition, and also in stating that it would have exercised its discretion in favour of BNS in any event. BNS argued that its refused to supply B-Filer because the B-Filer business model required BNS customers to disclose their confidential PIN to B-Filer, in breach of BNS rules, thereby putting bank account security at risk.

How the Tribunal will react in the more usual situation of a supplier simply seeking to restructure its distribution arrangements will be important to the future course of refusal to deal litigation.

However, the facts in this case were unusual. How the Tribunal will react in the more usual situation of a supplier simply seeking to restructure its distribution arrangements will be important to the future course of refusal to deal litigation, and for the ability of Canadian firms to ensure that their distribution systems are efficient.

In any event, the existing refusal to deal provision of the *Competition Act* represents a genuine challenge for suppliers of products in Canada. They cannot know with confidence that terminating a distribution arrangement will not lead to the cost and expense of Tribunal proceedings – perhaps involving an interim supply order – and in many cases they cannot have confidence that a final order will not be made requiring continuing supply. Consequently, at least until the law is clarified, entering into a supply arrangement in Canada will be easier than exiting from one.

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Proposed Federal Law Aims at Regulating Olympic Trade Mark Use

Karl Gustafson

Shortly after Vancouver was selected as the host site for the 2010 Winter Olympic Games, numerous news reports emerged concerning the efforts of the Canadian Games organizers to prevent local businesses from using various names and symbols associated with the Olympics.

A sometimes heated debate has developed, as long-established local businesses were targeted along with upstart opportunists. With the federal government's March 2nd introduction of Bill C-47, the proposed *Olympic and Paralympic Marks Act* (the "Olympic Marks Act"), a powerful new enforcement tool was created. Bill C-47 will provide protection for marks related to the Olympic and Paralympic Games and strengthen intellectual property rights for 2010 organizers.

In its proposed form, section 3 of Bill C-47 prohibits the unauthorized use of prescribed words and symbols (including translations or confusingly similar variations). Section 4 prohibits misleading commercial activities that falsely suggest an affiliation with the Games. Both of these prohibitions expire when the need to protect the designations and affiliations no longer exists.

Enforcement of protected Olympic marks is made easier as the standard of proof for infringement is less than that typically required.

Olympic and Paralympic marks are defined in the Act and include marks such as Canadian Olympic Committee; Faster, Higher, Stronger; Olympic; Paralympic; Vancouver Games; Games City and Whistler Games.

Section 3(1) of Bill C-47 resembles section 9 of the *Trade-marks Act* (Canada), which grants extensive protection to marks owned by "public authorities." Section 9 of the Act prohibits commercial adoption of a variety of marks, including the Royal Arms, the emblem of the Red Cross, national flags, scandalous words and others that falsely suggest a connection with a living individual.

Enforcement of protected Olympic marks is made easier as the standard of proof for infringement is less than that typically required. Under the *Trade-marks Act*, the owner of a trade mark must prove that an offending mark is "confusing with" the registered trade mark and, in that regard, the courts will assess not only the degree of distinctiveness of the marks, but will consider differences in the goods or services associated in the respective trade channels.

Under Bill C-47, the test will be whether the offending mark can be "mistaken for" any of the prescribed Olympic trade marks. This requires the enforcing party to demonstrate only that the offending mark is the same as, or so nearly resembles the Olympic marks in order to establish infringement. Accordingly, under Bill C-47, Olympic organizers will not need to prove similarity of the goods or services or the use of similar channels of trade. It is not relevant that a reasonable person would not confuse the use of a protected Olympic trade mark in a particular commercial venture, whether it be selling used cars or operating a laundry, with any official Olympic Games function. This is similar to the test that applies in relation to marks owned by "public authorities" under Section 9 of the *Trade-marks Act*.

It is important to note that there are exceptions to these prohibitions, including trade marks in use or registered before March 2, 2007 of this year and the extent of the wares and services those trade marks were used or registered as of that date. Other exceptions include official marks in which notice was given under section 9(1)(n) of the *Trade-marks Act* before March 2.

Bill C-47 provides broader protection for prescribed marks than is otherwise available under the *Trade-marks Act* because prohibited uses of trade marks are not restricted to use in association with the sale or performance of particular goods or services. Section 3 prohibits "use in connection with a business, as a trade mark or *otherwise*." However, section 3 also provides a "fair dealing" type exception by expressly permitting the use of the prescribed marks in the publication or broadcasting of news reports or for the purposes of criticism relating to the Games.

Enforcement under Bill C-47 will occur by way of an application to the Federal Court of Canada or in a provincial superior court. The Court will determine remedies appropriate in the circumstances, including an injunction, damages, an accounting of profits, punitive damages, the destruction of offending materials or the publication of a corrective advertisement. Obtaining injunctive relief has been made easier because section 6 eliminates the need for the applicant to prove that it will suffer irreparable harm.

The only persons with standing to commence an application under Bill C-47 are the Canadian Olympic Committee, the Canadian Paralympic Committee, official organizing committees and authorized persons, such as sponsors.

The Canadian Olympic Committee previously aggressively sought to restrict use of Olympic marks. Assuming Bill C-47 is passed into law, it will have a powerful new tool at its disposal. Anyone seeking to link their business with any of the names or symbols associated with the 2010 Winter Olympic Games would be well advised to proceed with great caution.

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Balancing Interests: Amendments to the *Canada Transportation Act*

François Tougas

On May 4, 2006, the Minister of Transport introduced Bill C-11 in the House of Commons to amend the *Canada Transportation Act* ("CTA"), and that Bill received Royal Assent in the early summer of this year.

Bill C-11 is similar to its predecessors, C-26 and C-44, both of which died on the Order Paper with the dissolution of prior sessions of Parliament. According to department officials, Bill C-11 focuses on "balancing the interests of communities, consumers, commuters and urban transit authorities with those of air and rail carriers." No mention is made of the balance between rail carriers and shippers. Bill C-58, introduced in the House on May 30, 2007, addressed some of those issues sought by some rail shippers for many years.

Bill C-58 (at 2nd Reading before the House was prorogued) might have clarified CTA provisions intended to protect rail shippers from abuse of market power by rail carriers. Among other things, Bill C-58 would have expressly allowed a group of shippers to initiate *final offer arbitration*, addressing a complaint that the use of this dispute settlement provision was prohibitively expensive for smaller shippers and even some not-so-small shippers.

Further, Bill C-58 would have repealed a 20-year-old provision that a shipper seeking relief respecting rates or service under the CTA first demonstrate that it would suffer substantial commercial harm if the relief were not granted. This reverse onus provision is one of the most frequently mentioned weaknesses of the CTA. There were a number of new provisions as well, and these will be discussed in future notes or articles if the proposed Bill is reintroduced into the current session of Parliament, as is expected.

Bill C-11, now law, deals with all modes of transportation. It contains three significant amendments which are summarily canvassed under these headings:

- National Transportation Policy,
- Reviews of Mergers and Acquisitions, and
- Dispute Resolution: Public Passenger Service Providers and Railway Companies.

The policy statement recognizes the dilemma inherent in reliance on competition when rates and services are provided by monopolies.

The new policy's main feature is to elevate the role that competition, economics and efficiency play in serving the needs of users.

National Transportation Policy

Bill C-11 replaces section 5 of the CTA with an updated National Transportation Policy Statement that had gone virtually unchanged since 1967, although governments had recently attempted to make similar changes. The new policy's main feature is to elevate the role that competition, economics and efficiency play in serving the needs of users, advancing the well-being of Canadians and enabling competitiveness and economic growth of areas throughout Canada.

Bill C-11 is striking in its reference to principles used in antitrust economics to benefit society in general and users in particular. The policy statement recognizes the dilemma inherent in reliance on competition when rates and services are provided by monopolies, which characterizes Canadian transportation providers across modes, particularly rail, but also air and marine carriers in certain corridors. Whether the new policy results in constraining the market power of carriers over price and service remains to be seen.

Review of Mergers and Acquisitions

Under the *Competition Act*, parties engaged in a transaction exceeding certain monetary thresholds must notify the Commissioner of Competition, allowing the Commissioner to block, approve or change the terms of such a transaction. Before the passage of Bill C-11, the CTA merger review provisions set out mandatory notification procedures for parties involved in airline industry transactions.

Bill C-11 repeals those previous provisions and replaces them with a new regime that would govern *any* federal transportation undertaking (air, rail, marine, buses, trucks, airports or marine ports). As a result, parties to a transaction involving a transportation undertaking that is notifiable under the *Competition Act* must also give notice to the Minister of Transport. Transactions involving air transportation require further notification to the Canadian Transportation Agency. In addition to the information required by the *Competition Act*, the notice must contain information that will allow the Minister to assess public interest concerns in relation to national transportation.

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Dispute Resolution: Public Passenger Service Providers and Railway Companies

Adopting the proposals in predecessor bills, Bill C-11 amends the provision definitions in the CTA to include "public passenger service provider" ("PPSP"). A PPSP is defined to mean "VIA Rail Canada Inc., a passenger rail service provider designated by the Minister or an urban transit authority."

Bill C-11 adds provisions that pertain to a process of dispute resolution between PPSPs and railway companies. When a PPSP and a railway company cannot agree on a rate, term or condition related to the operation of the passenger service on the railway's facilities, the PPSP may, after reasonable efforts to resolve the matter, apply to the Agency for a decision. Either party may also re-apply to the Agency for a new resolution if they cannot agree on the implementation of the previous decision. Notably, this procedure intends to replace the existing final offer arbitration recourse for PPSPs set out in Part IV of the CTA.

Final offer arbitration is a process available to a shipper dissatisfied with the rates or conditions of service proposed by a railway company. An independent arbitrator reviews the final offers made by each party, and selects one or the other. Predecessor bills proposed amendments to the final offer arbitration procedure which Bill C-11 did not adopt. Recourse to final offer arbitration is still available to a "railway company engaged in passenger rail services," though it remains to be seen whether the new system will gain traction over the final offer arbitration mechanism.

In contrast to the final offer arbitration procedures that involve an independent arbitrator, the above amendments give the Agency a role in dispute resolution. The dispute resolution mechanism allows for PPSPs to gain access to federally regulated railways in a manner designed to allow for compensation to the railways by the PPSP that prevents the imposition of unreasonably high rates.

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Significant Changes for Foreign Insurers on the Horizon

Carol Lyons

On April 20, 2007 Bill C-37, *An Act to amend the law governing financial institutions and to provide for related and consequential matters*, came into force. However, the changes to Part XIII of the *Insurance Companies Act* (the "Act") relating to foreign insurers are not expected to be effective until January 1, 2009. During the interval, Canada's federal insurance regulator, the Office of the Superintendent of Financial Institutions ("OSFI"), will consult with the industry concerning implementation and transition issues.

The changes – together with OSFI guidance through published advisories – will clarify the circumstances under which foreign insurers will be required to be registered in Canada and, if registered, the extent to which the foreign insurer's business will be subject to the reporting, vesting of assets and other requirements of the Act. The determination will be based on whether or not a foreign insurer is "insuring in Canada a risk."

The changes – together with OSFI guidance through published advisories – will clarify the circumstances under which foreign insurers will be required to be registered in Canada.

"Insurance in Canada of Risks"

Based on the OSFI advisory issued in September 2007, in order to determine whether or not a risk was insured in Canada, OSFI has identified four relevant indicia:

1. the location at which the interaction between the foreign insurer and the policyholder leading to the insurance of the risk takes place;
2. verbal or written representations made by the foreign insurer as to the location from which it will interact with the policyholder in performance of activities related to the policy and make decisions on all matters related to the policy;
3. the jurisdiction with which the policy is "most closely connected," having regard to the common law; and
4. where the foreign insurer promotes its insurance products (other than in the course of soliciting applications).

The advisory states that the first indicia will carry the most weight and will be determined having regard to:

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(a) the location of the policyholder when the application is solicited;

(b) the location at which the foreign insurer receives the application;

(c) the location of the person(s) who negotiate the terms and conditions of the policy on behalf of the foreign insurer;

(d) the location of the person(s) who communicate the offer to provide or renew coverage on behalf of the foreign insurer;

(e) the location at which the foreign insurer receives the acceptance of the offer to provide or renew coverage; and

(f) the location at which the policyholder receives the policy.

Examples: "Insuring in Canada a Risk"

The September advisory provides four examples of business models that OSFI will generally conclude to be "insuring in Canada a risk." These are:

1. Two or more of the activities in (a) to (f) above occur in Canada.
2. One of the activities in (a) to (f) occurs in Canada; the risks under the policy are located in Canada; the terms and conditions of the policy are prescribed by a Canadian law; and the foreign insurer represents to the policyholder that it will receive the premium payments in Canada.
3. One of the activities in (b) to (f) occurs in Canada; the foreign insurer's products are promoted primarily in Canada; and the foreign insurer represents to policyholders that it will, from Canada, interact with them in connection with their policies.
4. One of the activities in (b) to (f) occurs in Canada; the foreign insurer's products are promoted primarily in Canada; and the policy is "most closely connected" to Canada.

There are disincentives for Canadians to insure with unlicensed foreign insurers, including lack of vested assets and regulatory scrutiny.

Examples: "Insuring Outside Canada a Risk"

OSFI's September 2007 advisory states that OSFI will generally conclude a foreign insurer to be "insuring outside Canada a risk" if:

1. None of the activities referred to in (a) to (f) above occurs in Canada; or
2. No more than one of the activities referred to in (a) to (f) occurs in Canada; there is no significant promotion of the products in Canada; the policy is "most closely connected" to a foreign jurisdiction; and the foreign insurer represents that it will interact with the policyholder from outside Canada in the performance of all activities related to the policy.

Implications

Certain types of insurance either cannot be written by Canadian insurers, or are more suitably placed on the international market. Careful attention to the revised rules should provide extra flexibility for foreign insurers covering these risks that do not wish to enter the Canadian insurance regulatory system.

There are, however, disincentives for Canadians to insure with unlicensed foreign insurers, including lack of vested assets and regulatory scrutiny in Canada, and potential federal and provincial excise taxes. Although reinsurance is exempt from federal excise taxes, cedents that place business with unregistered reinsurers are not entitled to receive credit for the reinsurance, except where assets are posted in Canada.

On August 15, 2007, OSFI notified foreign companies that have branches in Canada that, following the date on which the changes come into force, risks insured outside Canada will not have to be reported on the foreign branch's books and the branch can apply for the release of "excess" vested assets, provided that the foreign company establishes to OSFI's satisfaction that the risks were insured outside Canada. On the other hand, OSFI advised that, if the foreign company insured in Canada risks located outside Canada and did not previously account for those risks on the books of its Canadian branch, the foreign company will be required to vest assets in Canada for those risks.

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Ed.: *This is an updated version of the article "Significant Changes for Foreign Insurers on the Horizon" that appeared in the Fall 2007 edition of* Corporate Insurance Brief. *Alterations were made based on the revised Office of the Superintendent of Financial Institutions advisory distributed in September 2007. This article has appeared in* Lawyers Weekly *and is an updated version of an article that was originally published on the* International Law Office *website.*

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Drafting and Protecting Renewal Rights

William Rowlands

Many commercial leases contain at least one right in favour of the tenant to renew or extend the lease at the end of its initial term. While it may be five to 10 years down the road before this provision becomes operative, the actions then taken by the tenant to exercise that right and the conduct of the tenant during the lease term can have an impact on the availability of that right. Accordingly, when negotiating and drafting renewal rights, particular care should be paid to the wording used.

Notice of Exercise

In almost all cases, the tenant will be required to give a formal notice to the landlord in order to exercise a renewal right. It is likely that elsewhere in the lease the manner of giving notice will be prescribed (such as, for example, by registered mail). If that method of notice is mandatory, in order to properly exercise its renewal right, the tenant must follow it strictly. If, rather than being set out as the only allowed method of giving notice, the lease sets out only a permissible method of notice, then the tenant may use other methods so long as the method chosen by the tenant is not less advantageous to the landlord and the notice is actually communicated to the landlord. Since the onus would be on the tenant to show that an alternate method was contemplated by the terms of the lease, no less advantageous to the landlord and actually received by the landlord, it is obviously much safer to follow the particular method described in the lease.

Since a renewal right is a benefit to one party only, the courts have generally required strict compliance by a tenant with the prerequisites to exercising such rights.

The lease will also prescribe the time period by which the notice must be given. If the tenant does not exercise its renewal right, the landlord will obviously be taking the space to market and will need some time to do so prior to the end of the tenant's lease. Accordingly, landlords require a range of six- to 12-months' notice prior to the end of the term. Typically, the more unique the space, the longer the notice period (as a longer period will be required to lease the space). Landlords may also have an outside date before which the notice cannot be given for administrative purposes.

Since a renewal right is a benefit to one party only, the courts have generally required strict compliance by a tenant with the prerequisites to exercising such rights. Accordingly, if the tenant misses the notice period, courts will generally not grant any relief to the tenant, with the result that the renewal right is lost.

Other Prerequisites

It is very common for renewal provisions prepared by landlords to require other prerequisites to the exercise of the renewal right by the tenant.

One very common prerequisite deals with defaults by the tenant. A wide variety of language is seen in leases. You might see requirements such as "the tenant not then being in default and never having been in default," "the tenant not then being in material default," "the tenant not then being in default beyond any curative period," "the tenant not then being in default and not having been previously in persistent or continuing default," or a variation or combination of the foregoing.

Another common prerequisite insisted on by landlords is that the tenant at the time of exercising the renewal right be the original tenant. In the landlord's view, this right is being granted on the basis of the identity of the original tenant and, should the lease be assigned, the landlord will argue it should not be obligated to accept a renewal term with somebody it did not do the original deal with.

A related requirement might be that, at the time of the exercise of the renewal right, the tenant actually be in possession or occupation of the premises. In this situation, a sublease to another party would put the tenant off side. Also, having the premises unoccupied may result in the tenant being unable to exercise a renewal right. Of course, if the premises were not occupied, it is far less likely that the tenant would have any interest in renewing the lease. Landlords should note, however, that occupancy has been defined by the courts to mean either physical occupancy or legal occupancy, the latter being the right to have occupancy even though not physically in occupation.

Relief from Non-Compliance

Occasionally, tenants will not exercise their renewal rights in strict compliance with the terms and prerequisites of the lease and look to the courts to give them some relief.

As indicated above, the law regards an option to renew as a privilege given to one party only and in view of such being a privilege, generally tenants must strictly comply with the terms and conditions. However, there are exceptions.

Courts have a general right to grant relief from forfeiture in leasing situations. A common example is where a landlord re-enters the premises and/or terminates a lease for non-payment of rent. If

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the tenant brings the lease into good standing shortly thereafter, the courts will generally grant the tenant relief from forfeiture and put the lease back into place.

However, this right to relief from forfeiture is very unlikely to be successful to relieve the tenant from non-compliance with a pre-requisite to a renewal right. The courts have distinguished between their jurisdiction to grant relief from forfeiture for the non-observance of terms and conditions in a lease as opposed to failure to comply with conditions precedent to the exercise of a renewal right.

Conclusion

The principles from the case law can be applied to the renewal provisions negotiated at the time the agreement to lease and lease are entered into. By paying attention to the terms and conditions at that time, the potential for subsequent disputes will be minimized. Specifically, the landlord can strive to limit the ability of the tenant to exercise the renewal option to those situations where the landlord feels it is appropriate. On the other hand, a tenant facing a landlord's standard renewal clause can negotiate for some protection, so that what it sees as minor variations from the strict terms do not have the drastic consequence of resulting in the renewal right being lost.

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Ed.: *"Renewal" rights are more often referred to and structured as "extension" rights. Although there are some technical differences in law, the issues discussed in this article generally apply whether the tenant's right is labeled a renewal or extension and, accordingly, only the term "renewal" was used. The unabridged version of this article appeared in* Real Estate Brief *Summer 2007. To subscribe to this publication, please visit our Publications Request page.*

Real Estate Title Fraud and Insurance: Recent Ontario Changes

Bruce McKenna

Over the past few years Ontario has been hit by a wave of fraudulent real estate transactions involving identity fraud; that is, people either forging or fraudulently conveying or mortgaging properties using the identity of the registered owner. Most of the property in Ontario is registered under a land registration system called the *Land Titles Act* (the "Act"). The Act is a Torrens system of title registration which guarantees the title as shown on its parcel register.

A year ago, the leading case in Ontario was the Ontario Court of Appeal decision in *Household Realty Corp.* v. *Liu,* which held that a fraudulent transfer or mortgage was valid and enforceable once registered, and that a forged mortgage was valid because the lenders did not participate in the fraud. That meant that title was considered "immediately indefeasible" (i.e., impossible to annul or void) and, in a series of Ontario cases, innocent owners lost their title or had it subject to a valid mortgage or charge and needed to apply for compensation to the Land Titles Assurance Fund (the "Fund") that exists under the Act to compensate those prejudiced by that statute. That raised important insurance issues in Ontario, because title insurers were greatly impacted by such reasoning. In Ontario, a residential title insurance policy provided coverage after the date of the policy for forgery where someone else claimed an interest in or a lien against the property. That clearly covered the identity fraud that was occurring. In addition, a title insurance policy, as an indemnity insurance policy, included a duty to defend the title and, therefore, to deal with the litigation related to such fraud and to make a claim against the Fund. Title insurers used those advantages to market their product and sold a number of policies to existing homeowners because of such concerns. At the same time, title insurers suffered because they were often bearing the costs of such claims and rarely were compensated by the Fund.

> *There have been changes to the law in Ontario that affect the growing impact of real estate title fraud on residential homeowners in the province.*

In the last year, there have been changes to the law in Ontario that affect the growing impact of real estate title fraud on residential homeowners in the province. The first was the enactment by the Province of the *Ministry of Government Services Consumer Protection and Service Moderation Act, 2006* ("Bill 152"), which amended the sections of the Act impacted by title fraud. The second was the decision of the Ontario Court of Appeal in *Lawrence* v. *Wright* ("*Lawrence*") in which the court reversed the position previously taken by Ontario courts in respect of title fraud. The third was an amendment to the Rules of Professional Conduct for lawyers in Ontario.

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Bill 152

Bill 152 solved the problem by making it clear that, in cases of fraudulent conveyances, the deferred indefeasibility model operates. That reversed the position taken in all of the cases decided before last fall and means that the initial transfer or charge is invalid. However, a subsequent transfer from the interim owner to an innocent purchaser or chargee would be indefeasible.

Clearly the deferred indefeasibility approach exposes title insurers to greater risk. A title insurer was never at risk when it insured a fraudulent purchaser or lender because of the policy exclusions. However, previously an "innocent" insured purchaser or lender would have obtained good title and the title insurer would not be called upon to compensate the insured as it was the Fund that was compensating the true owner. It should be noted that Bill 152 affirms that the Fund is a fund of last resort and that a title insurer is not able to collect from the Fund.

Lawrence Case

The Ontario government, in addition to enacting Bill 152, also made submissions when the *Lawrence* case was heard last fall by five Justices of the Court of Appeal, including Ontario's Chief Justice. The Court spent some time reviewing the position put forward by the Province of Ontario as to the deferred indefeasibility model. The Court looked at the earlier cases, including the reasoning set out in the Court of Appeal's decision in *Household Realty* and concluded "both the result and that reasoning to be incorrect" and adopted the deferred indefeasibility model.

Rules of Professional Conduct

Earlier this year, the body that regulates lawyers in Ontario, the Law Society of Upper Canada, joined the fight against title fraud by amending the Rules of Professional Conduct for Ontario lawyers to require that lawyers acting for both purchasers and lenders, as is commonly the case, provide both of the clients all material information relevant to the transaction in writing. The commentary to the Rule suggests looking for matters such as recent price escalation or recent transfers, even if not instructed to do so by the parties. The goal is to assist the parties in discovering fraud or other illegal activity.

Impact on Title Insurance

In Ontario, it is still prudent for a purchaser or lender receiving a conveyance of a home to title insure for several reasons. First, if the conveyance is fraudulent, the party could be the "intermediate owner" and the title or charge would be void as it was made pursuant to a fraudulent instrument under the current law. Second, the title insurance policy covers future fraudulent acts such as a later fraudulent transfer or charge. Third, as a title insurance policy is an indemnity policy, a title insurer is obliged to pay the litigation costs to protect the title that the title insurer has insured whether as an intermediate owner or a true owner obtaining rectification of title. Fourth, if a property owner loses title or has title subject to a charge, a title insurer would have an obligation to pay under the policy once the title question has been settled. A claim for compensation under the Act would require going through the process of showing, in addition to proving the claimant is unable to get compensation from other sources, that the claimant has met the obligation of doing reasonable due diligence (as set out by the Director of Titles) and the claim has been made within a six-year time limitation period. In addition to the cost and delay of applying to the Fund, these are all possible ways to lose compensation. The change to the Rules of Professional Conduct may disclose and eliminate some fraud, but won't eliminate the need for such coverage. Accordingly, a purchaser or lender initially acquiring title to a home will still wish to obtain title insurance coverage.

In Ontario, it is still prudent for a purchaser or lender receiving a conveyance of a home to title insure for several reasons.

Some Final Remarks

Since Bill 152 and the *Lawrence* case do not eliminate the risk of title fraud itself, only modify which parties maintain title and which need to claim compensation from the Fund, title insurers still have an insurance product that has a strong position in the residential market in Ontario. Unfortunately, since it is now clear that title insurers cannot obtain compensation from the Fund and innocent insureds, such as lenders who commonly purchase title insurance, will not be given the insured title or charge, the cost of providing that coverage may result in title insurance premium increases unless this wave of title fraud in Ontario is brought under control.

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Ed.: *This article is edited and abridged. Without cost or obligation, the unexpurgated version is available directly from Bruce McKenna.*

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Fiduciary Duties; Employer Responsibilities; Employee Mitigation; Negligent Investigation; Canada-U.S. Tax Treaty

This section offers a brief note or comment on an area or point of law (or information source) that may be of interest.

1 Broadening of Fiduciary Duty of Lawyers and Other Professionals?

The Supreme Court of Canada's recent decision in *Strother* v. *3464920 Canada Inc*. clarifies (and arguably expands) the fiduciary duties owed by lawyers to their clients. It makes clear that while the scope of a lawyer's retainer is determined by contract, there are fiduciary duties outside of the contract which overlay and govern the solicitor-client relationship. *Strother* was heard by a nine-member Supreme Court which split five-to-four on all but one minor issue under appeal.

Writing for a five-member majority of the Supreme Court of Canada, Binnie J. upheld the Court of Appeal's finding that Strother had breached the fiduciary duty he owed to Monarch. Binnie J. held that while a lawyer does not have a duty to alter a past opinion in light of a subsequent change of circumstances, that principle did not assist Strother. Monarch's 1998 retainer either expressly or impliedly required Strother to advise Monarch that new developments had rendered his earlier advice to be no longer operative. The fact that Strother personally benefited from not advising Monarch of the new scheme was clearly of concern to Binnie J.

The dissenting decision was written by Chief Justice McLachlin and the essence of her reasoning is captured in this passage:

> [W]hether a conflict between two clients exists is dependent on the scope of the retainer between the lawyer and the client in question. The fiduciary duties owed by the lawyer are molded by this retainer, as they must be in a world where lawyers represent more than one client.

Expanding on this point, McLachlin C.J. held that a lawyer's duty of loyalty to a client is not "a duty in the air. It is attached to the obligations the lawyer has taken pursuant to the retainer."

McLachlin C.J.'s reason for restricting the duties owed by lawyers to clients, to duties that arise specifically from the retainer, relates to her concern that if the duty of loyalty was left as a "free-floating" duty, the potential for conflicts would be vast and lawyers would be prevented from ever acting for two clients which compete in the same business and such a result would be inimical to modern commerce.

In summary, *Strother* is an important new decision which confirms that lawyers have a higher duty to their clients than found in the strict terms of an existing retainer they have with clients. While a lawyer has no duty to advise a client of any change to an opinion after the lawyer-client relationship has ended, if the lawyer continues to act for the client, there is a duty of loyalty to the client to keep them apprised when the opinion is no longer operative. It is the writer's view that this decision should not be seen as restricted to lawyers but will also have application to other professionals, such as those providing financial advisory services.

—**Gary Fraser**, Lang Michener LLP (Vancouver)

2 Employer Responsibilities

Nowadays employers are required to protect employees from co-workers. A court views employer even-handedness in the face of bullying as an abdication of responsibility. As one court said, "To treat the perpetrator of abuse and his victim identically is unjust and unconscionable."

...

Employers must also investigate all allegations of harassment and the investigator must be skilled and far removed from the conflict. Even the habitual complaints of the chronic malcontent can no longer be safely dismissed as out of hand. To do so flirts with a significant lawsuit.

—**Howard Levitt**, Lang Michener LLP (Toronto)

Ed.: *These short segments taken from an article that appeared in Howard's weekly column on the first page of the Working section of the* National Post *entitled "Ruling in Favour of Respect – Pendulum Has Swung to Side of Employee."*

3 Mitigation in Employment

Recent cases have shed light on the lower limits prescribed by courts on an employee's duty to mitigate, and on the higher burden on employers to prove that damages suffered during the notice period be reduced because of actual or potential mitigation income.

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Given the time that it takes for an action to reach trial, employers going into a trial have the opportunity to compile comprehensive evidence of the employee's complete mitigation efforts, full details of the economic and business conditions during the notice period, as well as all job opportunities that may have existed. This wealth of information should ensure that employers are more successful than ever.

In fact, although the obligation to mitigate remains a duty, it is not onerously imposed on a terminated employee. So too, it remains a defence available to the employer, but one whose burden of proof is so high that only the exceptional case will be successful.

—**Constance Olsheski**, Lang Michener LLP (Toronto)

Ed.: *The above is but a small edited segment of an article published in* Dismissal and Employment Law Digest *and entitled "Mitigation: The Extent of the Duty and the Limitation of the Defence."*

4 Negligent Investigation

Ed.: Here is a short edited excerpt of the majority decision of the Supreme Court of Canada case, Hill *v.* Hamilton-Wentworth Regional Police Services Board*. The full text and a lengthier abridged version of the majority judgment delivered by Chief Justice McLachlin, appeared in Issue 51 of Lang Michener's* S.C.C. L@wLetter*, prepared by Eugene Meehan, Q.C.*

[The]…police are not immune from liability under the Canadian law of negligence, that the police owe a duty of care in negligence to suspects being investigated, and that their conduct during the course of an investigation should be measured against the standard of how a reasonable officer in like circumstances would have acted. The tort of negligent investigation exists in Canada, and the trial court and Court of Appeal were correct to consider the appellant's action on this basis. The law of negligence does not demand a perfect investigation. It requires only that police conducting an investigation act reasonably. When police fail to meet the standard of reasonableness, they may be accountable through negligence law for harm resulting to a suspect.

It has not been established that recognizing a duty of care in tort would have a chilling effect on policing, by causing police officers to take an unduly defensive approach to investigation of criminal activity. In theory, it is conceivable that police might become more careful in conducting investigations if a duty of care in tort is recognized. However, this is not necessarily a bad thing. The police officer must strike a reasonable balance between cautiousness and prudence on the one hand, and efficiency on the other. Files must be closed, life must move on, but care must also be taken…

Recognizing sufficient proximity in the relationship between police and suspect to ground a duty of care does not open the door to indeterminate liability. Particularized suspects represent a limited category of potential claimants. The class of potential claimants is further limited by the requirement that the plaintiff establish compensable injury caused by a negligent investigation. Treatment rightfully imposed by the law does not constitute compensable injury. These considerations undermine the spectre of a glut of jailhouse lawsuits for negligent police investigation.

My colleague Charron J.…states that recognizing tort liability for negligent police investigation raises the possibility that persons who have been acquitted of the crime investigated and charged, but who are in fact guilty, may recover against an officer for negligent investigation. This, she suggests, would be unjust.

This possibility of "injustice" – if indeed that is what it is – is present in any tort action. A person who recovers against her doctor for medical malpractice may, despite having proved illness in court, have in fact been malingering. Or, despite having convinced the judge on a balance of probabilities that the doctor's act caused her illness, it may be that the true source of the problem lay elsewhere. The legal system is not perfect….

5 Protocol to the Canada-U.S. Tax Treaty

On September 21, 2007, Canada and the United States signed a Protocol agreeing to significant amendments to the *Canada-U.S. Tax Treaty*. The Protocol will come into force once ratified by both governments. If ratified in 2007, it will come into force generally as of January 1, 2008.

While key elements of the proposed amendments have been broadcast for some time (elimination of cross-border withholding tax on interest and extension of treaty benefits to U.S. LLCs, for example), the Protocol will implement additional, far-reaching changes in the context of cross-border structures.

—**Peter Botz**, Lang Michener LLP (Vancouver)

—**Kalle Soomer, Q.C.**, Lang Michener LLP (Toronto)

Ed.: These paragraphs introduce a detailed article issued as a Tax Law Alert *on October 3, 2007. To subscribe to Lang Michener publications, please visit our Publications Request page. The writers may also be contacted for more information on these topics or for advice relating to specific circumstances or structures.*

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Miscarriage of Justice; Runner Razed/Rises; Waifs and Strays

Editor: *This segment offers colleagues and readers an opportunity to briefly comment or read about a life experience, an accomplishment, an acknowledgement, a powerful image, an incredible experience or a simple "slice of life." I would be most pleased to consider publishing one of yours or one that pertains to a friend, family member or colleague. (I am always open to suggestion.)*

1 Miscarriage of Justice

Ed.: *In 1960, as a young teenager, Steven Truscott was on death-row to be hanged after being convicted of the rape and murder (by strangulation) of Lynne Harper, a 12 year old schoolmate. Jailed in Goderich, Ontario, Steven thought he would never reach his 15th birthday as he heard construction sounds just outside his prison walls and surmised gallows were being built for him. That nightmare was compounded by the fact that, in his case, there was a "miscarriage of justice" and, after nearly 50 years of effort, Steven Truscott was vindicated. Below is a short edited segment from the more than 300-page Judgment of the unanimous decision of the Ontario Court of Appeal.*

Mr. Truscott returns to the judicial system one last time seeking vindication, [and] this time [he] is successful. Based on evidence that qualifies as fresh evidence in these proceedings, we are satisfied that Mr. Truscott's conviction was a miscarriage of justice and must be quashed. We are further satisfied upon a review of the entirety of the evidentiary record and the additional material available to this court and not previously judicially considered, that if a new trial were possible, an acquittal would clearly be the likely result. The interests of justice dictate that we make that order. Mr. Truscott should stand acquitted of the murder of Lynne Harper.

…

For the reasons [previously set out], we are satisfied that the fresh evidence and the new material before this court have significantly undermined the strength of each of the four factual pillars of the Crown's case. In contrast, much of that material has given added force to the evidentiary foundation of the defence case.

[As for] the crucial issue of the time of Lynne Harper's death, the pathology evidence that we have admitted as fresh evidence renders the expert medical evidence heard in the prior judicial proceedings, to the effect that Lynne must have died before 8 p.m. on June 9, scientifically untenable. To the extent that the Crown relied on this evidence at trial and on the first Reference to demonstrate that the appellant had the exclusive opportunity to murder Lynne Harper, that key pillar of the Crown's case is now gone.

For these reasons, dealt with in considerably more detail [elsewhere in this Judgment], we have concluded that, while it cannot be said that no jury acting judicially could reason-

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ably convict, we are satisfied that if a new trial were possible, an acquittal would clearly be the more likely result. Having regard to the highly unusual circumstances of this Reference, we have determined that the most appropriate remedy is to enter an acquittal.

Ed.: *As for the pubic apology given by the Attorney General on behalf of the Government, Steven Truscott found it to be insincere, and on the day he was vindicated, Steven was prompted to comment that he had "more faith in the Court system today than [he did] yesterday."*

2 Runner Razed, Runner Rises

Ed.: *In the early spring of this year,* ***Eugene Meehan, Q.C.*** *was training to run the Ottawa Marathon and was averaging 25 to 50 miles a week when, one Sunday morning, he woke up and discovered he couldn't walk. In the E.R., he learned that he was probably suffering from Guillain-Barré Syndrome ("GBS"), a moderate case he was assured, as he was only "unable to walk," but other people can't move a thing except their eyelids, and a smaller number can't move their lungs, although the brain remains unaffected. It's a rare disease, 1 in 100,000, or, as dubbed by Eugene, a "drive-by disease." Initially thinking it would be a few hours in the E.R., Eugene soon found out that five hours would become become five days and five days would become five months. Eugene recorded his experiences and here is a short edited segment on a few topics:*

Rehabilitation: In the rehabilitation section of the hospital, there are truly stories of triumph and transcendence, but many more stories of despair and destruction. There are few happy endings. The level of suffering – physically or mentally, and often both – is beyond expression. I have meals with fellow patients here every day. Tears get quietly shed. Few people leave here whole. My social worker Rita tells me, "The most powerful gift you can give someone is simply listening." I listen a lot. If asked to help, I do or will. There are more than a few breakfasts that end with a hug, given or received.

The Denouement: Where am I now? Well, since being discharged from hospital in August, I have gone to the CBA Annual Meeting in Calgary, argued a tax case in the Federal Court of Appeal and taken a break with Giovanna [my spouse], just the two of us, and I am now back at work.

For most of the summer, I was chair-bound. I could walk short gym distances with walkers or canes and, starting in the late summer, I could even walk a wee bit on a treadmill holding on. The real world, however, is not set up for people who can walk short gym distances with walkers or canes, and treadmills tend to be only in gyms and you can't use them to walk around. I made good progress by the end of the summer and was even seen at my office walking unassisted – well, walking somewhat like a penguin at first. It is always difficult to make predictions about recovery. That's what's crazy about this. No-one knows, including the doctors. But I kept working at it. Sometimes to get out of a problem, you have to go through it.

Giovanna was always optimistic: "Not only will you walk, you're going to run. You're going to dance with me." She was right.

Ed.: *Taken largely from Eugene's note, here is a succinct summary of GBS. It affects the peripheral nervous system, not the central nervous system, as does MS (multiple sclerosis) or ALS (which is commonly referred to as Lou Gehrig's Disease). GBS attacks either the nerves themselves (axonal) or the covering over the nerves (myelin). If the axons or the myelin sheath recover, they do so at approximately one millimetre a day – an inch a month. Up to 5% die from it, 20% do not recover and 75% do. Eugene is now fully back in the saddle at work. For a full copy of how Eugene spent his summer vacation, email him direct at emeehan@langmichener.ca.*

3 Waifs and Strays?

Ed: *Les Vandor writes* LegalCounsel, *a legal column for CanWest MediaWorks. The column concludes with legal trivia or comment under the heading "LegalSpeak." Here is one:*

Bona Vacantia is not really Italian for have a nice vacation. It refers, in law, to goods that have no owner such as driftwood by the lake. Some exceptions include royal game and believe it or not, "waifs and estrays" which belong to the Crown. Waifs, in this case, refer to goods thrown away. Estrays refer to wild animals. Neither refer to the way your children look on a Sunday morning!

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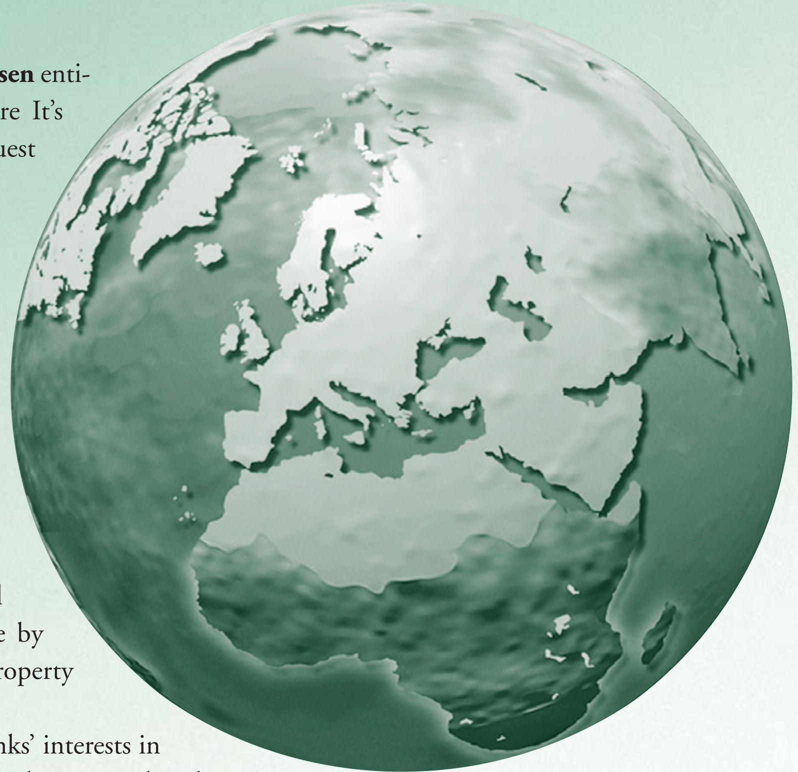
Letters & Comments



1 Requests for the unabridged article by **Ron Petersen** entitled "A Warning to Refereeing Associations Before It's Game Over" continue to come in, including a request from a high-level government policy advisor.

2 Permission was granted to BAR-eX Communications Inc. (jointly owned by Teranet Enterprises Inc., The Law Society of Upper Canada and LawPRO®) to publish the unabridged version of the article by **Celia Hitch** entitled "Fixing the Unfixable: Conflicts Between Permitted Uses and Exclusivity Rights" that appeared in the fall issue of ***In Brief***.

3 From a manager of one of western Canada's real estate boards, this edited comment on the article by **Lindsay Goldberg** in the last ***In Brief***: "Is your Property Safe from Canadian Government Seizure?"

"I was interested to read the part about two banks' interests in properties and the government's position that they had to prove that they were not involved in illegal activity. That's mind-boggling. I thought Canadians had to be proven guilty and not the other way around? The implications are interesting for a landlord if one of the tenants decides to establish a grow-op or drug lab or such. It seems credit checks, verifying references and periodic visits to the property aren't sufficient. Is the government expecting that the landlord either move in with the tenant or install cameras to monitor what is going on? Wouldn't that be popular?"

Lang Michener, In Brief…

Events

Commercial Real Estate Leases

November 26 and 27, 2007
Metropolitan Hotel Vancouver
Vancouver, BC

This two-day conference provides those involved in landlord/tenant relationships with practical information on operating cost issues, the trends in commercial lease negotiations, the latest leasing issues for franchises, and incentives and inducements for landlords and tenants. **Stacey Handley** will be speaking at this conference.

The Canadian Institute's 14th Annual Advertising and Marketing Law Conference

January 24 and 25, 2008
St. Andrew's Club
Toronto, ON

The Canadian Institute's 14th Annual Advertising and Marketing Law conference is the country's premier learning and networking experience. Canada's leading experts will be providing key updates and cutting edge analysis of managing contest development, legal challenges of advertising online and developments regarding cost of credit disclosures, ambush marketing and the *Olympic and Paralympic Marks Act*. **David Young** and **James Musgrove** will both be speaking at this conference.

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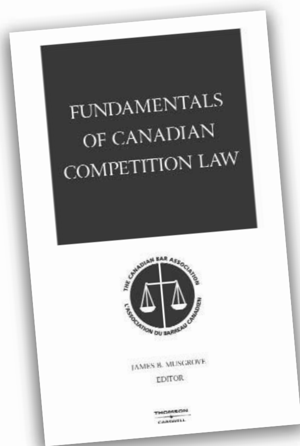
Deals

Teck Cominco Limited Acquires Aur Resources Inc.

In September 2007, Vancouver's Teck Cominco completed its C$4.1 billion acquisition of Toronto-based Aur Resources. Teck Cominco launched a takeover bid for Aur Resources on July 17, 2007. Teck Cominco is a Canadian diversified mining and metals company listed on the Toronto Stock Exchange and New York Stock Exchange. Aur Resources is a Canadian mining company that was listed on the Toronto Stock Exchange and the Santiago Stock Exchange. Lang Michener represented Teck Cominco with a team from Toronto that included **Geoffrey Myers**, **Hellen Siwanowicz**, **John Conway**, **Denno Chen** and **Parminder Batra** (securities), **James Musgrove**, **Daniel Edmondstone** and **Janine MacNeil** (competition) and **Kalle Soomer** (tax) and from Vancouver, **Amandeep Sandhu** and **Sandra Knowler** (securities) and **François Tougas** and **Steve Szentesi** (competition). Assistance was provided by articling student **Corin Bowman** and summer students **Sarah Kilpatrick**, **Laura Kraft**, **Damien Liddle** and **Natasha Wirtanen**.

News



New Publication – *Fundamentals of Canadian Competition Law*

James Musgrove, Chair of Lang Michener's Competition & Marketing Law Group is Editor-in-Chief of the newly released CBA/Carswell publication *Fundamentals of Canadian Competition Law*. Several individuals from the firm contributed to this publication including **Janine MacNeil**, **Michael Flavell**, **Martin Masse**, **Donald Plumley** and **Alison Hayman**. The book provides lawyers and law students who are interested in Canadian competition law with a brief overview of the subject. The publication provides a summary of the *Competition Act* and chapters focused on guidelines and policy statements. For more information, or to obtain a copy of the book, please go to www.carswell.com.

Announcements

David Young Appointed Chair of National Privacy and Access Law Section (CBA)

We are pleased to announce that David Young has been appointed Chair of the National Privacy and Access Law Section of the Canadian Bar Association ("CBA"). David has served as a member of the Marketing Practices Committee, Competition Law Section and is a past chair of the National Business Law Section.

David is Co-Chair of the firm's Privacy Law Group, Head of the e-Commerce Practice Group and a member of the Competition & Marketing Law Group.

Lai-King Hum and Annie Thuan Join Lang Michener's Toronto Office as Associates

Lai-King Hum
Employment & Labour Law
Toronto, ON

Annie Thuan
Real Estate Law
Toronto, ON

We are pleased to advise that and Lai-King Hum and Annie Thuan have joined the Toronto office of Lang Michener. Lai-King Hum is an associate in the Employment and Labour Law Group. Lai-King's practice is focused in the areas of employment law and commercial and corporate litigation. Annie Thuan joined the firm in the Toronto office as an associate in the Real Estate Law Group. Annie's practice is focused in the areas of environmental and aboriginal law.

Mary Jane Bennett Joins Lang Michener's Vancouver Office as Associate Counsel

Mary Jane Bennett
Transportation Law
Vancouver, BC

We are pleased to advise that Mary Jane Bennett has joined the firm as associate counsel in the Vancouver office. Mary Jane was most recently with the Canadian Transportation Agency, where she served from 1998 until May of this year. She has over twenty years of practice experience, primarily in litigation and administrative law. Her litigation experience includes appearances before the Supreme Court of Canada.

Cyndee Todgham Cherniak Joins Lang Michener's Toronto Office as Counsel

We are pleased to announce that Cyndee Todgham Cherniak has joined the International Trade Law Group and the Business Law Group as counsel in Lang Michener's Toronto office in October 2007. Her wide ranging practice includes, but is not limited to, international law, including World Trade Organization ("WTO") and Regional Trade Agreements ("RTA") analysis, interpretations, and opinions, government relations strategies, and dispute settlement and North American Free Trade Agreement ("NAFTA") verifications.

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New Associate Announcement

We are pleased to announce that **Robert Edmonds**, **Zachary Kerbel**, **David Mendicino**, **Esther Rossman** and **Aaron Rousseau** rejoined the firm in the Toronto office after their recent Call to the Bar. Rob joins the Business Law Group, Zach joins the Commercial Litigation Group, David joins the Corporate Finance/Securities Law Group, Esther joins the Competition, Marketing, Franchise & Distribution Law Group and Aaron joins the Employment and Labour Law Group.

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Toronto, ON

Zachary Kerbel
Commercial Litigation Law
Toronto, ON

David Mendicino
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Lang Michener publishes newsletters on current developments in specific areas of the law such as Competition & Marketing, Employment & Labour, Insurance, Intellectual Property, International Trade, Mergers & Acquisitions, Privacy, Real Estate, Securities and Supreme Court of Canada News.

InBrief offers general comments on legal developments of concern to business and individuals. The articles in *InBrief* are not intended to provide legal opinions and readers should, therefore, seek professional legal advice on the particular issues which concern them. We would be pleased to elaborate on any article and discuss how it might apply to specific matters or cases.

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