WeirFoulds LLP

LITIGATION UPDATE

DECEMBER 2011

DEVELOPMENTS OF INTEREST IN CASE LAW

(a) Landlord and tenant – Repudiation of Lease – Companies' Creditors Arrangement Act Proceedings

***In the Matter of the Bankruptcy of TNG Acquisition Inc. (successor estate of NexInnovations Inc., a bankrupt) of the City of Mississauga, in the Province of Ontario* 2011 ONCA 535 (Released July 28, 2011)**

In June 2001, EDS Canada Corp. ("EDS") subleased premises to NexInnovations ("Nex"). On October 2, 2007, Nex obtained creditor protection under the CCAA (the "Initial Order"). The Initial Order gave Nex the right to "vacate, abandon or quit any leased premises and/or terminate or repudiate any lease…"

The chief restructuring officer for Nex sent EDS a letter on February 22, 2008 repudiating the lease, effective March 21, 2008. The letter included an acknowledgement to be signed and dated by EDS. EDS never acknowledged, accepted, or returned the repudiation letter.

Nex abandoned the premises effective March 21, 2008. EDS immediately attempted to find a new tenant to re-let, but was unsuccessful.

On April 8, 2008, Nex was declared bankrupt. On August 21, 2008, EDS submitted a proof of claim to the trustee in bankruptcy of Nex (now known as TNG Services Inc.) (the "Trustee") for its "unrecoverable expenses" during the entire term of the lease up to January 30, 2012.

On September 18, 2008, the Trustee issued a disclaimer of the lease.

On December 29, 2008, the Trustee obtained a sale approval and vesting order which, among other things, annulled the Nex bankruptcy order. The same order transferred all Nex assets to TNG Acquisition Inc. TNG was then adjudged a bankrupt. All claims formerly against Nex became claims against TNG and all Nex assets became available to satisfy such claims.

On October 13, 2009, the Trustee disallowed the bulk of EDS's claim for unrecoverable expenses.

Hewlett-Packard (Canada) Co. ("HP"), as successor to EDS, moved to have the disallowance set aside and the claim declared to be valid. Justice Campbell dismissed the motion.

At issue on appeal was the legal effect of a notice of repudiation of lease given during *Companies' Creditors Arrangement Act* ("CCAA") proceedings.

Both the motions judge and appellate court agreed with the Trustee that the lease had not been forfeited prior to bankruptcy because the tenant could not unilaterally repudiate the lease, since repudiation does not in and of itself bring an end to the lease. While the tenant had given notice of repudiation, the landlord had not responded to the notice prior to bankruptcy. Additionally, the landlord continued to accept rent payments after receipt of the repudiation letter. Therefore, the Trustee was entitled to disallow the claim.

The Court of Appeal held that the landlord's submission essentially was asking the court to find that repudiation and termination are one and the same thing in a CCAA proceeding. They are not. The court explained:

> *To terminate a lease is to bring it to an end. Repudiation of a lease, on the other hand, does not in itself bring the lease to an end. It occurs when one party indicates, by words or conduct, that they no longer intend to honour their obligations when they fall due in the future. It confers on the innocent party a right of election to, among other things, treat the lease as at an end, thereby relieving the parties of further performance, though not relieving the repudiating party from its liabilities for breach.*

One party cannot unilaterally end its obligations of the lease. In absence of proof of both acceptance of repudiation and notification of acceptance, the lease continued.

In this case, the landlord did not acknowledge or accept the repudiation. Accordingly, notwithstanding the repudiation letter, the relationship between EDS and Nex remained that of landlord and tenant, and the lease had not been brought to an end. Therefore, it was susceptible to statutory disclaimer by the Trustee following commencement of bankruptcy and the claim was properly disallowed. The appeal was dismissed.

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(b) Comment on Recent Court Ruling in Occupy Toronto

***Batty v City of Toronto* (Released November 21, 2011)**

Batty v City of Toronto[1] marked the first in a series of court rulings in the "Occupy movement," applying the *Canadian Charter of Rights and Freedoms*[2] within the municipal context. Shortly after the *Batty* decision, courts in British Columbia and Alberta heard similar applications from the City of Vancouver and City of Calgary. Protesters were ordered to comply with local by-laws and remove all tents and structures from Art Gallery Land in Vancouver[3] and Olympic Plaza in Calgary.[4]

Occupy Toronto Ruling

On October 15, 2011, protesters began to occupy St. James Park, a 3.2-acre park located about three blocks east of the City's financial core.[5]

On November 15, City of Toronto staff served many protesters with a notice under the *Trespass to Property Act*,[6] stating that protesters were prohibited from erecting tents or other structures on the park and from using the park between 12:01 a.m. and 5:30 a.m.[7]

The protesters immediately began an application challenging the constitutional validity of the City's trespass notice.[8] On the afternoon of November 15, the Ontario Superior Court granted the protesters an interim stay order until the hearing of the application and the release of the court's reasons.[9]

At the issue was whether the City, by issuing the trespass notice, had violated the protesters' rights under Section 2 of the *Charter* by infringing their freedoms of conscience, expression, peaceful assembly and association.[10]

After hearing the application on November 18 and 19, with supplementary email submissions filed on November 20, the Court released its decision on November 21, dismissing the protesters' constitutional challenge.

The City's Order Constituted a Reasonable Limit Under the *Charter*

Justice Brown held that the structures and tents erected by the protesters in St. James Park constituted a mode of expression protected by Section 2 of the *Charter*.[11] Thus, the City's enforcement infringed the protesters' Section 2 freedoms by restricting the protesters' expressive activity, assembly and association, as well as the manifestation of their beliefs.[12]

However, Justice Brown upheld the City's trespass notice. The Court found that the limitations imposed on the protesters' rights were justified under Section 1 of the *Charter* as "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[13]

What Constitutes "Reasonable Limits" by the City?

The City relied upon its Parks By-law in Chapter 608 of the Toronto Municipal Code as authority to invoke the enforcement mechanisms of the *Trespass to Property Act*.[14] The Court in *Batty* confirms that limits contained in municipal by-laws satisfy the "prescribed by law" requirement as their adoption is authorized by statute.[15] Applying this analysis, the Court rejected the protesters' argument that the Parks By-law was overbroad and vague.[16]

The Court then applied the *Oakes* test to ascertain whether or not the limit can be demonstrably justified in a free and democratic society.[17] First, the reasonable limits must have a pressing and substantive objective; and second, the measure chosen by the City to achieve that objective must be proportional to the objective.[18]

Applying the *Oakes* test Justice Brown concluded that the trespass notice was constitutionally valid.

First, by ordering the protesters to take down their structures and vacate the park during the midnight hours, the City's objective was to balance fairly the different uses of public parks. This objective carried sufficient importance.

Second, the measures taken also met the three aspects of the proportionality test:

1. The limiting measures met the rational connection test:[19] The City issued the trespass notice, asking the protesters to "share the park with other people in Toronto and to afford the neighbouring community some peace and quiet during the midnight hours".[20]

2. The measures impaired the *Charter* rights at issue as little as possible:[21]

   (a) The City was not imposing an absolute ban on the protesters' political expression or associational activities. Protesters could continue to protest in the park for close to 19 hours a day.[22]

   (b) The Court rejected the argument that a less intrusive means for the City would be to redirect the non-protesting public to other parks. Justice Brown notes that if every protest group possesses a constitutional right to occupy a park of their choice, the result would be a "tragedy of the commons" rather than greater popular empowerment.[23]

   (c) The Court also rejected the submissions that the City had a duty to consult with the protesters. Aside from issue of aboriginal rights and interests, municipalities have no constitutional obligation to consult with the protesters before enforcing its by-laws.[24] Justice Brown noted whether "a municipality should consult with those who occupy public spaces before seeking to limit their use of those spaces is a matter of political prudence".[25]

   (d) That the City did not include a policy providing more details in which an exemption permit from the Parks By-law would be issued does not render the by-law constitutionally invalid.[26]

3. The measures' deleterious effects were proportional to their salutary effects:[27] The protesters had other means to express their message, including continued use of the park under terms, while other Torontonians could resume use of the park.

The City as the authority representing the greater community was entitled to reopen the park to the rest of the city by enforcing the by-law.

Concluding Remarks: Obligation to Share Urban Space Fairly

In the opening to his reasons Justice Brown began by asking: how do we live together in a community and how do we share common space? The *Charter*'s preamble, he suggested, reminds us that we are not unconstrained free actors but are all subject to the "rule of law".[28]

Justice Brown noted that "the expression of those questions has assumed a specific form – the creation of an encampment" in St. James Park.[29] In effect, the protesters argued that the Charter sanctioned their "unilateral occupation of the Park" indefinitely, because of the importance of the message and the way in which they convey it—"by taking over public property".[30]

Justice Brown took a different approach. He emphasized that the *Charter* does not "remove the obligation on all of us who live in this country to share our common urban space in a fair way."[31] The *Charter* does not allow us to "take over public space without asking, exclude the rest of the public from enjoying their traditional use of that space, and then contend that they are no obligation to leave."[32] Common sense still must play a very important role in balancing the competing rights.[33]

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[1] 2011 ONSC 6862 [Batty] (dated November 21, 2011).
[2] Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[3] 2011 BCSC 1647 (dated December 1, 2011).
[4] 2011 ABQB 764 (dated December 6, 2011).
[5] *Batty* supra note 1 at paras 3 & 24.
[6] RSO 1990, c T21.
[7] *Ibid* at para 4.
[8] *Ibid* at para 6.
[9] *Ibid* at para 7.
[10] *Charter* supra note 2, s 2.
[11] *Batty* supra at para 72.

[12] *Ibid* at para 75.
[13] *Ibid* at para 124; Charter supra note 2, s 1.
[14] *Ibid* at para 82.
[15] *Ibid*.
[16] *Ibid* at paras 83-90.
[17] *Ibid* at para 79, citing *R v Oakes*, [1986] 1 SCR 103.
[18] *Batty* supra note 1 at para 79.
[19] *Ibid* at paras 97-99.
[20] *Ibid* at para 97.
[21] *Ibid* at paras 100-121.
[22] *Ibid* at para 104.
[23] *Ibid* at paras 112-113.
[24] *Ibid* at paras 114.
[25] *Ibid* at para 115.
[26] *Ibid* at paras 116-121.
[27] *Ibid* at paras 123.
[28] *Batty* supra note 1 at para 1.
[29] *Ibid* at para 3.
[30] *Ibid* at para 10.
[31] *Ibid* at para 14.
[32] *Ibid* at para 15.
[33] *Ibid* at para 13.

(c) Administrative Law – Labour Law – Standard of Review-Labour Arbitration

***Nor-Man Regional Health Authority v Manitoba,* 2011 SCC 59 (Released December 2, 2011)**

This decision concerned the appropriate standard of review of an arbitrator's finding that an estoppel claim barred the union's grievance. The union applied for judicial review of the decision. The application was reviewed on the standard of reasonableness and dismissed. On appeal the Manitoba Court held that the arbitral decision should have been reviewed on the standard of correctness and overturned the arbitrator's ruling.

The Court unanimously held that the standard of review was reasonableness and granted the employer's appeal.

The Court noted that an arbitrator's mandate is unique, informed by the particular context of labour relations, and that arbitrators are not required to apply legal principles as a court would. The Court also noted that estoppel, applied in this context, is an arbitral remedy and that the application of estoppel in a labour arbitration should not be confused with the application of promissory estoppel or other equitable remedies. The Court highlighted the centrality of this context in finding that an arbitrator's application of an estoppel remedy is not a question "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" but instead a decision that falls squarely within the expertise of the arbitrator, and therefore reviewable on the standard of reasonableness. The Court's analysis placed a particular emphasis on the broad discretion that labour arbitrators are granted by their governing statutes and by the nature of the Canadian labour relations regime, which the Court held requires flexibility in crafting remedies in light of the ongoing relationship between the employer and the bargaining agent.

The Court concluded that the arbitrator's application of estoppel was reasonable as it was "reasonably consistent with the objectives and purposes of the LRA, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of [the grievor's] grievance."

(d) Ontario *Rules of Civil Procedure* – Summary Judgment

***Combined Air Mechanical Services Inc. v Flesch* 2011 ONCA 764 (Released December 5, 2011)**

The Court of Appeal for Ontario has used the principle of proportionality to inform what the Court calls a "new departure and a fresh approach" to summary judgment motions. Motion judges must deny a request for summary judgment if only a trial will give the "full appreciation" of the evidence and issues necessary to resolve the dispute. The likely practical effect of the ruling is – as perhaps the Court desired – not apparent.

Combined Air Mechanical Services Inc v Flesch ("*Flesch*") (and four other appeals) provided a panel of five the opportunity to consider recent changes to Rule 20 of the *Rules of Civil Procedure* ("Rule 20"), which were designed to improve the efficiency of and access to the civil justice system. Rule 20 now states that courts shall grant summary judgment unless there is a "genuine issue requiring a trial". Judges also now have explicit authority to weigh evidence, evaluate credibility, and draw reasonable inferences, and may order the presentation of oral evidence.

The Court stated its test for summary judgment as follows: "can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?"

The Court drew this test from the advantages which trials have over summary judgment motions. A trial judge sits in a "privileged position" because the judge can observe witnesses and view a developing "trial narrative". This makes trials particularly helpful when there is: a voluminous record; many witnesses; different theories of liability against different defendants; numerous factual issues; credibility issues at the dispute's heart; and the absence of documentary yardsticks to evaluate credibility. The effect of the test may be that judges must rely on their experience and sense of the need for a trial, and must do so with reference to the "touchstone of proportionality".

The Court also held that the judge and not the moving party must initiate oral evidence at a summary judgment motion. A moving party must present a case that is capable of decision on the paper record. This restrictive conclusion gives light weight to the words "mini-trial" in Rule 20.

This "full appreciation" test acknowledges that trials generally give a better appreciation of factual issues than do summary judgment motions. However, in the author's opinion a judge in a summary judgment motion will almost invariably have, on any absolute assessment, a less full appreciation than at trial. The real issue, therefore, is whether a motion judge has a sufficient appreciation of facts and issues to determine the issues. A judge should ask whether a trial could alter the inferences that, in reliance on ordinary logic and experience, he or she otherwise draws from the evidence available on the summary judgment motion. Any such conclusion must itself be informed by consideration of proportionality between the complexity of the factual issues and their importance to the resolution of the case.

Flesch leaves much to the experience of motions judges. It delivers a tone rather than a test: summary judgment motions are helpful; judges shall be guided by proportionality. *Flesch* should be evaluated for this tone rather that the practical applicability of the new test. On this basis, it is easy to feel disappointment at the failure of the changes to Rule 20 to increase substantially access to justice and efficiency of the civil justice system.

(e) Constitutional law – Federal paramountcy – Crown immunity

***Quebec (Attorney General) v Canada (Human Resources and Social Development)* 2011 SCC 60 (Released December 8, 2011)**

After an industrial accident, Rock Bruyère received income replacement benefits from the Commission de la santé et de la sécurité du travail ("Commission"). Pursuant to s. 126(4) of the *Employment Insurance Act*, SC 1996, c 23 ("*EIA*"), the Commission garnished his benefits to recover benefit overpayments that Mr. Bruyère had received. He challenged the remittance on the basis that his income replacement benefits were protected from seizure by s. 144 of the Act respecting industrial accidents and occupational diseases, RSQ, c A-3.001 ("AIAOD").

The Superior Court's ruling that the Commission had acted improperly was set aside on appeal. The Quebec Court of Appeal found there was a conflict between the Commission's right to require payment and the province's prohibition against seizure of income replacement benefits. The Court of Appeal declared the provincial provision to be inoperative.

Justice Deschamps, writing for the Supreme Court, upheld the Court of Appeal's decision.

The Court began by addressing the relationship between the Crown immunity rule and the doctrine of federal paramountcy. As a matter of judicial policy, the case law has established that the Court should first consider arguments based on the federal paramountcy doctrine, except if precedents justify applying the doctrine of interjurisdictional immunity to find that a provision is inapplicable. Justice Deschamps held that the erosion of the privilege of Crown immunity, the numerous exceptions to the rule, and the tendency of the federal Crown to benefit disproportionately from the rule were among the reasons why the paramountcy doctrine should be considered first. The Court concluded that "where a case can be decided without recourse to Crown immunity, the court should generally give preference to the other grounds raised by the parties".

The doctrine of federal paramountcy will apply where there is either an operational conflict or a conflict of intentions between federal and provincial laws. The Court found that an operational conflict did not exist in this case but considered whether there was a conflict of purposes, by reviewing each provision in context and looking at its legislative purpose.

The Court held that Parliament granted the Commission a "freestanding positive right to proceed by way of a requirement to pay rather than by way of seizure", which was intended to protect the integrity of the employment insurance system. This recovery mechanism was also intended to be independent from provincial exemption provisions such as s. 144 of the AIAOD.

Justice Deschamps held that the Court must defer to Parliament's policy decision to prefer the overall integrity of the employment insurance system to the needs of individuals. The Commission was given the positive right to recover benefit overpayments through this mechanism, and the right was not constrained by provincial prohibitions on seizure. The Court held there was a real conflict between the purposes of the two provisions, and declared the provincial provision to be inoperative. The appeal was dismissed.

(f) Administrative Law – Role and Adequacy of Reasons – Dunsmuir principles of "justification, transparency and intelligibility"

***Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* 2011 SCC 47 2011 SCC 62 (Released December 15, 2011)**

This Supreme Court of Canada decision clarified the proper approach for judicial review of an arbitrator's reasons under the principles previously set out in *Dunsmuir v New Brunswick*. In *Dunsmuir* the Court held:

> *In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.*

This case involved the judicial review on a reasonableness standard of an arbitrator's award in a dispute involving the calculation of vacation benefits under a collective agreement. In a 12-page decision, the arbitrator outlined the relevant facts, arguments, provisions of the collective agreement and applicable interpretive principles, and concluded that, under the collective agreement, a permanent employee could not include time previously spent as a casual employee for purposes of calculating his or her vacation entitlement.

The reviewing chambers judge found that the arbitrator's analysis and conclusion made up only three paragraphs of the decision, were largely repetitive, and did not adequately address the difference between the entitlements of casual employees versus permanent employees. Finding that the arbitrator's reasons required "more cogency" and that his conclusion was "completely unsupported by any chain of reasoning that could be considered reasonable", the judge set aside the arbitrator's decision.

The Court of Appeal overturned the judge's decision and restored the arbitrator's decision. While the arbitrator's reasons could have been more comprehensive, the Court held they were sufficient to satisfy the *Dunsmuir* criteria because, when read as a whole and in context, they demonstrated that he had grappled with the substantive live issues necessary to decide the matter.

On appeal, the Supreme Court of Canada upheld the arbitrator's decision, finding that his reasons provided a reasonable basis for his conclusion.

The Court clarified that a proper reasonableness review under the *Dunsmuir* criteria does not involve a separate analysis of the "adequacy" of reasons which could serve as a stand-alone basis for quashing a decision. Rather, *Dunsmuir* requires a "more organic exercise" in which the reasons are read together with the outcome to determine whether they show that the result falls within a range of possible outcomes. While the reviewing court should not substitute its own reasons, it may look to the record, if necessary, in order to assess the reasonableness of the outcome.

The Court held that a decision-maker's reasons do not need to include all arguments or explicit findings on each element leading to its final conclusion. Indeed, the Court emphasized that such a requirement would paralyze the purposes of speed, economy and informality underlying the grievance arbitration process.

The Court also rejected the argument that the deficient quality of reasons given could in effect amount to "no reasons", thereby triggering concerns of procedural fairness and a correctness standard of review under *Baker v Canada (Minister of Citizenship and Immigration)*. Rather, where reasons are given, any challenge to those reasons or the result of the decision should be made within the reasonableness analysis.

This decision indicates that it will generally be difficult to challenge a decision based on an assessment of the thoroughness of its reasons; if the reasons allow the reviewing court to understand why the decision-maker made its decision and to determine whether the conclusion is within the range of acceptable outcomes, the Supreme Court has indicated that the *Dunsmuir* criteria are met.

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