Q4 2023

On the Docket: Cases to Watch

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Introduction

On the Docket: Cases to Watch features a collection of cases, identified by our Research team, that move the law forward in some meaningful way. The cases in this edition are diverse in that they arise in different areas of the law: fraudulent conveyances, securities law, class actions, employment law, discovery, and Crown law.

BANK OF MONTREAL V ISKENDEROV

5-Judge OCA Panel Overturns *Anisman v Drabinsky* Regarding Limitation Period for Fraudulent Conveyances

KEY TAKEAWAYS

There is now clear authority that there is a two-year limitation period for fraudulent conveyance actions. This is a change not only from the historical position that there was no limitation period for such actions but also from the more recent position adopted by the OCA in *Anisman v Drabinsky* that a ten-year limitation period applied.

The decision also has an interesting discussion clarifying the nature of a fraudulent conveyance action and the relief that may be obtained, if successful.

Finally, the decision is also of note because of its discussion of the distinction between remedial judgments and declarations. As the Court notes, the distinction can be significant when a party is seeking to rely on the section of the *Limitations Act* which exempts actions seeking only declaratory relief from the application of the general limitation period under the Act.

CASE COMMENTARY

In *Bank of Montreal v Iskenderov*, the Bank of Montreal sought to set aside as a fraudulent conveyance Mr. Iskenderov's transfer of his residence to his wife. The action was commenced more than two years but less than ten years after the transfer.

Mr. Iskenderov argued that the action was statute barred under the *Limitations Act* but the bank argued that the ten-year period under the *Real Property Limitations Act* ("RPLA") applied. The lower court, relying on the 2021 decision in *Anisman v Drabinsky*, had concluded that the ten-year limit applied. On appeal, the appellant argued that *Anisman v Drabinsky* was not binding because full reasons were not given and because it was wrong in law.

In its decision, the Ontario Court of Appeal overturned *Anisman v Drabinsky* on the grounds that it was decided without the benefit of the relevant historical authority. The Court concluded that the ten-year limitation period in the RPLA does not apply to an action to declare a fraudulent conveyance of real property void as against creditors under section 2 of the *Fraudulent Conveyances Act*.

With respect to *Anisman v Drabinsky*, the Court noted that the OCA in that case had upheld the decision of Justice Morgan applying the ten-year limitation period under the RPLA but it noted that neither Justice Morgan nor the OCA in *Anisman* gave consideration to the history concerning the issue of the applicable limitation period. Justice Feldman in Iskenderov went on to consider the nature of a fraudulent conveyance action and whether it constitutes "an action to recover" land such that it would be covered by the RPLA. Justice Feldman noted that, while some courts in fraudulent conveyance actions have ordered a reconveyance of the subject property, in fact, the relevant section of the *Fraudulent Conveyance Act* does not afford that remedy.

While some courts in fraudulent conveyance actions have ordered a reconveyance of the subject property, in fact, the relevant section of the *Fraudulent Conveyance Act* does not afford that remedy.

Even if a fraudulent conveyance action is successful, the impugned transaction remains valid. The effect of an order under the FCA declaring the fraudulent conveyance void is not that the property is transferred back to the transferor. Rather, title does not change but the creditors may treat the property registered in the name of the transferee as exigible for the debts owed to them by the transferor. Thus, the creditor does not recover land as a result of the fraudulent conveyance being declared void nor does the transferor recover land. What occurs is what the statute intends: the creditors regain the ability to execute against the land for the payment of the debts owed to them by the transferor.

The Court went on to the conclude that *Anisman v Drabinsky* had been wrongly decided.

The Court then considered which provision in the *Limitations Act* applied to the claim. It rejected the argument that no limitation period applied pursuant to section 16(1)(a) which provides that there is no limitation period applicable in a proceeding for a declaration if no consequential relief is sought. The court noted the distinction between a remedial judgment and a declaration and noted that a fraudulent conveyance judgment is remedial because, while it includes a declaration that a transfer is void, it also imposes a consequence for that declaration (the remedy of setting aside the transfer as against creditors). Because the Bank sought consequential relief, section 16(1)(a) was not applicable.

The Court noted the distinction between a remedial judgment and a declaration and noted that a fraudulent conveyance judgment is remedial because, while it includes a declaration that a transfer is void, it also imposes a consequence for that declaration.

The Court concluded that the standard two-year limitation period under the *Limitations Act* applied, subject to discoverability.

The court briefly addressed – and rejected – the argument that the decision in *Anisman v Drabinsky* was not binding on the lower court judge because the reasons of the Court of Appeal in *Anisman v Drabinsky* were short and essentially consisted of the OCA adopting the lower court reasons of Justice Morgan. The OCA noted that, despite the brevity of the reasons, the decision in Anisman, prior to it being overruled in Iskenderov, was binding and lower courts were obliged to follow it.

MARKOWICH V LUNDIN MINING CORPORATION & PETERS V SNC-LAVALIN GROUP INC

The Ontario Court of Appeal Considers What Constitutes a "Material Change" and a "Material Fact" Under the *Securities Act*

KEY TAKEAWAYS

The determination of whether a "material change" has occurred pursuant to the *Securities Act* is highly fact dependent and there is no bright-line test. Delineating issues that only change external matters and those that bring about a change in the business, operations or capital of a company will no doubt be difficult to determine in some instances and subject to further refinement in the caselaw.

It should also be noted that *Markowich v Lundin Mining Corporation* and *Peters v SNC-Lavalin Group Inc* were decided in the context of motions for leave to commence a statutory cause of action under the *Securities Act*. At that stage, there is limited evidence available, and the moving party needs only to establish a reasonable possibility of success based on a plausible interpretation of the statute and the evidence. The interpretation of "material change" may be different – and likely narrower – in the context of a final hearing on the merits.

CASE COMMENTARY

In *Markowich v Lundin Mining Corporation* and *Peters v SNC-Lavalin Group Inc*, the Ontario Court of Appeal considered motions for leave to bring statutory causes of action under the *Securities Act* based on allegations of a failure to disclose a "material change".

In *Markowich*, the alleged material change related to pit wall instability in a mine and a subsequent rockslide; in *Peters*, the alleged material change related to a phone call in which the Department of Public Prosecutions Services of Canada ("PPSC") advised SNC-Lavalin Group Inc. ("SNC") that it would not be invited to negotiate a remediation agreement under the Criminal Code to resolve potential fraud and corruption charges.

In companion decisions from Justice Favreau of the Ontario Court of Appeal, the Court considered what constitutes a "material change" requiring disclosure. In *Markowich*, the Court concluded that the issues concerning the mine instability did constitute a "material change" requiring disclosure but, in *Peters*, the Court concluded that the phone call from the PPSC did not.

"Material change" is defined in the *Securities Act* as "a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer".

"Material fact" is defined as "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities". Justice Favreau noted that the disclosure requirements under the *Securities Act* for material facts and material changes are different. While issuers are required to disclose material facts, unlike material changes, they are not required to be disclosed "forthwith".

The Court noted that the issue of whether there has been a material change requires a two-step analysis. First, the court must determine whether there has been a change in the business, operations or capital of the issuer. Second, the court must determine whether the change was "material", in the sense that it would be expected to have a significant impact on the value of the issuer's shares.

While issuers are required to disclose material facts, unlike material changes, they are not required to be disclosed "forthwith".

Justice Favreau noted that the distinction between material change and material fact does not focus on the magnitude of the change but, rather, on whether the change was external to the company as opposed to in the business, operations or capital of the company. Justice Favreau approvingly referenced the comment of Perell J. in the lower court decision in *Peters* where he noted that the distinction between a material fact and a material change was "a deliberate and policy-based legislative decision to relieve reporting issuers of the obligation to continually interpret external political, economic, and social developments as they affect the affairs of the issuer, unless the external change will result in a change in the business, operations or capital of the issuer, in which case, timely disclosure of the change must be made." Justice Favreau further referenced a TSX policy statement which noted the following examples of changes that might affect an issuer's business, operations, or capital:

> "(a) development of new products; (b) developments affecting the company's resources, technology, products or market; (c) entering into a significant contract; (d) losing a significant contract; (e) significant litigation; and (f) other developments connected to the business and affairs of the issuer that would reasonably be expected to significantly affect the market price or value of any of the issuer's securities; or (g) other developments connected to the business and affairs of the issuer that would reasonably be expected to have a significant influence on a reasonable investor's investment decisions."

In *Markowich*, Justice Favreau concluded that the motion judge had erred in relying on an overly narrow interpretation of "material change". In particular, the motion judge had erred in concluding that it could not be established that there had been a change because there was no evidence that the pit wall instability or rockslide led Lundin to change its lines of business, to stop operating the mine or to change its capital structure. Instead, Justice Favreau concluded that:

> "...a change is a change and it should be defined broadly, especially in the context of a leave motion under s. 138.8 of the *Securities Act*. Contrary to what the motion judge asserted, the issue is not whether Lundin completely changed directions in its lines of business, stopped operating the mine in Candelaria or changed its capital structure. From the case law, one of the only restrictions on the meaning of change is that it cannot be external to the company without a resulting change in the business, operations or capital of the company, or it cannot simply be an unexplained change in results; rather, it must be a change in the company's business, operations or capital..."

The distinction between material change and material fact does not focus on the magnitude of the change but, rather, on whether the change was external to the company as opposed to in the business, operations or capital of the company.

In *Peters*, in contrast, Justice Favreau upheld the finding below that the call from the PPSC was not a "material change". SNC had faced the prospect of prosecution before the call and continued to face the prospect of prosecution after the call. SNC had publicly disclosed the risk of prosecution on many occasions. The Court noted that, after the call in question, PPSC had agreed to receive further submissions from SNC on the request for a remediation agreement. It was only after the PPSC said that it did not accept SNC's submissions that SNC made a public disclosure about the PPSC's position on a remediation agreement. Justice Favreau noted approvingly that the motion judge had adopted a broad and generous definition of "change" but that, even with that, the call could not be seen as a change in SNC's business, operation or capital.

JENSEN V SAMSUNG ELECTRONICS CO. LTD.

FCA Confirms Two-Step Approach for "Some Basis in Fact" Certification Criterion

KEY TAKEAWAYS

This case will be helpful for defence counsel facing certification motions with relatively tenuous evidentiary bases. It provides a forceful reiteration of the need to assess the evidence and provides a solid rebuttal to plaintiffs' counsel seeking to rely on the comments from Justice Rothstein in *Pro-Sys*.

CASE COMMENTARY

In *Jensen v Samsung Electronics Co. Ltd.*, the Federal Court of Appeal confirmed the necessity to establish on a certification motion that there is some basis in the evidence in support of the underlying claim.

In *Jensen*, the FCA upheld a lower court decision denying certification in a proposed *Competition Act* class action. The Court noted that the case was unusual in that, ordinarily, in competition class actions, there is no dispute at the certification stage as to the existence of an illegal agreement; the dispute at the certification stage ordinarily relates to whether the harm or damage allegedly caused by the conspiracy can be determined on a class-wide basis. In this case, there was a dispute about whether there had, in fact, been a conspiracy. The Court noted that there had to be adequate allegations in the pleadings as well as some minimal evidentiary background to establish that the defendants explicitly or tacitly agreed to act in the furtherance of a common goal in order for certification to be granted.

In their written and oral submissions on the common issues requirement, the Plaintiffs had emphasized that certification of a common issue simply requires a plaintiff to show some evidence that the proposed issue is common, and not some evidence for the existence of the common issue itself. In essence, they submitted that the "some basis in fact" standard required a so-called "one-step approach" focused solely on commonality rather than the two-step approach which requires a certification judge to determine whether there is "some basis in fact" in the evidence that the proposed common issues (1) actually exist in fact; and (2) can be answered in common across the entire class.

On appeal, the Court noted that it is clear that in practice, the "some basis in fact" test has a dual component: first, the putative class members must have a claim, or at least some minimal evidence supporting the existence of a claim and, second, some evidence that the common issue is such that its resolution is necessary to the resolution of each class members' claim. The FCA specifically approved of the following from the lower court decision:

> 211. I do not dispute that, at the certification stage, the evidence presented to support certification of a common issue must not be assessed in regard to the action's merits. The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim. Nor should the certification judge enter into a weighing of conflicting evidence with respect to the merits of the claim. However, applying the two-step approach does not mean that the courts engage in the weighing of evidence and enter into a consideration of the merits when dealing with the common issues criterion. It is still the some-basis-in-fact standard that applies, not the balance of probabilities standard. And it is not disputed that some basis in fact is a "relatively low evidentiary standard" (*Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58 [*Sun-Rype*] at paras 57, 61). The low evidentiary standard, however, needs some factual underpinning, and an absence of evidence or mere speculation will not be enough (*Sun-Rype* at para 70).
>
> 212. There is a fundamental difference between weighing the merits of the claim (which the courts cannot do at certification) and determining whether some minimal evidence exists to support the

> existence of the claim (i.e., the two-step test). Under the two-step approach, some evidentiary foundation is needed, but not an exhaustive record upon which the merits of the case will be argued. The standard requires some basis in fact, but not the proof of fact, or proof that the facts actually occurred. It is in that sense that the some basis in fact threshold falls comfortably below the civil standard of proof on a balance of probabilities, and cannot be equated with a merits-based test.

The Court further addressed the comment from Justice Rothstein in *Pro-Sys Consultants Ltd. v Microsoft Corp.* which many plaintiff-side class action counsel have argued advocates for a one-step approach to "some basis in fact" which does not require evidence of the conduct actually having occurred. In *Pro-Sys*, Justice Rothstein had noted:

> 110. The multitude of variables involved in indirect purchaser actions may well present a significant challenge at the merits stage. (...) In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members.

The Court in *Jensen* concluded that this comment was meant as a response to the argument that had been made that the "some basis in fact" standard equated to the balance of probabilities standard. The Court noted that, had Justice Rothstein intended a departure from the two-step test tracing back to *Hollick v Metropolitan Toronto (Municipality)*, one would have expected a more explicit statement from the court.

The FCA ultimately upheld the lower court's determination that there was not sufficient evidence before it of an unlawful agreement to support the certification of a claim under the *Competition Act*.

"The some basis in fact threshold falls comfortably below the civil standard of proof on a balance of probabilities, and cannot be equated with a merits-based test."

CPC NETWORKS CORP V MCDOUGALL GAULEY LLP

Is a Professional Advisor's File Owned by the Advisor or by the Client?

KEY TAKEAWAYS

This case may be helpful for lawyers in determining what is and what is not the property of the client when clients make requests for material from a lawyer's file. It also may be relevant in determining the disclosure obligations of a party involved in civil litigation when the party has retained a professional advisor. To the extent a party owns material in its professional advisor's file, it may be difficult for it to argue, in the context of discovery, that the material is not in its "possession, control or power".

CASE COMMENTARY

In *CPC Networks Corp v McDougall Gauley LLP*, the Saskatchewan Court of Appeal considered whether a lawyer's file was the property of the lawyer or the client.

A corporate client sought its file from two law firms, one of which objected to producing "solicitor's notes and inter-office memoranda" on the basis that the documents were the property of the firm, not the client. After considering various authorities addressing the issue, the Court of Appeal ultimately concluded that the ownership of file material depends on the nature of the material and the purpose for which it was created. The Court noted that the caselaw holding that a lawyer's "working files" invariably belong to the lawyer must be approached with caution. It noted that the principles which apply in determining the ownership of files are as follows:

- Documents in existence prior to the retainer and provided by the client to the lawyer are generally the property of the client.
- Documents prepared by a lawyer for the benefit of the client generally belong to the client (e.g. legal research memoranda; pleadings, briefs and other documents filed in court; witness statements; notes of conversations with the client, other counsel or third parties regarding matters related to the substance of the file).
- Documents prepared by a lawyer for their own benefit or protection belong to the lawyer (e.g. accounting records, conflict searches, time entry records, and financial administration records such as draft statements of account and cheque requisitions). Internal communications and notes concerning administrative matters such as the role that various lawyers and staff will play on the file may also fall in this category.
- Some documents will serve more than one purpose (e.g. a file note setting out a client's instructions benefit both the lawyer and the client). In such cases, the predominant purpose should be controlling and any doubt about the predominant purpose should be resolved in favour of the client.
- The fact that the client has been billed for the time involved in preparing a document will be a significant factor, but not necessarily a decisive one.
- The burden of showing that a document in a file is the property of the lawyer should rest with the lawyer.

The ownership of file material depends on the nature of the material and the purpose for which it was created.

WAKSDALE V SWEGON NORTH AMERICA INC

If ANY Termination Clause in an Employment Agreement Is Unenforceable, ALL Termination Clauses in the Agreement Are Unenforceable

KEY TAKEAWAYS

This caselaw is not new but it is important for employers seeking to rely on termination provisions in employment agreements and employees seeking to avoid being bound by such provisions. Even if specific termination provisions are not being relied on in the circumstances, unenforceability of one provision can have a domino effect on others and all provisions should be considered. This caselaw is in keeping with the courts' general approach to interpreting employment agreements in favour of employees given the power imbalance that generally exists between the parties.

CASE COMMENTARY

In *Waksdale v Swegon North America Inc*, leave to appeal ref'd 2021 CarswellOnt 356, the appellant had sued his employer for wrongful dismissal and took the position that the termination clause in his employment contract was void because it was an attempt to contract out of the minimum standards of the *Employment Standards Act* ("ESA"). The respondent conceded that the "Termination for Cause" provision in the contract was void because it violated the ESA but it argued that the "Termination of Employment with Notice" provision was valid and it could rely on the latter provision.

The Court noted the principle that termination clauses should be interpreted in a way that encourages employers to draft agreements that comply with the ESA. The enforceability of a termination provision in an employment contract is determined at the time it was executed and the interpretation of the contract alone determines the issue. Even if an employer's actions comply with the ESA, that compliance does not save a termination provision that violates the ESA.

There was no issue in this case that the termination for cause provision was unenforceable. The issue was whether the "with notice" provisions should be considered separately.

The Court concluded that an employment agreement must be interpreted as a whole and not on a piecemeal basis. It is irrelevant, in this analysis, whether the termination provisions are found in one place in the agreement or separated, or whether the provisions are, by their terms, otherwise linked. It is also irrelevant whether the employer ultimately relied on the provision that was in violation of the ESA. If one termination provision is unenforceable, all termination provisions in the agreement are unenforceable.

The Court also rejected the argument that the severability clause in the employment contract could save the termination provision. The Court noted that a severability clause cannot save a provision that has been made void by statute and, having concluded that the for cause and with notice provisions had to be understood together, the severability clause could not sever the offending portion from the employment agreement.

The Court noted the principle that termination clauses should be interpreted in a way that encourages employers to draft agreements that comply with the *Employment Standards Act*.

POORKID INVESTMENTS INC V ONTARIO (SOLICITOR GENERAL)

Why You Won't Succeed in Suing the Government & Other Valuable Lessons (Part I)

KEY TAKEAWAYS

Both at common law and pursuant to statute, the Crown and its employees and agents are often protected from claims other than those that allege some form of malice or bad faith. In an effort to avoid these protections, many plaintiffs bring claims against the Crown which allege some type of bad faith conduct. Crown counsel often bring R.21 or R.20 motions seeking to strike these claims at an early stage on the basis that the bad faith or malice are not adequately pled or that there is no basis in the evidence for these allegations. The *Crown Liability and Proceedings Act* and specifically section 17 will likely provide a useful new tool for Crown counsel seeking to address these claims going forward.

Poorkid Investments Inc. v Ontario (Solicitor General) is interesting in its narrow interpretation of the decision of *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)* and the protected scope of superior court jurisdiction under section 96 of the *Constitution Act*. While it may be fair to question the way in which Justice Huscroft in *Poorkid* distinguished the case from *Trial Lawyers*, it is clear that he is urging a relatively narrow conception of the core jurisdiction section 96 courts.

Finally, the case is a helpful reminder of the importance of strategic choices made by counsel. As noted, the applicants in this case did not seek to meet the statutory test but, instead, brought a constitutional challenge to the relevant section of the CLPA. The Court noted the lack of evidence that section 17 impedes access to courts and that this "factual vacuum" was created by the decision not to bring a leave motion pursuant to section 17, a choice counsel may have regretted.

CASE COMMENTARY

In *Poorkid Investments Inc. v Ontario (Solicitor General)*, leave ref'd 2023 CarswellOnt 188848, the Court of Appeal considered a proposed class action arising out of the Crown's response to protests by Indigenous activists in Caledonia, Ontario. The proposed representative plaintiffs sought damages arising from the OPP's response to the protests on the grounds of misfeasance in public office, nonfeasance, negligence, and nuisance. In essence, it was alleged that the various named Crown entities had failed to carry out their legal duties.

The *Crown Liability and Proceedings Act* ("CLPA") has various protections and special procedures that apply to proceedings involving the Crown. Section 17 of the CLPA provides that a proceeding against the Crown or an officer or employee of the Crown that includes a claim for misfeasance in public office or bad faith in the exercise of public duties or functions are deemed to be stayed and can only proceed with leave of the Court. To obtain leave, a plaintiff must establish that the proceeding is brought in good faith and that there is a reasonable possibility the claim will succeed.

The Plaintiffs in this case did not seek leave under the CLPA but rather brought an application for a declaration that section 17 of the CLPA violates section 96 of the *Constitution Act*, and is of no force and effect. The application judge determined that the financial cost of bringing a motion for leave under section 17 did not violate section 96 but that the procedure established by section 17 violated section 96 because it bars claimants from presenting evidence necessary to satisfy the Court that there is a reasonable possibility that a claim will succeed and, thus, prevents them from having meaningful access to the superior courts.

On appeal, the Court of Appeal concluded that section 17 of the CLPA was a valid exercise of the provincial lawmaking authority and that, though it does make it more difficult to bring proceedings against the Crown, the leave requirement and associated rules established by section 17 do not touch the core jurisdiction of superior courts. The appeal was allowed.

Like its predecessor, the *Proceedings Against the Crown Act* ("PACA"), the CLPA imposes liability on

the Crown for tortious conduct from which it would otherwise be immune at common law. The CLPA maintains some procedural provisions similar to PACA but it effects a significant change concerning some torts. Specifically, section 17 establishes a screening procedure that applies to claims for misfeasance in public office or a tort based on bad faith. Like the leave requirement under the *Securities Act*, section 17 requires that it be demonstrated that the proceeding is brought in good faith and that there is a reasonable possibility the claim will succeed. Unlike the leave test under the *Securities Act*, section 17 of the CLPA limits the evidence that can be adduced by the parties.

As the Court of Appeal described the provision, on a motion seeking leave under section 17 of the CLPA, the claimants must file an affidavit setting out the material facts on which they intend to rely, along with an affidavit of documents; the Crown defendant may file an affidavit but is under no obligation to do so; no one is to be examined or summoned for examination in regard to the affidavit, affidavit of documents, or in relation to the motion for leave except for the maker of the affidavit or prescribed document, and the defendant is not subject to discovery or the inspection of documents, or to examination for discovery.

Relying on *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, the application judge had determined that the restrictions on evidence effectively limited meaningful access to the court. In particular, the application judge concluded that the provisions effectively barred claimants from any realistic and effective means of presenting evidence to satisfy the court that there is a reasonable possibility that their claims would succeed.

The Court of Appeal in *Poorkid* distinguished the proceeding from *Trial Lawyers* in which a court fee was found to have infringed the jurisdiction of section 96 courts by effectively ensuring that certain matters would not be heard. In contrast, the Court noted that nothing in section 17 denies or otherwise prevents access to the superior courts and their core function of adjudicating disputes.

The provisions in issue only regulated the way in which disputes came before the court; they did not prevent disputes from being heard and determined by the superior courts.

The Court noted that the core jurisdiction concept has been understood as “very narrow” and includes only “critically important jurisdictions which are essential to the existence of a superior court”. The Court noted that the provisions in issue only regulated the way in which disputes came before the court; they did not prevent disputes from being heard and determined by the superior courts.

The Court also noted that there was no evidence before it demonstrating that the screening mechanism under section 17 was preventing access to the court. The Court noted that the applicants had relied on academic commentary regarding the difficulty of establishing bad faith or misfeasance in public office absent discovery. The Court noted the lower court had erred in taking judicial notice of the statements made in the academic commentary and that the factual vacuum regarding this issue was created by the strategic choice made by the applicants to not actually bring a leave motion.

TRILLIUM POWER WIND CORPORATION V ONTARIO

Why You Won't Succeed in Suing the Government & Other Valuable Lessons (Part II)

KEY TAKEAWAYS

In addition to its discussion of spoliation, this case is interesting as it highlights the difficulty in successfully litigating government policy decisions.

CASE COMMENTARY

In *Trillium Power Wind Corporation v Ontario*, the Court of Appeal considered a motion for summary judgment regarding claims of misfeasance in public office and spoliation in connection with the provincial government's cancellation of wind power projects. Note that the action was commenced in 2011, prior to the enactment of the *Crown Liability and Proceedings Act* ("CLPA") and the leave test in section 17 for misfeasance claims, discussed above.

In *Trillium Wind Corporation*, the Court upheld the motion decision that there was inadequate pleading and evidence to support the claim for misfeasance in public office. The Plaintiff had alleged that Ontario's decision had been targeted to stop the plaintiff's offshore wind project before its financing was in place in order to deprive it of the resources to contest Ontario's cancellation decision. The Court rejected the claim that there was evidence to connect the timing of the cancellation with the plaintiff's financing.

Regarding the spoliation claim, the Court of Appeal overturned the motion decision and allowed the claim to proceed. The Court noted that spoliation "occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation." The Court noted that, while there is still a question of whether spoliation can be a cause of action, Ontario courts have recognized spoliation as an evidentiary rule where there has been destruction of evidence by a party who reasonably anticipated litigation in which that evidence would play a part. That rule of evidence gives rise to a rebuttable presumption that the evidence destroyed would have been unfavourable to the party who destroyed it. The Court noted that the remedies granted have mostly included but are not limited to the application of the adverse presumption and costs. The Court concluded, in this case, that there was no question that the destruction in this case was deliberate and in accordance with an improper government policy. The Court also noted that the document destruction occurred after the claim had been commenced and concerned likely relevant documents in the possession of individuals intimately involved in the events.

The Appellants obtained a somewhat pyrrhic victory, however, in that the Court of Appeal refused to remit the matter for a determination on the grounds that the appellant could not have compelled Ontario to reverse its moratorium on wind projects and the appellants, therefore, suffered no damages.

While there is still a question of whether spoliation can be a cause of action, Ontario courts have recognized spoliation as an evidentiary rule where there has been destruction of evidence by a party who reasonably anticipated litigation in which that evidence would play a part.

About the Author

Lynne's practice is focused on legal research, written advocacy, and advice. She uses her thorough understanding of the law to help our clients analyze their complex legal problems and execute the best litigation strategy.

Prior to joining Lenczner Slaght and after starting her career practicing litigation at a large full-service firm, Lynne spent 20+ years practicing litigation for the provincial Crown.

During her career, Lynne has acted for clients in a wide variety of proceedings including oppression and dissent claims, commercial disputes, various class actions and injunctions, an aggregate claim for the recovery of health care costs caused by smoking, judicial reviews, and the defence of Crown attorneys and police officers.

Lynne has appeared at all levels of court including the Supreme Court of Canada.

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