Atlantic Business Counsel

LEGAL DEVELOPMENTS OF INTEREST TO BUSINESS IN ATLANTIC CANADA

September 2010

Volume XI, Issue 3

Editor: Susanna P. Duke
Knowledge Manager
709.570.8844
sduke@smss.com

In this issue

No Privilege for In-House Counsel

Public Company Disclosure – Does Your Company Comply?

Be Clear About Who Gets Ownership of Newly Developed Software

Class Actions: the "Tar Ponds" Litigation

Why CRA Clearances?

Business Disputes Corner

No Privilege for In-House Counsel: European Court Decides that Communications with In-House Counsel Are Not Protected By Legal Privilege

On September 14th, 2010, the European Court of Justice ("ECJ") released its long-awaited decision in *Akzo Nobel Chemicals and Akcros Chemicals Ltd. v. Commission ("Akzo and Akcros")*. In its decision, the ECJ upheld a 2007 decision of the General Court, finding that legal privilege does not apply to communications between a company and its in-house lawyers in the context of EU competition investigations. In this case, Akzo claimed privilege for emails between the company and its in-house counsel in the context of an investigation of suspected cartel practices by two of the world's largest plastics manufacturers. The decision has wide-ranging implications for corporations operating in Europe, and highlights the distinction between the EU and countries such as Canada, where communications with in-house counsel are for the most part protected by legal privilege.

The Decision in Akzo and Akros

The decision in *Akzo and Akros* follows the decision of the ECJ in *AM & S European Ltd. v. Commission*[1] *("AM & S")*. In that case it was decided that legal privilege exists only where 1) the communication is made for the purpose of and in the interest of a client's defence; and 2) the communication must emanate from independent lawyers.

The ECJ decision centres on the issue of independence; namely, whether in-house counsel can satisfy the requirements laid down in *AM & S*. In coming to the conclusion that they could not, the ECJ held that the *"requirement of independence means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers."* Moreover, that *"the concept of independence of lawyers is determined not only positively, that is by reference to professional ethical obligations, but also negatively, by the absence of an employment relationship. An in-house lawyer, despite his enrollment with a Bar or Law Society and the professional obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm*

1. (1982) E.C.R. 1575

does in relation to his client. Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client." In essence, because in-house lawyers are employees, they lack sufficient economic independence from their employer to be covered by legal privilege.

Legal Privilege in Canada

In Canada, communications between in-house counsel and their employers enjoy the same privilege protections as communications between private counsel and their clients. However, this is only so if the communications are legal in nature. In *Pritchard v. Ontario (Human Rights Commission)*[2] the Supreme Court of Canada determined that there is a two-step process for deciding whether privilege exists where in-house lawyers are involved. 1) Is the subject matter of the advice legal in nature? This involves an analysis of the circumstances surrounding the commission of the advice. In this context, legal advice has been defined very broadly and can include both advice as to the state of the law, as well as advice regarding what should be done in a relevant legal context: *Samson Indian Band v. Canada*[3]. 2) If the nature of the advice is found to be legal, has privilege been waived? If the privilege is not explicitly or impliedly waived, privilege attaches to communication with in-house counsel. It is important to note that the privilege is the client's privilege and can only be waived, explicitly or impliedly, by the client.

The contradistinction between the ECJ's notion of privilege vis-à-vis in-house lawyers and that of the Supreme Court of Canada is obvious. The same distinction holds true for other countries such as the United States and a number of EU Member States. The fact that a significant number of EU members possess a much more inclusive notion of privilege than that of the ECJ adds to the perplexing nature of this decision.

Practical Implications and the Broad Scope of the ECJ's decision

This decision will have important ongoing implications for corporations operating in Europe that rely on in-house legal departments. Careful consideration must be had as to how in-house lawyers communicate with management on sensitive matters that they wish to be confidential. Moreover, the decision in *Akzo and Akcros* places communications between foreign in-house counsel and offices with subsidiaries in Europe at risk. Under the decision in *Akzo and Akcros*, it is more than likely that privilege does not attach to such communication, even though the lawyers providing the advice are located outside the jurisdiction of the EU.

Practically, it also means increased agency costs for corporations operating in Europe, as companies who wish to seek legal advice on sensitive material will be forced to engage outside legal counsel to ensure that privilege attaches to their communications.

While *Akzo and Akcros* began as a competition investigation, the ECJ did little to indicate that this narrow view of privilege was confined to those sorts of investigations. In fact, the Court stated that it was *"called on to decide… the legality of a decision taken by an institution of the European Union on the basis of a regulation adopted at [the] European Union level."* This broad conception as a basis for the Court's decision lends itself to the conclusion that the same rule will apply beyond competition investigations, a position not welcomed by many in the legal or business community.

Conclusion

It is unlikely that this decision will have any direct implications on Canadian law, as privilege in this country is well-known, understood and applied. However, companies with operations in Europe must take note of this decision and take appropriate steps to ensure that material they wish to be confidential remains "privileged" under EU law.

Deanne MacLeod – Partner
Halifax, NS
902.420.3313
dmacleod@smss.com

Ryan Baker – Articled Clerk
Halifax, NS
902.420.3200
rbaker@smss.com

2. [2004] 1 S.C.R. 809
3. [1995] 2 F.C.A. 762

Public Company Disclosure – Does Your Company Comply?

Canadian public companies are subject to a complex web of continuous disclosure obligations. As with other parts of the regulatory regime, there is a near constant stream of updates, revisions and commentary on continuous disclosure from the regulators. This constant change makes it challenging for issuers to stay on top of current requirements and generally makes it unwise for issuers to simply rely on their last disclosure document, without first revisiting the rules, notices and commentary.

The Canadian Securities Administrators ("CSA") take the view that reliable and accurate disclosure is a critical component of fostering both investor confidence and efficient capital markets. To ensure that issuers are providing reliable and accurate disclosure to the market, the CSA completes an annual review of continuous disclosure. The CSA publishes the results of its review and identifies material disclosure deficiencies in order to help other issuers keep from making similar types of mistakes.

On July 9, 2010, the CSA announced the results of its fiscal 2010 review. A summary of some of the deficiencies identified by the CSA with respect to CEO and CFO certification of interim and annual filings, management discussion and analysis ("MD&A"), executive compensation disclosure, forward looking information disclaimers, oil and gas disclosure, and mining technical disclosure is set out below.

CEO and CFO Certification

The CSA required a number of issuers to re-file their CEO and CFO certificates because issuers made significant amendments to the wording of the required forms, including:

- omitting paragraphs;
- failing to properly remove paragraphs 5.2, 5.3 and 6(b)(ii) and insert N/A when such paragraphs did not apply;
- inserting incorrect dates;
- adding text;
- failing to re-file certificates on the date of re-filing of financial statements; and
- failing to file certificates on the correct date.

Based on its review, the CSA reminded issuers that:

- the forms of certificates are prescribed and alterations are not permitted;
- the date of the certificates must be the date the certificate is filed and that such certificates must be filed concurrently with the later filed of (a) the AIF, if applicable, and (b) the financial statements and MD&A; and
- if the issuer is a non-venture issuer that chooses to voluntarily file an AIF, the issuer must file the applicable form of certificates on the date the AIF is filed.

MD&A Disclosure

The CSA noted that MD&A remains the area with the most compliance issues. MD&A should provide clear and concise disclosure of important risks and trends in addition to material information that may not be fully reflected in an issuer's financial statements. The CSA noted that issuers tend to provide boilerplate disclosure instead of entity-specific disclosure and that boilerplate disclosure is a particular concern with respect to discussion and analysis of:

- results of operations, where the CSA noted a lack of meaningful analysis and descriptions of reasons behind material variances;
- liquidity, where the CSA noted insufficient information and analysis where a working capital deficiency exists;
- risk, where the CSA noted a lack of meaningful detail and lack of discussion of the effects of the current economic environment on financial conditions, operations and liquidity;
- related party transactions, where the CSA noted that issuers should be disclosing the business purpose of the transaction and the quantitative and qualitative aspects of the transaction; and
- critical accounting estimates, where the CSA advised that discussion should include methodology and the assumptions underlying accounting estimates.

Additional MD&A deficiencies arose out of the disclosure requirements resulting from CEO and CFO certification of annual filings, as follows:

- some issuers (including some venture issuers who elected to file Form 52-109F1) failed to disclose, in their MD&A, the certifying officers' conclusions about the effectiveness of the issuer's disclosure controls and procedures ("DC&P") and internal control over financial reporting ("ICFR") as required by 6(a) and (b)(i) of the CEO and CFO certificates.

- Some venture issuers, using the venture issuer basic certificates, that voluntarily decide to discuss DC&P or ICFR in their MD&A did not include appropriate cautionary language (as set out in section 15.3 of 52-109CP).

- a number of issuers improperly qualified their conclusions about the effectiveness of DC&P and/or ICFR. Certifying officers may not qualify their assessments unless the qualification pertains to one of the scope limitations explicitly permitted by section 3.3 of NI 52-109. MD&A discussion should clearly state whether the limitation constitutes a material weakness relating to ICFR or a weakness in DC&P that is significant.

In addition to the above, the CSA commented on the fact that the lack of segregation of duties is a significant ICFR challenge that may be addressed through the additional involvement of the audit committee or board of directors. The involvement of the audit committee or board could represent either a *mitigating procedure* (which reduces but does not eliminate the risk) or a *compensating control* (which fully addresses the weakness and allows the certifying officers to conclude that ICFR and DC&P are effective). The CSA indicated that the threshold is high for the additional involvement of the audit committee or board to constitute a compensating control. If the issuer has implemented only a mitigating procedure it should identify the lack of segregation of duties as a material weakness and conclude that ICFR is not effective. The CSA notes that such a weakness in ICFR will almost always represent a weakness that is significant in the issuer's DC&P.

Further deficiencies in MD&A disclosure arose as a result of non-compliance with the requirement to provide disclosure about transition to International Financial Reporting Standards ("IFRS"). In particular, the CSA review revealed that a number of reporting issuers did not provide any or sufficient IFRS transition disclosure. In the CSA's view, lack of disclosure implied that such issuers had not begun to prepare for the IFRS transition or do not believe it is necessary to do so. If an issuer does not have a changeover plan, the CSA believes that this is material information that should be disclosed in the MD&A together with reasons why a changeover plan is not necessary.

Issuers should be providing a comprehensive discussion of the impact that IFRS would have on each element affecting the entity, including the impact on the issuer's accounting policies, ICFR, DC&P, financial reporting expertise (technical training in IFRS for an issuer's board, management and employees), business activities, and IT systems. The CSA expects issuers to provide significant details of their changeover plan and information about key decisions on policy choices under IFRS *1 First-time Adoption of International Financial Reporting Standards,* and, as available, information about the impact of IFRS on key financial statement line items. The CSA expects that incremental disclosure will become more robust and complete as the transition approaches and advised that it will request re-filings of MD&A if an issuer has not met disclosure obligations and staff may consider other regulatory action as circumstances warrant.

Executive Compensation

In its review of executive compensation disclosure, the CSA found a number of problems including:

- insufficient explanation in issuer's compensation discussion & analysis ("CD&A") of how each element of compensation was tied to each NEO's performance.

- failure of the CD&A to fully and accurately describe the issuers' process of making executive compensation decisions, because such disclosure (i) did not fully and accurately describe the relative importance between corporate-level goals and individual performance objectives; (ii) did not fully explain the use of discretion (by the board or the compensation committee) in the process; (iii) failed to quantify objective measures (such as earnings per share, EBITDA, growth in net sales and operational targets), and (iv) improperly used the "seriously prejudice" exemption from disclosing specific performance goals.

- failure to tie the CD&A into the rest of the executive compensation disclosure, including, for example, inconsistency between the CD&A and compensation numbers found in the summary compensation table ("SCT").

- incomplete disclosure regarding the use of benchmarks and the determination of performance goals, including explaining how benchmarking was used to set compensation, and disclosing the components of the benchmark group.

- incorrect reporting of the grant date fair value of multi-year awards in the SCT.

- failure to reconcile the grant date fair value of share-based and option-based awards with accounting fair value in the SCT.

- failure to quantify the amount of termination and change of control benefits that would be payable to NEOs.

Oil & Gas Disclosure

In its review of oil & gas disclosure, the CSA noted that it commonly sees use of terms not recognized by the Canadian Oil and Gas Evaluation Handbooks (COGEH). Issuers are required to use COGEH terminology without modification. In addition, the CSA noted other common oil & gas disclosure deficiencies, including:

- not providing all the information required under NI 51-101;
- inconsistency between information provided in the disclosure document; and
- not providing disclosure of important economic factors or significant uncertainness that affect particular components of the reserves data.

Mining Technical Disclosure

In its mining technical disclosure review, the CSA noted that the main disclosure problems with respect to mining technical disclosure include:

- failing to include the name of the qualified person in the document containing scientific and technical information;
- failing to provide required disclosure for historical estimates (such as source and date of estimate);
- failing to include certificates/consents for qualified persons; and
- corporate presentations and websites that did not comply with NI 43-101.

We note that proposed amendments to NI 43-101, if adopted, would limit the requirements to include certificates/consents for qualified persons in many circumstances.

Forward-Looking Information

In its disclosure review, the CSA found that many issuers use boilerplate disclosure with respect to forward looking information ("FLI") that does not readily enable the reader to identify the FLI in the document. Further, the CSA noted that many issuers included FLI disclaimer statements when, in fact, no FLI was contained in the document. The CSA encouraged issuers to avoid inserting FLI statements where to the issuer's knowledge there is no FLI.

It was found that in many instances issuers either neglected to discuss the factors underlying FLI or stated that there were factors or assumptions without identifying them. This practice does not comply with the requirements of NI 51-102. In addition, the CSA noted that issuers often included identical or nearly identical risk factors and assumptions in each disclosure document despite obvious differences in the type of FLI contained in the different documents. Boilerplate disclosure should be avoided.

The CSA noted that section 5.8(20) of NI 51-102 provides that issuers must update previously disclosed FLI in certain circumstances. Therefore, issuers should not include statements in its FLI disclosure that the issuer "does not assume any obligation to update FLI".

Issuers were reminded that any FOFI or financial outlook disclosure is required to reveal the purpose of the financial outlook/FOFI and to caution readers that the information may not be appropriate for other purposes.

Continuous Disclosure in 2010 and 2011

The CSA advised that in fiscal 2011, in addition to its regular full review program, it would conduct issue-oriented reviews of IFRS transition disclosure, material contract disclosure, corporate governance, and further CEO and CFO certification reviews.

Given the interlinked nature of disclosure obligations and the constant updates, revisions and commentary by regulators in this area, it is often a challenge for public companies to stay on top of current continuous disclosure requirements. We encourage you to contact any member of Stewart McKelvey's Securities and Public Companies group if you have any questions about continuous disclosure rules, notices and commentary or if you would like assistance in reviewing or preparing your company's ongoing continuous disclosure documentation. Our team has expertise in legal issues and disclosure requirements with respect to information circulars, annual information forms, management discussion & analysis of financial statements, CEO and CFO certification of annual and interim filings, press releases, material change reports, and various voluntary forms of disclosure (including websites and annual reports).

Tauna Staniland - Associate
St. John's, NL
709.570.8842
tstaniland@smss.com

Be Clear About Who Gets Ownership of Newly Developed Software

Dora and Diego are entrepreneurs. Both have an interest in software companies, but neither is a software developer.

Dora has a great idea for software that can help people solve problems, typically by traveling through various obstacles to reach the final destination or solution.

Diego thinks there is a growing market for software that can help people learn about, and rescue, exotic animals.

Each of them starts up a company with the goal of creating the desired software for licensing to customers.

Because neither of them is a software developer, Dora and Diego each find a skilled developer to create the software for them. Each signs their chosen developer to an agreement.

The developers work full-time on the software. After six months, Dora's problem-solving software and Diego's animal-finding software are nearing market readiness. Dora and Diego kick their sales efforts into high gear, and both are overjoyed to find that they had underestimated the market demand for their respective products.

Both companies sign lucrative licensing agreements with corporate customers seeking the new software. As soon as the developers put the finishing touches on the software, Dora and Diego will deliver their software to their respective customers and watch the cash roll in.

But on the eve of delivery of the software to customers, Dora's developer asks if he could have a word with her. "I saw one of your license agreements," he said to Dora. "It's written as if you own the software. You don't. I do."

"What are you talking about?" exclaimed Dora. "My company paid you good money to develop the software so it's company property."

"You retained me as an independent contractor," the developer snickered. "Not as an employee. That means whatever I develop, I own. You need to buy the software from me if you want to license it to your customers."

Dora called Diego to see if he was having the same problem with his developer. "Nope," said Diego. "I hired my developer as an employee of my company. Whatever employees create in their course of employment becomes property of the employer—in this case, my company. So my company owns the software."

"Why didn't you hire your developer as an employee?" Diego asked.

"I don't know," said Dora. "I guess I didn't want to have the responsibility for employee withholdings and remittances, severance obligations, that sort of thing. I thought it would be less hassle just to contract the work out rather than to hire an employee. I had no idea that would impact the ownership of the software."

Diego didn't know what to say. He hated to see his fellow entrepreneur in such a jam. "I'm so sorry, Dora. I wish I had a rescue pack that could help fix this situation. But unless your agreement says that your company gets ownership of the software on completion, then your developer—as an independent contractor—retains ownership."

"No, the agreement doesn't provide for that," said Dora sadly. "I guess I'll just have to pay my developer for the software. I don't know how I'll afford that after what I paid him already under the development contract. I suppose he has all the bargaining power now. I should have known not to trust a developer named Swiper."

"Next time, you should think about talking to a lawyer to make sure all your bases are covered before you start out on a project," advised Diego. "That's what I did."
"Yeah, you're probably right," said Dora.

"But for now, why don't you try to use the software Swiper developed to help you find a solution to this dilemma—it is problem-solving software after all."

"That's a good idea," said Dora. "Thanks for helping."

Andy Clark – Associate
506. 444-6982
Fredericton, NB
aclark@smss.com

Class Actions: the "Tar Ponds" Litigation

In March 2004, a proposed class proceeding was commenced in the Supreme Court of Nova Scotia in response to the alleged health and property harm caused by the steel plant and coke ovens in Sydney, Nova Scotia. The claim has been brought against the Sydney Steel Corporation, the Province of Nova Scotia and the Government of Canada. This is routinely referred to as the "Tar Ponds" litigation, although in reality the claim is not focused on the actual tar ponds.

The Statement of Claim was amended on a number of occasions, most recently in March 2010. In addition, and with the proclamation of the *Class Proceedings Act* in June 2008, the matter was continued under the detailed statutory regime. It had initially been commenced as a proposed representative proceeding under the rules of court and a proposed class proceeding under the common law.

The allegations are numerous and complicated. Put most simply, the plaintiffs allege that the steel works unlawfully contaminated property through air, groundwater and soil emissions. The plaintiffs also allege either an actual harm to health or the creation of a risk of harm to health by such emissions. A number of causes of action have been pleaded, including nuisance, trespass, negligence, battery and breach of fiduciary duty.

There are four named plaintiffs, but they propose to advance the claim on behalf of a rather large class of individuals. In particular, the proposed class of individuals that would be bound by a trial on common issues includes individuals who have lived for at least three consecutive years since 1967 within a 3.5 mile radius of an area close to the coke ovens. The proposed class also includes those individuals who own property within this same location. This geographical zone is quite significant – it is approximately 100 square kilometres in size and includes the entire inhabited areas within the historical boundaries of Sydney, Edwardsville and Westmount.
A certification hearing took place over five days in June 2010 before the Honourable Justice John D. Murphy. At least in Nova Scotia, this hearing was unique for two reasons.

First, the hearing took place in Halifax but was simultaneously broadcast on the court's website to allow any interested persons (be they in Cape Breton or elsewhere) to follow along. This was the first ever broadcast of proceedings in the Supreme Court of Nova Scotia, and the videos remain posted on the website's archive.

Second, Justice Murphy concluded the hearing in a somewhat unusual manner. After four days of submissions by counsel, Justice Murphy refused to certify the proceeding in its current form. His Lordship, however, provided plaintiffs' counsel with an opportunity to amend the claim in response to the court's concerns.

Of primary concern to Justice Murphy was the sheer breadth of the proposed class. He considered the 3.5 mile radius to be too large and unmanageable, such that a class action would be unworkable. As proposed, the court was not satisfied that all class members would, in fact, share common issues – a prerequisite to certification. Justice Murphy therefore asked for a "significant redefinition of the boundaries of the class", and he adjourned the application for certification until such time as plaintiffs' counsel can do so.

Nevertheless, Justice Murphy did note that there are aspects of the proceeding that would appear to warrant certification as a class action. His Lordship also indicated that the four named plaintiffs would be suitable to represent the class (should it ultimately be certified on a narrower basis).

Counsel are continuing to work with Justice Murphy in his capacity as case-management judge. Although an amended claim has not yet been filed, it is expected that this (and further submissions thereon) will take place in the coming months. If and when the matter is certified as a class proceeding, it will be among the most noteworthy of such proceedings in the history of Nova Scotia.

Scott Campbell – Associate
902. 420.3383
Halifax, NS
srcampbell@smss.com

Why CRA Clearances?

ABC Co. ("ABC"), a modestly successful restaurant and micro-brewery, made the decision that to solidify its market presence in the unstable restaurant business, it needed to expand and open additional locations in order to compete with some of the national chains. To fund this expansion, its board of directors decided to focus on the restaurant side of the business. This meant selling its beer making equipment and cutting the weaker part of the operation. The hope was that by injecting some of its own cash into the expansion, and trimming a weaker division, the business would be more appealing to lenders.

After a deal was struck to sell the beer making equipment to XYZ Co. ("XYZ"), the lawyer acting for XYZ requested that ABC sign a consent form allowing the purchaser to request a lien search from Canada Revenue Agency ("CRA"). ABC's board of directors was very private with its financial affairs and resisted this request when approached by its counsel.

While the sale of the beer making equipment was progressing, ABC's bank (the "Bank") approved a loan to subsidize the remainder of the funds needed for the expansion. The loan was to be secured in part by a first priority charge over all real and personal property. In order to ensure this priority, the Bank's counsel started the due diligence process against ABC, and like XYZ's counsel, the Bank's counsel required a CRA clearance as a pre-closing condition.

The second request for a CRA clearance in such a short time concerned ABC. ABC was typically up to date with its remittances to CRA; however, it was currently a slow time of year and ABC was clinging to its cash in order to fund the expansion efforts until the loans and sale proceeds were received. As a result, ABC was behind on its HST and employee source deduction remittances, which would be evident if it allowed XYZ or the Bank to conduct its searches. Given this fact, ABC refused to sign.

ABC's principal shareholder discussed this issue with a friend who had undergone a similar business reorganization not long before. The friend told him that he didn't recall needing to provide a CRA clearance when he sold his business, so why was this CRA lien search necessary now? What good was this information to XYZ or the Bank? ABC had no other loans outstanding, and as a result the Bank was getting a first charge; and XYZ didn't need to worry about a lender seizing the assets.

These questions are common amongst business owners selling assets and borrowing money. Further complicating the matter is the fact that there does not appear to be an agreed upon standard practice amongst corporate counsel as to how to address the issue.

The significance of a CRA search is that it discloses to the searching party whether the subject company owes any money to CRA for unremitted employee source deductions or HST. As payment of source deductions to CRA is a federal statutory requirement, the allocated funds are considered the property of CRA. They are not a payable requiring an action to enforce, but rather an existing lien already attached to the debtor property.

When source deductions are made, they are deemed to be held separate and apart from the property of the employer and in trust for Her Majesty the Queen. If source deductions are not remitted to the Receiver General by the prescribed due date, the provisions of the federal *Income Tax Act* (the "ITA") become operative and a lien attaches to the property of the employer to the extent of the unremitted source deductions, as a trust is deemed to have existed in favour of the Crown the moment the source deductions were made. This trust is similar to a floating charge over all the tax debtor's assets. As long as the tax debtor continues to be in default, the trust continues to float. Thus, as a result of its late remittances, the Crown has a lien over the property of ABC to the extent of the unremitted withholdings.

The rationale behind the rule is that the collection of source deductions has been recognized as being "at the heart" of income tax collection in Canada. Due to their importance, federal legislation provides the Minister this vehicle to ensure the recovery of employee tax deductions which employers fail to remit. Also, where the Minister is an involuntary creditor and must rely on its ability to collect source deductions under the ITA, the Minister has been given special priority over other creditors.

Given the above, it makes sense that XYZ wants to ensure that CRA doesn't claim a lien against ABC's assets, which would include the beer making equipment. Similarly, the Bank wants to ensure that CRA won't have a priority over ABC's assets. However, the question remains: is a CRA clearance necessary in both circumstances?

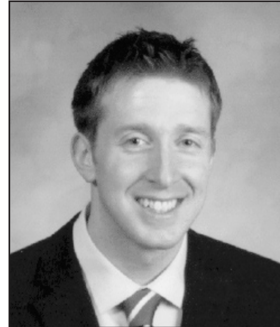
In *First Vancouver Finance v. Minister of National Revenue*[1], the Supreme Court of Canada confirmed that the deemed trust does not [specifically] attach to any particular asset of the tax debtor. As a result, the debtor is free to alienate its property in the ordinary course, in which the trust property is replaced by the proceeds of the sale of such property. The court stated that to allow CRA's deemed trust to override the rights of purchasers for value would result in an unprecedented level of uncertainty and that adopting this interpretation of the deemed trust would have a chilling effect on commercial transactions. As a result, XYZ can purchase the beer making equipment without fear

1. 2002 SCC 49, [2002] 2 S.C.R. 720.

of CRA seizing the equipment. While it may be useful to know whether a target company is up to date on its remittances (i.e., if XYZ was buying all the shares of ABC), it shouldn't be an impediment to this asset sale.

By contrast, a lender needs to be more cautious. It's been held that a lender will be subordinated to CRA if a lien was in place prior to the registration of security documents[2]. Given this priority, it is essential from the Bank's perspective that it gets a CRA clearance before advancing any funds. Without the clearance from ABC, the Bank can't be certain of its first priority charge or the extent of any possible subordination.

At the end of the day, the CRA clearance requests should not be an impediment to ABC's expansion plans. The asset sale can seemingly close without a CRA clearance; however, whether via the sale proceeds from the XYZ deal or the loan proceeds from the Bank, it's clear that ABC will have to make arrangements to settle up with CRA in order to satisfy the Bank and move forward with the expansion plans. Accordingly, while it is unlikely that CRA would ever represent a roadblock to your commercial activities, given the super priority status of its deemed trust, it certainly could represent a speed bump along the way if you are not current with your remittances.



Steve Winter – Associate
709.570.8851
St. John's, NL
swinter@smss.com

Business Disputes Corner

Case Comment

In a recent trial before the Nova Scotia Supreme Court, RBC Dominion Securities Inc. ("RBCDS") and a now-retired Investment Advisor with RBCDS were sued by G. C. Baxter Developments Limited in relation to an investment account that was open between 1992 and 2000. The Plaintiff claimed that the Investment Advisor had failed to meet the applicable standard of care and that RBCDS had failed to meet supervisory obligations. The Plaintiff claimed the Defendants were negligent; breached fiduciary obligations owed to the Plaintiff; and that there had been unauthorized discretionary trading. The Plaintiff took the position that during the time the account was open at RBCDS, it evolved into an unsuitably high-risk portfolio. The Plaintiff sought damages in excess of $1.5 million, claiming that the portfolio ought to have earned greater than a 10% annual rate of return.

RBCDS, on the other hand, took the position that the account was suitable in light of the Plaintiff's investment objectives and risk tolerance, and that the portfolio in fact showed modest gains, rather than losses, over the relevant time period. RBCDS disputed the damages methodology advanced by the Plaintiff arguing that it failed to reflect certain gains in the portfolio.

At trial, the key issues were suitability, unauthorized trading, and whether there were damages as alleged. A review of broker negligence cases indicates that courts often focus on questions of suitability. In assessing whether the appropriate standard of care has been met, a key factor is whether the advice from an investment advisor was suitable in light of an investor's objectives, knowledge, net worth, income, age, and risk tolerance. These factors collectively are relevant to an assessment of investment "suitability", typically referred to in the industry as the "know your client" rule. Courts have made it clear that an advisor is not a "guarantor," "custodian" or "insurer," but need only show that he or she reasonably applied the skill and care appropriate to the circumstances.

In the Nova Scotia Supreme Court trial, the Defendants denied that any trades were made without input or agreement from the Plaintiff. RBCDS and the Investment Advisor sent the Plaintiff various confirmation slips, prospectuses, research reports, and year-end summaries outlining the portfolio's performance. At trial the Plaintiff acknowledged receipt of many of these materials, though claimed that he did not carefully review all documentation sent to him.

The Defendants challenged the position put forward by the Plaintiff and by the Plaintiff's expert in relation to the issues of the appropriate standard of care and the quantification of any damages.

After four days of evidence in the scheduled nine day trial, and part way through the cross-examination of the Plaintiff's expert witness, the Plaintiff withdrew the claim and agreed to a without costs dismissal of the action. In view of the without costs dismissal, there is no written decision, though the case provides an example of a positive outcome for defendants in an investment/stock broker liability claim.

RBC Dominion Securities was represented by ***Rory Rogers*** *and* ***Tanya Butler*** *of Stewart McKelvey's Halifax office.*

Roderick Rogers – Partner
902.420.3369
Halifax, NS
rrogers@smss.com

2. MCAP Service Corporation v. Hunter 2007 ONCA 83, [2007] 2 C.T.C 181.

Practice Contacts

Business

The firm provides comprehensive services in all aspects of company and commercial law including creation of corporate and other vehicles, shareholder agreements, partnerships, joint ventures, distribution, agency and other such agreements; franchising and licensing; all manner of commercial contracts; mergers and acquisitions including structuring, due diligence, bids, and associated financing and tax planning; MBOs, LBOs, amalgamations, and asset and share transactions; cross-border transactions and assisting foreign clients making investments in Atlantic Canada, including the establishment and expansion of operations; all aspects of business disputes, including commercial litigation, arbitration and mediation. Stewart McKelvey has expertise in using corporations and unlimited liability companies, as well as international trust companies formed in the jurisdiction in which we practice, to solve the unique requirements of our domestic and international clients.

Department Manager, Business

Maureen Ryan – Partner
709.570.8880
mryan@smss.com

Practice Group Leaders

Business Disputes
Colin Piercey
902.420.3345
cpiercey@smss.com

Commercial Real Property
Fraser MacFadyen
902.420.3365
fmacfadyen@smss.com

Intellectual Property/Information Technology/Entertainment
Rob Aske
902.420.3310
raske@smss.com

Lending & Insolvency
Lee Bell-Smith
506.632.2793
lbellsmith@smss.com

Mergers & Acquisitions
Deanne MacLeod
902.420.3313
dmacleod@smss.com

Natural Resources & Environmental
Greg Moores
709.570.5797
gmoores@smss.com

Owner Managed Businesses
Peter Klohn
506.632.2788
pklohn@smss.com

Securities/Public Companies
Gavin Stuttard
902.444.1709
gstuttard@smss.com

Tax, Estates & Trusts
Paul Festeryga
902.420.3302
pfesteryga@smss.com

Service First

Clients expect and have the right to receive full value for the fee charged. We have earned a reputation for providing value to business, the public sector and individuals. Service First defines the standards of client service at Stewart McKelvey. Our lawyers and staff hold themselves accountable to deliver the following standards of service to each of our clients:

1. We will work to provide you with the highest quality of confidential, ethical legal services.

2. We will work with you to develop a full understanding of your business / organization and expectations.

3. We will pursue your work conscientiously and without delay. We will work together with you to establish time specific goals and objectives that meet your needs.

4. We will delegate work to our lawyers who have the legal expertise and experience appropriate to both the nature and complexity of the matter and our understanding of your expectations. Where deemed appropriate by you, we will designate a qualified lawyer as an alternative service contact to ensure continuity of service when the lawyer responsible for your matter is not available. At your request, we will work with you to develop practical fee estimates. We will always strive to add value.

5. At your request we will provide documentation that outlines the scope of the legal services to be provided; the potential timeline for handling the matter; a list of the client team members and alternate service contact, with their fields of expertise; and our lawyers' contact information.

6. We will meet and strive to exceed your expectations and always welcome your feedback. We will from time to time, seek from you, either formally or informally, an assessment of our performance.

7. We will maintain effective channels of communications including keeping you informed of all significant developments in the legal matter and responding to your contact in a timely fashion.

8. Accounts will be easy to understand. We will always be receptive to client feedback on our billing practices. When issues arise, we will treat them seriously and respond promptly.

9. If you are dissatisfied with our services, or if you feel we have failed to meet any of these commitments, we ask that you call the service lawyer on your matter, the alternate service lawyer, Regional Managing Partner, Department Manager or Practice Group Leader to discuss your concern. We will honestly and fairly address your concerns.