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LEGAL DEVELOPMENTS OF INTEREST TO BUSINESS IN ATLANTIC CANADA

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

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Canadian National Securities Regulator – What Will It Mean To You?

Introduction

For decades, the topic of a Canadian national securities regulator has been discussed, studied and debated. Many (including myself) have said that it would not likely happen in their lifetime, largely due to the politics surrounding the concept.

However, in July 2009 the government of Canada established the Canadian Securities Transition Office to lead and manage the transition from the current system of 13 provincial and territorial securities regulators to a single, national securities regulator. The mandate of the Transition Office includes developing national securities legislation and a transition plan. Although it is not yet a done deal, it is looking more likely than ever that a "national" regulatory regime will be established in the next few years, albeit without the participation of a few key provinces.

The Politics of a National Securities Regulator

Ten of the thirteen provinces and territories in Canada have indicated some interest in climbing aboard the national securities regulator bus by participating in the establishment of a national regulatory system. The provinces of Alberta and Quebec lead the opposition to a national securities regime and have been very vocal in their opposition, going so far as to challenge the initiative in Quebec court. Manitoba is also not participating in the process at this time and has expressed some opposition. Other provinces participating in the process, including British Columbia and New Brunswick, have recently expressed some concern as well. The Quebec court challenge, together with a separate referral by the Federal government to the Supreme Court of Canada to confirm the constitutionality of Federal securities regulation, remain outstanding.

The securities regulatory authorities now existing in some provinces are self-funding, with essentially their entire fee revenue going back into securities regulation. However, securities regulation is a money-maker for other jurisdictions, with securities regulators taking in more revenue for the jurisdiction than the jurisdiction pays to run the regulator. This and provinces' reluctance to give up independence mean that the federal government must spend political and other capital to convince each of the jurisdictions to sign on to the national securities regulatory regime.

Is it Worthwhile?

In my personal opinion, if we were setting up a new securities regulatory regime in Canada from scratch, it would make perfect sense to set it up as a national regulator. I understand that there may be some potential benefits to a national regulator, although national regulators aren't perfect either – witness the tale of Bernie Madoff and the SEC, the national securities regulator in the United States.

However, we currently have a system of provincial and territorial regulation that isn't necessarily broken, certainly from a corporate finance perspective. Over the last 15 years, the securities regulators in each jurisdiction have done a decent job of harmonizing securities regulation in Canada. In addition to coordinating changes in legislation and rules so that they are essentially identical in each province and territory (with a few limited exceptions), the securities regulators have cooperated, initially through a mutual reliance review system (MRRS) and most recently through a "passport" system. Under passport, issuers deal only with the regulator in their principal jurisdiction, and that principal regulator effectively makes the decisions for all jurisdictions. In many cases we now have virtual one-stop shopping. Notably, Ontario has not signed on to the passport system, largely because it would prefer a national securities regulator. Of course, other jurisdictions are concerned that a national securities regulator will mean regulation from Toronto, making the politics more difficult.

In short, I have not yet been convinced that the benefit of "fixing" our securities regulatory system by creating a national securities regulatory regime outweighs the cost of establishing the national regime. The Transition Office is expected to cost approximately $33 million over its initial three year existence, and it is difficult to know what the federal government will need to pay in order to convince various jurisdictions to buy in, including provinces that have participated in the process to set up a national regulator. At this time, there is a $150 million budget to negotiate with the provinces and territories.

In any event, the federal government is pushing ahead with what appears to be a "build it and they will come" strategy. The "national" securities regime will initially be optional for the provinces and territories, with several provinces expected to opt-out. As a result, if the national securities regime does get off the ground, securities regulation in Canada will continue to be fragmented into the foreseeable future.

What Will the National Securities Regime Mean to My Business?

To begin, the national securities regulator will not be in place until at least mid 2012. This current target date remains aggressive and there is a good chance the date will slip.

As stated, if and when the national securities regulatory authority does come online, it will likely exclude several key provinces. Accordingly, issuers will still be forced to deal with multiple jurisdictions. With the current passport system, issuers in the Atlantic provinces usually are required to deal with two regulators – their home province and Ontario. Depending upon which jurisdictions do not opt-in, the number of jurisdictions with which a business must deal could increase under the proposed national regime. However, there will likely be a passport-like interface negotiated between the "national" system and the non-participating provinces, which would likely result in issuers continuing to deal with two regulators.

I do not anticipate businesses will see much, if any, day to day change as a result of the national securities regulatory regime, at least initially. The national securities legislation will be substantially the same as the harmonized securities legislation now in existence in the provinces. Further, it is likely that there will be regional offices for the national securities regulator staffed largely by the same individuals who staff the provincial securities regulators. Accordingly, businesses will still be able to talk to the same people about the same issues that they always have. And although there will be fewer jurisdictions to which fees are owed, one would expect that the national fee will likely be close to the aggregate of all of the provincial fees it is replacing. Accordingly, issuers will not likely see any material reduction in regulatory costs.

One area in which businesses could see a slight change in practice is in the conformity of regulatory review. Provincial securities regulators sometimes have their own particular issues on which they focus from time to time, while the same issue may not be the focus of a neighbouring province. We have experienced a few situations where a non-principal regulator (such as Ontario or Quebec) will flag an issue on regulatory review that the local jurisdiction did not initially flag. Under the current system, the non-principal regulator often relies on the principal regulator and does not review a matter. Although jurisdictions currently discuss various hot-button or unique issues, there could be some additional focus under a single national regulator on issues of the day from all jurisdictions. This could potentially lead to more questions or comments on filings.

In the longer term, the hope for those participating in the national regulator is that additional jurisdictions will eventually be convinced to join the national regime, either by market forces or settlement with the Federal government. It will likely also make sense to eventually close at least some of the local securities offices in the Atlantic provinces.

Given the political negotiations still to be had, I am not holding my breath that there will be a true single, national securities regulatory regime in Canada any time soon. Any "national" securities regulatory regime will likely remain fragmented for some time, with businesses seeing little change in day-to-day dealings with Canadian securities regulators.

Andrew V. Burke – Partner
Halifax, NS
902. 420.3395
aburke@smss.com

Carbon Trading and Your Business

Over the last few years there has been an increasing awareness and concern about the risks associated with climate change caused by human-produced greenhouse gas emissions. This has led to demand for "carbon offsets". But what does this mean for Atlantic Canadian businesses? This article will give a very brief introduction to carbon offsets, who buys them, and how they are created and sold, in order to help you determine whether they could benefit your organization.

Carbon Offsets 101

A carbon offset is a reduction in greenhouse gas emissions undertaken by someone who is not required to make the reduction. In practice, a greenhouse gas reduction only becomes a marketable offset once steps have been taken to quantify and verify it. It is called an "offset" because it is used to offset emissions made elsewhere. The reduction in emissions is measured against what would happen in a "business as usual" scenario. As with many products, there are various types or "brands" of carbon offsets, which vary depending on how a carbon offset is created. Offsets are measured in tonnes of carbon dioxide equivalent ("CO_2e").

Where are Carbon Offsets Used?

There are two types of markets for carbon offsets:

The first are **compliance markets**, where demand for carbon offsets comes from an obligation on regulated entities to meet emission reduction targets and the ability, of those regulated entities to use carbon offsets or other carbon credits to meet their targets. An example of a compliance market is the one created by Alberta's *Specified Gas Emitters Regulation*[1], which has been in effect since 2007.

The second are **voluntary markets**, which are the markets most relevant to businesses in Atlantic Canada. In voluntary markets demand comes from businesses, organizations, governments and individuals who do not have a legal obligation to reduce their greenhouse gas emissions but want to offset some or all of their emissions, from such sources as their electricity use or travel.

Nova Scotia passed the *Voluntary Carbon Emissions Offset Fund Act*[2] (the "Act") in May 2010. It provides for the creation of a provincial non-profit fund that individuals, businesses, organizations and government bodies can pay money into in return for emissions credits. Emissions credits can be used by purchasing entities to offset their carbon footprints. The Act only provides a framework and leaves the significant details to be filled in by regulation. The Act is not yet in force, however, it is likely that if implemented, the Fund provided for by the Act would purchase offsets from projects in Nova Scotia that meet criteria specified by the government.

Who Buys Carbon Offsets?

The main source of demand for voluntary carbon offsets comes from businesses and governments. For example, TD Bank, Google and the 2010 Winter Olympics (VANOC) have purchased offsets in pursuit of their goals to be carbon neutral. In British Columbia public sector

1. Alta Reg. 139/2007.
2. S.N.S. 2010, c. 10. Available online: http://nslegislature.ca/legc/bills/61st_2nd/3rd_read/b038.htm.

organizations are required by law to be carbon neutral and purchase carbon offsets from a provincial fund similar to the one enabled by the Act.

In practice, voluntary carbon offset buyers will often buy their offsets from a middle man (sometimes known as an aggregator) that sources them from the projects that generate the greenhouse gas emissions reductions. There are a number of aggregators in Canada that are in the business of purchasing offsets from organizations that have undertaken greenhouse gas reduction projects and in turn selling them to end-users who want to reduce their carbon footprints.

A significant hurdle to many organizations who are considering selling carbon offsets is determining what price they can get for them. This is a difficult determination for two reasons: first, the price varies by the type of offset (i.e., what regulation or standard the offsets are created under), as well as such things as the location and type of the project generating the offsets. The second reason is that carbon offset transactions are private transactions where prices are rarely made public. Voluntary carbon offsets may be sold from less than a dollar to over $20 (per tonne of CO_2e), with the voluntary market currently skewing heavily towards the lower end of that range.

How are Carbon Offsets Created?

The range of activities that can generate carbon offsets is wide – for example, in Canada offsets have been generated from installing more energy efficient machinery at industrial facilities, switching to less carbon intensive fuels (e.g., from natural gas to biomass), capturing methane emitted from landfill, using low-till or no-till agriculture techniques, and generating power from renewable energy sources such as wind.

In order to create carbon offsets that can be sold, a number of criteria have to be met and steps have to be taken. The exact criteria and steps will depend on what type or "brand" of offset you are seeking to create. For example, to create offsets for Alberta's compliance market, you would need to meet criteria set out in regulations and guidance documents published by authorities there. To give another example, in order to create Voluntary Carbon Units, a popular type of voluntary market offset, you would need to meet the criteria and take the steps set out in the Voluntary Carbon Standard,[3] which sets out rules for creating credible voluntary carbon offsets.

If your business has achieved greenhouse gas emissions reductions and you think there may be an opportunity to sell the reductions as carbon offsets, the first question to ask is whether the reductions go beyond what is "business as usual". In the carbon world this is known as "additionality" and is an important but sometimes difficult threshold to meet. Other common criteria for offsets are that they be unique, quantifiable, verifiable, and that the offsetting activity is not already required by law. In addition, there are often time or geographical criteria that have to be met – for example, a requirement that only projects started after 2002 are eligible to generate offsets or that only offset projects within the province can generate eligible emissions reductions.

Once the relevant threshold criteria are met, steps that typically need to be taken include: registering the project on a registry that publishes the project's details,[4] and quantifying, reporting and verifying[5] the emissions reductions.

A number of the above steps require the assistance of external consultants with expertise in the carbon offset creation and verification process, and there are transaction costs involved in registering and selling carbon offsets. Some offset aggregators make things easier for offset project owners by agreeing up front to take on these costs (usually in exchange for a reduced purchase price).

Know Your Opportunity

Because it is a relatively new concept and the process is specialized, the opportunity to generate and sell carbon offsets is often overlooked. However, in the right circumstances it can be a welcome source of additional revenue for businesses and other organizations. If your organization has taken steps to reduce its greenhouse gas emissions and you think you have an opportunity to create carbon offsets, it is worth investigating!

Keith Sutherland – Associate
Halifax, NS
902.444.1737
ksutherland@smss.com

3. See www.v-c-s.org.
4. See for example the Canadian Standards Association's CleanProjects Registry at http://www.ghgregistries.ca/cleanprojects/masterprojects_e.cfm or the Voluntary Carbon Standard registries available through http://www.v-c-s.org/projects.html.
5. Verification is an independent third-party review of a project's assertion of greenhouse gas emission reductions, similar to an accounting audit.

The Importance of Consulting with your Trade-mark Lawyer

Are you sure you're doing all the right things to enhance your commercial goodwill?

Many Atlantic Canadian businesses have significant goodwill on their balance sheet based on well-known or unique brands, such as highly distinctive corporate or product names, visually striking logos or catchy slogans. Surprisingly, many of those same businesses have not taken any steps to protect those valuable assets in the way other revenue-generating "bricks & mortar" assets are protected. It's high time for you to examine your trade-mark portfolio and assess whether you are doing everything you can to ensure that each of your marks is duly and appropriately protected from infringement, imitation and abuse in your marketplace.

New Brands and Searches

First, it is highly recommended that you use the services of an experienced trade-mark lawyer when developing a new brand, a marketing concept or a promotional campaign, because the trade-mark searching and registration process often requires extensive knowledge of trade-mark law and related practice and procedures. A trade-mark lawyer can advise you on many aspects of your trade-mark searches and filings and on trade-mark protection services generally before you invest significant funds in advertising or on packaging that could ultimately be infringing, unusable and a waste of valuable resources.

For example, when choosing a product name or a service slogan, a trade-mark lawyer can provide strategic advice on distinctiveness, usage and potential confusion issues arising from the list of available marketing options. Typically, your trade-mark lawyer will obtain a trade-mark search report to help you assess both the availability for use of your proposed mark and its likelihood of successful registration under federal trade-mark legislation. Your trade-mark lawyer will counsel you on the results of the trade-mark searches and whether it is prudent to proceed with using and registering the proposed mark in light of the apparent risks involved. She or he will also counsel you on how to best structure your trade-mark registration application, the cost to register your trade-mark and how to protect your trade-mark on a go-forward basis as your business grows and your precious brand evolves.

Drafting the Application

Second, an experienced trade-mark lawyer will strive to draft the trade-mark application in a way that is most likely to pass a successful examination at the Canadian Intellectual Property Office ("CIPO") while establishing the greatest possible scope of protection for your mark. Your trade-mark lawyer will give special attention to the detailed descriptions of the products and services to be included in the registration application in order to ensure that it only uses ordinary commercial terms and that it will avoid potential objections and minimize potential third party oppositions during the approval process.

A competent trade-mark lawyer will also help you to ensure that your trade-mark application is complete and comprehensive. For example, your trade-mark lawyer will review your current and future potential uses of the existing or proposed trade-marks. Use is a fundamental aspect of trade-mark law that can give rise to legal issues which a trade-mark lawyer is best equipped to address on your behalf.

Responding to Objections

Third, an experienced trade-mark lawyer will be able to work with the CIPO examiners to respond to any objections they may have with your trade-mark application prior to its allowance. Your trade-mark lawyer will write and submit legal arguments that address substantive and/or technical objections to the registration of the trade-mark, if and when they arise.

To summarize, your trade-mark lawyer will be able to counsel you on all facets of selecting and registering a trade-mark, trade-mark filings and trade-mark usage on an on-going basis. You will be advised about trade-mark registration costs and timing, formal trade-mark searching, cursory online trade-mark searching and the best strategies and tactics to get your trade-mark promptly registered and protected under applicable laws.

Other Trade-mark Services

In addition to trade-mark registration services, an experienced trade-mark lawyer can also advise you on how to effectively and efficiently handle other trade-mark related circumstances, such as the negotiation, formation and enforcement of contractual licensing relationships or receiving a cease and desist letter from a potential litigant. A cease and desist letter is issued when a party believes its trade-mark is being infringed or improperly used. A cease and desist letter must be promptly evaluated and responded to by your trade-mark lawyer who will provide you with reliable trade-mark advice and practical assistance. Moreover, you may want to issue cease and desist letters from time to time as part of your regular trade-mark policing activities, again something that an experienced trade-mark lawyer can quickly assist you with.

Protect your Assets

A trade-mark can often be the most valuable form of intellectual property that a business owns and exploits. By registering it early, using the mark properly and diligently and by policing its use on a consistent basis, the trade-mark owner can preserve the legal rights associated with the trade-mark indefinitely at relatively little cost and can thereby prudently protect the valuable goodwill and reputation associated with the brand, the trade-mark and the business.

Stewart McKelvey has been at the forefront of trade-mark law practice for many years and has the largest number of experienced trade-mark agents and IP lawyers in the Atlantic provinces. If you have any questions or concerns about your trade-marks, the members of our Technology and Intellectual Property Group would be happy to help you address them. Give us a call to be sure.

Marc J. Belliveau – Partner
Halifax Office
902.420.3343
mbelliveau@smss.com

Pending Health Privacy Legislation In Nova Scotia

Nova Scotia's legislature has very recently passed the *Personal Health Information Act*, which has been in development within Nova Scotia's health bureaucracy for several years. Similar legislation is already in place in New Brunswick, Newfoundland and Labrador (not fully in force) and other provinces in Canada.

When put in force and implemented, this Act will impose a very detailed legal structure for the handling of personal health information. The Nova Scotia Health Department hopes to have the Act in force and implemented within 6 to 9 months.

Purpose

The purpose of the new Act is to deal with all aspects of handling personal health information, and the Act recognizes both the right of individuals to protect their information and the need of others to use it for health care purposes.

Application

The Act will govern all aspects of collection, use and disclosure of personal health information, but will not apply to health information which does not identify individuals, and will not apply to information used for purposes other than health care.

Some Key Definitions

The Act will apply to "custodians", which includes various government health bodies, and also health professionals.

"Personal health information" has a broad definition in respect of an individual's health care, but only includes information which identifies an individual, or where it may be reasonably foreseeable that it will identify the individual in association with other information.

Consent

Like most privacy legislation, the cornerstone is consent, and custodians shall only collect, use and disclose personal health information with an individual's consent, and when reasonably necessary for a lawful purpose.

Consent must be either express, or "knowledgeable implied consent", which must be knowledgeable, relate to the information and be voluntary (a high standard).

Any capable individual, regardless of age, may consent or withdraw consent. Individuals may revoke consent, but not retroactively.

Collection, Use and Disclosure

Custodians shall not collect, use or disclose personal health information if other information would serve the purpose, and such collection, use and disclosure must be limited to the minimum amount necessary to achieve the purpose.

Various circumstances are set out in the Act where personal health information may be collected, used and disclosed without consent. This is intended to provide a comprehensive set of exceptions for custodians and others to review when considering such circumstances.

Any disclosure without consent must be documented, including a description or copy of the information, the identity of the recipient, the date of disclosure and the authority for the disclosure.

Collection, Use and Disclosure By Agents

The Act extends to "agents" of custodians, who might include any person or entity acting for or on behalf a custodian in respect of personal health information (e.g., information technology providers). Agents are prohibited from collecting, using or disclosing personal health information unless permitted to do so by the custodian.

Practices to Protect Personal Health Information

The Act will require custodians to implement and maintain practices that protect against theft, loss or unauthorized access to personal health information. A complaints policy will need to be implemented.

Custodians will also need to maintain records of user activity for any electronic information system that is used to maintain personal health information. Records of such user activity must be made available to individuals upon request without charge.

Privacy policies will need to be maintained by custodians, similar to PIPEDA requirements. Privacy officers must be designated to facilitate compliance with the Act.

Reporting and Reviewing Privacy Breaches

Custodians must notify individuals if information is stolen, lost or subject to unauthorized access, where there is a potential for harm or embarrassment.

Complaints under the Act are subject to review by a review officer. The review officer has the power to investigate and make recommendations, and custodians must indicate whether they will comply or shall refuse to comply. Individuals can then appeal to the Supreme Court of Nova Scotia, who can hear the matter in a new hearing and may examine any records. The Court is given the authority to make any order it considers appropriate.

Offences and Penalties

The Act includes a long list of offences, many of which require intentional acts, but offences also include the basic failure to protect personal health information in a secure manner as required by the Act. Individuals may face fines of up to $10,000, and corporations may be liable to fines of up to $50,000, and officers, shareholders and employees of a corporation may be liable if they authorized the offence or had authority to prevent the offence, even if the corporation is not prosecuted.

Rob Aske – Partner
Halifax, NS
902. 420.3310
raske@smss.com

Guidance on Environmental Disclosure

On October 27, 2010 the Canadian Securities Administrators ("CSA") released CSA Staff Notice 51-333 *Environmental Reporting Guidance* (the "CSA Guidance"). The CSA Guidance is intended to clarify existing environmental disclosure obligations that arise in respect of current obligations to provide risk disclosure, risk management/oversight disclosure and forward-looking information disclosure. These existing disclosure obligations are found in the requirements of National Instrument 51-102 *Continuous Disclosure Obligations*, National Instrument 58-101 *Disclosure of Corporate Governance Practices* and National Instrument 52-110 *Audit Committees*.

Materiality Determinations

The CSA Guidance is intended to assist issuers in assessing what information must be disclosed on material environmental matters and to assist reporting issuers in enhancing or supplementing their existing disclosure if needed. In particular, the CSA guidance provides discussion of some "guiding principles" to help facilitate materiality determinations for environmental risk disclosure. The CSA notes that these principles are derived from existing rules and authorities and, as a result, the disclosure in the CSA Guidance may assist issuers in making materiality determinations in other contexts. In general, while there is no bright line test for disclosure, a materiality determination will be based on an assessment of the magnitude of the risk taken in its context and the probability of the risk materializing, given current trends (including the anticipated magnitude of the effect of such trend), known factors and time horizons for the potential growth of such risks. Issuers are counselled that when they are in doubt about materiality, they should err on the side of disclosure.

Key Disclosure Items

The CSA Guidance discusses five key disclosure requirements in NI 51-101 relating to environmental matters, being:

- environmental risks (including, litigation, physical, regulatory, reputational and business model risk);
- trends and uncertainties regarding environmental matters which may materially impact an issuers financial performance and future prospects (including impact on liquidity, capital resources, results of operations, revenue, expenditures on cash flows) to be discussed in issuer's MD&A;
- environmental liabilities detailed in issuer's financial statements and/or MD&A;
- asset retirement obligations and the impact on financial statement disclosure; and
- financial and operational impacts of environmental protection requirements on capital expenditures, earning and competitive positions.

Further, with respect to financial statement and MD&A disclosure, the CSA Guidance provides specific examples of how revenues and expenses may be impacted by the above environmental matters.

Environmental Policies and Corporate Governance

The CSA Guidance clarifies that issuers must disclose any adopted environmental policies that are fundamental to its operations and the steps that the issuer has taken to implement such policies. Issuers should note that such policies may include policies that govern the management of risk generally (including any responsibilities for managing risk as set out in a Board mandate), or policies that specifically govern the management of environmental risk.

The CSA Guidance confirms that it is the responsibility of boards, audit committees, and certifying officers to ensure that reporting issuers have adequate disclosure controls and procedures and that this responsibility extends to ensuring there are adequate controls and procedures in place around disclosure of environmental matters.

For further information on environmental disclosure and the CSA Guidance, please contact any member of Stewart McKelvey's Securities and Public Companies practice group.

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

Court Orders House Arrest for Failing to Comply with Production Order

On September 9, 2010, the Nova Scotia Supreme Court made a finding of contempt against Douglas Rudolph for failing to produce documents requested of him at a discovery examination in aid of execution. A motion for contempt was brought on behalf of the Plaintiffs, David and Patricia Johnson. In June 2006, David and Patricia Johnson were approached by Douglas Rudolph regarding an investment opportunity. The Johnsons invested, secured by way of a promissory note, with a repayment date of June 2007. The repayment date came and went without any payment by Mr. Rudolph.

A judgement was obtained, on October 23, 2008, against Mr. Rudolph and a discovery examination in aid of execution was conducted of him on December 22, 2008. Numerous requests were made at the discovery, including financial information, income tax records and an interest in a property located in the Bedford area of Halifax Regional Municipality. Despite numerous requests, Mr. Rudolph refused to provide any of the documentation.

After some preliminary appearances before the Supreme Court seeking production of the requested documentation, the parties appeared before the court on April 13, 2010. Mr. Rudolph was ordered to produce the documentation within 30 days, but he failed to do so. On July 8, 2010, the Johnsons filed a Motion for Contempt and appeared before the Supreme Court on two other occasions, when Mr. Rudolph was warned of the potential consequences of continuing to fail to comply with the court order, including jail time.

On September 9, 2010, Justice Murphy found that Mr. Rudolph was in contempt for failing to comply with the terms of the April 13, 2010 court order, with sentencing to follow. Under the Nova Scotia *Civil Procedure Rules*, penalties following a finding of contempt range from a fine to a maximum of five years imprisonment.

Justice Murphy sentenced Mr. Rudolph to a term of imprisonment of 14 days in the community (house arrest), with additional time to be spent performing community service. It is believed that this is the first time in Nova Scotia that a term of imprisonment has been imposed in a civil matter when a party has failed to produce documents. Justice Murphy commented that the Burnside jail was full and for that reason, as well as that this was a civil matter, the penalty of house arrest was the only viable solution to match the seriousness of the contempt.

In sentencing Mr. Rudolph to the house arrest, Justice Murphy made it clear that parties cannot ignore court orders and to do so is a serious matter. In this case, Mr. Rudolph's contempt warranted more than a fine and the house arrest was ordered.

Over the course of the proceedings, Justice Murphy was clear that the priority of the court was to ensure production of the requested documents was fulfilled. Ultimately, Mr. Rudolph provided some of the requested documentation to the Johnsons.

The Johnsons were represented by **William L. Ryan, Q.C.,** and **Sara Scott** of Stewart McKelvey.

Sara Scott – Associate
Halifax, NS
902.420.3363
sscott@smss.com

New Brunswick Court of Appeal Narrows the Test for Intention in Inducement of Breach of Contract Cases

On April 10, 2010, the New Brunswick Court of Appeal released its decision in *SAR Petroleum Inc. et. al. v. Peace Hills Trust Company*[1]. In its decision, the Court adopted the approach taken by the *UK House of Lords in OBG Ltd. v. Allen*[2] by holding that the tort of inducement of breach of contract arises only if the breach was a desired end in itself or a means to an end. In coming to that conclusion, the Court focused on the requisite element of intention, holding that the fact that a breach may be a foreseeable consequence of, or substantially certain to result from, a defendant's actions is insufficient to establish that element of the tort.

This approach differs from that applied by other Canadian appeal courts that held the intention element of the tort was satisfied if a defendant acted with the substantial certainty that a breach of contract would occur from its actions.[3]

The Decision in SAR Petroleum et al v. Peace Hills Trust Company

The appellant, SAR Petroleum Inc. (SAR), appealed a trial level decision granting summary judgment and dismissing its action for inducement of breach of contract against the defendant, Peace Hills Trust.

SAR contracted with the Eel River First Nation (Eel River) to construct a gas bar and convenience store on unsurrendered Native land for $4.9 million. The contract provided there would be no holdback.

Initially, Eel River paid SAR's invoices from its own money. However, to finance the balance of the construction project, Eel River obtained a secured loan from Peace Hills Trust. Peace Hills Trust was aware of the terms of the contract between SAR and Eel River. Despite this knowledge, Peace Hills Trust made many of the progress payments late and, on the advice of its legal counsel, who also represented Eel River, held back 15%, citing clauses of the loan agreement which the Court of Appeal agreed were relevant. At the time of the hearing, Peace Hills Trust continued to hold $250,000.00 back from SAR.

The court recognized that in delaying the progress payments and insisting on retaining a hold back, Peace Hills Trust knowingly caused Eel River to breach its contract with SAR. However, this conduct, in the court's opinion, did not amount to an inducement because Peace Hills Trust did not intend to cause the breach.

In coming to this conclusion, the New Brunswick Court of Appeal adopted the approach taken by Lord Hoffman in *OBG Ltd. v. Allen*[4], which established that:

- in order to successfully establish intention in an action for inducement of breach of contract, a plaintiff must show that the breach was either an end in itself or a means to an end;
- a breach is an end in itself when the defendant acts out of malice or ill will toward the plaintiff in procuring the breach; and
- a breach is said to be a means to an end when the defendant induces the breach to gain an advantage to which it was not otherwise entitled.[5]

The parties acknowledged that Peace Hills Trust acted without malice and on the advice of legal counsel, who initially and mistakenly believed that they were legally entitled to retain a holdback pursuant to the *Mechanics' Lien Act*[6]. Therefore, the breach could not be characterized as an end in itself. When faced with the question as to whether the breach was a means to an end, the Court held that it was not, because Peace Hills Trust did not profit from the breach.

Conclusion:

This decision, if followed, will likely have a significant impact on Canadian tort law as it has clarified one of the most problematic aspects of the tort of inducement of breach of contract; the element of intention. In doing so, it has limited the scope of the tort to those instances in which a plaintiff can demonstrate either (a) that a defendant's conduct, in causing a breach of contract between the plaintiff and a third party, was borne out of malice or ill will, or, (b) that as a result of the breach, the defendant gained an economic advantage to which it was not otherwise entitled.

1. 2010 N.B.C.A. 22
2. [2007] U.K.H.L. 21
3. Klar's *Tort Law*, 3rd ed at p. 612; *Park West Mall Ltd. v. Jennett* (1995), 178 A.R. 45 (Alta. C.A.); *Brae Centre Ltd. v. 1044807 Alberta Ltd.* 2008 A.B.C.A. 397; *Vechere v. Greenpeace Canada* 2004 B.C.C.A. 242 (leave to appeal refused by (2004), 241 D.L.R. (4th) 327 (S.C.C.))..
4. Supra at para. 43
5. 2010 N.B.C.A. 22 at paras. 55 & 56.
6. R.S.N.B. 1973, c. M-6

Given the inherent difficulties in proving the subjective state of mind of a defendant, this narrowed scope all but precludes success in actions for inducement of breach of contract in the absence of clear evidence that the defendant gained an unauthorized economic advantage as a result of its conduct, and eliminates any consideration that the defendant acted with intention as well as knowledge that its conduct would result in a breach of contract.

Stephen Hutchison – Partner
Saint John, NB
506.632.2784
shutchison@smss.com

Misty Watson – Associate
Saint John, NB
506.632.8317
mwatson@smss.com

Electronic Document Preservation and Production Requirements: Some General Principles

Parties to litigation are required to produce all documentation that could impact the hearing of the action. This is not a new concept, and is intended to both promote settlement through early disclosure and to ensure that trials are fair and decided on the basis of all relevant and available information.

Although the use of email, word processing files and other electronic forms of correspondence and work product are far from new to the business community, their increasing use, combined with their ease of storage, has added some complexity to the burden imposed on litigants, and particularly commercial litigants. These complexities continue to be dealt with by the courts.

The complexities could generally be described as two-fold:

1) Businesses generate large amounts of electronic documentation that remains accessible for an extended period of time through back-up servers or hard drive searches. Corporate litigation involving an event that arose only several years previously could easily require reviewing tens of thousands of emails or other types of electronic documentation. The review and disclosure of this information can be very costly.

2) Documentation stored in electronic form contains information that is not accessible from a review of the printed version. This electronic information could include the date and place of creation and any blind-copied recipients of emails. This information can be relevant in many kinds of litigation, and has proven to be of particular interest in cases concerning intellectual property.

With a few exceptions, the disclosure and preservation requirements imposed on litigants are similar across the Atlantic provinces. All of the Atlantic provinces have rules which clearly require the review and production of electronic documentation. While Nova Scotia is the only Atlantic province that also has a rule specifically dealing with electronic information, their rule is generally in accord with the caselaw that has been considered and applied throughout all of Canada.

There are several key points businesses should keep in mind in respect of document preservation and production.

First is that the duty to preserve documentation, including electronic records, generally arises when litigation is

reasonably foreseeable. There are many situations when litigation might be reasonably foreseeable, and examples would include the receipt of a claims letter from a potential plaintiff or upon discovery of an error or omission which could give rise to litigation.

When litigation is reasonably foreseeable, businesses are required to preserve potentially relevant documentation, even if it would otherwise have been destroyed pursuant to a corporate destruction policy. The failure to institute and follow this "litigation hold" can have severe consequences, including monetary penalties, the drawing of adverse inferences and, in the most severe cases, judgment against the business.

Another point to keep in mind is that although the cost of production is generally borne by the party required to produce and while parties have a duty to disclose all relevant documentation, the court retains a discretion to deviate from this principle. Courts can consider the cost of disclosure as compared to the amount at issue as a means of limiting disclosure requirements, and have also allowed businesses to use key word searches of electronically stored data as a searching tool, which has the potential of significantly reducing the amount of documentation requiring review.

Jonathan Dale – Associate
St. John's, NL
709.570.5795
jdale@smss.com

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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

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