Toronto Law Journal

1196303 Inc. v. Glen Grove Suites Inc.: Using privity and agency to hold third parties liable

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The Ontario Court of Appeal's August 2015 decision in *1196303 Inc. v. Glen Grove Suites Inc.*[1] held that a non-party to a settlement agreement, Glen Grove Suites Inc. ("Glen Grove"), was bound to obligations pursuant to that agreement. The Court rejected the trial judge's reasons for this result, holding that the privity exception was not engaged. Rather, the Court of Appeal held that another party to the settlement had acted as Glen Grove's agent, thus binding Glen Grove. The decision arises from an unusual fact situation. Nonetheless, the case illustrates:

- why obtaining default judgment against one defendant in an action may not prevent a plaintiff from obtaining relief against another defendant, even (or perhaps especially) when the defendants are related;
- how and why a non-party may have obligations pursuant to a settlement agreement under the doctrines of privity or agency; and
- why it is best practice for parties negotiating contracts when one or more "sides" is in fact many up of several related but separate individuals and/or corporations, to:
    - clearly delineate each separate entity's obligations; and
    - have each separate entity execute the contract.

Background

Edwin Hyde was a lawyer and real estate developer. Two corporations that he controlled, Glen Grove and Spendthrift Developments Limited ("Spendthrift"), owned valuable long-term leases on a property on Yonge Street in Toronto (the "Property"). Edwin transferred his interests in the Property and Glen Grove to his wife ("Sylvia") prior to a 1997 bankruptcy. Edwin's creditors regarded these as reviewable transactions. Ultimately, a settlement agreement (the "Settlement") was negotiated between 1196303 Ontario Inc. ("119"), a creditor of Edwin's that had a proof of claim for over $10.9 million, and 1297475 Ontario Inc. ("129"), a shell corporation through which Sylvia owned 100% of the shares. During the settlement discussions, Glen Grove was extensively involved in the negotiation of the

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1 2015 ONCA 580, 9 E.T.R. (4th) 173 ["Appeal Decision"].

Settlement. The Settlement purported to place guarantee and security obligations on Glen Grove, but Glen Grove was not a party to the Settlement. When the Property was sold, the question arose whether Glen Grove could be said to be bound by the Settlement.

At the time of the Settlement, Sylvia owned 100% of the shares of Glen Grove, Spendthrift, and 129. After the Settlement, 129 did nothing to fulfill its obligations under the Settlement. 119 commenced an action to enforce the Settlement, naming 129, Spendthrift, Sylvia, and Glen Grove as defendants. Default judgment was obtained against 129. The Court eventually made an endorsement that the other defendants "undertake that no further encumbrances or steps to transfer will be undertaken without further court order." Glen Grove nonetheless registered a mortgage against the property without informing 119, leading to a certificate of pending litigation being obtained. Glen Grove later sold its interest in the Property. Some of the proceeds were paid into court to the credit of the action. The estate of Sylvia received net proceeds that it might not have received had 119 not given up its ability, through the Settlement, to attack the transfer to Sylvia of the Glen Grove shares and the interest in the Property.

Trial Decision

Sylvia, Glen Grove and Spendthrift defended the Action, unsurprisingly, on the basis that they were not parties to the Settlement. They also submitted that:

- Sylvia was merely the nominal owner of 129;
- 129 had not acted as their agent, but if it had, then 119 was estopped from pursuing them because it had already obtained default judgment against 129; and
- the corporate veil could not be pierced.

The trial judge made extensive findings of fact. One key finding was that, two months prior to the approval of the Settlement, Sylvia understood that the Settlement involved Glen Grove providing a mortgage on the Property and guaranteeing 129's obligations under the Settlement.

The trial judge found that Glen Grove and Spendthrift were liable under the Settlement because "where companies intimately connected in interest are used by a common controlling mind in combination to secure a court-approved benefit, they cannot subsequently be used by the common controlling mind to avoid performing the obligations which arose from their earlier combined action."[2] However, Sylvia was not found personally liable.

The trial judge accepted, without elaboration, Glen Grove and Spendthrift's argument that 129 was not their agent but noted this did not help them given his other conclusions. Finally, he found no reason to pierce the corporate veil.

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2 *1196303 Ontario Inc. v. Glen Grove Suites Inc.*, 2013 ONSC 7284, 94 E.T.R. (3d) 73 (S.C.J.) at ¶ 121.

The Appeal

Spendthrift and Glen Grove appealed the decision to the Court of Appeal. Justice Weiler wrote the majority judgment. She made quick work dismissing the appellants' challenges to the trial judge's factual findings in light of the deference owed to him on these points. The issues of privity of contract and agency, however, required in-depth analysis.

Privity

Glen Grove submitted that it was not bound by the Settlement because it was not party – or "privy" – to it. Justice Weiler agreed that the trial judge's reasons for finding Glen Grove liable under the doctrine of privity were flawed. The trial judge had stated:

> [T]he law will only hold parties to a contract liable for its terms and obligations. As a matter of general principle, of course that is true. However, while the separate legal personality of corporate entities must be given recognition when those entities are operated as separate entities, the same respect need not be accorded to the separate legal personalities when, having been used in combination to secure a court-approved benefit, the separate legal personalities are then erected as barriers to performing the obligations which secured the benefit.[3]

Justice Weiler held that this broad statement was erroneous. The trial judge had cited a single decision, *Martinez de Morales v. Lafontaine-Rish Medical Group Ltd.*,[4] to support this proposition, but that case was distinguishable. *Martinez* concerned whether a corporation should be estopped from attacking findings in a previous proceeding where that corporation was well aware of the proceeding. *Martinez* was thus primarily concerned with the doctrine of *res judicata* in a case where the basis of a corporation's liability was first and foremost in tort/negligence. But in this case, the trial judge suggested that a party could be held liable to ***perform a contract*** even though it had not executed that contract.

The trial judge's error, however, did not solve the privity question in and of itself.

The doctrine of privity is based in the notion that it is only fair for parties to contracts to benefit from or have obligations pursuant to those contracts. Having said that, a rigid reliance on this doctrine can lead to injustices, particularly in cases of reliance, and/or when persons or corporations closely related to those that executed a contract were meant to benefit from and/or have obligations under it. As such, many common law jurisdictions have moved away from strictly enforcing the doctrine of privity.

While privity remains part of Canadian contract law, there are situations where a non-party may be deemed to have enforceable rights under a contract, notably when: "1) the parties to

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3 *Ibid.* at ¶ 119

4 [2009] O.J. No. 2573, 178 A.C.W.S. (3d) 105 (S.C.J.) ["*Martinez*"].

the initial agreement intended to extend a benefit to the third party; and 2) the activities of the third party were the very activities contemplated as coming within the scope of the contract or particular provision".[5]

Non-parties being deemed to have obligations are less common but do exist as "principled exceptions" to the doctrine of privity. Justice Weiler pointed to the 2009 Ontario Court of Appeal case of *Seip & Associates Inc. v. Emmanuel Village Management Inc.*,[6] in which Justice Gillese explored this issue. Justice Weiler suggested in *obiter dicta* that a "principled exception" to the doctrine of privity ***could*** have been a permissible basis upon which to decide this case. However, she decided not to base her decision on privity due to lack of argument from the parties on this point. She said:

> [103] To summarize, in *Seip*, the privity of contract rule was relaxed and liability imposed where the following three factors were present: 1) the parties to the initial agreement intended to impose an obligation on the third party; 2) the activities of the third party, upon which basis the parties sought to impose liability, were within the scope envisaged under the agreement and 3) the third party had knowledge of the provision assigning it liability and, by its conduct, the third party assumed the agreement. […] Arguably, all three criteria are present in this case.
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> [104] As the argument was not made that liability could be imposed based on a principled exception to the doctrine of privity of contract, nor was the decision in *Seip* the subject of submissions, it would not be fair to decide the case on a point counsel did not have the opportunity to address. Consequently, the doctrinal basis for a principled exception to the doctrine of privity of contract when liability is sought to be imposed on a third party will have to await argument another day.

Justice Epstein, in a very brief concurring judgment, urged caution on this point. She wrote:

> [112] I do not want to be taken to agree with my colleague's suggestion that the third party exception to the doctrine of privity of contract might have been an available basis upon which to find Glen Grove responsible under the Settlement. In addition to the fact that this exception to the doctrine of privity of contract was not advanced on appeal (as my colleague noted), or pleaded or argued at trial, I note that third party liability is a relatively uncharted doctrinal area and in all of the circumstances, I cannot say that it may apply to the circumstances here.

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5 Appeal Decision, *supra* note 1 at ¶ 97, citing *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 at ¶ 32.

6 2009 ONCA 222, 247 O.A.C. 78 [*Seip*].

Ultimately, the Court was unwilling to hold that Glen Grove could be found liable pursuant to the Settlement based on a principled exception to the doctrine of privity. Nonetheless, it left open the possibility that non-parties to an agreement may have obligations in certain narrow circumstances.

Agency

Instead, the Court of Appeal based its decision on the doctrine of agency. Determining whether a relationship of agency exists is a question of fact and a trial judge's decision in this respect is usually entitled to deference on appeal. In this case, however, Justice Weiler held that the trial judge had ignored relevant evidence that should have led to the determination that 129 acted as agent for Glen Grove in negotiating the Settlement.

Justice Weiler relied on Professor Gerald Fridman's definition of agency: "the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position by the making of contracts or the disposition of property."[7] In her view, a relationship of agency could be inferred from the context in this case. She helpfully noted that while an agency relationship is contractual, factual circumstances need to be analyzed to determine if, in fact, such a contractual relationship exists.[8] On this case, relevant facts included:

- Glen Grove's previous offers to ensure Sylvia's ownership of Glen Grove would not be challenged (the same purpose as the Settlement);
- 129 was not an active company, and had had no assets, meaning that the security that 119 insisted upon could only come from Glen Grove;
- Edwin proposed terms of the Settlement that only Glen Grove could grant;
- cheques for counsel's legal fees made in conjunction with the Settlement came from Glen Grove;
- Edwin represented that Glen Grove would guarantee the Settlement; and
- relevant documents were prepared on Glen Grove letterhead, implying that 129 was acting as its agent.

Ultimately, Justice Weiler interpreted the facts of this case to create an agency relationship, meaning that 129's offering security of payment in the Property bound Glen Grove to the Settlement. The fact that Sylvia was unhappy with the relationship and arrangement between

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7 *Canadian Agency Law*, 2d ed. (Markham: LexisNexis, 2012) at 4.

8 *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 at ¶ 57, noting contractual interpretation is an exercise of mixed fact and law.

the corporations, largely created by Edwin, was irrelevant to the fact that Glen Grove could not resile from its obligations.

One interesting appellate practice note is that the appeal had not been argued on the basis of agency. Justice Weiler nonetheless found that it was fair to decide the appeal on the basis of agency, as it was not a "new" issue raised by the Court. It was argued fully below, and was referred to (albeit not as a stand-alone basis on which to decide the appeal) in the notice of appeal, both parties' factums, and in argument.

Effect of Default Judgment Against 129

Glen Grove also argued that 119 should be estopped from pursuing judgment against it because it had "elected" to obtain default judgment against 129, or the cause of action had otherwise merged. Justice Weiler rejected this argument. She concisely explained these two concepts:

> [80] Election and merger are separate, albeit related, concepts. Election refers to a decision to pursue either the agent or the principal for a single cause of action. Once a plaintiff has definitively elected to sue either principal or agent, he or she may not later choose to pursue the other party. Whether a party has elected is a question of fact, and is often difficult to prove. Merger, by contrast, occurs once judgment has been granted against either agent or principal. Once judgment is given against one, the cause of action against the other disappears […]

The cause of action did not disappear here, however, and 119 was entitled to seek judgment action against both Glen Grove and 129 as:

- both corporations adopted distinct obligations under the Settlement;
- separate remedies were both sought against both corporations; and
- both corporations were liable to 119 ***but on different bases***.

Thus, any common law rule that would have prevented recovery from both Glen Grove and 119 was inapplicable. In any event, s. 139 of the *Courts of Justice Act*[9] allows for joint and several liability, abrogating such a common law rule.

Implications

This Court of Appeal decision helpfully illustrates issues surrounding settlement, agency, privity, and election, areas of the law that may appear to be somewhat malleable.

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[9] R.S.O. 1990, c. C.43.

This case is a reminder that parties negotiating a settlement – or any other contract for that matter – should be encouraged to clearly state which parties have rights and obligations pursuant to it. Ensuring all parties execute the agreement is also wise. Doing so ensures clarity and avoids the situation seen in *Grove Grove*, where non-signing entities and non-parties were held liable pursuant to a settlement agreement. As this case illustrates, courts may not be reticent to look into the fact situation giving rise to a contract to determine how to fairly distribute benefits and liabilities. While fairness from the courts is of course a good thing, advance clarity is also likely to be in the best interests of all parties.

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Ontario's New Waste Diversion Regime

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Introduction

On November 26, 2015, Ontario's Minister of the Environment and Climate Change (MOECC) posted proposed new waste reduction legislation on the Environmental Registry (EBR #012-5832) for public comment. In its current form, the new legislation would dramatically overhaul the province's recycling regime. Entitled the *Waste-Free Ontario Act*, Bill 151 proposes to enact the *Resource Recovery and Circular Economy Act* and the *Waste Diversion Transition Act*. Together, these statues will replace the current *Waste Diversion Act, 2002* (which utilizes industry funding organizations (IFOs) and industry stewardship plans) and transition to what Ontario believes will be a more robust producer responsibility regime.

Ontario's existing waste diversion regime has come under increasing criticism in recent years, with critics pointing to stalled recycling rates and unpopular "eco-fees" on consumer products. Bill 151 is not the government's first attempt to revise the existing regime – a previous attempt in 2013 (see our July 24, 2013 Osler Update on Bill 91) died on the order paper when a provincial election was called in the spring of 2014.

Along with the proposed legislation, Ontario has also posted on the Environmental Registry its draft *Strategy for a Waste Free Ontario: Building The Circular Economy*, which explains and illustrates how the new legislation may be applied.

Both Bill 151 and the strategy document are open for public comment until February 24, 2016.

Key features of Ontario's new waste diversion regime

The proposed *Waste Diversion Transition Act* would replace the existing *Waste Diversion Act, 2002* until such time as existing waste diversion programs and their related industry funding organizations are wound up and/or transitioned to the new producer responsibility framework, described below. The existing programs for Blue Box, used tires, waste electronics, and municipal hazardous/special waste (e.g., paints, solvents, batteries, fertilizers, etc.) will be transitioned under this Act.

The proposed legislation will empower the Minister to direct the relevant IFO to prepare a wind up plan, and will further empower a new Resource Productivity and Recovery Authority

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(RPRA) to approve this plan. Once approved, the wind up plan must be implemented by the IFO.

The draft *Resource Recovery and Circular Economy Act* proposes to:

- borrowing from the *Planning Act*, establish a long list of "provincial interests," and require both statutory decision makers under this and other statutes, as well regulated parties under this statute, to "have regard to" these provincial interests
- obligate the Minister to finalize the draft strategy document as an overarching statutory policy that would require review every ten years
- further, borrowing from the *Planning Act*, enable the provincial government to issue policy statements in respect of resource recovery and waste reduction, and require the same set of statutory decision makers and regulated parties to exercise their powers and carry out their obligations "consistent with" the policies
- make "responsible persons" (brand holders and others with commercial connections to a product, such as first importers and retailers) accountable for recovering resources and reducing waste associated with their products and packaging
- replace Waste Diversion Ontario (established under the *Waste Diversion Act, 2002*) with the RPRA which will have delegated authority for overseeing the new regime, and carrying out compliance and enforcement

A draft *Strategy for a Waste Free Ontario: Building The Circular Economy* (the Strategy) was posted on the Environmental Registry on November 26 with Bill 151, and sets out the province's key objectives with respect to waste recovery, which include using resources more effectively to reduce waste, promoting a more efficient recycling system, and creating conditions to support sustainable end-markets for recovered materials. To achieve these objectives, the draft Strategy sets out an action plan that prioritizes the following actions:

- Recognize the provincial interest in achieving specific resource recovery and waste reduction outcomes, and develop policy statements to co-ordinate decision-making across multiple sectors and actors, with the first such policy statement to be developed within the first year should the legislation pass.
- Expand producer responsibility by placing full responsibility on producers to be accountable for their products and packaging at end of life. This producer responsibility framework would include recovery targets, standards and reporting requirements applicable to all producers, but would provide producers with the flexibility to decide how to meet the requirements, whether individually or collectively by pooling efforts intra- and inter-

provincially. However, producers would not be able to transfer their liability. The RPRA would be empowered to monitor this new producer responsibility regime.

- Divert more waste from disposal by collecting data, developing better metrics and putting performance measures in place, targeting areas for greater diversion through regulations designating new products and packaging, enhancing requirements for waste generators and service providers, developing an Organics Action Plan to reduce the volume of organic material going to landfill, and implementing disposal bans and additional plans for landfill use and management.
- Help people to reduce, reuse and recycle by increasing awareness or and participation in diversion activities through education and promotion.
- Stimulate markets for recovered materials by implementing modern environmental standards and promoting best practices in green procurement.

Analysis

A notable feature of both the proposed *Waste Diversion Transition Act* and the *Resource Recovery and Circular Economy Act*, is that they are largely skeletal statutes which, apart from their inspection, compliance and offence provisions, relegate virtually all of the real, substantive details on how the Strategy will be accomplished, to regulations. Those draft regulations have not been posted on the Environmental Registry, but will be the key to evaluating the success, effectiveness, viability and commercial fairness of the new regime.

Legislative Timeline and Comment Period

The Ontario Legislature reconvenes in mid-February 2016, which allows some time for stakeholder consultation. As noted, the MOECC has posted the *Waste-Free Ontario Act* and the draft Strategy on the Environmental Registry for public and stakeholder comment. The 90-day comment period closes on February 24, 2016.

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Godard v. Godard – the Ontario Court of Appeal addresses the duty of the primary residential parent to ensure compliance with an access order

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The Ontario Court of Appeal has recently set the bar higher for a primary residential parent's obligation to ensure children spend Court ordered access time with the other parent. In *Godard v. Godard*, 2015 ONCA 568, 2015CarswellOnt 11572, [2015] W.D.F.L. 4371, 123 W.C.B.(2nd 442), 256 A.C.W.S. (3rd) 86, 387 D.L. R. (4th) 667, the Court upheld the motion Judge's finding of contempt against a primary residential parent after determining the evidence proved, beyond a reasonable doubt, there was willful and deliberate disobedience of an access order.

The decision gives guidance as to the primary residential parent's obligation as follows:

- The primary residential parent must go "beyond mere encouragement." (*paragraph 31*)
- There is mention of a "stronger form of persuasion," being sometimes necessary, without detail as to what that form might be. *(paragraph 33)*
- The primary residential parent must "take concrete measures to apply normal parental authority to have the child comply with the access order." (*paragraph 29*)

These words are a helpful message for the primary residential parent who is, consciously or unconsciously, pleased that the child is resistant to spending time with the other parent.

It seems accepted that a primary residential parent is not required to physically force a child into the other parent's car or home. In *Godard*, the Court said, "Parents are not required to do the impossible in order to avoid a contempt finding. They are, however, required to do all that they reasonably can." (*paragraph 29*)

What must a primary residential parent do to prove he or she has done all that he or she reasonably can to comply with an access order and avoid a contempt finding? Is it removing cell phone or internet privileges; grounding; no television for the refusing child? The answer remains unclear.

For older children, the primary residential parent may stay away from direct involvement in the pickup/drop off. Ensuring the child is prepared in advance and ready, with necessary items packed, at the appointed time is a reasonable step. The primary residential parent can then absent himself or herself and let the access parent deal with the reluctant child.

While the message in *Godard* is clearly, directly and properly aimed at primary residential parents who purposefully thwart the bond between child and access parent, the "remedy" of

contempt can expose decent primary residential parents to an extreme penalty. Picture the child who has experienced, sometimes unknown to the resident parent, intense conflict with, or assault from the access parent, or who has witnessed abusive behaviour by the access parent towards the primary residential parent that frightens or offends the child. That child may have valid reasons for refusing, or limiting access (such as only going when a sibling is present; only going for short periods; no overnights). The primary residential parent in such a case is caught in a bind: does he or she exert pressure/discipline to force the reluctant child to go, leading to possible harm to the child, or risk contempt by allowing the child to refuse to go and, thereby possibly protecting the child from harm or perceived risk of harm?

In *Van Alstine v. Jean-Vezina,* 2015 CarswellOnt 17237, 2015 ONSC 6961, a decision that references *Godard* and that exemplifies the complexity of families today, Justice Corthorn dismissed a former step father's contempt motion against the biological father, despite months of the children not attending scheduled visits with the former stepfather. The Court did not find, beyond a reasonable doubt (the standard of proof in a family law contempt motion) a willful and deliberate disobedience of the order. Corthorn, J., suggested an alternative remedy for the step father would have been a motion to enforce the access order. One might understand the frustration of a litigant required to return to court on a motion to enforce the terms of a clearly worded order, already in his or her possession, when such order has been issued by the same court.

In *Godard*, the Court supported the Motion Judge's rejection of a Settlement Conference or the involvement of the Office of the Children's Lawyer as an appropriate alternative to contempt. There was no reference to counselling assistance. There are family counsellors and therapists abundant who have skill in this sensitive area of family relations. A court could adjourn a contempt motion in such a case, on terms that the primary residential parent bring the child to a set number of counselling sessions which include, eventually, both (or all) parents as the counsellor determines. In this forum there is the highest likelihood that the family can be helped, whether that help comes in changing the behaviour of the alienating parent, or validation and addressing the reluctant child's concerns. On return of the motion after a reasonable period of counselling, and evidence of its result, the Court may be better informed as to whether a contempt finding is justified.

In *Godard* case, the Court of Appeal sent the matter back to the motion Judge, for determination of costs of the motion and the penalty for the Appellant's contempt. Until those results are known, the true cost for the primary residential parent in this case, emotionally, financially and possibly incarceration time, will not be known. When it is, future litigants can be counselled as to those risks.

Some families cannot be helped by any intervention – therapeutic or judicial. In those families, the reluctant child will be increasingly estranged from the access parent, and the access parent can only hope time and maturing of the child will present an opportunity for a renewed relationship.

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No Deal for Audatex: The Test for Leave in *Competition Act* Refusal to Deal Cases

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Introduction

Canada's "refusal to deal" law allows the Competition Tribunal to order firms to accept, or prevent them from cutting-off supply to customers for their products in certain circumstances. Between 1976 and 2002, only the Commissioner of Competition could bring refusal to deal cases to the Tribunal. That changed in 2002, when Canada's *Competition Act*[1] was amended to permit private parties to bring cases to the Tribunal in their own name, with leave of the Tribunal.

At the time the law was so amended, and subsequently, there were concerns that the Tribunal would receive a flood of refusal to deal applications filed by private parties, resulting in over-enforcement of private refusal to deal compared to other reviewable practices under the Act.[2] Such concerns were based on a number of issues.

First, the amended section 75 contains no requirement that the refusal be in any way not in accordance with the law. For instance, the fact that the refusal is fully consistent with a negotiated termination right contained in the distribution contract appears to be irrelevant. This means that almost any private party who is cut off from supply of a product would have at least a *prima facie* argument under the refusal to deal provision, even if there is no breach of contract.

The second reason for predicting heightened enforcement of the refusal to deal provision is that the fifth element of the provision establishing the conduct requires only that the conduct have or be likely to have an "adverse" effect on competition in a market. The word adverse creates a different and lesser competitive effects test than the general anti-competitive effects test found in other provisions of the Act (other than section 76), which requires a "substantial prevention or lessening" of competition. This difference makes bringing a refusal to deal case easier than it would otherwise have been, for practically any refusal to supply removes one potential supplier from the marketplace, and hence, at least *prima facie,* could arguably have some "adverse" effect on competition.

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[1] *Competition Act*, RSC 1985, c C-34, as amended.

[2] James Musgrove and Janine MacNeil, "Till Death Us Do Part: Is the Canadian Law of Refusal to Deal Becoming an Increasing Challenge for Efficient Distribution Arrangements in Canada?" (September 2007) Distribution, The Newsletter of the Distribution and Franchising Committee, Antitrust Section - American Bar Association Volume 11, Number 2. See also James Musgrove, "Refusal to Deal in Canada: A Primer", *Distribution Issues in the North Atlantic Triangle: Part III: Refusal to Deal*, Antitrust Section - American Bar Association Teleseminar on January 14, 2010.

The foregoing prediction has been only partially borne out. Since 2002, the Tribunal has received twenty-one refusal to deal applications, all commenced by private parties, which is far more than cases involving other types of reviewable practices but is not fairly characterized as a "flood". However, of the twenty-one total applications, only seven[3] have been granted leave by the Tribunal to proceed. Of these seven applications, five have been resolved one way or another short of a hearing and the remaining two, which did reach the hearing stage, have resulted in a dismissal of the applicant's case.[4] In other words, two-thirds of all refusal to deal cases commenced by private parties since 2002 were dismissed at the leave stage. So, the test for leave is an important one.

The Test for Granting Leave to Bring Refusal to Deal Applications

The test for granting leave to proceed with private applications to the Tribunal is contained in subsection 103.1(7) of the Act. That subsection provides as follows:

> The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.[5]

The foregoing test was reviewed and applied for the first time in *National Capital News*[6] in 2002. Justice Dawson, in her capacity as a judicial member of the Tribunal presiding over the leave application, interpreted subsection 103.1(7) as setting out a two-part test, whereby the Tribunal must be satisfied that it "has reason to believe" that:

(1) the applicant is directly and substantially affected in its business by any practice referred to in section 75 or 77 of the Act; and

(2) the alleged practice could be subject to an order under that section.

In addition, Justice Dawson construed the wording "has reason to believe" to mean that the appropriate standard of proof for granting leave under subsection 103.1(7) is "whether the leave application is supported by sufficient credible evidence to give rise to a *bona fide*

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[3] *Barcode Systems Inc. v Symbol Technologies Canada ULC*, 2004 Comp Trib 1; *Allan Morgan & Sons Ltd. v La-Z-Boy Canada Ltd.*, 2004 Comp Trib 4; *Quinlan's of Huntsville Inc. v Fred Deeley Imports Ltd.*, 2004 Comp Trib 15; *Robinson Motorcycle Ltd. v Fred Deeley Imports Ltd.*, 2005 Comp Trib 6; *B-Filer Inc v Bank of Nova Scotia*, 2005 Comp Trib 38 [*B-Filer*]; *Nadeau Poultry Farm Ltd. v Groupe Westco Inc.*, 2008 Comp Trib 7 [*Nadeau*]; *Used Car Dealers Assn of Ontario v Insurance Bureau of Canada*, 2011 Comp Trib 10 [*Used Car Dealers*].

[4] *B-Filer Inc v Bank of Nova Scotia*, 2006 Comp Trib 42; *Nadeau Poultry Farm Ltd. v Groupe Westco Inc. et al.*, 2009 Comp Trib 6.

[5] *Competition Act*, RSC 1985, c C-34, s.103.1(7).

[6] *National Capital News Canada v. Canada (Speaker of the House of Commons)*, 2002 Comp Trib 41, [2002] CCTD No. 38, 23 CPR (4th) 77 [*National Capital News*].

belief" that *both* parts of the test are met.[7] Justice Dawson's conclusions as to the leave test was subsequently adopted by the Federal Court of Appeal in 2004 in dismissing the appeal by Symbol Technologies Canada ULC from the Tribunal's granting of leave to Barcode Systems Inc to commence a refusal to deal application.[8] The Federal Court of Appeal further noted that this standard was lower than standard of proof on a balance of probabilities, which would be applicable to the decision on the merits.[9]

With respect to the second part of the leave test, the Federal Court of Appeal in *Barcode Appeal* noted that all five elements of reviewable practice of refusal to deal set out in subsection 75(1) of the Act[10] must be addressed before the Tribunal could determine whether the alleged refusal to deal "could" be subject to an order under section 75. Following *Barcode Appeal*, the Tribunal, in its decision dismissing the *B-Filer*[11] application, stated that the second part of the test requires an applicant to show sufficient credible evidence to give the Tribunal a *bona fide* belief that each of the five elements "could be met when the application is heard on the merits".[12]

With respect to the first part of the leave test, the analysis tends to turn upon the interpretation of two key phrases contained in subsection 103.1(7): "business" and "directly and substantially". The Tribunal articulated the meaning of "business" definitively in the *Sears*[13] decision:

> Based on this review, I have concluded that the Tribunal has consistently taken the position that a substantial effect on a business is measured in the context of the *entire business*.[14] [Emphasis added]

On the facts of that case, the Tribunal held that the business to be considered was Sears' entire business as a department store retailer, and not simply the particular products for which Sears was cut off from supply.

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[7] *Ibid* at para 14.

[8] *Barcode Systems Inc. v Symbol Technologies Canada ULC*, 2004 FCA 339 [*Barcode Appeal*].

[9] *Ibid* at para 17.

[10] Section 75(1) of the Act sets out the following five elements: "(a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms; (b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market; (c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product; (d) the product is in ample supply, and (e) the refusal to deal is having or is likely to have an adverse effect on competition in a market." *Competition Act*, RSC 1985, c C-34, s.75(1).

[11] *B-Filer*, *supra* note 3.

[12] *Ibid* at para 53.

[13] *Sears Canada Inc. v Parfums Christian Dior Canada Inc.*, 2007 Comp Trib 6 [*Sears*].

[14] *Ibid* at para 21.

Regarding what is considered "substantial", the *Chrysler*[15] decision in 1989 (although in a different context) is an oft-cited authority for the proposition that it should be given its ordinary meaning – to wit, "more than something just beyond *de minimus*" – and assessed based on the circumstances of the case at hand.[16]

On January 4, 2016, the Tribunal released its latest decision on a private application for leave to bring a refusal to deal application, which addresses a substantial effect on a business, for the purpose of getting leave to bring an application.[17] The applicant, Audatex Canada ULC ("Audatex"), was denied leave to commence an application against CarProof Corporation ("CarProof"), Trader Corporation ("Trader") and Marktplaats B.V. ("Marktplaats" and together with CarProof and Trader, the "Respondents"). In reaching this conclusion, the Tribunal re-articulated its approach to deciding whether to grant leave to commence a private application under section 75 of the Act, and offered valuable guidance on the analysis of "directly and substantially affected" under the first part of the leave test.

The *Audatex* Case

Audatex was a provider of data and software solutions to Canadian automobile insurance companies and repair shops. Audatex described its "primary business" to be the provision of two services: "total loss valuation" and "partial loss estimating". The total loss valuation services involved generating total loss valuation for damaged automobiles based on information from automobile sales listings and preparing valuation reports for insurance company customers. A key input for providing such services was the automobile sales listings data. The partial loss estimating services referred to the automobile repair estimates offered to both insurance companies and repair shops. Unlike total loss valuation services, partial loss estimating services did not require automobile sales listings data as an input.

Trader and Marktplaats were two companies that provided online automobile classified advertisements services. Both companies refused to supply their automobile sales listings data to Audatex on the basis that they had entered into exclusive supply agreements with CarProof. CarProof used automobile sales listings data to produce detailed vehicle-history reports for use by prospective used car sellers and buyers. CarProof also sublicensed some of the data to other industry participants. Audatex tried to negotiate a satisfactory sublicense agreement with CarProof to gain access to Trader and Marktplaats automobile sales listings data. However, the parties could not agree on the contractual terms. Consequently, Audatex applied to the Tribunal for leave to commence a refusal to deal application, seeking an order requiring CarProof, Trader and Marktplaats to supply Audatex with automobile sales listings data on usual trade terms.

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[15] *Canada (Director of Investigation and Research) v Chrysler Canada Ltd* (1989), 27 CPR (3d) 1 (Comp Trib), aff'd 38 CPR (3d) 25 (FCA) [*Chrysler*].

[16] *Ibid* at para 64.

[17] *Audatex Canada, ULC v. CarProof Corporation*, 2015 Comp. Trib. 28 [*Audatex*].

The Tribunal Decision

Applying the two-part leave test as explained above to Audatex's leave application, the Tribunal held that Audatex failed to meet the first part of the leave test. On this basis, the Tribunal denied Audatex's leave application, without proceeding to the second part of the test to consider whether each of the five elements of the refusal to deal could be met.

Audatex claimed that the Respondents' refusal to supply "directly and substantially" affected its total loss valuation services, because Trader and Marktplaats were the only sufficiently large sources of data to enable Audatex to produce the valuation reports for its insurance company customers. Furthermore, Audatex claimed that its partial loss estimating services would also be adversely impacted, even though automobile sales listings data was not used as input for such services, for two reasons. First, the master services agreement under which some insurance company customers purchased both of Audatex's services in a bundled package permitted the customers to terminate the entire contract if Audatex failed to provide one of the services. The second reason was that Audatex believed the repair shop customers would not remain with Audatex if insurance companies dropped Audatex as a supplier.

The Tribunal, however, was not persuaded that the alleged impact on Audatex's partial loss estimating services was supported by sufficient credible evidence. It viewed the claims as "essentially based on an interpretation of certain contractual provisions" in Audatex's master services agreements and on "a complex chain of cascading assumptions" about how Audatex's insurance company customers and repair shop customers might act in the future. There was no evidence of any actual or threatened contract terminations by Audatex's customers. Thus, the Tribunal concluded that the evidence adduced by Audatex only amounted to a mere possibility and was speculative.

Focusing on the Audatex's total loss valuation services, the Tribunal found that the alleged impact of Respondents' refusal was not of a sufficient magnitude to be considered a "substantial effect" for purposes of the first part of the leave test. As noted above, the alleged impact of the refusal is to be measured in the context of the Applicant's entire business. Audatex submitted that the total loss vacation services made up "approximately one-quarter" – more precisely, 22 to 23 percent – of its revenues from its "primary Business", but gave no indication as to what the "primary Business" represented in Audatex's entire business. Audatex's evidence also lacked clear information on the proportion of Audatex's total purchases of automobile sales listings data represented by the Respondents. Furthermore, the Tribunal opined that, even if it were to equate Audatex's "primary business" with its total business, "approximately one-quarter" did not amount to a substantial effect. In reaching this conclusion, the Tribunal cited three past refusal to deal cases in which it granted leave – *Used Car Dealers*[18], *Nadeau* and *B-Filer* - and observed that the magnitude

[18] *Used Car Dealers*, *supra* note 3.

of the impact of the alleged refusal to deal was 48 percent of the applicant's total supply in *Nadeau*, and 50 percent of the applicants' total revenue or net income in the other two cases. By contrast, the Tribunal denied leave in the *Construx* case[19] where the alleged impact of the refusal was 38 percent of total sales over a six-year period, and in five cases[20] where the Tribunal found that there was no direct and non-speculative evidence about the alleged impact.

Conclusion

The *Audatex* decision illustrates a key point about the test for the granting of leave to private parties to advance refusal to deal cases. A refusal to deal affecting 22 – 23 percent of the applicant's total business is not of a sufficient magnitude for the Tribunal to grant leave. When considered together with *Nadeau*, it appears that the line that the Tribunal draws between substantial effect and insubstantial effect lies somewhere in the range from 22 or 23 to 48 percent. This significantly clarifies the meaning of "substantial" under section 103.1(7).

As well, the *Audatex* decision offers important guidance on the standard of proof at the leave stage. In order to adduce "sufficient credible evidence to give rise to a *bona fide* belief", an applicant must provide enough information about its own business to allow the Tribunal to understand precisely (i) the portion of its total business that is affected by the refusal and (ii) the portion represented by the suppliers refusing to supply. Allegations about the impact of the refusal must be based on actual past experiences, or on solid evidence of likely future events, as opposed to forward-looking speculation.

At the time of writing, the *Audatex* decision was under appeal. It remains to be seen if and how the Federal Court of Appeal will modify the interpretation and application of the test for leave to bring private applications respecting refusals to deal.

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[19] *Construx Engineering Corp v General Motors of Canada Ltd*, [2005] CCTD No 20 (Comp Trib) [*Construx*].

[20] *Sears*, *supra* note 13; *Mrs. O's Pharmacy v Pfizer Canada Inc.*, (2004), 35 CPR (4th) 171 (Comp Trib) [*Mrs. O's Pharmacy*]; *Paradise Pharmacy Inc. v Novartis Pharmaceuticals Canada Inc*. [2004] CCTD No 21 (Comp Trib) [*Paradise*]; *Broadview Pharmacy v Pfizer Canada Inc.*, [2004] CCTD No 23 (Comp Trib) [*Broadview*]; *Broadview Pharmacy v Wyeth Canada Inc*. [2004] CCTD No 24 (Comp Trib) [*Wyeth*].