Toronto Law Journal

Maintaining a Wills and Estates Practice During COVID-19

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As a result of COVID-19, lawyers across the country have had to temporarily alter their practices. In a profession where in-person meetings are expected by clients and/or necessary to see to the proper execution of legal documents, social distancing has forced the legal system to rapidly adapt to allow us to continue serving our clients in these unprecedented circumstances. This has posed a challenge for members of the Estates Bar in particular, as client meetings, will signings, hearings, and mediations have all been affected. During this time, however, it remains crucial that estate lawyers continue to help clients in creating or amending estate plans and in moving estate litigation matters forward. Familiarizing ourselves with the tools that have recently become available can be of great assistance in this regard.

Ordinary Execution and Witnessing of Testamentary Documents

Ontario has strict rules regarding the execution of a will. Unlike many other provinces, Ontario is not a "substantial compliance" jurisdiction, which would allow a court to validate a will that has not been executed in strict compliance with formal legislative requirements.

Section 4 of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (the "**SLRA**"), outlines the execution requirements of a will. According to subsection 4(1) of the SLRA, a will is not valid unless:

> (a) it is signed at its end by the testator or by some other person in his or her presence and by his or her direction;
>
> (b) the testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time; and
>
> (c) two or more of the attesting witnesses subscribe the will in the presence of the testator.

Similarly, the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 (the "**SDA**"), requires a continuing power of attorney for property or a power of attorney for personal care to be executed in the presence of two witnesses, who are also required to sign the document (subsections 10(1), 48(1)).

Under normal circumstances, a lawyer would meet with an estate planning client to directly supervise the execution of wills and powers of attorney, and often supply the witnesses (typically the lawyer him/herself and one of his/her staff). In a COVID-19 world, where many of us are working remotely with limited, if any, in-person contact with clients, the "in the presence of" requirement for the execution of testamentary documents is particularly challenging. At the time of execution of a will or shortly thereafter, the lawyer will commission

an affidavit of execution sworn by one of the witnesses to the will. The affidavit of execution is later filed as part of the application for a Certificate of Appointment of Estate Trustee with a Will (also known as a "probate application") after the testator's death.

Virtual Will and Power of Attorney Witnessing Now Permitted

On April 7, 2020, in recognition of the barrier to the ability to obtain lawyer assistance in estate planning resulting from the requirement that witnesses be physically present with the testator/grantor at the time of execution or attestation, which has been exacerbated by the COVID-19 pandemic, an emergency Order in Council was made pursuant to subsection 7.0.02(4) of the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9, to permit the virtual commissioning and execution of wills and powers of attorney (the "**Emergency Order**").

Under the Emergency Order, the "in the presence of" requirement imposed by both the SLRA and the SDA may now be satisfied by "audio-visual communication technology". Notably, at least one of the witnesses must be a licensee within the meaning of the *Law Society Act*, R.S.O. 1990, c. L.8.

The Emergency Order defines "audio-visual communication technology" as any electronic method of communication in which participants are able to see, hear, and communicate with one another in real time.

There is an important distinction between the impact of the Emergency Order and the doctrine of substantial compliance. In substantial compliance jurisdictions, courts will typically review the will on a case-by-case basis, necessitating a legal proceeding to address the issue of the validity of the will, notwithstanding its procedural abnormalities. The Emergency Order, however, simply permits this new procedure for the execution and witnessing of a will, without the need for an application to obtain validation by the court.

As the Emergency Order does not state otherwise, the following requirements remain:

- The same original copy of the will or power of attorney must be physically signed by all three participants (the testator/grantor and two witnesses); and

- Digital signatures are not permitted. The physical document must be signed by hand.

The Emergency Order is not retroactive and will remain in effect during the current state of emergency, subject to further order or legislative amendment. Accordingly, only wills and powers of attorney witnessed using audio-visual communication technology from April 7, 2020 onward are valid under the Emergency Order.

Due to the very recent nature of the Emergency Order, it is not yet known precisely what courts may require as evidence of execution to be filed as part of the probate application in respect of a will that is virtually witnessed. For this reason, it is recommended to have one affidavit of

execution sworn by each witness, one of whom will be a lawyer or paralegal. A precedent affidavit of execution can be found here.

In light of the procedural changes resulting from the Emergency Order, we have released a suggested Will Execution by Video Checklist (a link to which is included within the Law Society of Ontario's Corporate Statement Regarding COVID-19) and a Power of Attorney Execution by Video Checklist that may be a helpful guide for lawyers wishing to assist clients in the virtual execution and witnessing of testamentary documents.

Innovative software, such as Hull e-State Planner, can assist lawyers in gathering information from clients, obtaining and documenting their instructions, illustrating an estate plan, and formulating a draft will in a timely manner. Once the draft will is prepared, video-conferencing software can also allow lawyers to "meet" with clients virtually to review draft estate planning documents prior to video execution with the witnesses in the testator's virtual presence.

Holograph Wills

In limited circumstances where a client may not have access to or may not be able to use audio-visual communication technology, lawyers can consider providing clients with the information that they need to prepare their own holograph will, in accordance with section 6 of the SLRA. If this option is pursued, it is important to meet with the client once it is safe to do so to review the holograph will and, in most circumstances, prepare a more comprehensive, formal will to replace it.

The SDA does not include a provision for holograph powers of attorney. Accordingly, a continuing power of attorney for property or a power of attorney for personal care written entirely in the grantor's handwriting and unwitnessed is invalid. However, the SDA does include a curative provision that may permit some leniency in respect of documents that do not strictly comply with the formal execution requirements set out in the legislation (subsections 10(4), 48(4)).

Commissioning of Affidavits

According to section 9 of the *Commissioners for Taking Affidavits Act*, R.S.O. 1990, c. C.17, "every oath and declaration shall be taken by the deponent in the presence of the commissioner or notary public." The Law Society of Ontario states that the best practice for commissioning documents remains for the lawyer acting as commissioner to be in the physical presence of the deponent to commission the document(s). However, until further notice, the Law Society is interpreting section 9 as not requiring the lawyer to be in the physical presence of the client. An alternative means of commissioning, such as a video conference, will be permitted. If virtual commissioning is used, lawyers should be aware of and attempt to manage the risks associated with this method of communication.

Estate Arbitration Litigation Management

In an effort to move estate matters forward during this period of instability, we have spearheaded an initiative called Estate Arbitration Litigation Management ("**EALM**"). As part of the initiative, senior members of the Estates Bar assist the parties as arbitrators in determining various procedural (and certain substantial) issues. The issues are set out in an EALM agreement, which is signed by each party before the arbitration. The arbitrations are conducted via teleconferencing or video conferencing. If the decision of the arbitrator requires a court order to become effective (*i.e.*, the appointment of an estate trustee during litigation), the parties will agree to file a consent motion in writing to obtain the necessary order. Once court operations are resumed, the parties may return to court to address substantive issues or they may elect to proceed to arbitration or mediation.

A precedent EALM agreement is available here. A list of arbitrators prepared to assist lawyers and their clients with EALM is available here.

Concluding Thoughts

COVID-19 has resulted in some temporary limitations to the way that we can practice law. However, legislative amendments and innovative tools, including those referred to above, provide the opportunity to limit the disruption to an estates practice so that we can continue to assist clients during this period of uncertainty.

Toronto Law Journal

YVR Makes Safe Landing: Competition Bureau Abuse of Dominance Case against the Vancouver Airport Authority is Dismissed

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A. Thumbnail Summary

On October 11, 2019, the Competition Tribunal released its decision in the *Vancouver Airport Authority* case.[2] In the case, the Competition Bureau alleged that the Vancouver Airport Authority's (VAA) decision to authorize only two firms to provide in-flight catering and galley handling services and therefore to exclude other providers at the Vancouver International Airport (YVR) constituted abuse of dominance under section 79 of the *Competition Act*. The Tribunal agreed with the Bureau that VAA had substantial or complete control of the market for galley handling services through its control of airside access at the airport and also agreed that VAA had a "plausible competitive interest" in the market for galley handling services. However, the Tribunal sided with VAA in concluding that VAA's conduct did not constitute a practice of anti-competitive acts because it had other overriding legitimate business justifications for the conduct and that the conduct did not have the effect of substantially preventing or lessening competition in respect of galley handling services. The Tribunal also awarded costs in favour of VAA. These issues are explored in somewhat greater depth below.

B. Background

In 2016 the Competition Bureau brought an abuse of dominance application under section 79 of the *Competition Act* against VAA. The Bureau's allegation focused on VAA's decision to authorize only two firms to provide in-flight catering or galley handling services ("galley handling services") at the YVR. The Bureau alleged that VAA's practice effectively excluded other third-party suppliers of inflight catering services, including new entrant firms, which substantially prevented or lessened competition in respect of galley handling services (i.e., the loading and unloading of food on airplanes) at YVR. Unlike most abuse of dominance cases, the allegedly dominant firm, VAA, was not itself a competitor in the business affected (galley handling services) nor was it an association or organization representing those in the business (as was the situation in the *Toronto Real Estate Board* case[3]). Rather VAA was, in effect, a landlord trying to make sure airline operators had access to the services. As outlined below, the Tribunal's reasoning in respect of this relationship offers important guidance as to the

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[1] This paper is republished with the permission of McMillan LLP.

[2] *Commissioner of Competition v. Vancouver Airport Authority,* 2019 Comp. Trib. 6 [*VAA*].

[3] *Commissioner of Competition v. The Toronto Real Estate Board,* 2016 Comp. Trib. 7, affirmed 2017 FCA 236 [*TREB*].

applicability of the abuse of dominance doctrine in cases where the conduct affects a market in which the allegedly dominant firm does not compete.

Pursuant to the abuse of dominance provision in section 79 of the *Competition Act*, in order to succeed in its application against VAA the Bureau was required to show that (a) VAA substantially or completely controlled a class or species of business (typically described as a market), (b) VAA engaged in a practice of anti-competitive acts (typically acts undertaken with a predatory, disciplinary or exclusionary intent aimed at a competitor), and (c) the practice substantially prevented or lessened competition in a market (that is, but for the conduct, competition would have been substantially more vigorous). Typically this is demonstrated by showing that the conduct has the effect of preserving, enhancing or entrenching the dominant firm's market power. The Tribunal considered each of these elements in turn in the *VAA* case, and also considered whether the regulated conduct defence might have been applicable in the case.

C. Substantial or Complete Control of a Market

"Substantial or complete control of a market" is traditionally treated as synonymous with a substantial degree of market power.[4] The *TREB* case expanded this concept to include firms that do not themselves compete in a market but nonetheless substantially control the market.[5] In that case, the Toronto Real Estate Board, a trade association of residential real estate brokers, did not directly compete for the supply of real estate brokerage services but was nonetheless found to substantially control the market for those services in the Greater Toronto Area through its policies and rules governing its members.

In the *VAA* case, the Tribunal concluded that VAA substantially or completely controlled the market for galley handling services by virtue of its control over airside access at YVR, which is a critical input into that market.[6] This was, of course, not a surprising conclusion, since VAA controls its own facilities, as does any owner of a facility, such as a shopping mall, and controls who may enter onto or supply services at or from such facilities. However, the fact that the owner of a facility will be found to have dominance or market power with respect to products supplied from that facility may, it is submitted, significantly broaden the concept of what a dominant firm may be, at least in some cases.[7]

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[4] *TREB*, at para. 173.

[5] *Commissioner of Competition v. Toronto Real Estate Board*, 2014 FCA 29.

[6] *VAA*, at para. 421.

[7] *VAA*, at paras. 446-455.

D. Practice of Anti-Competitive Acts

i. The Alleged Anti-Competitive Acts

As noted above, in order to make a finding of abuse of dominant market position, the Tribunal had to find that VAA had engaged in a practice of anti-competitive acts. The Bureau alleged that VAA's decision to authorize only two operators at YVR (thereby excluding others, including new entrants from the market for galley handling services) constituted a practice of anti-competitive acts. According to the Bureau, the purpose of VAA's practice "on its face" was to exclude competitors, as it was reasonably foreseeable that its practice would prevent competitors and entrants from competing for the supply of galley handling services. In response, VAA maintained that it had valid pro-competitive business justification for its conduct. This is explained below.

ii. Plausible Competitive Interest

In this case, because VAA was not itself engaged in the business of supplying galley handling services, the Tribunal had to consider whether VAA had a plausible competitive interest in that affected market. The notion of "plausible competitive interest" came from the Tribunal's decision in the *TREB* case, which established that if a dominant firm is found to have no plausible competitive interest in the allegedly affected market, its practices generally would not be considered an anti-competitive act under section 79.[8] Where the dominant firm does not compete in the allegedly affected market, the lack of a "plausible competitive interest" creates a presumption that the supplier does not have an anti-competitive purpose for its conduct and that it will be able to demonstrate a legitimate business justification for the conduct.[9]

The Tribunal concluded that "plausible" means more than "possible", "conceivable", "imaginable", "thinkable" or "within the bounds of possibility", but less than "likely", "convincing", "persuasive" or "economically rational". It settled on "reasonably believable". To be reasonably believable, the Tribunal noted that there must be "some credible, objectively ascertainable basis in fact" to find that the dominant firm has a competitive interest.[10]

The two judicial members of the Tribunal's three-person panel (but not the lay economist member) concluded that VAA did have a "plausible competitive interest" in the galley handling services market, because of its interest in the concession fee revenues VAA receives from providers of galley handling services. By contrast, the lay economist member found that the potential concession revenue loss that VAA may have avoided by excluding entrants from the

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[8] *TREB*, at paras. 279-282.

[9] *VAA*, at para. 460.

[10] *VAA*, at paras. 464-465.

galley handling market was too small and too speculative to qualify as a plausible competitive interest.[11]

iii. Legitimate Business Justification

Following established jurisprudence, the Tribunal then focused on the purpose of the impugned conduct in seeking to determine whether it constituted an anti-competitive act or acts under section 79. The party that controls the market has to engage in the impugned conduct for an anti-competitive purpose, meaning an intended predatory, disciplinary or exclusionary effect on a competitor in the allegedly affected market.[12] If the act is motivated by some legitimate business justification it cannot be an anti-competitive act because it is not undertaken with an anti-competitive purpose. A legitimate business justification must provide a credible efficiency or pro-competitive explanation, unrelated to an anti-competitive purpose, for why the dominant firm engaged in the conduct alleged to be anti-competitive.[13]

In this case, the Tribunal panel unanimously concluded that VAA had a legitimate business justification for engaging in the conduct that excluded other providers. The Tribunal accepted that VAA's concern was that allowing entry of additional providers (especially partial-service providers) might cause one or both of the incumbent full-service providers to exit the market at YVR without a comparable replacement.[14] The choice to limit the number of providers was not meant to limit competition, but to provide certainty that there would be at least two full-service providers rather than taking the risk of ending up with only one, which would have caused disruption to airlines and passengers at the airport and reputational harm to YVR. The Tribunal found that the risk of losing a full-service provider was the overarching, overriding purpose of VAA's refusal to authorize additional providers.[15] It further rejected the Bureau's objection that VAA did not consider the matter in sufficient depth or seek out sufficient advice or information. The Tribunal recognized that business people make many decisions with incomplete information. It was sufficient that VAA management made its decisions in good faith based on sufficiently robust information; they were not required to be as correct and thorough as the Bureau would have preferred.

Accordingly, the Tribunal concluded that VAA did not engage in a practice of anti-competitive acts. This finding was sufficient to dismiss the Competition Bureau's case.

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[11] *VAA*, at para. 506.

[12] While the conduct has to be aimed at a competitor, it need not be a competitor of the firm alleged to be abusing its dominant market position, but rather may be any competitor in the marketplace. *TREB*, at para. 275-277.

[13] *Canada (Commissioner of Competition) v. Canada Pipe Co.*, [2007] 2 F.C.R. 3, 2006 FCA 233.

[14] *VAA*, at para. 582.

[15] *VAA*, at paras. 631-623.

E. Substantial Lessening or Prevention of Competition

The Tribunal also unanimously concluded that the conduct in question did not and was not likely to prevent or lessen competition substantially in the market for galley handling services at the airport. The Tribunal found that the Commissioner did not show, on a balance of probabilities, that the conduct did or would be likely to have a substantial effect on prices or non-price aspects of competition. In particular, the Tribunal was not persuaded that, "but for" VAA's conduct, there would have been materially lower prices or materially improved innovation in the galley handling market.

F. Regulated Conduct Defence

In addition to the argument (successful, as it transpired) that the Bureau had not demonstrated that VAA's conduct met the test for abuse of dominance, VAA also argued that it was acting pursuant to legal authorization, such that its conduct was insulated from challenge pursuant to the Regulated Conduct Defence (RCD).

Historically, the RCD was developed as a principle of statutory interpretation, whereby courts read down the conspiracy provisions of the prevailing competition law to avoid criminalizing a regulatory body exercising its authority under a validly enacted provincial legislation or the regulated person proceeding in accordance with such provincial regulation.[16] Courts have occasionally applied the RCD in the context of federal legislation.[17] Given the historically criminal nature of Canadian competition law, courts have indicated that conduct engaged pursuant to a valid legislation could not involve criminal intent.[18] In addition, courts also relied on "leeway language" in the relevant provisions, such as "public interest" or "undue", as the necessary indicia of Parliament's intent for permitting the RCD to apply.[19] When the conspiracy provisions of the *Competition Act* were substantially amended a decade ago to eliminate the term "unduly", the applicability of the RCD was retained by express statutory language.[20]

There had been debate as to whether the RCD could apply to reviewable conduct at all. This point has been considered[21] but has not been definitively adjudicated by any court. In the *LSUC* case,[22] a lower court applied the RCD to the reviewable conduct provisions of the Act, but did not expressly consider or decide the issue, as the court simply proceeded based on the parties'

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[16] See *Hughes v. Liquor Control Board of Ontario,* 2019 ONCA 305*; A.G. Can. v. Law Society of B.C.,* [1982] 2 S.C.R. 307.

[17] For example, *Society of Composers, Authors and Music Publishers of Canada v. Landmark Cinemas of Canada Ltd.* (1992), 45 C.P.R. (3rd) 346 (F.C.T.D.); *Eli Lilly et al. v. Apotex Inc.*, [2005] F.C.J. No. 1808.

[18] *R. v. Canadian Breweries Ltd.*, (1960) O.R. 601; *A.G. Can. v. Law Society of B.C.*, [1982] 2 S.C.R. 307.

[19] *Garland v. Consumers' Gas Co*, 2004 SCC 25, at para. 77.

[20] See s. 45(7) of the *Competition Act*.

[21] *Alex Couture Inc. v. Canada (Procureur général)* (1991), 38 C.P.R. (3d) 293.

[22] *Law Society of Upper Canada v. Canada (Attorney General)* (1996), 134 D.L.R. (4th) 300. [*LSUC*]

agreement (including the Bureau's agreement) that RCD applied to all parts of the *Competition Act*.

In its 2010 *"Regulated" Conduct* bulletin, the Bureau noted that the reviewable conduct provisions do not contain any criminal intent element and do not have any leeway language like "unduly" (preventing or lessening competition) or "public interest". In this context, the Bureau took the position that it "[could not] responsibly limit its statutory mandate by the general application of the RCD to the reviewable matters provisions of the Act."[23]

In the *VAA* case, the Tribunal concluded that VAA could not rely on the RCD as a shield from the application of abuse of dominance provision in section 79. The Tribunal confirmed that the RCD could apply in a case where the impugned conduct was subject to a federal legislation or regulatory scheme, as is the case in the *VAA* case. However, on the facts, it found that VAA's conduct was not specifically required, directed, mandated or authorized by any validly enacted statute, regulation or other subordinate legislative instrument. That is a necessary ingredient of the RCD. Therefore, the RCD was not available to the VAA even if the Tribunal had found it applicable to section 79.[24]

In addition to the finding that the VAA's challenged conduct was not authorized by relevant legislation and therefore could not benefit from the RCD, the Tribunal found that, as a matter of law, the RCD does not apply to section 79 (or, indeed, any of the reviewable conduct provisions). The Tribunal observed that section 79 as a civil reviewable practice provision does not require any criminal intent element and therefore the traditional criminal law rationale for RCD does not apply.[25] The Tribunal found that section 79 does not contain the necessary leeway language that would permit the application of RCD. In particular, the word "substantially" in the phrase "preventing or lessening competition substantially" (s. 79(1)(c)) does not constitute the necessary leeway language. The Tribunal did not find the word "substantially" in section 79 comparable to the word "unduly" in the old Act, which was considered sufficient leeway language for the RCD to apply.[26] Therefore, on the logic of the Tribunal's reasoning, and somewhat surprisingly, it appears that the RCD could never apply to defeat an allegation of abuse of dominance under section 79 or allegations under any other reviewable conduct provisions of the *Competition Act*.[27]

Because of the Tribunal's factual finding, including the findings that VAA did not engage in a practice of anti-competitive acts that substantially lessened or prevented competition, the

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[23] Competition Bureau, *"Regulated" Conduct* bulletin (September 27, 2010).
[24] *VAA*, at paras. 263-289.
[25] *VAA*, at para. 230.
[26] *VAA*, at para. 222.
[27] Whether a person complying with a regulatory requirement could successfully argue that it did not have an anti-competitive intent in undertaking the conduct, but rather that its intent was to conduct itself in accordance with the applicable regulatory scheme and therefore the conduct is not an anti-competitive act, is an issue which was briefly considered in the case, but not in depth. The Tribunal did say that, in the right case, compliance with a regulatory scheme could be a legitimate business justification.

Tribunal's legal finding that the RCD does not apply to section 79 may be considered *obiter dicta*. We may have to wait for the issue to be more central to a decision in a case in order to have the matter definitively resolved. If the *VAA* case is appealed, that also may provide an opportunity for more authoritative guidance on the point.

G. Conclusion

This reflects some important developments in the Canadian abuse of dominant market position jurisprudence. In particular, the Tribunal (a) found the owner of a facility (VAA) to have market power with respect to services supplied from that facility; (b) clarified, to some degree, the concept of "plausible competitive interest" in cases where the allegedly dominant firm does not compete in the affected market; (c) explored the concept of legitimate business justifications in assessing the anti-competitive purpose of the impugned conduct; and (d) found that the Regulated Conduct Defence does not apply to the abuse of dominance provisions of the Act found in section 79.

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Construction Statutory Trusts in CCAA Sales

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Construction legislation in Ontario contains a number of clauses that provide for the creation of statutory trusts in favour of any person that provides material or services to a construction improvement. Specifically, under both the former *Construction Lien Act* (and now the *Construction Act*) ("CLA"), subsection 9(1) states that an amount equal to the proceeds from the sale of an owner's interest in the improvement constitutes a trust fund in favour of a contractor.[1] This subsection further provides that reasonable expenses incurred from the sale as well as amounts paid to discharge mortgages can be deducted from the proceeds. Subsection 9(2) goes on to state that the now former owner can neither appropriate nor convert any part of the trust funds for its own use or for any use inconsistent with the trust until the contractor is paid all the amounts owed to it in relation to that particular improvement.

The Ontario Court of Appeal recently had the opportunity to consider a s. 9(1) trust under the CLA within the context of a sale in ongoing insolvency proceedings in *Urbancorp Cumberland 2 GP Inc.(Re)*.[2] At the time of writing, it remains to be seen whether leave will be sought to appeal the decision to the Supreme Court of Canada.

The Cumberland Group ("Cumberland"), which consisted of various related companies, was a residential condominium developer. In 2011, one of Cumberland's entities, Edge on Triangle Park Inc. began developing the "*Edge Project*" — a two tower residential condominium project with over 600 units. In 2015, Triangle sold a number of these units. By 2016, the entities forming the Cumberland Group, including Triangle, were in CCAA proceedings.

Units of the Edge Project continued to be sold during CCAA proceedings, further to various court orders. The sale proceeds, which exceeded $11 million, were used first to partially fund the ongoing insolvency proceedings and to repay the DIP lender. After further deducting for mortgage indebtedness, the balance of the proceeds stood at around $4.2 million.

At the time of the CCAA filing, certain contractors (the "Appellants") claimed that they were owed $3.8 million for unpaid work and materials that they had supplied to the Edge Project. The Appellants argued that the proceeds from the sale of these units constituted a trust in their favour under s. 9(1) of the CLA. The Monitor applied for direction from the Court, and the motion judge held that a s. 9(1) trust did not arise, relying on the *Re Veltri Metal Products Co.* ("*Veltri*")[3] decision, which has been the subject of some debate over its correctness. The Appellants appealed the Motion Judge's decision, raising as well the additional constitutional

[1] See *Construction Lien Act*, R.S.O. 1990, c. C. 30, s. 9 and *Construction Act*, R.S.O. Chapter C. 30, s.9.
[2] 2020 ONCA 197 ("*Urbancorp*").
[3] (2005), 48 CLR (3d) 161 (Ont. C.A.).

issue of whether s. 9 of the CLA continued to apply in CCAA proceedings. The Attorney General intervened on that issue.

Justice Zarnett, writing for the Ontario Court of Appeal on behalf of a five member panel, allowed the appeal. He broke down his reasoning into three key issues.

First, on the constitutional question of whether a s. 9(1) trust is effective in insolvency, he limited his comments to the triggering of such trusts to sales occurring after the insolvency filing. He then applied the reasoning used in *The Guarantee Company of North America v. Royal Bank of Canada* ("*Guarantee*"),[4] (which built on the *Iona Contractors Ltd. v. Guarantee Company of North America*[5] decision of the Alberta Court of Appeal) in which the Ontario Court of Appeal considered whether funds impressed with the statutory trust created under s. 8(1) of the CLA would be excluded from distribution to creditors pursuant to the scheme contemplated by the *Bankruptcy and Insolvency Act* ("*BIA*").[6] Justice Zarnett observed that a s. 9(1) trust comports with the general principles of trust law. The subject matter of the trust is certain because s. 9(1) identifies the subject matter to be the sale proceeds, after deducting for expenses and amounts paid to discharge any mortgages. He noted that the object of the trust is certain as s. 9(1) identifies whom the trust is in favour of, namely the suppliers of services, labour and material. Finally, he observed that there was certainty of intention as s. 9 of the CLA provides for the creation of the trust and states that the funds cannot be used in a way that is inconsistent with the trust.

Justice Zarnett then went on to state that in applying the *Guarantee* decision, if a s. 9(1) trust can be effective in a proceeding subject to the BIA, then such a trust might be effective in a CCAA insolvency. He, however, also observed that following the Supreme Court of Canada's decision in *Sun Indalex Finance, LLC v. United Steelworkers*,[7] a statutory trust may be wholly or partially ineffective if doing so would come into conflict with federal law (such as a specific priority in the CCAA), due to the doctrine of federal paramountcy.

Before coming to a conclusion on the constitutional question, Zarnett J. turned to discuss a second issue of whether *Veltri* was correctly decided. *Veltri* was a 2005 decision from the Ontario Court of Appeal and was relied upon by the motion judge in the case at hand. The motion judge observed that the Court in *Veltri* held that a s. 9(1) trust could not arise if a CCAA Monitor received the sale proceeds to be held for creditors. The motion judge concluded that *Veltri* applied because the Monitor here controlled both the sales process and the proceeds.

Justice Zarnett, writing here for the Court, explicitly stated that in his view, *Veltri* is correctly decided. He observed that *Veltri* had been read more broadly than what it stood for. In addition to discussing the facts in *Veltri*, amongst other things, he pointed out that a s. 9(1) trust could not have arisen in *Veltri* because the sale proceeds were less than the amount needed to

[4] 2019 ONCA 9.
[5] 2015 ABCA 240, leave to appeal to the Supreme Court of Canada dismissed, [2015] SCCA No. 404.
[6] R.S.C. 1985, c. B-3.
[7] 2013 SCC 6.

discharge the debt. His view is that a s. 9(1) trust could not arise if there is no value to the consideration received for the sale of the premises, or if the mortgage debt is equal to or exceeds the sale proceeds. Justice Zarnett concludes that:

> *Veltri* does not stand for the proposition that the control by a CCAA Monitor of a sales process, or the receipt by the Monitor of the proceeds of sale, without more, prevents a s. 9(1) trust arising when the proceeds of sale of the improvement are shown to have a positive value that exceeds the mortgage debt on the property.[8]

Justice Zarnett also observed that the deemed receipt rule was not relevant to the reasoning in *Veltri*. As a result, Zarnett J. concluded that *Veltri* would not obligate him to reject the Appellants' claim here.

Turning to the third and final issue, Justice Zarnett discussed whether a s. 9(1) trust in fact arose here. He pointed to factors that supported his finding of a trust. These include the fact:

- that the sale of the units transferred all right, title and interest of Cumberland Group in the units to the purchasers;
- the sale proceeds exceeded the mortgage debt;
- the consideration received for the sale of the units could be attributed to the sale of property that was subject to a particular improvement; and
- the sale proceeds were received by the owner as the proceeds were placed into accounts opened for Triangle and another Cumberland Group entity.

Justice Zarnett then discussed whether other factors might displace the trust. He noted, among other things, that the initial CCAA Order provided that the Cumberland Group would remain in possession of its current and future assets. Although the Monitor had control over the sales process of the units, in Justice Zarnett's view, it was still the owner that sold its interest in the units and had received proceeds that exceeded its expenses and mortgage debt.

Justice Zarnett also observed that his view was not altered by the fact that the sale proceeds were used to pay CCAA proceeding expenses and the DIP lender. He noted that the remaining balance, following such payments, exceeded the amount owed to the Appellants. He also observed that charges under the CCAA, such as one in favour of the DIP lender, may take priority over a provincial statutory trust to the extent required to deal with the conflict.

Finally, he noted that the specific language in the Approval and Vesting Order regarding the sale of these units did not prevent a s. 9(1) trust from arising. Furthermore, the Order stated that sale proceeds would stand in place of the units (as if they had not been sold) with respect to determining stakeholders' priorities, and all claims and encumbrances would attach to these proceeds as if the unit had not been sold. The Order provided that purchasers' title would vest

[8] *Urbancorp*, *supra* note 2 at para 53.

in the units free and clear of claims and encumbrances, as defined in the Order. Zarnett J. concluded that a s. 9(1) trust did not fall into the type of claims or encumbrances contemplated by the Order as both of these were defined terms.

As a result of the foregoing, Justice Zarnett concluded that a s. 9(1) trust applied to the sale proceeds in the sum of $3.8 million for the benefit of the Appellants.

Based on the comments of the Court of Appeal, it seems that the Court has been waiting for an opportunity to clarify its decision in *Veltri*. *Urbancorp* most definitely provides further insight into the application of *Veltri* and also provides important direction for practitioners on the evolving law on construction trusts.

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A Notice of Rescission By Any Other Name: ONCA - Pleadings Can Double as Notice of Rescission

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Under the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (the "Wishart Act"), franchisees are given a broad right to rescind their franchise agreement if the franchisor has failed to provide adequate disclosure, or if the franchisor provided no disclosure at all. The *Wishart Act* does not specify any form of notice of rescission, but requires that notices of rescission be in writing and delivered to the franchisor in a manner prescribed by the Act.

In *779975 Ontario Ltd. v. Mmmuffins Canada Corp.*, 2009 ONSC 4055, the Court stated that for a notice of rescission to be valid, it must adequately inform the franchisor that "the franchisee is exercising its statutory right of rescission under the [*Wishart Act*] and to inform the franchisor that the clock has begun to run".

In the past, Ontario courts have not accepted notices of rescission if they were given to the franchisor within a court pleading. However, in the recent case of *2352392 Ontario Inc. v MSI*, 2020 ONCA 237 ("*MSI*"), the Ontario Court of Appeal held that an originating process can sometimes double as a valid notice of rescission.

Factual Background

In a previous action on the same facts, the former franchisee's bank commenced an action against the former franchisee, alleging a breach of guarantee. In response, the former franchisee, through its former solicitors, issued a third-party claim against the franchisor, wherein it claimed rescission due to inadequate disclosure and damages for the same. In *MSI*, both the former franchisee and the former franchisor argued that the third-party pleading did not constitute a valid notice of rescission, while the former franchisee's former solicitors argued that it did. The parties brought a Rule 21 motion to determine this issue.

Legislative History

At first instance, the motion judge held that the third party claim did not constitute sufficient notice under the *Wishart Act*. According to Nakatsuru J., the motion's judge, an originating pleading is distinct from a notice of rescission, because the two documents serve different purposes. Moreover, since the *Wishart Act* states that a franchisor has sixty days to pay rescission amounts after the notice of rescission is delivered, an action for damages cannot be commenced until that time period has expired.

Legal Analysis

In *MSI*, the Court of Appeal reversed the motion judge's decision. According to Feldman J.A., there was nothing in the *Wishart Act* that precluded a valid notice of rescission being delivered through a third-party claim, as long as it was delivered within the prescribed time period.

The reasoning for this is because the *Wishart Act* is remedial legislation, and as such, "it should be interpreted in a generous manner" and in a way that balances the rights of both franchisees and franchisors.

Moreover, according to Feldman J.A., a notice of rescission is not always a precondition to litigation, and should not be treated as such. The *Wishart Act*'s only requirements for a valid notice of rescission are that it be in writing and that it be delivered to the franchisor.

A pleading may comply with these requirements, as it did in this case, because it notified the former franchisor of the former franchisee's intention to rescind its franchise agreement, without prejudicing either party.

Practice Takeaways

The Court of Appeal's decision reinforces that in franchise law disputes, substance will be prioritized over form. It must be noted that although in this case, a pleading, the third-party claim was held to be a valid notice of rescission, a separate statement of claim was issued for the actual rescission damages. It is unclear whether a notice of rescission contained within the statement of claim for rescission damages will constitute sufficient notice.

Moreover, in *MSI,* a key distinguishing factor from previous jurisprudence was the high level of detail included in the third-party claim. The third-party claim referenced the *Wishart Act* and adequately informed the former franchisor of the former franchisee's intent. Franchise law practitioners should ensure that any documents that are meant to be notices of rescission are detailed and follow all requirements set out in the *Wishart Act*.

The Court of Appeal also emphasized that this approach is not ideal or recommended. As such, practitioners ought to be careful, at least until *MSI* is not widely adopted, and best practice would be to issue a separate, stand-alone notice of rescission.