

# LITIGATION NOTES

VOLUME 3, ISSUE 1

JANUARY 2008

## CGAs Win Round With CPAB

*Synopsis: The Certified General Accountants Association of Canada brings an application for judicial review to the Divisional Court of Ontario, alleging that the Canadian Public Accountability Board (“CPAB”) favours the interests of Chartered Accountants over those of Certified General Accountants. CPAB’s motion to quash the application is unsuccessful.*

The Certified General Accountants (“CGAs”) in Canada have had a long-standing dispute with the country’s Chartered Accountants (“CAs”), relating to whether CGAs should have the same practice rights as CAs, and specifically whether they should have the right to audit public companies. The CGAs apparently consider that the Canadian Public Accountability Board (“CPAB”) is another mechanism whereby the CAs maintain a stranglehold on access to public company audits. This led the Certified General Accountants Association of Canada (“CGA-Canada”) to bring an application for judicial review to the Ontario Divisional Court of Ontario, seeking the following declaratory relief as against CPAB:

“(a) A declaration that CPAB is subject to the rules of natural justice and procedural fairness,

(b) A declaration that CPAB’s structure does not meet the requirements of natural justice and procedural fairness in that it:

(i) lacks fair representation from CGAs, one of the professional accounting designations that CPAB purports to oversee,

(ii) has failed to provide meaningful or adequate representation within its governance structure for CGAs, as it has undertaken to do,

(iii) is not acting in the pub-

lic interest because it is structurally biased and partial towards the interests of CAs to the exclusion of other accounting designations,

(iv) is unduly influenced by the CAs in its governance structure and activities while denying the CGAs any meaningful role or input, and

(v) is not institutionally independent of the CAs whose work CPAB oversees.”

CPAB made an application to quash the application for judicial review on the grounds that the Divisional Court does not have jurisdiction to hear the application, because CPAB exercises no statutory powers subject to judicial review and because CGA-Canada lacks both private interest and public interest standing to seek the declaratory relief. CPAB argued further that the declaratory relief sought by CGA-Canada would not resolve any existing legal dispute, but was brought merely for the political objective of seeking an expanded role for CGAs in the auditing of public companies.

The Court’s jurisdiction to hear an application for judicial review is found in s. 2 of the *Judicial Review Procedure Act* which provides that the Court may grant relief in “proceedings by way of an action for a declaration or for an injunction or both in relation to the exercise, refusal to exer-

cise or proposed or purported exercise of a statutory power [our emphasis]”.

CPAB however is not a creature of statute. CPAB was created in the wake of the accounting scandals and high-profile business failures such as Enron and Arthur Anderson, which took place at the beginning of the decade. The American government responded by passing the *Sarbanes-Oxley Act* of 2002, which created the Public Company Accounting Oversight Board. In Canada, CPAB was created. However, Canada does not have a national securities regulator or federal legislation pursuant to which CPAB could be created and endowed with statutory powers to supervise the audit of public companies across Canada. To have implemented legislative changes in each of the provinces in a reasonable time-frame would have been impractical. Consequently, CPAB was created as a not-for-profit corporation under the *Canada Corporations Act*.

CPAB does not have any statutory powers beyond its general corporate powers. It enters into “Participation Agreements” with accounting firms. These agreements require the accounting firm to audit in accordance with cer-

*(Continued on page 4)*

### INSIDE THIS ISSUE:

CGAs and CPAB	1
CCB Upheld in Court of Appeal	2
The Long Arm of the US Government	3

## Court of Appeal Says CCB Acted Reasonably

*Synopsis: Court of Appeal upholds decision of Consent and Capacity Board on treatment incapacity and financial incapacity*

Daniela Giecwicz was admitted to Oakville Trafalgar Hospital, after her lawyer alerted police to his concerns about her living conditions. Ms. Giecwicz was 77 years old and a widow. She was living in a nice house which she and her husband had purchased many years earlier, but which had fallen into substantial disrepair. The basement was flooded, there was no hydro and part of the ceiling in the bedroom had collapsed. Ms. Giecwicz had been living without heat for about three years and was using a pot as a urinal.

Ms. Giecwicz was given a psychiatric assessment and it was concluded that she should be admitted as an involuntary patient, because she would be subject to serious physical impairment if she were released back to her home. It was also found that she was incapable of making her own decisions with respect to treatment with antipsychotic and side-effect medications pursuant to the *Health Care Consent Act* and that she was not capable of managing her property within the meaning of the *Mental Health Act*. She appealed all three findings to the Consent and Capacity Board, where they were upheld. She then appealed the orders declaring her incapable of making treatment decisions and of managing her property to the Ontario Court of Appeal. She did not appeal her involuntary status and remained as an involuntary patient.

The appeal was based on the fact that the Consent and Capacity Board had allegedly not applied the correct legal test to the determination of capacity and that its decision was not reasonable in the circumstances. On the first point, Doherty, J. A., quoted the case of *Starson v. Swayze* where Justice Major of the Supreme Court of Canada explained the test for capacity found in s. 4(1) of the *Health Care Consent Act*:

*“Capacity involves two criteria. First, a person must be able to understand the information that is relevant*

*to making a treatment decision. This requires the cognitive ability to process, retain and understand the relevant information. ... Second, a person must be able to appreciate the reasonably foreseeable consequences of the decision of lack of one. This requires the patient to be able to apply the relevant information to his or her circumstances, and to be able to weigh the foreseeable risks and benefits of a decision or lack thereof.”*

Justice Doherty then went on to review the Board’s Reasons and concluded that they had applied the right legal test. The doctor had testified and the Board had accepted that the Applicant could understand the information that is relevant to making a decision about treatment. However the Board found that she did not apply it to herself. She denied her delusional disorder. She said she did not need treatment and did not appreciate the benefits of taking medication or the risks of not taking it.

On the second ground of appeal Justice Doherty reviewed the evidence adduced before the Board. The Appellant had been involved for many years in legal proceedings against her neighbours and the city. She had spent a great deal of money on these proceedings and had been “singularly unsuccessful”. Her attending physician, Dr. Hastings, was of the opinion that the Appellant suffered from a disorder involving persecutory delusions and that the dispute with her neighbours had developed into an obsession which affected all aspects of her life. Justice Doherty referred to the three “common clinical indicators” of a person’s ability to appreciate the consequences of accepting or declining treatment, as described by Chief Justice McLachlin in the *Starson* case: 1) whether the person is able to acknowledge the fact that the condition for which the treatment is recommended may affect him or her; 2) whether the person is able to assess how the proposed treatment and alternatives, including no treatment, could affect his or her life or quality of life; and 3) whether the person’s choice is not substantially based on a delusional belief. He went on to say that Dr. Hastings’ evidence revealed two of the three indicators. Dr. Hastings had stated that the appellant was unable to

acknowledge the fact that the condition for which he recommended treatment may affect her (the first indicator) and that her choice to refuse treatment was substantially based on her delusional belief system (the third indicator). Dr. Hastings’ evidence had been virtually unchallenged at the Board hearing and the Court of Appeal therefore concluded that the Board was acting reasonably in accepting his opinion.

The Appellant also argued that the Board’s decisions were unreasonable because there was no evidence that Dr. Hastings had explained the risks and benefits of the proposed treatment to the Appellant and no evidence had been provided at the hearing as to the effectiveness of the proposed treatment or the potential adverse side-effects. The Court of Appeal found that Dr. Hastings had in fact testified that he spoke to the Appellant about possible adverse side-effects but that she could not apply the information to her own situation because she did not accept that she suffered from a mental disorder. This was therefore not a case where it could be suggested that the Appellant’s lack of appreciation of the risks and benefits reflected the “physician’s failure to adequately inform the patient of the decision’s consequences” as was the case in *Starson*.

The Court also dismissed the Appellant’s argument that Dr. Hastings’ testimony at the Board did not describe the nature of the benefits of the proposed treatment or the specific potential adverse side-effects. The Court said that it was not necessary for the Board to have this information to make the decisions it was required to make. Justice Doherty stated: “It is not the Board’s task to weigh the risks and benefits of the proposed treatment or to make any determination as to the advisability of the treatment from a medical standpoint. The issue before the Board was the Appellant’s capacity to make the relevant decisions.”

*Giecwicz v. Hastings* [2007] ONCA 890 (CanLII)

## The U.S. Government's Long Arm

*Synopsis: The U.S. Supreme Court has refused to hear an appeal by Teck Cominco from a decision of the Ninth Circuit Court of Appeals which confirmed that U.S. courts can enforce U.S. environmental laws against a Canadian polluter, even where the source of the pollution was in Canada.*

In the September 2006 issue of Litigation Notes we reported on an insurance coverage dispute between Teck Cominco Metals Ltd. (“Teck”) and its insurers (“Forum Shopping for Insurance Coverage”). In the April 2007 edition, we commented on the decision of the British Columbia Court of Appeal in that dispute (“Teck Cominco Appeal Dismissed”).

The underlying dispute has continued. Teck owns and operates a lead-zinc smelter in Trail, British Columbia. A by-product of the smelting process is known as “barren slag” and Teck discharged this substance into the Columbia River from the 1920s until the mid 1990s. In the 1930s and 1940s the Grand Coulee Dam was constructed on the Columbia River in Washington State, creating a reservoir known as Lake Roosevelt. In 2004, an action was commenced in Washington State, requiring Teck to comply with the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA” or “Act”). The action was commenced by Joseph Pakootas and other members of the Colville Tribe who reside in the vicinity of Lake Roosevelt. The action was commenced pursuant to the Citizens Suit Provision of CERCLA and seeks enforcement of an order issued by the Environmental Protection Agency (“Order”) requiring Teck to conduct a remedial investigation/feasibility study with respect to the extent of contamination in Lake Roosevelt.

Teck argued before the District Court that the Court lacked subject matter jurisdiction, because the Order was based on activities carried out by Teck in Canada and lacked personal jurisdiction over Teck, a Canadian corporation with no presence in the United States. Furthermore, Teck argued that the Order was an impermissible extraterritorial application of CERCLA. Teck was unsuccessful and appealed to the United States Court of Appeals for the Ninth Circuit. In the Court of Appeals,

Teck did not repeat its arguments based on subject matter or personal jurisdiction. Rather Teck concentrated on the argument that applying the Order to Teck’s activities in Canada would be an impermissible extraterritorial application of United States law and also that Teck was not liable as a person who “arranged for disposal” of hazardous substances within the meaning of CERCLA.

The Court of Appeals points out that unlike other environmental laws in the United States, CERCLA is not a regulatory statute, but rather imposes liability for the cleanup of sites where there is a release or threatened release of hazardous substances into the environment. CERCLA liability attaches when three conditions are satisfied:

- (1) The site at which there is an actual or threatened release of hazardous substances is a “facility” within the meaning of the Act;
- (2) A “release” or “threatened release” of a hazardous substance from the facility has occurred; and
- (3) The party is within one of the four classes of persons subject to liability under the Act.

A facility is defined as “any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located”.

Lake Roosevelt was deemed to be a “facility” as the slag had “come to be located” at that site and the first element of liability was therefore met.

With respect to the second element, the Court found that there were several events which could be characterized as releases. There was the discharge of the slag from the Trail smelter into the Columbia River in Canada. There was the discharge or escape of the slag from Canada when the Columbia River enters the United States and finally there was the leaching of various heavy metals and other hazardous substances from the slag into the environment.

The term “person” in the Act includes “an individual, firm, corporation, association, partnership, consortium, joint venture, or commercial entity”. Teck argued that because the definition did not indicate whether foreign corporations are covered and because recent caselaw from the US Supreme Court had held that the term “any court” does not include foreign courts, the term “any person” should be interpreted to exclude foreign corporations. The Court of Appeals disagreed, relying on the case of *United States v. Palmer*, in which the US Supreme Court dealt with a statute prohibiting piracy on the high seas and concluded that although the statute did not specifically enumerate foreign parties as “persons”, the statute should be interpreted to apply to punish piracy committed by foreign parties against vessels belonging to subjects of the United States.

The Court went on to hold that the location where a party arranged for disposal of disposed of hazardous substances is not controlling for purposes of determining whether CERCLA is being applied on an extraterritorial basis. “Because the actual or threatened release of hazardous substances triggers CERCLA liability, and because the actual or threatened release here, the leaching of hazardous substances from slag that settled at the Site, took place in the United States, this case involves a domestic application of CERCLA”. The Court of Appeals therefore denied Teck’s appeal.

Teck argued that it had not “arranged for disposal” of the waste, because CERCLA refers to the arranging being done by “another person or entity” and Teck had done it itself. This argument was, not surprisingly, rejected.

Teck sought leave to appeal to the Supreme Court of the United States and on January 7, the Supreme Court denied Teck’s application.

*Joseph A. Pakootas et al v. Teck Cominco Metals Ltd.*, 452 F.3d 1066 (Ninth Circuit) Supreme Court Docket No. 06-1188



33 Yonge Street, Suite 201  
Toronto, Ontario  
CANADA

Phone: 416-982-3800  
Fax: 416-982-3801

[www.lexcanada.com](http://www.lexcanada.com)

*These Litigation Notes are intended to provide general information and do not constitute legal advice. Readers should consult legal counsel on matters of interest or concern raised by anything contained in this publication.*

*Our firm specializes in Insurance, Professional Liability & Indemnity, Media & Defamation, Health & Administrative Law, Transportation and Dispute Resolution. These Litigation Notes focus on decisions, actions and events of interest to our clients. We welcome your comments and suggestions.*

V.R.P. (Sas) Bersenas	416-982-3802	<a href="mailto:sas@lexcanada.com">sas@lexcanada.com</a>
Peter M. Jacobsen	416-982-3803	<a href="mailto:pjacobsen@lexcanada.com">pjacobsen@lexcanada.com</a>
Gerard A. Chouest	416-982-3804	<a href="mailto:chouest@lexcanada.com">chouest@lexcanada.com</a>
James P. Thomson	416-982-3805	<a href="mailto:jthomson@lexcanada.com">jthomson@lexcanada.com</a>
Janice E. Blackburn	416-982-3806	<a href="mailto:jblackburn@lexcanada.com">jblackburn@lexcanada.com</a>
James R. Lane	416-982-3807	<a href="mailto:jlane@lexcanada.com">jlane@lexcanada.com</a>
Carlos P. Martins	416-982-3808	<a href="mailto:cmartins@lexcanada.com">cmartins@lexcanada.com</a>
Adrienne Lee	416-982-3809	<a href="mailto:alee@lexcanada.com">alee@lexcanada.com</a>
Tae Mee Park	416-982-3813	<a href="mailto:tpark@lexcanada.com">tpark@lexcanada.com</a>
Ioana Bala	416-982-3810	<a href="mailto:ibala@lexcanada.com">ibala@lexcanada.com</a>

## CGAs v. CPAB (continued)

*(Continued from page 1)*

tain prescribed standards and to submit to inspections by CPAB. The Canadian Securities Administrators (“CSA”) is an umbrella organization consisting of the provincial and territorial securities regulators across Canada. The CSA has adopted a requirement that any reporting issuer that files financial statements accompanied by an Auditor’s Report, must have the Report prepared by a public accounting firm that has entered into a Participation Agreement with CPAB.

The test to be applied on a motion to quash an application for judicial review is that it is “plain and obvious that the judicial review application would fail”. In this case, the Divisional Court did not consider that it was plain and obvious that it could not take jurisdiction over CPAB. CPAB was created to restore investment confidence in the securities and investment field and was a response to a public need recognized by all levels of government in Canada. CPAB would certainly have been created by statute, had it not been for the constitutional division of powers in Canada

which would have made it extremely difficult to incorporate and empower a body like CPAB in the short period of time required. The Court asked the Question: “Should an organization such as CPAB that has a public interest mandate and that has the approbation of both federal and provincial governments as well as regulatory bodies to control the gate to full public practicing rights of the auditing profession, by way of their Participation Agreements, be subject to the supervisory jurisdiction of this Court on questions of natural justice bias?”

The Court went on to say that the very public nature and mandate of CPAB required that the question be answered in the affirmative and the Court therefore found that it had the jurisdiction to hear the matter.

With respect to CGA-Canada’s standing, the Court considered caselaw involving other professional organizations and concluded that CGA-Canada, as a professional self-regulatory body, “...has and

should have the standing to challenge matters affecting the profession that it regulates and for which it sets standards.”

With respect to whether or not the declaratory relief would serve a useful purpose, the Court rejected the argument that any judicial review application would serve merely political purposes. The caselaw does not support the conclusion that declaratory relief should be granted “...only in those cases in which the relief, if granted, would resolve a specific present or existing legal dispute. Rather, relief may be granted based upon serving a “useful purpose” or even a “preventative role”. The Court concluded that the question of the function and import of the declaratory relief on the facts of the case should be left to the argument of the matter on its merits.

*Certified General Accountants Association of Canada v. Canadian Public Accountability Board, 2008 CanLII 1536*