BERSENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP

LITIGATION NOTES

VOLUME 3, ISSUE 12

DECEMBER 2008

INSIDE THIS ISSUE:

Read Before Signing	1
Air Ambulance Service Exonerated	2
No Bias in Consent & Capacity Board Decision	2
Court Considers Gatekeeper Role	4

Read Before Signing

Synopsis: The Ontario Superior Court of Justice holds that a failure to review terms and conditions in a contract does not excuse performance and that a forum selection clause in the contract is enforceable.

The Ontario Superior Court of Justice recently had occasion to consider the binding nature of contractual arrangements and form selection clauses. ITEX Corporation is an American company involved in trading and bartering and promoting alternative currency trade for businesses. ITEX was incorporated in the State of Nevada and had an office in Mississauga, Ontario until August of 2003. However, after 2004 it had no place of business in Ontario and was not registered to carry on business in Ontario.

ITEX had an Ontario client, Wembley Marketing Ltd. Wembley commenced an action against ITEX in Ontario, alleging that it had failed to receive various goods and services which ITEX was supposed to have provided. ITEX brought a motion to have the action dismissed or permanently stayed on the basis of a form selection clause in its contract with Wembley.

Wembley took the position that it had no formal contract with ITEX, as the only documentation that had been exchanged between them was a Preferred Membership Application which Wembley had completed. On the Application there was a fairly bold heading "Agreement" and beneath that in small, but legible, type a reference to various terms and conditions including the Operating Rules of the ITEX Trade Exchange. This was signed by Mr. Fuss, as president of Wembley. In the text, there was an acknowledgement that the Operating Rules had been received.

Mr. Fuss claimed that he had not seen the Operating Rules and that indeed he had never really read the agreement very carefully before he signed it. A witness on behalf of ITEX testified that the Rules were sent to every customer of ITEX and that in any event they were available on the website, a reference to which was visible on the Preferred Membership Application form. The Rules contained a clause providing that any action arising under the agreement should be brought in the courts of Sacramento, California and also that the parties would resolve any dispute in accordance with the Commercial Rules of the American Arbitration Association in Sacramento.

The Ontario Superior Court of Justice found firstly that there was a binding agreement between Wembley and ITEX. Mr. Fuss was an experienced businessman who signed the agreement. The Court found that this case bore no resemblance to the *non est factum* line of cases, such as *Tilden Rent-a-Car v. Clendenning*. As the Court states, "The scenario in this case is a far cry from the situation of the average consumer, leaning over the counter of a busy car rental kiosk, confronted with a non-negotiable, near incomprehensible standard form contract. Mr. Fuss is an experienced businessman. There is nothing in the record to suggest that he was subject to any time pressures in considering whether to sign his name to the agreement. He could have inquired about the agreement before signing it. If he did not have a copy of the Rules already (and I am satisfied that it is more probable then not that a copy was sent to Wembley…) he could have asked for a copy. He could have gone to ITEX's website… to examine the … Rules. Instead, Mr. Fuss did nothing. His failure to act reasonably should not exonerate him from the terms of the contract".

The Court went on to consider whether or not the form selection clause should be enforced and referred to recent jurisprudence in Ontario to the effect that such clauses should be afforded great deference unless a strong cause is demonstrated which goes beyond merely determining the balance of convenience. The Court considered the well-known criteria drawn from the case of the *Eleftheira* and found that most of the criteria referred to therein favoured enforcing the form selection clause.

Wembley Marketing Ltd. v Itex Corporation, 2008 CanLII 67425

Air Ambulance Service Exonerated

Synopsis: Ontario Superior Court of Justice rules that there is no private law duty of care owed by a public air ambulance service to an injured citizen

In February of 2005 Patrick Heaslip was tobogganing on a ski hill north of Toronto when he was thrown from the toboggan and collided with a tree. He was transported to a local hospital where it was determined that his injuries were so serious that he needed to be transferred by air ambulance to Toronto. A call was placed to the air ambulance dispatcher, who advised that no air ambulance would be available for 2 hours. Consequently, the young man was placed in a land ambulance for transport to Toronto, a trip which would take about 1 hour. Unfortunately he died en route.

The Estate commenced a legal action against the ski hill, the regional hospital, various physicians, as well as the Ontario Ministry of Health, which operates the air ambulance service. On the evening of the accident there were three air ambulance helicopters on duty in Ontario. There were also two others which were out of service, one for maintenance and the other because the pilot has reached his duty hours.

One of the operating helicopters was close to the regional hospital and was carrying a patient with non-life threatening injuries. The ambulance dispatcher was aware that Mr. Heaslip required a higher priority response than one of the patients already on board a helicopter. The Statement of Claim alleged 26 heads of negligence against the Ministry of Health, alleging essentially that the air ambulance service was inadequately operated and staffed, that the aircraft were not properly maintained and that Patrick Heaslip's case had not been properly prioritized.

The Ministry of Health moved to have the claim dismissed under Rule 21 of the Ontario *Rules of Civil Procedure*, which permits a claim to be struck where it is "plain and obvious" that it discloses no reasonable cause of action. The Ministry pleaded that there was no private law duty of care owed to Patrick Heaslip. The Court considered the test set out by the House of Lords in *Anns v. Merton London Borough Council* and later affirmed by the Supreme Court of Canada in the case of *Cooper v. Hobart*. That test requires firstly that the harm suffered be a foreseeable consequence of the defendant's act. In this case the Crown conceded that the element of foreseeability of harm had been established.

The second part of the test requires that there be a sufficient degree of proximity between the parties to give rise to a duty of care. In this case the Court found that there was no private law duty of care as between the Crown and Patrick Heaslip: The Minister's duties "…are owed to the public at large, not to any individual member. Accordingly, there does not exist the necessary proximate relationship. The Minister is invested with the duty and power to ensure the existence throughout Ontario, for the public as a whole, of a balanced and integrated system of ambulance services and communication services used in dispatching ambulances. The Minister has the discretion to use that power for the benefit of the public as a whole in fulfilling the Minister's mandate. The overall scheme of the statute contemplates that the Minister's duty of care is not owed to individual members of the public but rather to the public as a whole in respect to the provision of air ambulance services".

The Court went on to say that in case it was wrong with respect to its conclusion with respect to the duty of care, it would consider whether or not there is a policy consideration which justifies denying liability. On this score as well, the Court concluded that the imposition of the duty of care could lead to potential indeterminate liability and that there are any number of scenarios which could be imagined where a person injured in Ontario could claim entitlement and priority to air ambulance services.

The Court went on to say that there would be a "potential chilling effect on the provision of air ambulance services if the Crown is held to owe a private law duty of care to individuals as opposed to the public as a whole. The imposition of such liability would place the Crown in conflict, not only between individuals themselves, but also in conflict as between individuals and the public as a whole".

The action against the Ministry of Health was dismissed.

Heaslip Estate v. Mansfield Ski Club Inc., 2008 CanLII 63209

No Bias in Consent and Capacity Board Decision

Synopsis: Ontario Superior Court of Justice dismisses an appeal from the Consent and Capacity Board's decision with respect to treatment incapacity and finds that the Board properly exercised its discretion in curtailing cross-examination

The Ontario Superior Court of Justice recently considered an appeal from a decision of the Ontario Consent and Capacity Board ("CCB" , which confirmed a finding that a patient in a psychiatric facility was incapable of consenting to treatment with psychiatric medications. Lewis Markowitz is an individual who suffers from Huntingtons' Chorea and a psychotic disorder and dementia secondary to that diagnosis. The manifestations of his illness are cognitive deficits, physical and verbal aggression, irritability and paranoid ideation. Mr. Markowitz was found not criminally responsible on account of mental disorder with respect to criminal charges of assault and failure to comply and was ordered by the Ontario Review Board to be transferred to the Centre for Addiction and Mental Health (CAMH).

When Mr. Markowitz arrived at CAMH

(Continued on page 3)

No Bias (continued)

(Continued from page 2)

he was assessed by a psychiatrist who found that he had no awareness of his diagnosis or the need for treatment, that he was "marginally competent to make decisions regarding his treatment" and that it was highly likely that in the near future he would be no longer capable of making decisions. He was subsequently assessed by another psychiatrist who found him incapable of making treatment decisions.

Subsequently Dr. Rootenberg became his attending physician and he testified that he tried to meet with Mr. Markowitz on several occasions and to discuss proposed medications and their side effects. He described Mr. Markowitz as "steadfast that he does not have any mental illness or in fact, medical illness that needs treatment of any kind" and that Mr. Markowitz was dismissive with him when he tried to discuss the proposed treatment and either curtailed the conversation or terminated the interview.

Mr. Markowitz applied to the CCB for a review of the finding of incapacity. When the finding of incapacity was upheld, Mr. Markowitz appealed to the Ontario Superior Court of Justice. It was alleged: 1. that the CCB misapprehended the test for capacity in Section 4 of the *Health Care Consent Act, 1996*; 2. that the CCB erred in failing to consider whether changes had occurred between the time of Mr. Markowitz's admission and the finding of incapacity; 3. that the finding of incapacity was based primarily on the fact that the Appellant would not consent to treatment; and 4. that the CCB demonstrated a reasonable apprehension of bias by not allowing a full cross-examination of the doctor.

The Court considered the test for capacity as described in the case of *Starson* in the Supreme Court of Canada and found that the CCB had applied the proper test. Section 4 of the *Health Care Consent Act, 1996* contains a two part test. For a person to be capable, he or she must firstly be able to understand the information that is relevant to making a decision about the treatment and secondly must be able to appreciate the reasonably foreseeable consequences of a decision or lack of decision. Dr. Rootenberg was of the opinion that the Appellant failed both parts of the test. The CCB considered that the doctor had not met the onus of establishing that Mr. Markowitz failed the first part of the test, but found that because of his inability to accept that he suffers from a mental disorder, he was unable to appreciate the reasonably foreseeable consequences of a decision or lack of decision. The Court found that the CCB had properly analyzed the evidence and had applied the right test.

With respect to the second point, the Appellant had relied on the case of *Boimier v. Swaminath,* in which the Court referred to a lack of evidence concerning the patient's condition during the month prior to a finding of incapacity and concluded that Dr. Swaminath had declared Mr. Boimier incapable primarily because he refused to take antipsychotic medications, rather than by reason of any actual change in his condition. In this case, however, the Court referred to the finding by the first psychiatrist who examined Mr. Markowitz and concluded that his condition was likely to deteriorate and that he would be found incapable. Dr. Rootenberg described the Appellant's condition as a deteriorating one with poor prognosis and that without treatment the psychiatric manifestations would worsen. Consequently the Court concluded that it was not unreasonable for the CCB to have found that the patient's condition had in fact deteriorated between the initial assessment and the ultimate finding of incapacity.

On the question of whether the incapacity was based on a refusal to accept treatment, the Court agreed that a refusal to accept treatment cannot be equated with incapacity and that considerations of what may or may not be in the best interests of the patient are not relevant to a finding of incapacity. However, in this case, the Court was satisfied that the CCB had applied the right criteria and reached the right conclusion as to the reasons for the Appellant's incapacity.

With respect to the reasonable apprehension of bias point, the Court referred to section 10.1 of the *Statutory Powers and Procedures Act* which permits cross-examination of witnesses "reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceedings". In this case, Dr. Rootenberg had been cross-examined with respect to the length and frequency of his interviews with Mr. Markowitz. This cross-examination apparently went on for eight pages of transcript and was then curtailed by the CCB. The Court found that cross-examination is permitted to the extent that it is "*reasonably* required for a full and fair disclosure of all matters *relevant* to the issues". However the CCB was entitled to terminate cross-examination which was repetitious or irrelevant. In this case, the Court concluded that the CCB had properly exercised its discretion in this regard.

Markowitz v. Rootenberg, 2008 CanLII 65589

Gatekeeper (continued)

(Continued from page 4)

"coercive and unmeritorious claims which are aimed at pressuring a Defendant into a settlement in order to avoid costly litigation". The legislative purpose of section 138.8 was not to assist plaintiffs in prosecuting an action but rather to protect defendants from coercive litigation and to reduce their exposure to costly proceedings. "The essence of the leave motion is that putative plaintiffs are required to demonstrate the propriety of their proposed secondary market liability claim before a defendant is required to respond".

Furthermore, on a reading of section 138.8, it is clear that the defendants are required to file an affidavit "setting forth the material facts upon which each intends to rely". If the defendant does not have any facts on which it intends to rely there is no requirement that it file an affidavit. Consequently, the Plaintiff's motion was dismissed.

Ainslie v. CV Technologies Inc., 2008 CanLII 63217

BARRISTERS, SOLICITORS

33 Yonge Street, Suite 201
Toronto, Ontario
CANADA

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

www.lexcanada.com

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*	*sas@lexcanada.com*
Peter M. Jacobsen	*416-982-3803*	*pjacobsen@lexcanada.com*
Gerard A. Chouest	*416-982-3804*	*chouest@lexcanada.com*
James P. Thomson	*416-982-3805*	*jthomson@lexcanada.com*
Janice E. Blackburn	*416-982-3806*	*jblackburn@lexcanada.com*
James R. Lane	*416-982-3807*	*jlane@lexcanada.com*
Carlos P. Martins	*416-982-3808*	*cmartins@lexcanada.com*
Adrienne Lee	*416-982-3809*	*alee@lexcanada.com*
Tae Mee Park	*416-982-3813*	*tpark@lexcanada.com*
Ioana Bala	*416-982-3810*	*ibala@lexcanada.com*

Court Considers Gatekeeper Role

Synopsis: Ontario Superior Court of Justice rules that in seeking leave to commence a class action based on violation of continuous disclosure obligations, the plaintiff has the onus to satisfy the Court that there is a reasonable prospect of success. The defendants are not oblige to provide evidence in response.

The Ontario Superior Court of Justice recently released a decision which provides some interesting insights into its thinking with respect to recent amendments to the *Ontario Securities Act*, relating to secondary market disclosure. The action is one of the first brought under part XXIII.1 of the *Ontario Securities Act*, which came into force in December of 2005. The action is a proposed class action by shareholders of CV Technologies Inc. ("CV"), which is the manufacturer of Cold FX products. The lawsuit is against the company, some of its officers and directors and its former auditors. The Statement of Claim alleges that CV improperly recognized sales of its Cold FX products to customers in the United States as revenue and that this did not fairly present CV's financial results.

Section 138.8 of the *Ontario Securities Act* requires leave of the Court before such an action may be commenced. The section also provides that on the leave application "… the Plaintiff and each Defendant shall serve and file one of more affidavits setting forth the material facts upon which each intends to rely". Counsel for CV's auditors indicated that they did not intend to file any affidavit material but rather rely on facts disclosed in the Plaintiff's motion materials. This prompted the Plaintiff to bring a motion to require the auditors to file an affidavit on which they could be cross-examined.

Justice Lax reviewed the history which led to the amendments to the *Securities Act*, including the work of the Toronto Stock Exchange Committee on Corporate Disclosure (the Allen Committee). She concludes that the purpose of the amendments was the adoption of a regime to deter misleading continuous disclosure by securities issuers. Deterrence and not investor compensation was the primary aim. The objective was "…to create a system of statutory liability that would contain enough checks and balances through...due diligence defences and limitations on liability by means of damage caps so that issuers ... would be deterred from inadequate or untimely disclosure without at the same time, creating a regime that would favour short-term over long-term investors. The focus on deterrence was in part a recognition that while compensation of a prospectus investor would generally involve the culpable issuer returning subscription money it received from aggrieved investors, by contrast, compensation of aggrieved secondary market investors would come at the expense of other innocent investors, particularly the issuer's continuing shareholders".

Section 138.8 introduced a gatekeeper mechanism which was designed to prevent "strike suits", being

(Continued on page 3)

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.