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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Commercial Litigation Update

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This newsletter is designed to bring news of changes to the law, new law, interesting decisions and other matters of interest to our commercial litigation clients and friends. We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, or call the head of our Commercial Litigation group:

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"Ontario's new Commercial Mediation Act, 2010, *which took effect last October 25, introduces some welcome features to this collaborative dispute resolution process..."*

NEW ONTARIO LAW MAKES COMMERCIAL MEDIATION MORE COMPELLING OPTION FOR SETTLING DISPUTES

Ralph Cuervo-Lorens

Mediation in its various forms continues to evolve as an alternative to litigation.

Ontario's new *Commercial Mediation Act, 2010*, which took effect last October 25, introduces some welcome features to this collaborative dispute resolution process generally, one in which the parties opt to have a mediator, who cannot impose any particular outcome, help them resolve the dispute.

A helpful and unusual feature of the new legislation is that it permits the parties to apply it to their mediation in its entirety or to apply only particular parts of it to certain aspects of the mediation.

Key Features

The Act deals only with "commercial disputes," contractual or not. It aims to facilitate the effective use of mediation by enshrining certain requirements specifically designed to make it more likely that the process will accomplish what the parties are seeking. This is not to say that these features were not in use before, but only that they are now legally mandatory, which means, among other things, that if there is a breach of the mediation rules, the aggrieved party now has a clear remedy. Here are some of these key features:

- **conflicts of interest** – the proposed mediators must first make sufficient inquiries to determine if they have any conflicts of interest or if there are any circumstances that could give rise to a concern about any bias. If there is, there must be full disclosure to the parties, which still have the option of allowing the person to mediate the case.

- **fairness in the process** – the *Act* explicitly requires the mediator to treat the parties fairly throughout the process. If a party concludes that it has been treated unfairly, it is open to the party to seek a remedy in the courts.

- **relation to litigation or arbitration proceedings** – mediation can proceed before, during or after litigation or arbitration and will be always available, if needed, to preserve the rights of a party or to assure that the interests of justice are met.

- **confidentiality of information** – this issue can often be a significant barrier to a successful mediation. Now there is an explicit obligation on everyone involved to keep information relating to the mediation confidential unless all parties agree to disclosure or if the success or

"By removing some of the long-standing concerns about mediation as a process, the new Act should also result in an increased number of mediations."

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fairness of the process requires it. This is designed to (a) minimize the risk that business-sensitive information disclosed to facilitate a mediated settlement will become widely known and (b) after a mediation is concluded, to prevent a party that has learned something during the mediation from launching a subsequent suit on an unrelated subject.

- **admissibility in other proceedings** – The new *Act* sets out a lengthy list of information that cannot be used in other legal proceedings (arbitration, litigation or administrative/regulatory), whether relating to the same subject matter as the mediation or not (unless, as before, there is consent or that the effectiveness of the process, or the general law, requires it). The obvious intent here is to encourage the parties to make the best of the mediation. The fact that there was a mediation, views were expressed, things were said or done or proposals made, together with information or documents generated for the purposes of the mediation, are now all protected from being admitted in other proceedings.

- **enforcement** – this is a particularly welcome feature which simplifies greatly what one needs to do in order to enforce an agreement reached through mediation. In short, the new *Act* does away with the prior step of commencing a lawsuit for breach of the mediated agreement. (In many cases, having to do this would have the effect of rendering the original mediation rather pointless.) Now, a party simply applies to the court to have the agreement registered, after which it is as good as a court judgment and can be enforced through the established means available for the enforcement of judgments here and elsewhere.

Conclusions

Mediation, both formal (court mandated) and informal, has been a component of the dispute resolution landscape in Ontario and elsewhere for many years. For those already sold on the concept, the new *Act* simply makes the case more compelling.

By removing some of the long-standing concerns about mediation as a process, the new *Act* should also result in an increased number of mediations.

At the very least, parties regularly exposed to commercial litigation should take a moment to review their approach to such litigation and consider revising their dispute resolution documents to ensure that resorting to the full set of features in the new *Act* will be an option when the next dispute arises.

In addition to making mediation of commercial disputes more effective and likely more common in Ontario, the new *Act* also can be expected to make Ontario more attractive for parties interested in mediation for the resolution of their disputes. (Only one other province at the moment, Nova Scotia, has a similar scheme).

This would mean that across the land (and maybe even beyond, as Toronto and other large Canadian cities position themselves as global Alternative Dispute Resolution centers), parties and their lawyers would do well to consider what changes they should make to their approach to commercial dispute resolution in order to take advantage of the features of Ontario's new commercial mediation regime. ■

COMMERCIAL LITIGATION UPDATE

"Insolvent companies with under-funded employee pension plans that want to borrow money to keep operating and ultimately return to profitability may find it tougher to find new financing as a result of a recent Ontario Court of Appeal decision."

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COURT CREATES POTENTIAL NEW HURDLE FOR INSOLVENT COMPANIES THAT SPONSOR EMPLOYEE PENSION PLANS AND SEEK NEW FINANCING

Domenico Magisano

Insolvent companies with under-funded employee pension plans that want to borrow money to keep operating and ultimately return to profitability may find it tougher to find new financing as a result of a recent Ontario Court of Appeal decision.

The Court ruled on April 7 that Indalex Limited (and certain affiliated companies), the second largest aluminum extrusion company in North America, which administered two pension plans, one for employees and the other for executives, was obliged to pay its pension obligations first and, only after that, to pay its secured creditors and other lenders.

The fact that Indalex was the administrator of the pension plans covering its executives and other employees was central to the Court's decision. In that decision, the Court left open the possibility that, on different facts, it might have decided differently.

The Indalex decision adds to case law regarding which creditors rank where in the effort to recapture what they are owed by borrowers that have company-sponsored pension plans. Herewith some background and comment on some of the ebb and flow in that case law.

Background

In recent years, both Air Canada and Stelco have undertaken significant, court supervised restructurings, in part due to underfunded pension obligations. These cases opened (some would say resurrected) the debate on how distressed companies provide for company-sponsored pension plans when so many other stakeholders are competing for an ever decreasing supply of money.

Tied to the more general issue of insufficient resources for stakeholders, pensions also provide a legal tension between *Ontario's provincial Pension Benefits Act* (PBA) and Canada's federal *Bankruptcy and Insolvency Act* (BIA).

Section 75 of the PBA requires that, prior to wind up, employers fund all amounts due, or accrued, that have not been paid and any additional amounts relating to the pension shortfall. Section 57 of the PBA creates a deemed trust for all employer contributions accrued to the date of the wind-up (including the wind-up deficiencies). Section 30 of Ontario's *Personal Property Security Act* (PPSA) confirms the priority of the deemed trusts under the Pension Benefits Act, at least as it pertains to provincial legislation. However, section 67 of the bankruptcy act states that, on bankruptcy, all but three very specific deemed trust claims (Canada Pension Plan, Employment Insurance, and Withholding Tax) are extinguished.

The receivership of Usarco Limited (an importer and supplier of copper wire) and the restructuring of Ivaco Inc (a steel products manufacturer). tackled the tension between these various pieces of legislation. Based on these decisions, the general belief was that, at law, the deemed trust provisions of the PBA (and confirmed by the PPSA) remained in force unless and until the debtor company became a

bankrupt. On bankruptcy, the paramountcy of federal legislation dictated that section 67 of the BIA applied and that the deemed trust claims under the PBA were extinguished.

The Court of Appeal's decision in Indalex Limited has created uncertainty in these generally held beliefs.

The Indalex Decision – Motions Court

On April 3, 2009, Indalex Limited obtained court protection through an Initial Order pursuant to the *Companies' Creditors Arrangement Act*. At the time of this Initial Order, Indalex was a plan sponsor and administrator of two registered pension plans. Five days later, the Initial Order was amended permitting Indalex to obtain debtor-in- possession (DIP) financing,, which would rank in priority to virtually all other debts (including pension deficiencies). The DIP loan was to be used to finance Indalex's operations during the restructuring. On June 12, 2010, the DIP loan was increased (with court approval) to almost $30 million.

On July 20, 2010, Indalex sought an Order approving a sale of its assets to a third party and further sought an order distributing the proceeds of sale. The approval motion was granted. It was opposed, however, by two groups on the basis that it did not provide for the deemed trust claims pursuant to the PBA. The court ultimately approved the distribution but required the court-appointed Monitor to hold back $6.75 million pending argument on the deemed trust provisions of the PBA

The deemed trust argument was brought before the motions court on August 28, 2010. The Honourable Mr. Justice Morawetz dismissed the motion requiring payment of all deemed trust claims. The dismissal was in large part due to the fact that there were no payments "due" or "accruing due" as of the date of the Sale and Distribution Orders The learned motions judge acknowledged that there would have been a payment due on December 31, 2009, but reasoned that the stay of proceedings provided for in the Initial Order (as amended) made that payment no longer "due" or "accruing due".

The Court of Appeal Reverses the Motions Court

In reasons released April 7, 2011, the Court of Appeal allowed the appeal and ordered that all deemed trust claims under the PBA (including any wind up deficiencies) were payable and that the holdback be applied to these claims. Furthermore (and in spite of the provisions of the amended Initial Order, which was not appealed), the Court of Appeal ordered that the PBA payment be made in priority to the DIP loan.

In its reasons, the Court of Appeal stated that the PBA payment accrued on the date that the plans began to wind up. The fact that the PBA provides for these payments to be made over five years does not mean that they have not accrued immediately. Furthermore, the record before the court approving the DIP loan did not reference said loan as taking priority over the deemed trust provisions of the PBA. In fact, the Court of Appeal held that the materials made some suggestion to the contrary

Finally, the Court of Appeal also dismissed the argument that the motion was a collateral attack

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on the Order approving the DIP loan. This was decided on the Court of Appeal's belief that "the collateral attack rule does not apply in the circumstances of this case". This finding is based in part on the "flexible, judicially supervised reorganization process that allows for creative and effective decisions".

Indalex - What does it Mean?

On the surface, the Court of Appeal decision appears to give all pension payments, including wind up deficiencies where applicable, priority over secured creditors and any debtor-in-possession financings which a debtor may wish to obtain to assist in its restructuring.

Read broadly, the decision could raise serious concerns among lenders who might wish to lend to companies that sponsor employee pension plans. It could also make it all but impossible for these same financially-strapped companies to obtain debtor-in-possession financing, particularly if there were a wind up deficiency in their pension plans.

On a closer review of the Indalex decision, the Court of Appeal was concerned with three specific actions:

1) In Usarco and Ivaco, the prospect of their bankruptcies was already before the court. In Indalex, the idea of bankruptcy appears to have been brought in response to the motion that the PBA payment was a deemed trust claim that was in priority over the secured creditors and the DIP loan.

2) The motion to approve the DIP loan was brought forward on short notice to all stakeholders and without notice to the pension plan beneficiaries.

3) Indalex was the plan administrator of both its executive and general pension plans and, in this capacity, had a fiduciary obligation to the beneficiaries. In spite of these obligations, Indalex sought, and obtained, approval for the DIP loan, which effectively subordinated the rights of the plan beneficiaries to the DIP lender. This calls into question the company's obligations to all of its stakeholders versus its obligations to the plan beneficiaries and, as such, is a conflict of interest.

These three particular actions are facts specific to this case. In its decision, the Court of Appeal left open the possibility that, on different facts, it may have dismissed this appeal.

Conclusions

To sum up, in reviewing the Indalex decision, the most that can be said is that it created some uncertainty with respect to the priority of pension plan deficiencies in an insolvency proceeding.

As indicated earlier, this will likely have a chilling effect in the credit market (particularly where the debtor has company-sponsored pension plans).

This author believes, however, that the Court of Appeal has left the door open for a return to the priority scheme articulated in Usarco and Ivaco, providing certain procedural requirements are met

Blaney McMurty LLP understands that certain Indalex stakeholders have sought leave to appeal the Ontario Court of Appeal's decision to the Supreme Court of Canada. ■

COMMERCIAL LITIGATION UPDATE

"...what do you do if you discover a website, message board, social media page, or other online publication containing false and damaging statements about you or your business?"

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PROTECTING YOURSELF AND YOUR BUSINESS FROM ONLINE DEFAMATION

Danielle Stone

Some time or other, most people give in to the temptation. You turn on your computer or smart phone, find your way to an Internet search engine, and type your own name into the search engine toolbar. Typically, you will come across links to your professional profile, or reports about your business and charitable dealings. But what do you do if you discover a website, message board, social media page, or other online publication containing false and damaging statements about you or your business?

The quickly expanding sources of defamatory content on the Internet have raised new challenges for people seeking to protect their reputation. The ease of Internet publishing, the potential world-wide span of Internet content, the immediacy of publication, and the indefinite availability of defamatory statements on the world-wide-web can cause devastating reputational effects for you or your business.

But there are unique circumstances to Internet publications that make defamation actions even more complex. Before you pull out your litigation armour, consider the following challenges, and options:

Whom to sue?

Unlike traditional media, in the world of Internet publishing anyone with a computer and a few technical skills can publish truths or falsehoods to the world, often anonymously. If the statement is on an author's personal social media page or blog, or a reputable news organization's website, you may be able to easily identify and locate those responsible for publishing the statements. If the offending material is on an Internet message board, or some other ambiguous website where members of the public can post anonymous comments, taking action against the author and publisher may not be so simple. In these cases, consider putting the Internet Service Provider (ISP) or Website host on notice about the defamatory statements. Consider the advantages of pursuing remedies against the ISP and Website host as publisher of the statements and/or the advantages of compelling the ISP or Website host to provide the name and location of the person who posted the statements.

Litigate or mitigate?

Often times, a statement may be on a message board, or in some other format that allows others to immediately rebut or post additional comments about the defamatory statements. If so, be sure to mitigate your damages by posting a response to the comment. This is obviously much more of an immediate and cost-effective response than a defamation action, and will help protect your reputation, especially if you have discovered the statements on a timely basis.

Are there credibility issues?

Defamation actions are time-consuming, complex, and expensive. Before proceeding with an action, consider the Internet source of the statement, and the potential for a reasonable person to trust the credibility of that Internet source. While legally, the source of a statement does not have to be proved as one with credibility, some websites may be so remote that they have minimal reader traffic, or cater to readers who are insignificant to you or your business. The general content of a particular website may also indicate

"To succeed in a defamation action, you must be able to prove that third parties read and understood the statements to be defamatory."

unreliability. If the website is obviously an unreliable source, ask yourself whether there is actual damage to your reputation justifying the commitment and expense of pursing a defamation action.

Can you prove publication?

To succeed in a defamation action, you must be able to prove that third parties read and understood the statements to be defamatory. Unlike newspaper or television and radio broadcasts, the courts may not automatically assume this publication. For example, in *Crookes v Newton*, the British Columbia Court of Appeal decided that a website providing a hyperlink to defamatory statements on another website did not establish publication of the material by the person who posted the hyperlink. Neither would the court accept evidence of the number of "hits" to the website as sufficient evidence of publication (we are awaiting the Supreme Court's decision in the case). Consider whether you have any proof, or can get proof, that third parties viewed and understood the defamatory statements.

Where to sue?

Similarly, you may not be able to successfully bring an action against an author and publisher of a statement on a foreign Internet site and beyond the reach of the Ontario courts. In such circumstances, you may have to prove that the online publication reaches significantly into Ontario. Evidence of your reputation in Ontario, and damage to your reputation in Ontario, will help convince Ontario courts to hear the matter. Additional evidence that the publisher targeted Ontario readers, or that Ontario residents downloaded the statements, will help convince the courts to hear the case.

What's your goal?

If you are successful in a defamation action, remember the goal. You have accomplished very little in salvaging your reputation if the defamatory statement is still accessible on the Internet in its original form. Unlike a newspaper or television broadcast, Internet publications can spread quickly and last indefinitely. In addition, "the truth rarely catches up with a lie" (*Crookes v Newton*). Either at the negotiation stage, or as the relief sought in a defamation action, seek removal of, or amendments to, the statements on the defendant's offending website and archive databases. Even if the publisher removes the statement from the offending website, Internet search engines may still publish links to a "cached" version of the offending material. For this reason, and as much as possible, removal of the material from all Internet sources should be the goal. ■

EXPECT THE BEST

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