Goodmans LLP Update

Supreme Court of Canada Cases to Watch: Fall 2019

This week, the Supreme Court of Canada (SCC) began its regular Fall sittings.[1] Before the end of the year, the top court will hear several civil and commercial cases that will impact the legal landscape in areas such as employment, class actions, arbitrations, tort, contract, and freedom of expression. Here are a few cases to watch.

Good Faith in Employment Contracts: *Matthews v. Ocean Nutrition Canada Ltd.*

The first case of the Fall sitting calls upon the SCC to consider the duty of good faith and honest performance in employment contracts. The plaintiff alleges that he was constructively dismissed after his employer engaged in dishonest and bad faith conduct designed to force his resignation. He seeks damages for wrongful dismissal that include compensation under a long term incentive plan, which entitled him to a portion of the proceeds of any sale of the company, if that sale was completed during his employment (the incentive plan specifically excluded any compensation for sales completed when he was not an employee). The company was sold shortly after the plaintiff's resignation. The trial judge found that the plaintiff was constructively dismissed, that the notice period was 15 months, and that he was entitled to compensation under the incentive plan since the sale occurred during the notice period. The majority of the Nova Scotia Court of Appeal agreed that the plaintiff had been constructively dismissed and upheld the notice period, but overturned the finding that he was entitled to damages under the incentive plan. The SCC will consider whether the employer's conduct breached its duty of good faith and honest performance and, if so, whether the plaintiff is entitled to a remedy that includes the compensation he is seeking under the incentive plan. It will provide an opportunity for the SCC to comment on the duty of good faith in the employment context. The case was heard on October 8. The SCC will consider two more cases about the duty of good faith and honest performance in December, discussed below.

Duty of Care to Supply Chain Intermediaries: *1688782 Ontario Inc. v. Maple Leaf Foods Inc., et al.*

In October, the SCC will hear a case that could affect the degree to which manufacturers and suppliers are liable in negligence to intermediaries in a supply chain. The case arises out of a listeria outbreak in meats supplied by Maple Leaf. The plaintiff is suing Maple Leaf on behalf of Mr. Sub franchisees for financial losses allegedly arising from the reputational harm they experienced in the aftermath of the listeria outbreak. The franchisees did not buy the contaminated meats directly from Maple Leaf, but from distributors. Maple Leaf brought a summary judgment motion to dismiss the claim on the basis that it did not owe franchisees a duty of care that would make it liable for the economic losses they suffered. The motion judge found that they did owe such a duty, but that finding was overturned by the Ontario Court of Appeal, which held that Maple Leaf's duty of care did not extend to protecting the franchisees from pure economic loss. When the SCC takes up the case, it will have to weigh in on whether a manufacturer, like Maple Leaf, can be liable to intermediaries in a supply chain, like the franchisees, for pure economic losses arising out of a product recall. The case will be heard on October 15.

[1]It heard two cases in Winnipeg in late September outside its regular sittings, the first time ever that the SCC has sat outside Ottawa.

Authors

Ryan Cookson
rcookson@goodmans.ca
416.849.6012

Tamryn Jacobson
tjacobson@goodmans.ca
416.597.4293

Samantha Galway
sgalway@goodmans.ca
416.597.4143

Arbitrations, Class Actions and Employment Law: *Uber Technologies Inc., et al. v. Heller*

A proposed class action against Uber could reshape the worlds of arbitration, class actions and employment law. The plaintiff alleges that Uber drivers are employees of Uber and thus protected by Ontario's employment standards. But Uber drivers enter into a services agreement that contains an arbitration clause requiring all disputes to be resolved by arbitration in Amsterdam. When Uber moved to stay the claim in favour of arbitration, the plaintiff argued that the arbitration agreement was invalid and unconscionable. The motion judge stayed the action in favour of arbitration, but the Ontario Court of Appeal overturned that decision (we have discussed that decision here). On appeal to the SCC, Uber has raised several hot button issues that include: (1) whether a court or an arbitrator should decide questions relating to the validity of an arbitration agreement at first instance, (2) whether Ontario's employment standards legislation precludes arbitration for employment disputes (like consumer protection legislation does), and (3) the framework for determining unconscionability in the context of standard form agreements, like the one entered into by the plaintiff. The case has drawn considerable attention, as 17 parties have been granted leave to intervene, including the Attorney General of Ontario and various arbitration, trade and legal organizations. The case will be heard on November 6.

Expression on Matters of Public Interest: *Bent et al. v. Platnick, et al.* and *1704604 Ontario Ltd. v. Pointes Protection Association, et al.*

In 2015, Ontario created a new pretrial procedure that allows defendants to move expeditiously for an order dismissing claims that unduly limit public debate on matters of public interest, sometimes called Strategic Lawsuits Against Public Participation (SLAPP). British Columbia passed similar legislation in 2019. The SCC will hear two appeals of decisions made under the new procedure. In the first case, *Bent v. Platnick*, a medical doctor sued a lawyer who sent an email to the Ontario Trial Lawyers Association listserv, which the doctor alleged was defamatory. In the second case, *1704604 Ontario Ltd. v. Pointes Protection Association*, the proposed developer of a subdivision sued a non-profit organization for giving evidence before the Ontario Municipal Board opposing the development, which the developer alleged breached a settlement agreement between the parties.

The defendants in both cases brought motions to dismiss the claims under Ontario's new regime, which requires the defendant to show that the claims arise out of expressions by the defendant on matters of public interest. If that is established, the burden shifts to the plaintiff to show that (1) the proceeding has substantial merit, (2) there are reasonable grounds to believe that the defendant has no valid defence, and (3) the harm likely to have been suffered by the plaintiff is sufficiently serious that the public interest in permitting the action to proceed outweighs the public interest in protecting the defendant's expression. Ten organizations or groups have been granted intervenor status, including certain civil liberties, environmental and media groups. The two cases will hopefully provide much-needed guidance on interpreting the new statutory regime. The cases will be heard together on November 12.

Waiver of Tort in Canada: *Atlantic Lottery Corp. v. Babstock*

Over the last 15 years, class action judges have repeatedly granted certification orders in respect of claims for a cause of action commonly referred to as "waiver of tort", which is based on a breach of a duty of care owed in negligence, but with no proof of resulting loss or injury. Those types of cases were certified generally on the basis that the law relating to "waiver of tort" was unsettled. Late last year, the Court of Appeal of Newfoundland and Labrador ruled that there was no longer any uncertainty on the issue, such as had been expressed by the earlier case law, and that the time had come to recognize a cause of action for waiver of tort (or, as the Court preferred to term it, "unjust enrichment by tortious wrongdoing") pursuant to which a claim could be based on a breach of a duty of care, without causally linked loss or injury. On the appeal, the SCC is being asked to decide whether such a cause of action should be recognized in Canadian law. The case will be heard on December 3.

Revisiting Good Faith and The Duty of Honest Performance: *C.M. Callow Inc. v. Zollinger, et al.* and *Wastech Services Ltd. v. Grater Vancouver Sewerage and Drainage District*

It has been five years since the SCC's decision in *Bhasin v. Hrynew*, which held that good faith contractual performance is an organizing principle of the common law and that parties to a contract have a duty to perform their contractual obligations honestly. The SCC will hear two contractual interpretation cases that could clarify those principles.

In *C.M. Callow Inc. v. Zollinger*, the main issue is whether a party breached its duty of honest performance when it delayed informing the other party of its intention to terminate a contract, even though the notice to terminate was given within the contractually required timeframe. The plaintiff performed extra "freebie" work to incentivize a renewal, which was accepted by the defendant even though it knew it would be terminating the contract. The trial judge found that the defendant had acted in bad faith by failing to disclose its intention to terminate the contract. The Ontario Court of Appeal overturned that decision, finding that the defendant's actions "may well suggest a failure to act honourably, but they do not rise to the high level required to establish a breach of honest performance."

In *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, a dispute arose after the defendant exercised its discretion under a waste transport and disposal contract to allocate waste among several disposal facilities in a manner that reduced the plaintiff's profit margins. The dispute went to arbitration, where the arbitrator found a breach of an implied duty of good faith because the defendant failed to exercise its discretion with appropriate regard for the plaintiff's legitimate expectations under the contract. A judge of the British Columbia Supreme Court overturned the arbitrator's decision on the basis there was no free-standing obligation to exercise the contractual discretion in good faith in these circumstances. The British Columbia Court of Appeal dismissed the appeal, holding that there was a duty to exercise the discretion in good faith, but that the arbitrator had failed to address whether the plaintiff's legitimate expectations were founded in the contract. The Court of Appeal also held that bad faith conduct requires a subjective element of dishonesty or improper motive.

These two cases give the SCC an opportunity to bring some clarity to the principles articulated in *Bhasin v. Hrynew*. The cases will be heard on December 6.

For further information, please contact the authors or any member of our Litigation Group.