Goodmans LLP Update

Supreme Court of Canada Cases to Watch: Winter 2020

This week, the Supreme Court of Canada (SCC) will begin its regular Winter sittings. In the next few months, the top court will hear several civil, commercial and constitutional cases that will address issues such as the scope of federal and provincial jurisdiction to regulate environmental matters, the use of litigation funding in insolvency proceedings, and the balance between the protection of privacy and the open court principle. Here are a few cases to watch.

Provincial Jurisdiction to Regulate Environmental Matters
Attorney General of British Columbia v. Attorney General of Canada

In the first case of the Winter sittings, the SCC will consider the scope of provincial jurisdiction to regulate environmental matters related to the Trans Mountain pipeline expansion (TMX).

In April 2018, the Government of British Columbia sent a reference to the British Columbia Court of Appeal to provide an opinion as to whether B.C. had jurisdiction to regulate certain environmental aspects of the TMX project. Specifically, B.C. proposed amending its main provincial environmental statute, the *Environmental Management Act* (EMA), to include a hazardous substance permit regime. Effectively, the proposed amendments would allow B.C. to impose conditions on, and even prohibit, the presence of "heavy oil" in the province, unless a director under the EMA issued a "hazardous substance permit". The Attorney General of Canada argued that federal jurisdiction includes the regulation of the construction and operation of the pipeline, and, therefore, the amendments were beyond the province's jurisdiction.

The Court of Appeal unanimously held that the amendments to the EMA were beyond provincial jurisdiction. The Court of Appeal's conclusion appears to have been influenced by the targeted nature of the proposed amendments, which suggested that the law was intended to specifically inhibit the construction of the TMX.

The case has drawn considerable attention, with 20 parties set to intervene at the SCC, including multiple Indigenous groups and the Attorneys General of several provinces.

The SCC will hear this appeal on January 16.

Whether a Contract Can Impose Monetary Consequences on Insolvency
Chandos Construction Ltd v. Deloitte Restructuring Inc.

In this case, the SCC will address whether the "anti-deprivation rule", which precludes parties from entering into contractual terms that prejudice creditors by directing assets out of a debtor's estate upon becoming insolvent, forms part of Canadian common law. Additionally, the SCC will have the opportunity to address the common law rule against penalty clauses for the first time since 1978, which the U.K. Supreme Court considered in 2015 and the High Court of Australia considered in 2016.

The appellant, Chandos Construction, was a general contractor that subcontracted with Capital Steel in connection with a construction project. In the contract between the parties, Capital Steel agreed to forfeit 10 percent of the total contract price if it became insolvent. The trustee in bankruptcy argued that the contractual

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term was invalid because it violated the common law anti-deprivation rule and because it was an unenforceable penalty clause, rather than a genuine estimate of damages resulting from the breach.

The majority of the Alberta Court of Appeal held that Canadian common law includes an anti-deprivation rule and, on that basis, found that the impugned clause was unenforceable.

In contrast, the dissenting judge concluded that the anti-deprivation rule does not form part of Canadian common law and, even if it did, based on U.K. jurisprudence, the court would have to assess whether the purpose (not the effect) of the impugned clause was to prejudice creditors by depriving the debtor's estate of assets upon becoming insolvent. With respect to the rule against penalty clauses, the dissenting judge found that the impugned clause was enforceable and that a court should only decline to enforce clauses requiring the payment of a stipulated amount upon breach where the clause is so "grossly one-sided that its enforcement would bring the administration of justice into disrepute".

The SCC will hear this appeal on January 20.

The Role of Litigation Funding in Insolvency Proceedings
9354-9186 Québec inc. v. Callidus Capital Corporation

This case will give the SCC an opportunity to provide clarity about how litigation funding may work in an insolvency proceeding.

The case involves a *Companies' Creditors Arrangement Act* (CCAA) debtor that attempted to secure litigation funding to pursue a claim against Callidus Capital, its largest creditor. At the time the debtor secured the funding, its only asset was its claim against Callidus Capital. The debtor sought to have the litigation funding treated as interim financing, such that the expenses and any success fees would rank ahead of the claims of the debtor's unsecured creditors. The Quebec Court of Appeal held that, under these circumstances, the debtor was required to obtain approval of the litigation funding agreement from its creditors by way of a plan of arrangement. The Court of Appeal also ordered that the CCAA debtor, in the course of seeking creditor approval for a plan of arrangement, must disclose the litigation funding agreement to the creditors.

The SCC will hear this appeal on January 23.

Whether Parliament's Price on Carbon is Constitutional
Reference Re Greenhouse Gas Pollution Pricing Act

Over two days in March, the SCC will hear two appeals that will address the constitutionality of federal legislation that aims to address climate change by putting a minimum price on carbon.

Last year, the governments of Saskatchewan and Ontario each sent a reference to their respective Courts of Appeal requesting an opinion on whether the federal *Greenhouse Gas Pollution Pricing Act* (Act) was constitutional. Among other things, the Act imposes a price on carbon pollution to reduce greenhouse gas emissions. The Act only applies to certain "listed provinces" that have not adopted sufficiently stringent carbon pricing mechanisms, as determined by regulation promulgated by the Governor in Council.

Ontario and Saskatchewan argued, among other things, that the Act was unconstitutional on the basis that the federal government does not have jurisdiction to regulate all activities that produce greenhouse gas emissions and that recognizing such federal jurisdiction would radically alter the balance between federal and provincial powers. However, a majority of the Saskatchewan Court of Appeal and a majority of the Court of Appeal for Ontario held that the Act was constitutional under the federal government's power to make laws "for the Peace, Order and good Government of Canada".

The SCC will hear these appeals on March 24 and 25.

Clarifying the Test for Sealing Orders
Estate of Bernard Sherman and The Trustees of the Estate, et al. v. Donovan

In this case, the SCC will have an opportunity to revisit the legal test for a sealing order previously set out in its 2002 decision in *Sierra Club of Canada v. Canada (Minister of Finance)*.

The case involves the estates of Bernard and Honey Sherman, who were found murdered in their home in Toronto on December 15, 2017. The crimes against them remain unsolved. On June 29, 2018, the motion judge made an order sealing court files related to the Shermans' estates, which prevented the public from accessing materials in the court files. Kevin Donovan, Chief Investigative Reporter for the Toronto Star, brought a motion to terminate or vary the sealing orders. The motion judge dismissed Mr. Donovan's motion, finding that the sealing order was justified for several reasons, including the need to protect the privacy and dignity of the victims' families, and a reasonable apprehension of harm to those who have an interest in receiving or administering the assets of the estates. The Court of Appeal for Ontario allowed Mr. Donovan's appeal and set aside the sealing order. Among other things, the Court of Appeal found that the risk of harm to the estates' beneficiaries and trustees was speculative.

This case will give the SCC an opportunity to comment on the balance between the protection of privacy and the importance of the open court principle. Among the issues the SCC will be asked to consider is the degree to which personal privacy is an important interest that can justify a sealing order and the circumstances in which a court may infer that objectively discernable harm may result if the sealing order is not granted.

The SCC will hear this appeal on March 26.

For further information concerning these cases, please contact any member of our Litigation Group.