

# In Brief

Fall 2007



In Brief: General comments on legal developments of concern to business and individuals

## In This Issue

Mergers involve a variety of interesting legal aspects, including competition and antitrust issues. In separate articles, James Musgrove and Martin Masse discuss some of those from both a practical and legal perspective, and Steve Szentesi looks at merger clearance developments in Canada.

Bruce McKenna reviews sale-leaseback transactions and some of the significant benefits for a vendor. Broadening the lease theme, Celia Hitch considers conflicts between permitted uses and exclusivity rights. Some practical business issues are also canvassed in articles dealing with ownership of the contents of business websites and copyright infringement and the ramifications of workers having a *Charter* right to

bargain collectively. And two other articles look at “interference” with contracts, and money lenders/investors being subject to government seizure of assets.

There are a host of interesting topics in LAW NOTES: An excerpt from a recent Supreme Court decision on joint accounts and investments; NOTES on the refusal-to-deal provision in the *Competition Act*; unilateral change in an employment contract; managing employees with substance abuse, and tax savings through various trusts.

In the hard copy, a tribute and a unique perspective on the entrepreneurial spirit in *Brief Life Bites*; your *Letters and Comment*, and a little bit about us.

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## Rocks, Trees and a Substantial Lessening of Competition



James Musgrove

Canadians are good at many things. We make planes, trains, automobiles and all kinds of high tech devices, and we are leading suppliers of various professional and business services. However, we can also hew wood, draw water and dig rocks with the best of them.

A review of Canadian transactions over the last few years reveals a significant volume of resource mergers: Glamis Gold Ltd./Goldcorp Inc.; Inco Limited/Teck Cominco Limited; Placer Dome Inc./Barrick Gold Corporation; Inco Limited/Companhia Vale do Rio Doce (CVRD); Terasen Inc./Kinder Morgan; Xstrata/Falconbridge Ltd.; Petro Kazakhstan Inc./China National

Petroleum Corporation; PrimeWest EnergyTrust/Calpine Natural Gas Trust; TransCanada Corp/Gas Transmission Northwest Corp.; and West Fraser Timber Co. Ltd./Weldwood of Canada. Now, Alcan is in play.

As legal counsel, our firm has been privileged to have participated in a number of those mergers and been involved in a variety of interesting legal aspects, including competition and antitrust issues, which are reviewed in this abridged article as they pertain to resource transactions.

## Global or Regional Markets

One antitrust advantage that most resource mergers enjoy is that the products of the merging companies are very often sold in broad geographic markets – often global or continental markets. This means that, typically, there will be a relatively large number of competitors. Of course, that is not always the case, but a broad geographic market is usually helpful to avoid antitrust difficulties.

In some cases, however, resources such as aggregates, for example, have a very high cost of transportation and are, therefore, sold in relatively small geographic markets. Mergers including these products may cause difficulties, although in such cases, the difficulties may tend to be localized to one or two sites which can be divested by the merging parties.

In any case, an accurate assessment of the geographic markets involved in the sale of the relevant product or products, noting that resource companies may sell a variety of products – some of which are sold globally and others of which may be sold in more local markets – is essential to assessing potential antitrust issues in the transaction.

## Concentration in Specialized Product Areas

One of the things about natural resources transactions is that the products – for example, coal, lumber, gold, nickel and such – are usually easy to understand. That simplicity, however, may sometimes be misleading. For instance, coal is not just coal. Coal may be subdivided into thermal coal (typically used for power plants) and coking coal (typically used for steel making). There are also intermediate products which can be economically efficient if used

either way, in combination with true thermal coal or coking coal. Defining the correct antitrust product market, and therefore determining the antitrust concerns, may not be as simple as it seems.

This issue arose in a very practical sense in the proposed merger of Inco and Falconbridge. Their combined share of the worldwide nickel market, while considerable at roughly 25%, was not problematic. However, their combined share of a narrow market of high purity nickel used in making alloys for jet engines was found to be some 80%. As a result, the proposed transaction was held up by both the European Union and United States Department of Justice for many months. That delay prevented the parties from consummating their merger in a timely fashion, and each of Inco and Falconbridge were ultimately purchased by other firms. So, while at first blush the product market might seem straightforward, there may be subtleties in the product definition which could undermine the ability to undertake the transaction, or at least to undertake it expeditiously.

*An accurate assessment of the geographic markets involved in the sale of the relevant product is essential to assessing potential antitrust issues in the transaction.*

## Monopsony and Monopoly Power

Most antitrust or competition law concerns which arise when firms propose to merge are related to whether the merged firm will gain market power so that it can raise prices in downstream (i.e., output) markets. This is known as monopoly power – although of course a firm can acquire this kind of power without being any sort of technical monopoly. Much more rarely, concerns arise when the firm will gain power not over its ability to raise prices in downstream markets, but its ability to lower the price of input (i.e., upstream) products – so called monopsony or buying power.

While this is a relatively rare concern in mergers, it has arisen in a number of Canadian cases, including: UGG; Chapters/Indigo; Maple Leaf/Schneider; Canfor/Slocan; West Fraser/Weldwood; and Riverside/Tolko.

Accordingly, although the question of monopsony power created by mergers is relatively uncommon and somewhat controversial, it has arisen in a number of Canadian transactions, particularly in the resource sector, and it is an important consideration to bear in mind when planning a merger which may have implications for buying power in a local area.

*Defining the correct antitrust product market, and therefore determining the antitrust concerns, may not be as simple as it seems.*

## International Coordination and Hostile Takeovers

One of the practical issues in natural resource mergers, among others, is the need to consider and comply with merger laws of various jurisdictions around the world. This issue applies to mergers in any industry, but is particularly relevant for Canadian natural resource firms, for various reasons.

The primary reason is that the nature of the products tends to mean that they are sold on a continental or even worldwide basis. Many jurisdictions have different tests governing whether approval for a proposed transaction is required; some major jurisdictions require approvals when there are certain levels of sales of the product in that jurisdiction, whether or not there is any office or business on the ground in those countries. The lack of an “on the ground” office often characterizes natural resources businesses that simply sell product rather than those that have exploration assets in those jurisdictions.

### Investment Canada Issues

Acquisitions of firms over certain size thresholds, \$281 million as of January 1, 2007, require approval from the Minister of Industry under the *Investment Canada Act*. Outside of the field of cultural industries, this approval has always been forthcoming, although often at the price of giving undertakings to the Minister with respect to such things as investment, employment, Canadian purchasing, Canadians in management and the like.

In the concluded purchase of Falconbridge by Xstrata, the Minister of Industry was quoted, early on in the process, as expressing the view that there might be issues with respect to that purchaser – presumably because of the possible involvement of Mark Rich in its establishment. Ultimately, however, approval was given.

In the natural resource area, however, there has been some expression of concern that some types of buyers may not be approved to purchase significant Canadian natural resource companies.

Not long ago, in *Advantage Canada: Building a Strong Economy for Canadians*, the Government of Canada indicated that the *Investment Canada Act* may be amended to include specific provisions restricting the ability of large state-owned enterprises with non-commercial objectives and unclear corporate governance to purchase Canadian firms.

*Although the question of monopsony power created by mergers is relatively uncommon and somewhat controversial, it has arisen in a number of Canadian transactions, particularly in the resource sector*

It is not yet clear how these matters will ultimately resolve. In the interim, however, the Investment Canada process is important, in that it may affect the timing within which foreign-owned purchasers can close transactions. The *Investment Canada Act* permits the Minister to take up to 75 days to issue his or her approval, and also provides that, with the consent of the parties, that period may be extended. The need to await Investment Canada approval may have implications for transactions where competing buyers are either further ahead in their Investment Canada process or are Canadian-based and do not require approval.

### Some Final Remarks

While resource mergers tend to give rise to a relatively small number of antitrust concerns, because the markets are often global in scope, even global markets can become concentrated at some point and give rise to antitrust concerns, or particular jurisdictions may

be disproportionately affected and hold up a transaction. As well, while at first blush the product market definition may appear to be relatively simple, on delving into the facts, sometimes there are niche markets which give rise to substantive concerns. In addition, even where the output is sold globally, inputs are often purchased locally, and that may give rise to concerns about market power exercised by the merged party in squeezing suppliers.

Finally, even without a serious substantive issue, there is the task of coordinating a merger with antitrust authorities in, in some cases, a score or more of countries. Determining where to file, the timelines, the necessary filing materials and all of the complexity that goes with managing these filings in many places is far from a simple prospect. To build and maintain world-scale players in these important Canadian industries, however, is not necessarily supposed to be easy. It is the price of playing in the big leagues, where Canadian resource companies operate.

**James Musgrove** is a partner and Chair of the Competition and Marketing Law Group in Toronto. Contact him directly at 416-307-4078 or [jmusgrove@langmichener.ca](mailto:jmusgrove@langmichener.ca).

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## When Can the Commissioner of Competition Halt a Merger?



Martin Masse

The Competition Tribunal recently released a decision denying an application by the Commissioner of Competition (“Commissioner”) seeking to delay Labatt Brewing Company’s takeover of Lakeport Brewing Income Fund. In so doing, the Tribunal provided some much needed guidance as to when the implementation of a merger transaction can be halted by the Commissioner.

On February 1, 2007, Labatt Brewing made an offer to buy all outstanding units of the Lakeport Brewing Income Fund. Both are important participants in the discount beer market. The parties sent the appropriate merger filings to the Competition Bureau and announced that the transaction was scheduled to close on March 29, 2007, after the expiry of the 42-day statutory waiting period.

The Bureau, for its part, classified the transaction as being “very complex” and indicated that it would need more time to conduct its review. And under its own service standards, the Bureau can take up to five months to review very complex cases.

As part of the transaction, Labatt and Lakeport offered to be bound by a time-limited hold-separate agreement (“HSA”) for a month post-closing, during which time the assets of Lakeport and Labatt would remain distinct. The Commissioner did not accept this HSA offer and instead pursued an application for an injunction under s. 100 of the *Competition Act* to prevent the closing of the transaction in order to allow more time for the merger to be reviewed. While the decision was of obvious importance to the parties and to the Commissioner, it was also of great interest to competition lawyers, as it was the first to come after Parliament had removed from s. 100 the condition that the Commissioner show that the transaction, if allowed, would “reasonably likely” result in a substantial lessening of competition.

At issue before the Tribunal was whether the Commissioner had met the test for an injunction, particularly whether it had established that, absent the order forbidding the closing, actions that are difficult to reverse would occur that would substantially impair the Tribunal’s capacity to remedy the merger if it was contested.

In answering the question, the Tribunal rejected the Commissioner’s argument that, if the merger took place, there could be no effective remedy because to try to undo the merger would be akin

to “unscrambling eggs.” Instead, the Tribunal referred to the decision of the Federal Court of Appeal in *Superior Propane*, in which Justice Linden held that a merger is not like scrambled eggs. Rather, a merger can be broken up and competition can be restored, though it may be inconvenient and difficult to do.

The Tribunal also found that, while there was no longer a need to prove that the transaction would be reasonably likely to substantially lessen competition, this did not mean that competitive effects were removed entirely from the analysis. The test for an injunction still requires the Commissioner to show that, without it, the Tribunal would not be able to remedy any substantial lessening of competition that might occur. It is not sufficient to show that the merger cannot be undone; the Commissioner must show that closing the transaction, if allowed, would substantially impair the Tribunal from remedying any substantial lessening of competition.

*The test for an injunction still requires the Commissioner to show that, without it, the Tribunal would not be able to remedy any substantial lessening of competition that might occur.*

Ultimately, the application was dismissed because the Commissioner failed to show that the acquisition prevented the Tribunal from imposing remedies which would sufficiently remedy any substantially lessened competition and that losing the possibility of forbidding the merger would substantially impair the Tribunal.

As a more overarching comment, the Tribunal expressed its view that, while s. 100 may have been amended to remove a key part of the injunction test, Parliament did not intend to make obtaining a s. 100 order a relatively simple matter based principally upon the Commissioner’s need for more time to examine the merger. Rather, it took the approach that s. 100 injunctions were extraordinary remedies to be granted sparingly.

The bottom line for parties to a merger is that, despite changes to s. 100, the Commissioner still has a relatively steep hill to climb. Parties to a very complex transaction might take comfort in this and approach the Competition Bureau with confidence when proposing a closing date that is within a reasonable time after the statutory 42-day waiting period.

**Martin G. Masse** is an associate in the International Trade Group and the Competition & Antitrust Group in Ottawa. Contact him directly at [mmasse@langmichener.ca](mailto:mmasse@langmichener.ca) or 613-232-7171 ext. 245.

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## Reviewing Merger Clearance Developments in Canada



Steve Szentesi

The past year has been another exceptionally active one for merger transactions in Canada and internationally. In Canada, notification of at least 300 mergers has been given to the Competition Bureau (the “Bureau”) to date, and cross-border acquisitions, frequently requiring clearance by multiple antitrust agencies and close coordination between parties and local counsel, are increasingly common.

Against the backdrop of enhanced merger activity, the Bureau continues to review and redesign virtually every core aspect of its merger clearance process to “clarify fundamental merger principles.” The federal government has also appointed a Competition Policy Review Panel to review Canada’s competition and foreign investment laws, in response to criticism of increased foreign acquisitions of Canadian companies.

These continuing changes to Canada’s merger clearance regime, and potentially significant changes to the rules governing acquisitions and foreign investment in Canada, mean that merging parties and their counsel face an increasingly complex and moving regulatory landscape in seeking to successfully clear and complete transactions in Canada.

### Competition Policy Review Panel

The most significant competition law development this year was the federal government’s creation in July of a Competition Policy Review Panel to review key aspects of Canada’s competition and foreign investment laws in light of a rapidly changing global economy and to ensure that they encourage “even greater foreign investment” and more Canadian jobs.

The five-member Review Panel’s “core mandate” is to review the *Competition Act* (the “Act”) and the *Investment Canada Act* (the “ICA”). The Review Panel is also charged with examining Canada’s sectoral restrictions on foreign direct investment – for example, in the airlines, financial services and broadcasting sectors. The Review Panel is to report back to the Minister of Industry in June, 2008 with concrete recommendations that could form the basis of legislative changes to the Act and ICA to “further enhance competition in Canada and ensure that the benefits of foreign investment are maximized.” As an over-arching objective, the Review Panel will advise on whether Canada’s investment framework should be

updated to address national security concerns and issues relating to acquisitions by large foreign state-owned enterprises with non-commercial objectives.

Given the significant level of recent debate over foreign takeovers of established Canadian companies (e.g., Alcan, Inco and Hudson’s Bay), notably by the NDP and Liberals, the focus of the Review Panel may include the Act’s merger clearance rules, as well as existing ICA rules governing foreign investment in Canada (which requires that applications for review be made for investments in Canadian businesses that exceed certain monetary thresholds, with approval turning on whether the investment is of “net benefit” to Canada). Especially controversial are likely to be acquisitions in the natural resources and manufacturing sectors.

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### Bureau Merger Review Initiatives

The Bureau has commenced (or continues to carry out) a number of significant initiatives to review core aspects of its merger clearance policy. These include:

- **Ex-Post Merger Review.** The Bureau is conducting ex-post merger reviews of several significant, but unchallenged, completed transactions to determine whether a substantial lessening of competition has resulted in relevant markets affected and whether its conclusions in reviewing the mergers were appropriate.
- **Merger Remedies Study.** The Bureau is also conducting a review of past merger remedies, similar to those conducted by the U.S. Federal Trade Commission and the European Commission. The objective of the Bureau’s study is to determine whether past remedies were effective in addressing competition concerns, with an emphasis on evaluating behavioural and quasi-structural remedies. (While the Bureau prefers divestitures, merging parties may prefer to negotiate behavioural or quasi-behavioural remedies that do not require the outright sale of assets.)
- **Technical Backgrounders.** Finally, the Bureau continues to issue technical backgrounders that outline its analysis and rationales for conclusions in completed mergers, which are intended to give merging parties and their counsel increased guidance with respect to the Bureau’s merger review policies. The Bureau’s

technical backgrounders, which mirror the methodology of its *Merger Enforcement Guidelines* (focusing on key factors including post-merger concentration, barriers to entry, countervailing power and remaining competition), have added some degree of insight into the Bureau's analytical approach to merger review. For example, in one case (Maytag/Whirlpool), the Bureau decided not to challenge the transaction despite a significant post-merger share based on effective remaining competition and buyer countervailing power. Ten backgrounders have been issued to date including in the steel (Mittal/Arcelor), consumer health care (Johnson & Johnson/Pfizer) and motion picture industries (Cineplex/Famous Players).

## Some Final Remarks

The past year has been an exceptionally active one for mergers and has also been marked by significant Bureau activity, which continues to review and revise key elements of its merger clearance policy. At the same time, the federal government's Review Panel is now engaged in an extensive review of Canada's competition and foreign investment laws. The ultimate impacts of the Bureau's current policy initiatives and the government's review of fundamental aspects of competition law in Canada remain to be seen. What is clear, is that merging parties and their counsel currently face a moving (and currently politically charged) regulatory landscape in seeking successful review and clearance of their transactions.

**Steve Szentesi** is an associate in the Competition and Marketing Law Group in Vancouver. Contact him directly at 604-691-7420 or [sszentesi@lmis.com](mailto:sszentesi@lmis.com).

## Sale-Leaseback Transactions: Rationale and Benefits



**Bruce  
McKenna**

Companies that carry on an operating business that is not in the business of investing in real estate can often help maximize the use of their assets with a sale-leaseback transaction. An owner will sell its real property to investors and retain the benefits of its location through a tenancy, usually a long-term lease with terms of 10 to 20 years.

A typical example would be a company that has, over the years, acquired a number of locations across Canada where it manufactures its products. It has acquired those sites over time and has either constructed or retrofitted buildings to make them suitable for its manufacturing purposes. Such locations were acquired to meet the needs of its operating business and to be close to its customers in locations where it could obtain the raw materials and skilled workers for its manufacturing process. The company acquired those locations using a mixture of the profits from the business (shareholders' equity) and loans to the company. Being in those locations helped the successful business grow and it is now a strong company with assets, a strong business and good support from its customers. However, it is not a professional real property investor or land developer. Its expertise is in manufacturing, sales and client service and there may be a number of reasons why it wishes to consider a sale-leaseback transaction.

*The traditional sale and leaseback may be an excellent way for a company to use real estate that is important to its operations while allowing the company to free up debt and equity capital.*

For the vendor, here are some of the possible benefits of a sale-leaseback transaction:

- It eliminates debt and frees up equity either to distribute to shareholders or to use in a more effective, advantageous way.
- It ensures the continued use of those crucial sites for its operating business for the foreseeable future.
- It can obtain greater returns in its core operational business than it can from the ownership of real estate.
- It can eliminate debt and/or free up its ability to take on other debt to assist with the financing of its business.
- It can take advantage of existing positive market conditions.
- It can use the real estate expertise of purchasers to handle future property issues.
- It will be entitled to deduct its rental as an ongoing operating expense and avoid capital tax.
- It can improve its balance sheet by exchanging fixed assets carried at below-market value for cash.

The challenge for the lawyer drafting the documents in a sale-leaseback transaction is to strike a balance between the goal of the broker to have the most marketable product that it can and

the goal of the vendor to ensure that it has adequate protections for its business interests in the future. That balance makes these files interesting.

### Other Similar Transactions

What is described above is a typical sale and leaseback transaction but each transaction will have its own individual characteristics. Other vendors/tenants in sale and leaseback transactions may have different goals. For example, a company may decide to consolidate its locations into a single location serving all of Canada with a goal of freeing up capital and taking advantage of the existing market conditions. It could carry out a sale and leaseback transaction with much shorter leases with a goal of continuing to provide the operating company with the use of the real estate assets only until the longer-term organizational goal is realized. With that variation, the negotiation on the sale side and lease side is much closer to a traditional property sale and short-term lease negotiation. While that kind of transaction is also technically a sale-leaseback transaction, it has different goals and does not fit as closely with the typical structure this memorandum deals with.

Another approach is to use a sale-leaseback transaction more as a financing technique, much more akin to a build-to-suit arrangement. In this situation, the company has a site that it would like to develop, it arranges for a contractor/developer to buy the land from the company, develop and construct the manufacturing facility and

lease it back over a long term lease that will provide the developer/contractor with sufficient funds to pay off its financing and to obtain a reasonable profit from the construction of the building. In these circumstances, the lease is much more of a capital nature, than an operating nature and, at the end of the term, the tenant usually has the right to purchase on a nominal or reduced-cost basis. Again, while technically a sale and leaseback, this transaction is more a financing technique and is not the subject of this paper.

### Some Final Remarks

The traditional sale and leaseback may be an excellent way for a company to use real estate that is important to its operations for the foreseeable future, while allowing the company to free up debt and equity capital and achieve some of the various advantages listed earlier. In order to complete such a transaction there are significant marketing and legal issues to be dealt with and it is important for a company to obtain the right advisers so that the transaction is carried out, the value is maximized and the company's operational interests are adequately protected during the term of the lease.

**Bruce McKenna** is a partner in the Real Estate Group in Toronto. Contact him directly at 416-307-4112 or [bmckenna@langmichener.ca](mailto:bmckenna@langmichener.ca).

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## Fixing the Unfixable: Conflicts Between Permitted Uses and Exclusivity Rights



Celia Hitch

Problems occasionally arise from badly drafted exclusive rights clauses in commercial leases. And when they do, these can be one of a landlord's worst nightmares, as it almost always creates tension in the landlord and tenant relationship and often between affected tenants.

### The Breaches

There are really two ways that a breach like this can happen:

- a tenant starts selling things which are not permitted by its permitted use clause (and thus violates another tenant's exclusive rights covenant); or
- a landlord permits a tenant to sell items or offer services which the landlord has already agreed it will not permit other tenants to sell or perform.

The first is a difficult situation for a landlord to navigate but, at least, a landlord can try to negotiate an agreement which will

bring the tenant with the offending use into line. What makes this difficult is that the offending tenant may not care whether or not it is causing its landlord to breach an exclusive rights covenant and may not be willing to co-operate. The second is also difficult because it most likely arose when a landlord inadvertently gave one tenant a right which violates another tenant's rights.

In either case, the answer to the question, "Who owns this problem?" is "the landlord!"

### What's a Landlord to Do?

In the first case, the landlord – and not the aggrieved tenant – is the party which has a binding agreement with the offending tenant. Usually only the landlord can enforce its rights under the contract and require the offending tenant to adhere to its permitted use clause. (Registration of its exclusivity right may give the tenant with such right an ability to seek an injunction directly, but it will usually want the landlord to pursue the matter). In the second case,

the landlord created the problem and cannot shirk it, whether or not it intended to create the problem.

Often, a landlord does not want to annoy a tenant over use clause breaches which it considers to be minor in nature – especially if it is a successful retailer or a national retailer with whom the landlord has multiple locations. On the other hand, the landlord also does not want to further annoy the tenant with the exclusive right. This is particularly sensitive when the breaches are not major.

### The Legal Solution

The courts have been pretty clear in holding that, if there is an injury, damages are adequate compensation. If the landlord gives an exclusive rights covenant and there is a breach of it, then a court will likely look to assess what the tenant's damages are and assess damages which take into consideration that amount. If, for example, the tenant can establish that it has lost \$10,000 a year since the breach occurred, then a court will give serious consideration to this amount. More difficult is a breach which happens when the tenant is new and not fully established. Even in a case like that, courts have admitted evidence of what the tenant's projected profits were likely to be.

To avoid being found liable for damages, if the offending tenant refuses to co-operate a landlord may find itself in the unfortunate position of having to seek an injunction to stop the tenant from selling the offending product(s). Alternatively, it may have to consider commencing default proceedings and, if necessary, termination of the lease. In either case, litigation is likely and it is important to ensure that the landlord's efforts are co-ordinated with its choice of litigator so that the case is as strong as possible when the court date comes around.

*If the offending tenant refuses to co-operate a landlord may find itself in the unfortunate position of having to seek an injunction to stop the tenant from selling the offending product(s).*

### The Practical Solution

Although court decisions in this area of law are interesting to read, there are not as many of them as one might expect. And this may well be because a solution is often created and implemented before the parties make it to court. Realistically, if a court is likely to award damages anyway, there is no point in going to court, since the case should be capable of settling outside of court. The same applies to injunctive relief.

The hardest cases to assess, however, are the ones where there are no apparent damages. Here, some creativity may need to be brought to the table. Perhaps a sign location within the property, gratis for the duration of the breach; perhaps something else. In any event, a real and tangible recognition that there is a right and it has been violated is often what the tenant with no damages most desires.

### Avoidance – and its Importance

In the end, many difficult situations can be avoided by ensuring that property staff in a retail environment are aware of the contents of the tenants' use clauses and trained to monitor regularly what the stores are selling. The best way to stop the incremental approach of adding new uses outside of a permitted use clause is at the beginning, not after several years of turning a blind eye. Even though it may feel awkward to property management staff to raise this with the offending tenant, in the end, even the offending tenant can rest assured that the landlord is taking seriously its obligations to each tenant to ensure that the others abide by their leases in order to ensure that the property runs as harmoniously as possible.

**Celia Hitch** is counsel in the Real Estate Group in Toronto. Contact her directly at 416-307-4029 or [chitch@langmichener.ca](mailto:chitch@langmichener.ca).

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## Is Your Property Safe From Canadian Government Seizure?



Lindsay D. Goldberg

Would the Canadian government ever try to seize investment property, mortgage investment security or any other valuable assets from law abiding taxpayers? The surprising answer is "yes." Indeed, society's best behaved and most productive citizens are vulnerable. There is a little-known provision in federal drug enforcement legislation which the government has been using to support such action and, regrettably, those

never involved in substance-use or abuse have fallen prey. How so?

The *Controlled Drugs and Substances Act* ("CDSA") is an important device in the federal government's law enforcement arsenal. At the government's request, it permits a court to order the seizure and restraint of any offence-related property pending the outcome of the offender's criminal trial and, on conviction, complete forfeiture of the property to the government. "Offence-related property" under the CDSA includes any property, within or outside Canada, that is



used in any manner in connection with the commission of a designated substance offence. An obvious example is a home used as a grow-op for the production of marijuana. If the Crown establishes reasonable grounds to believe that a house has been used as a grow-op, then a judge may make a restraint order under section 14(3) of the CDSA, “prohibiting any person from disposing of, or otherwise dealing with any interest in, the offence-related property specified in the order other than in such manner as may be specified in the order.” This section serves to prevent the disposition of offence-related property pending a criminal trial so that, if the accused is convicted, the Crown may seek, as part of the sentencing package, the property’s forfeiture to the government. These restraint and forfeiture provisions of the CDSA are intended by Parliament to serve as a general deterrent and to make offence related property unavailable for further criminal use and to impose a very high cost on the commission of a criminal offence.

All of this appears to be quite reasonable. The government must arm itself with powerful tools to fight crime. Other than the criminals themselves, no one would complain about the government’s seizure of a convict’s property.

The trouble is that the government does not believe that the CDSA should be limited only to participants in the alleged crime. On the contrary, the Crown says the statute empowers the government to tie up for indeterminate periods and ultimately to confiscate property even from those not charged with any offence. In two recent cases (*Scotia Mortgage Corporation v. Leung*, and *Maple Trust Company v. Walton*) involving foreclosures of alleged grow-op homes in B.C., the Crown argued that a CDSA restraint prevents mortgage lenders from foreclosing on their security before the criminal proceedings are concluded (even if that takes a number of years). The Crown said that it is necessary to stop the lenders’ foreclosures pending the outcome of the borrowers’ criminal trials

*The Crown says the statute empowers the government to tie up for indeterminate periods and ultimately to confiscate property even from those not charged with any offence.*

because the mortgages themselves are liable to future CDSA forfeiture. After a borrowers’ conviction, the onus is on the lenders to prove that they were innocent of collusion or complicity in the crimes, and that they “exercised all reasonable care to be satisfied that the property was not likely to have been used in connection with the commission of an unlawful act.”

How does a mortgage lender prove that? How would a good citizen? Parliament doesn’t say, and that is not the Crown’s problem. Of course, the Crown never suggested that either Scotia Mortgage Corporation or Maple Trust Company participated in any way in the alleged drug cultivation. Those are large Canadian lending institutions interested only in the residential mortgage business, not drug cultivation, and it is absurd to even suggest that those lenders were complicit or participated in any alleged criminal activity.

Both the B.C. Supreme Court and Court of Appeal ruled that clearly innocent lenders should not be dragged into the middle of their borrowers’ criminal disputes with the Crown, and they should not be delayed in their mortgage realization. At the time of writing, it is not yet known whether the Crown will appeal the B.C. rulings.

If a lender takes a mortgage security on a B.C. home that, through no fault of its own, was used as a grow-op, is it fair that its attempts to foreclose are delayed until after the criminal trial (and appeals) and it is forced to incur the legal expense of proving its innocence to protect its mortgage investment from the government? Fortunately, B.C. courts don’t think so. This may be because when a mortgage investment in Canada is made, the lender is more focused on the borrower’s creditworthiness than trying to assess the cost of litigation to oppose the government and realize on its security.

**Lindsay D. Goldberg** is a partner in the Litigation Group in Vancouver. Contact him at 604-691-7476 or [lgoldberg@lmls.com](mailto:lgoldberg@lmls.com).

## Statutory Damages for Copyright Infringement



Keith Bird

The *Copyright Act* (“Act”) sets out the rights afforded to the owner of copyright in a work. Works protected under the Act include literary works that encompass, among other things, software. The Act also provides for various remedies for copyright infringement, including statutory damages of be-

tween \$500 and \$20,000 per work infringed as an alternative to compensatory damages and/or profits.

The case *Microsoft Corporation v. Cerrelli et al.* was heard in the fall of 2006 and the public version of the decision was released early this year. It related to the alleged sale by the defendants of counterfeit copies of 25 different Microsoft works. These included such

well known programs as Windows 98, Office 97 and Office 2000.

According to Microsoft, the defendants had begun selling counterfeit software at least as early as 1997. Microsoft put the defendants on notice several times in 1997 and 1998. In 1999, the RCMP executed a search warrant against the defendants and seized about 400 software packages, virtually all of which were later determined to be counterfeit. In 2000, the Montreal Police executed a similar search warrant and seized approximately 700 additional software packages. Ultimately, the Crown did not lay charges against the defendants and the software seized by the Montreal Police was returned to the defendants before Microsoft was able to move to prevent its disposal. The defendants claimed that the returned software was thrown in the garbage and was not available to be tested for authenticity.

Mr. Justice Harrington found that the defendants knowingly infringed Microsoft's copyright and that "Mr. Cerrelli deliberately, willfully and knowingly engaged in a course of conduct likely to infringe..." He described Mr. Cerrelli as "a liar and a scofflaw" and the defendants collectively being "caught up in a web of deceit which amply demonstrates their utter disregard for the process of this Court."

In the result, the Court found that the sale of counterfeit copies of Microsoft software by the defendants constituted copyright infringement; that the behavior of Mr. Cerrelli was sufficient to attract personal liability for the infringement; and, in fact, that the defendants' behavior was so egregious that punitive damages were warranted.

The Court considered the appropriate quantum of statutory damages for the infringement of 25 works and determined that an amount of \$500 for each work infringed (not for each infringing

act), or \$12,500 total, would have been grossly out of proportion with the infringement that had been committed. Instead, the Court determined that the maximum statutory damages of \$20,000 per work infringed, or \$500,000 total, was appropriate. Having found the defendants' conduct to be outrageous, the Court awarded a further \$100,000 against each of Mr. Cerrelli and the two corporate defendants, collectively, in punitive damages.

The Court also issued a permanent injunction against the defendants, prohibiting them from selling any further counterfeit copies of the 25 works. However, the Court declined to extend the injunction to any non-parties to the action, and did not extend the

injunction to other Microsoft software, despite the fact that the Act specifically contemplates such a "wide injunction" in circumstances where the plaintiff satisfies the court that the defendant will likely infringe copyright in those other works if not so enjoined. One wonders what situation could possibly justify a wide injunction if the facts of this case did not.

In the end, the decision was a major victory for Microsoft, but one that took

almost eight years, and undoubtedly significant expenditures, to achieve. The level of statutory damages and the award of punitive damages does send a significant message to software counterfeiters, although the behaviour of the defendants certainly exacerbated the damages awarded in this case and it is likely restricted to situations where such behaviour warrants the Court's disapprobation.

**Keith Bird** is a partner in the Intellectual Property Group in Toronto. Contact him directly at 416-307-4205 or [kbird@langmichener.ca](mailto:kbird@langmichener.ca).

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*The level of statutory damages and the award of punitive damages does send a significant message to software counterfeiters.*

## Who Owns the Contents of Your Business Website?



**Alison Hayman**

When a business has an employee or consultant create its business website, it is likely assumed that the business owns the copyright in the resulting site. But is that the really the case?

Copyright in a website is usually multi-layered. A website is typically a compilation of artistic works (graphic designs), literary works (text) and photographs. It is important that the business own or have a licence to

the copyright in each of these components to avoid having copyright infringement claims made against it and to permit reproduction of those elements without concern. Despite what you as a business entity may think, you may not have those rights!

Your position will be most favourable if an employee created your business website. In that case, by operation of law, your business will be the first owner of the copyright in the elements of the site the employee created. In contrast, if you hired an independent

consultant to create your website, the consultant will be the first owner of copyright, and you will need to obtain an assignment of the copyright in any elements he or she created.

Once you have acquired the copyright in the elements created by the web designer (employee or consultant), either by operation of law or by assignment, the next task is to determine whether there are elements on the website which are owned by third parties. There is a real risk that the consultant or employee who designed your website may have incorporated copyrighted images, text or photographs and may not have obtained permission or paid the applicable licence fees to use such work. In particular, it is not uncommon for website designers to source images for their clients' websites from stock image companies without seeking permission or paying the applicable royalty fees.

Unlicensed use of any work in which copyright subsists is actionable, but the risk of detection is particularly great if the copyright is owned or licensed by a stock image company. These companies use sophisticated software to scan the Internet for the images they control. If they find their images on your website, you may receive a letter requesting payment of licence fees for the period during which the image was displayed on your website. These fees can be significant, especially if multiple images were used over a long period of time. If you fail to pay, you could face a copyright infringement law suit.

Plaintiffs in copyright infringement suits can seek the damages they actually suffered, plus the profits made by the infringement. Alternatively, they can claim a fixed amount per infringement, ranging from a minimum of \$500 to a maximum of \$20,000. The minimum amount can be reduced to \$200 per infringement if the defendant can satisfy the court that s/he was not aware and had no

reasonable grounds to believe that s/he was infringing copyright. The minimum amount can be further reduced to an amount the court considers just if the infringement involves more than one work in a single medium and awarding the minimum amounts would result in an award grossly disproportionate to the infringement.

To minimize your exposure to these types of copyright infringement claims, it is advisable to take the following steps:

- Ask your web designer, whether an employee or a consultant, where the images on your website came from.
  - If the images are not photographs or graphic designs taken or created by the web designer, ask him or her whether permission and/or payment of a licence fee is required to use the images. If this can't be confirmed, don't use the image.
  - Document your conversations with your web designer about the source of the images.
  - Even if you are satisfied that you will be lawfully using images on your website, as an extra precaution, it is advisable to have a liability and indemnification clause in the agreement governing an independent web

designer's services. This type of clause can limit your legal and financial liability in the event that you or your business are sued for copyright infringement as a result of content placed on your business website by the independent web designer.

It is only prudent to be diligent when developing your business website. As you strive to create an attractive and functional website, you want to avoid creating one that leaves you open to copyright infringement claims.

**Alison Hayman** is an associate in the Intellectual Property Group in Toronto. Contact her directly at 416-307-4155 or [ahayman@langmichener.ca](mailto:ahayman@langmichener.ca).

*Unlicensed use of any work in which copyright subsists is actionable, but the risk of detection is particularly great if the copyright is owned or licensed by a stock image company.*

## Workers' Charter Right to Bargain Collectively – Implications



**George Waggott**

In a radical shift from prior labour cases, the Supreme Court of Canada ("SCC") in the *Health Services and Support* case held that the guaranteed right of freedom of association stipulated in the *Charter* includes the right of Canadian workers to bargain collectively on fundamental workplace issues. This ruling will certainly make employers think twice before proposing to sidestep the collective bargaining rights of their employees.

In 2002, with minimal consultation, British Columbia passed the *Health and Social Services Delivery Improvement Act* as a response to the many challenges which faced its health care system. Indeed, a year earlier, the B.C. government had characterized the state of its health care system as facing a "crisis of sustainability." In attempting to resolve this crisis, the Act had several ambitious goals, which included providing a more flexible health care delivery system, developing more cost effective and efficient ways to deliver patient care, and improving the use of human resources.

## What the Act Tried to Address

The provisions relevant in the SCC proceeding relate to: 1) changes to transfers and multi-work assignment rules; 2) contracting out; 3) job security programs; and 4) layoffs and bumping rights, with respect to health care worker. These provisions afford employers more flexibility with respect to how they structure their employee relations and permit employers to act in ways which would not have been ordinarily permitted under existing collective agreements.

## Why the SCC Objected

The majority opinion, written by McLachlin C.J. and Lebel J., stated the four following propositions upon which their decision rests:

- 1) **New approach:** The reasons put forward in the past for restricting collective bargaining from the protection of s. 2(d) of the *Charter* can no longer stand;
- 2) **History on labour's side:** Restricting collective bargaining from s. 2(d) is inconsistent with the historic recognition of collective bargaining in Canada;
- 3) **Global perspective:** The principle of freedom of association in international law encompasses collective bargaining as a key component, which should influence the Canadian interpretation of s. 2(d);
- 4) **Freedom in context:** Including collective bargaining in the interpretation of s. 2(d) is consistent with and promotes the other rights, freedoms and values expressed in the *Charter*.

*In their decision to include collective bargaining under the umbrella of rights protected, the SCC was very clear to highlight that not all collective bargaining is protected.*

gained for is not a factor in the first part of the test. In answering question #2, the majority held that it is necessary to answer both 2(a) and 2(b) in order to conclude whether there is a substantial interference with the process of collective bargaining.

## Scope of Decision

In their decision to include collective bargaining under the umbrella of rights protected under s. 2(d), the SCC was very clear to highlight that not all collective bargaining is protected. Only the procedural right to associate and bargain collectively is protected; the substantive outcome for which the employees are bargaining does not attract the same protection. Further, only collective bargaining for the purpose of achieving fundamental workplace goals is protected, and when the subject matter of the collective bargaining is of lesser importance, it will less likely be granted protection under s. 2(d). Issues traditionally considered to be important are those concerning working conditions. Issues traditionally considered to be of lesser importance are those concerning matters such as the design of uniform and the availability of parking spots.

It is important to clarify exactly who is affected by this SCC decision. The *Charter* only applies to state action and thus this decision is limited in its application. One form of state action is the passage of legislation, which means that legislation enacted by the government which affects employees cannot violate s. 2(d). Another form of state action is when the government is the employer. In cases when the government is the employer, the government must act in accordance with s.

2(d). Thus, this SCC decision protects the collective bargaining rights of employees who are regulated by government enacted legislation and those employees who are employed by the government.

## Test for Review

In concluding that specific provisions of the Act violated s. 2(d) of the *Charter*, the majority conducted a two part test:

- 1) Does the Act interfere with the *process* of collective bargaining?
- 2) Was the interference *substantial* as to constitute a breach of the guarantee of freedom of association under s. 2(d)? In terms of substantive review, the Court directed the following inquiries:
  - a) What is the nature of the affected right, which involves looking at the specific issue over which the union is bargaining?
  - b) How does the Act impact the underlying duty of the employer to negotiate in good faith when engaging in collective bargaining?

In answering question #1, the court noted that it is important to consider only whether the general process of collective bargaining is being interfered with; the substance of what is being bar-

## Implications for Employers

The reason this case has spun a media frenzy is because it impacts the way employers must conduct their employee relations with respect to collective bargaining. As mentioned above, employees have the right to unite and bargain collectively which imposes corresponding duties on the employer to bargain in good faith and to facilitate the pursuit of a peaceful and productive solution to fundamental workplace issues. Collective bargaining is a fundamental aspect of Canadian labour relations and the SCC's decision to formally declare it as such only leads to the conclusion that employers are going to have to be more respectful and responsive to their employees' rights to collectively bargain on fundamental workplace issues.

**George Waggott** is an associate in the Employment and Labour Group in Toronto. Contact him directly at 416-307-4221 or [gwaggott@langmichener.ca](mailto:gwaggott@langmichener.ca).

## Judicial Circumvention of Contractual Rights in a Plan of Arrangement



Karen  
Carter

Courts will only rarely and sparingly interfere with contractual rights that parties freely negotiate and agree upon.

However, in *Protiva Biotherapeutics Inc. v. Inex Pharmaceuticals Corp.*, the British Columbia Court of Appeal recently determined that it could adjust contractual rights in order to achieve a workable plan of arrangement proposed by a company under the British Columbia *Business Corporations Act* (“Act”).

A plan of arrangement is a mechanism by which a company may reorganize its affairs in order to achieve an economic benefit for the company and its stakeholders. Convenience and flexibility are at the heart of the arrangement provisions of the Act. Plans of arrangement may consist of virtually any kind of corporate reorganization that a company wants to propose and must be voted on by the stakeholders directly affected by the arrangement. Once the plan of arrangement is approved by those stakeholders, it must be approved by the court.

The arrangement provisions of the Act are particularly important for businesses in British Columbia because they allow for convenient and efficient corporate reorganizations that would otherwise be more complicated to complete, if they could be at all, under the Act.

In the *Inex* case, Protiva appealed an order of the Supreme Court of British Columbia approving a plan of arrangement proposed by Inex to transfer all of its property, rights, interests and liabilities to a company called Tekmira Pharmaceuticals Corporation, with the result that Inex’s contractual obligations with Protiva were also transferred to Tekmira.

The plan of arrangement was opposed by Protiva because the assignment of the contracts it had with Inex required Protiva’s consent and Protiva was not willing to provide that consent.

Inex argued that the Court had broad discretion under the Act to approve any plan of arrangement as long as the arrangement was fair and reasonable to all of those affected by the arrangement.

The issue before the Court in the *Inex* case was whether the broad discretion of the Court under the Act included the ability of the Court to approve an arrangement that would essentially circumvent Protiva’s contractual rights. The balancing of third-party contractual rights against an otherwise fair and reasonable plan of

arrangement had not previously been considered in British Columbia in connection with the arrangement provisions of the Act.

Mr. Justice Pitfield was able to reconcile the principle of freedom of contract with the purpose of the arrangement provisions in the Act. Because the reorganization proposed by Inex was otherwise fair and reasonable from a business perspective, the Court preferred to approve the plan of arrangement, as long as it could find a way to address any prejudice that might be suffered by Protiva as a result of circumventing its right to withhold consent to the assignment of its contracts to Tekmira.

Protiva asserted, among other things, that Tekmira would be better positioned than Inex to compete with Protiva. It also asserted that if the contracts were assigned to Tekmira, thereby relieving Inex from its contractual obligations, Inex would be under no

obligation to respect the contracts’ confidentiality provisions and would not be constrained from carrying on the business activity prohibited by those contracts.

Mr. Justice Pitfield held that there was no prejudice to Protiva as a result of the plan of arrangement that could not be removed by means of court orders. He found that the power to remove any such prejudice by court order is contemplated in the language of the Act (section 291(4)(c)). Inex was permanently enjoined from disclosing any confidential information and

from pursuing any business activity as provided in the contracts.

Protiva unsuccessfully appealed the decision of the Supreme Court of British Columbia. The Court of Appeal held that “third party rights must be considered and accommodated within the discretionary analysis, but they cannot be erected as an impermeable barrier to an arrangement.”

Had the Court not balanced the parties’ interests and exercised its discretion in this way, the restrictions on assignment contained in the *Inex/Protiva* contracts would have allowed Protiva to effectively exercise a veto over the plan of arrangement. As stated by the Court of Appeal, “were it otherwise, the third party could exercise powerful leverage wholly out of proportion to the value of the rights compromised by the arrangement, or the party could simply act as a spoiler for purposes unrelated to those rights.”

The full scope of the Court’s discretion to approve arrangements in the face of third-party contractual rights remains to be seen. However, it is now certain that the courts are empowered by

*The issue before the Court was whether the broad discretion of the court under the Act included the ability of the Court to approve an arrangement that would essentially circumvent Protiva’s contractual rights.*

the Act to affect contractual rights in connection with the approval of a plan of arrangement. The actual extent to which contractual rights might actually be compromised under the arrangement provisions of the Act will likely depend on the severity of the prejudice that can be demonstrated by a third party trying to assert its contractual rights in opposition to a plan of arrangement.

In the meantime, this case is good news for companies that want to engage the economic efficiencies and benefits of the arrangement provisions of the Act, even in the face of potential or

actual resistance from their contractual counterparts. As long as any prejudice to that third party can be minimized or eliminated either through the plan arrangement itself, or by way of a proposed court order in connection with court approval of the plan of arrangement, such resistance will not be a bar to a company's access to the arrangement mechanism in the Act.

**Karen Carteri** is an associate with the Litigation Group in Vancouver. Contact her directly at 604-691-7431 or [kcarteri@lmls.com](mailto:kcarteri@lmls.com).

## Unlimited Liability Companies



**Greg McIlwain**

In the spring of this year, the British Columbia legislature passed amendments to its *Business Corporations Act* to permit the incorporation of unlimited liability companies ("ULCs") in B.C. The amendments are expected to soon become effective.

ULCs have long existed in Nova Scotia, where they gained prominence commencing in the mid 1990s in connection with cross-border U.S. tax planning. B.C. joins Alberta, which enacted legislation permitting ULCs in 2005, as an additional province where ULCs may be established.

For Canadian tax purposes, ULCs are treated as taxable Canadian corporations. Under "check the box" rules in the U.S. *Internal Revenue Code*, however, ULCs may be treated either as a disregarded entity (if it has a single owner) or as a partnership (if it has multiple owners). This treatment provides certain tax benefits for U.S. shareholders.

Any business contemplating operating as a ULC should obtain U.S. tax advice as well as Canadian legal counsel to assist in determining under which provincial statute to operate. The following table sets out some of key considerations applicable to the decision as to whether to establish a ULC in B.C., Alberta or Nova Scotia.

	Nova Scotia	Alberta	British Columbia
<b>Liability of Shareholders</b>	Joint and several liability arises only upon winding up of ULC; exceptions available for former shareholders	Joint and several liability for any act or default of ULC before or after winding up	Joint and several liability arises only on dissolution or liquidation of ULC; exceptions available for former shareholders
<b>Director Residency Requirement</b>	None	One quarter of directors must be resident Canadians	None
<b>Name</b>	Name not required to include "unlimited liability company" or "ULC"	Name must include "unlimited liability company" or "ULC"	Name must include "unlimited liability company" or "ULC"
<b>Incorporation</b>	Fee: \$1,000 (recently reduced from \$6,000) Annual renewal: \$2,750	Fee: \$100 Annual renewal: \$Nil	Fee: \$1,000 Annual renewal: \$Nil
<b>Converting Existing Corporation to a ULC</b>	Three-step process: 1) Incorporate ULC 2) Continue existing corporation to Nova Scotia 3) Amalgamate existing corporation with ULC or wind up existing corporation into ULC (court order required in either case)	One-step process: 1) Continue existing corporation into Alberta as a ULC (An existing Alberta corporation can convert to a ULC by filing Articles of Amendment)	Two-step process: 1) Continue existing corporation into British Columbia 2) Convert to a ULC by amending Notice of Articles. (An existing B.C. corporation can convert to a ULC in one step by amending its Notice of Articles)

	Nova Scotia	Alberta	British Columbia
<b>Amalgamation</b>	Only long-form amalgamations are available and a court order is required	Both short-form amalgamations (requiring only board approval) and long-form amalgamations are available without court approval	Both short-form amalgamations (requiring only board approval) and long-form amalgamations are available without court approval
<b>Corporations Statute</b>	Nova Scotia <i>Companies Act</i> is based on English <i>Companies Act</i> and adopts only some typical of the modern business corporation statute concepts	Alberta <i>Business Corporations Act</i> is a modern corporations statute	British Columbia <i>Business Corporations Act</i> is a modern corporations statute which came into force in 2004 after approximately 15 years in development

**Greg McIlwain** is an associate in the Business Law Group in Toronto. Contact him directly at 416-307-4169 or [gmcilwain@langmichener.ca](mailto:gmcilwain@langmichener.ca).

## LAW NOTES No Deal; Joint Investments; Managing Substance Abuse; Changing Contract; Saving Tax (Trusts)

*This section offers a brief note or comment on an area or point of law (or information source) that may be of interest.*

### 1 “No Deal” for B-Filer: Competition Tribunal

Hardworking lawyers seldom get the chance to watch TV, and those that do rarely admit it, but there is a television show, starring a Canadian, in which various offers are made and the contestants decide whether it will be “deal” or “no deal.” Slightly less known or popular is a provision of Canada’s *Competition Act*: the refusal to deal provision. But it, too, has recently generated some excitement as a result of the *B-Filer* decision.

The refusal to deal provision allows firms which have been refused supply of a product to apply to the Competition Tribunal for an order that they get supplied. Amongst other preconditions for such an order is a requirement that the person seeking the order is substantially affected in their business or precluded from carrying on business due to the inability to obtain supply, that the reason for the inability to obtain supply is that there is insufficient competition, and that the refusal to supply had an adverse effect on competition. Until 2002, only the Commissioner of Competition could seek orders relating to refusal to supply, but since that time parties who have been injured have had the right to do so, and 12 cases have been launched. Only the *B-Filer* case has resulted in a decision, and it is now under appeal.

B-Filer’s business allowed customers to pay Internet merchants by debiting the customer’s bank account. The majority of B-Filer’s business involved money transfers to fund on-line gaming accounts at casinos outside Canada. To operate its service, B-Filer relied on the supply of certain financial services with major banks. To use

B-Filer’s service, customers had to provide their confidential bank code to B-Filer. Ultimately, that turned out to be an important fact for the Competition Tribunal and for a number of reasons it turned down the B-Filer application.

This is the first of the private refusal to deal cases which has been heard on its merits, and the decision is unlikely to encourage a flood of additional applications. That said, the facts of the case were peculiar. A key question, which remains outstanding, is whether the Tribunal will be sympathetic to respondents whose business justifications for discontinuing supply are related to the relatively common desire to restructure distribution agreements – to be more efficient or compete more effectively. The Tribunal was clearly sympathetic to the Bank’s justification for cutting off supply to B-Filer, both in finding that the reason B-Filer could not obtain supply was not due to insufficient competition, and also in including that it would have exercised its discretion in favour of the Bank in any event. However, the facts in the *B-Filer* case were unusual. How the Tribunal will react in the more usual situation of a supplier simply seeking to restructure its distribution arrangements will be important to the future course of refusal to deal litigation, and for the ability of Canadian firms to ensure that their distribution systems are efficient.

—**James Musgrove**, Lang Michener LLP (Toronto)

—**Steve Szentesi**, Lang Michener LLP (Vancouver)

Ed.: *This is an abridged version of an article that appeared in Competition & Antitrust Brief Spring 2007. To subscribe to this publication, visit our “Publications Request” page.*

## 2 Joint Bank and Investment Accounts: Estate Planning/Financial Management

Ed.: *In Madsen Estate v. Saylor, on the topic above, the Supreme Court of Canada dismissed the appeal and the majority judgment was delivered by Justice Rothstein:*

This appeal, like its companion case, *Pecore v. Pecore*, 2007 SCC 17 (released concurrently), involves questions about joint bank and investment accounts. As discussed more fully in *Pecore*, joint accounts are used by many Canadians for a variety of purposes, including estate planning and financial management.

As discussed in *Pecore*,... the fact that a transferor maintains sole control over or use of funds in a joint account will not be determinative of whether a transferee is entitled to the balance in the account upon the transferor's death. Whether or not a transferor continues to pay tax on the income of the joint accounts is also not determinative.

However, I am unable to agree with the trial judge that there was no evidence to suggest that Patricia's father intended for her alone to have the assets in the joint accounts. On the relevant financial institution documents, the father elected to have the joint accounts carry a right of survivorship. Patricia testified that both she and her father acknowledged that they understood at the time that this meant that on the death of one of the joint account holders, the other would become the sole owner.

As discussed in *Pecore* ... banking documents may, in modern times, be detailed enough that they provide strong evidence of the intention of the transferor regarding how the balance in the accounts should be treated on his or her death. The clearer the evidence in the documents, the more weight that evidence should carry.

## 3 Managing Employees with Substance Abuse Problems

Many employers face the complex challenge of an employee with a substance abuse problem. Drug abuse or alcohol abuse-related issues raise human rights and common law liability concerns for employees. The case of *Whitford v. Agrium Inc.* provides an example of an employer's apparent good intentions that eventually led to the wrongful dismissal of an employee. The case also provides useful insights and strategies for employers in managing and, if necessary, terminating the employment of an employee with a substance abuse problem:

- Be aware of your obligations and rights pursuant to the applicable human rights legislation.
- Provide accommodation to the employee as required.
- Provide a unified and coordinated approach in managing and addressing the workplace issues.

- Regularly meet with the employee to monitor the situation.
- Clearly articulate expectations.
- Provide clear and effective warnings.
- Assess and ensure the safety of others.

—**Voula Michaelidis**, Lang Michener LLP (Toronto)

## 4 Employment Contracts Can Be Changed – Unilaterally!

Even a chief executive can be forced to accept a demotion if the company manages its case properly. Darrell Wronko incorrectly assumed the right to two years' severance he had negotiated in his employment contract was written in stone. In fighting his employer's attempt to reduce his notice period by more than 70%, he learned that employment contracts can be changed if sufficient notice is provided. [The Court held that] Western Inventory had every right to amend the employment agreement provided sufficient notice was given to Wronko. While amending the termination provision was a fundamental change, no claim for constructive dismissal could be made given [that] the two-year notice of the change [had been] provided.

—**Howard Levitt**, Lang Michener (LLP) Toronto

Ed.: *This short segment is taken from an article that appeared in Howard's weekly column on the first page of the Working section of the National Post.*

## 5 Estate Planning – Tax Savings

Ed.: *Trusts that are established under a will are called "testamentary trusts." Trusts (including those established during the lifetime of an individual that establishes them) are useful for a variety of purposes, including tax savings. Below is a short segment from the Lang Michener Reference Guide (available at [www.langmichener.ca](http://www.langmichener.ca)) on Estate Planning by Marni Whitaker:*

A testamentary trust is taxed at the same progressive rates as an individual. Income that is not paid or payable to a beneficiary and is not used to benefit a beneficiary is taxable income of the trust rather than the beneficiary. After being taxed, the income becomes capital and may be paid out to the beneficiary in a subsequent year without income tax consequences. In some circumstances, executors can also elect to tax income in the trust even if it had been paid out to the beneficiary. Thus, there may be income-splitting benefits gained by placing property in trust and giving the trustees the power to accumulate.



## Brief Life Bites Tribute; Entrepreneurial Spirit

Ed.: *This segment offers colleagues and readers an opportunity to briefly comment or read about a life experience, an accomplishment, an acknowledgement, a powerful image, an incredible experience or a simple “slice of life.” I would be most pleased to consider publishing one of yours or one that pertains to a friend, family member or colleague. (I am always open to suggestion.)*

### 1 Tribute to Bertha Wilson

Bertha Wilson, appointed to the Supreme Court of Canada a few weeks before the *Charter of Rights and Freedoms* was signed in 1982, passed away earlier this year. Eugene Meehan, Q.C. was the Executive Legal Officer of the Supreme Court while she was on the bench. Quoted in the *LAW TIMES*, Eugene said, “Beyond North Sea oil, scotch and porridge, Scotland’s best export was **Bertha Wilson**. . . . She made me proud and others proud to be Scottish, and also proud to be Canadian.”

### 2 Entrepreneurial Spirit

Ed.: *Speaking in China in June of this year as President of the Canada China Business Council (“CCBC”) and Senior Business Advisor of Lang Michener LLP, the Honourable Sergio Marchi touched on some human and personal notes when discussing opportunities for entrepreneurs. Here is a edited portion of what he said:*

I want to share with you a story of a Chinese entrepreneur who was a member of our CCBC Beijing Chapter. Perhaps it is a story you already know, but it nonetheless illustrates how

changing conditions in China have allowed entrepreneurs to develop and flourish.

In 2001, my colleagues in the CCBC Beijing office met with a Chinese businessman. In 1987, this individual had started his own business – selling eyeglasses from the back of his bicycle. He told us that when he started in 1987, his family was quite embarrassed – for at that time, private business people and entrepreneurs were still perceived quite negatively, and China was still relatively in the early stages of its economic openings.

When our Beijing office visited his offices in 2001, he had a chain of 34 eyeglass stores across Beijing. Last year, I learned that the entrepreneur had sold his company, which then numbered a total of 79 stores in Beijing, for RMB 169 million to a leading Italian eyeglass company.

What is happening in China today reminds me of the entrepreneurial spirit of immigrants to Canada, which is another remarkable story. It is also a personal story for me.

Canada is a very young country, at least compared to the 5,000 years of Chinese history! It is also a land of opportunity. My own family’s experience is a testimony to this reality. My parents were born in Italy, but because of poor economic conditions, they looked abroad for their economic aspirations. They first immigrated to Argentina, where I was born. However, the economic situation in Argentina was not always stable, so my parents immigrated for a second time to Canada. My father had arranged for us to stay with some friends from Italy who had already settled in Toronto. All we had when we arrived in this new land was the address of our friends. They did not own a car, so we took a taxi from the airport.

Instead of going directly to our friend's home, my father struggled with his English and managed to ask the cab driver to take him to a steel factory. By trade, my father was a tool and die maker. It was late at night, so the driver was somewhat perplexed, but he reluctantly took us to an industrial park and stopped at a metal stamping factory that was on its evening shift. While my mother and I waited in the taxi, my father went inside and explained to the factory foreman that he was a tool and die maker, and that he had just arrived from Argentina and needed a job. It so happened that the factory was searching for a tool and die maker. So, he was taken to the drafting room

where the foreman tested my father's ability to read blueprints. Being convinced of his skills, the foreman offered my father a job on the spot, and asked him to come back the very next morning. My father never looked back and eventually established his own successful business.

Being an immigrant is entrepreneurial by definition; you don't necessarily know where you are going; you don't have a precise map to follow; and you don't always speak the language. But you make a calculated risk to find a better life for your family, and you work hard to make it happen.

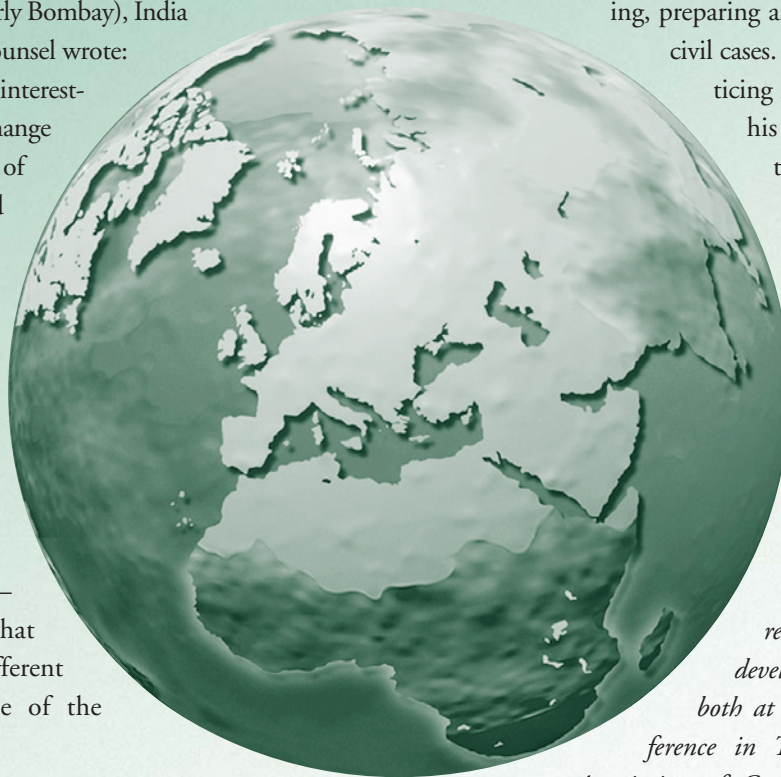
## Letters & Comments

**1** The article by **Sunny Pal** entitled "Liability for Climate Change: The Other Shoe Drops," in the summer issue of *In Brief*, garnered significant interest from disparate places including Mumbai (formerly Bombay), India from which senior legal counsel wrote: "I found your article very interesting. The issue of climate change has been a subject matter of worry of the entire world and, therefore, your analysis on the subject is very timely."

**2** The article in this issue of *In Brief* by **Celia Hitch** – "Fixing the Unfixable: Conflicts Between Permitted Uses and Exclusivity Rights" – appeared in a somewhat modified form with a different title in a summer issue of the *Lawyers Weekly*.

**3** In the May-June issue of *Briefly Speaking*, Joel B. Kohm, reviewed the book, *The Law of Fraud and the*

*Forensic Investigator*, by David Debenham (previously referred to in *In Brief*) and concluded: "**David Debenham** has put together a highly useful and accessible manual on investigating, preparing and litigating fraud issues in civil cases. It's a must for anyone practicing in this area. David...knows his way around a civil fraud trial. He's an experienced litigator, widely regarded legal commentator and lecturer and fraud examiner with a string of credentials to back him up: LL.B., LL.M., M.B.A., C.M.A., C.F.I., C.F.E. and D.I.F.A. (the latter three relate specifically to forensic accounting)." Ed.: *David also recently received high praise for developing material and speaking both at the Canadian Fraud Conference in Toronto (organized by the Association of Certified Fraud Examiners of Austin, Texas) and at the annual conference of the Association of Certified Forensic Investigators of Canada.*



## Lang Michener, In Brief...

### News

#### Lang Michener Lawyers Recognized as Best Lawyers in Canada 2008

Lang Michener is pleased to announce that 16 Lang Michener lawyers were Recognized by their peers in the *Best Lawyers in Canada* 2008 edition. Lang Michener lawyers were recognized in the following practice areas: Aboriginal Law, advertising and marketing, banking, competition & antitrust, franchising, health care law, insolvency and financial restructuring, intellectual property, international trade, natural resources, real estate law and trusts and estates.

#### Toronto

**Donald H. MacOdrum**  
Intellectual Property Law

**James B. Musgrove**  
Advertising and Marketing Law  
Competition/Antitrust Law

**Frank Palmay**  
Health Care Law

**William Rowlands**  
Real Estate Law

**William J. V. Sheridan**  
Natural Resources Law

**Marni M. K. Whitaker**  
Trusts and Estates

**David M. W. Young**  
Advertising and Marketing Law

#### Vancouver

**James M. Bond**  
Franchise Law

**Larry S. Hughes**  
Natural Resources Law

**Anthony H. S. Knight**  
Real Estate Law

**John D. Morrison**  
Banking Law

**Peter J. Reardon**  
Insolvency and Financial  
Restructuring

**Bernard J. Zinkhofer**  
Natural Resources Law

#### Ottawa

**C. J. Michael Flavell**  
International Trade and  
Finance Law

**Geoffrey C. Kubrick**  
International Trade and  
Finance Law

**Eugene Meehan**  
Aboriginal Law

#### Lang Michener Patent and International Trade Lawyers Among World's Leading

Lang Michener is pleased to announce that three lawyers from our Intellectual Property Group have been named in Legal Media Group's 2007 *Guide to the World's Leading Patent Law Practitioners*. Included in this year's publication are **Don MacOdrum**, Chair, Intellectual Property Group, **Don Plumley**, Partner, Intellectual Property Group and **Keith Bird**, Partner, Intellectual Property Group. We are also proud to announce that two lawyers in the firm

have been included in The Legal Media Group *Guide to the World's Leading International Trade Lawyers*. **C. J. Michael Flavell, Q.C.**, Chair of Lang Michener's International Trade Group and **Geoffrey Kubrick**, Counsel in the International Trade Group, have been recognized as leading international trade lawyers in Canada.

### Announcements

#### James Bond Elected Secretary-Treasurer of B.C. Branch of the CBA

We are pleased to announce that James Bond has been elected Secretary-Treasurer of the Canadian Bar Association British Columbia Branch (CBABC) on June 23, 2007. As the Secretary-Treasurer, James will serve a one-year term on the executive committee and will assume the position of Vice President in 2008 and of President in 2009.

### New Associate



**Hartley Lefton** joined the Corporate & Insurance Law Group in the Toronto office of Lang Michener LLP in June 2007. His areas of expertise include corporate and commercial law.

### Events

#### PIPA Conference 2007: An Educational Forum for Businesses & Non-Profits: Private Sector Privacy in a Changing World

September 20–21, 2007  
The Hyatt Regency Vancouver  
Vancouver, BC

The focus of this event is on practical, real-world issues and solutions. James Bond will be speaking on "Privacy 202 – The ABCs of Compliance."

#### ICSC 2007 Canadian Convention – Deal Making and Trade Exposition

September 24–26, 2007  
Metro Toronto Convention Centre  
Toronto, ON

Lang Michener is proud to be an exhibitor at the International Council of Shopping Centers' (ICSC) 2007 Canadian Convention – Deal Making and Trade Exposition. Members of Lang Michener's Real Estate Group will be in attendance at the Lang Michener booth throughout the trade show.

## Shared Risks, Shared Standards – Managing the Risks and Defining the Rules for the Security of Electronic Health Records in Ontario

October 23, 2007

The Estates of Sunnybrook  
Toronto, ON

Lang Michener, together with Sunnybrook Health Sciences Centre and Greyhead Associates, is pleased to present *Shared Risks, Shared Standards – Managing the Risks and Defining the Rules for the Security of Electronic Health Records in Ontario*. This one-day conference provides an opportunity for health care providers, professionals and their representatives to participate in an independent process that examines EHR security risks, requirements and solutions to build trust in health care's emerging asset – the single electronic health record. For more information and a copy of the brochure, please visit the upcoming events section of our website at [www.langmichener.ca](http://www.langmichener.ca).

## Protecting Intellectual Property Rights in the Energy Sector

October 30–31, 2007

Calgary Telus Convention Centre  
Calgary, AB

The Canadian Institute's Protecting Intellectual Property Rights in the Energy Sector conference has been specifically designed to assist in meeting the unique IP challenges facing the Energy industry. **Don MacOdrum** will be speaking on "Litigation Overview: Learning from Significant Cases."

## Deals

### Eastern Platinum Completes C\$200 Million Equity Offering

On May 11, 2007, Eastern Platinum Limited completed an equity financing through a syndicate of underwriters led by Canaccord Capital Corporation and GMP Securities LP and including UBS Securities Canada Inc. and Raymond James Ltd.

EastPlats sold 92,105,300 common shares at a price of C\$1.90 per share to raise gross proceeds of C\$175,000,070 pursuant to a short form prospectus. Further, the offering included the full over allotment option for the sale of an additional 13,815,795 shares, resulting in aggregate gross proceeds of C\$201.250,081.

Eastern Platinum was represented by **David J. Cowan**, **Barbara J. Collins** and **Grant Wong** (securities) from Lang Michener.

## In Brief

Editor: Norm Fera  
613-232-7171 ext. 125  
[nfera@langmichener.ca](mailto:nfera@langmichener.ca)

RETURN UNDELIVERABLE CANADIAN ADDRESSES TO:

Lang Michener LLP  
BCE Place  
181 Bay Street, Suite 2500  
P.O. Box 747  
Toronto ON M5J 2T7  
Tel.: 416-360-8600 Fax.: 416-365-1719  
e-mail: [info@langmichener.ca](mailto:info@langmichener.ca)

### Lang Michener LLP

Lawyers – Patent & Trade Mark Agents

**Toronto**  
BCE Place  
181 Bay Street, Suite 2500  
P.O. Box 747  
Toronto, ON M5J 2T7  
Tel.: 416-360-8600 Fax.: 416-365-1719

**Vancouver**  
1500 Royal Centre  
1055 West Georgia Street  
P.O. Box 11117  
Vancouver, BC V6E 4N7  
Tel.: 604-689-9111 Fax.: 604-685-7084

**Ottawa**  
Suite 300  
50 O'Connor Street  
Ottawa, ON K1P 6L2  
Tel.: 613-232-7171 Fax.: 613-231-3191

Lang Michener publishes newsletters on current developments in specific areas of the law such as Competition and Marketing, Employment & Labour, Insurance, Intellectual Property, International Trade, Mergers & Acquisitions, Privacy, Real Estate, Securities and Supreme Court of Canada News.

*InBrief* offers general comments on legal developments of concern to business and individuals. The articles in *InBrief* are not intended to provide legal opinions and readers should, therefore, seek professional legal advice on the particular issues which concern them. We would be pleased to elaborate on any article and discuss how it might apply to specific matters or cases.

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