

Take Five

February 2010

ONTARIO EDITION

Inside this Issue:

This month we have summarized what we consider to be the five most interesting cases from the Ontario C.A. in January.

We highlight cases from the following areas of law: Civil Practice and Procedure (p.4); Appellate Procedure and Security for Costs (p.3); Administrative Law (p.5 and 6) and Class Actions (p.7).

To answer a frequently asked question-

Yes, we work for lawyers in Ontario. We have clients across Canada.

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In honour of events occurring in Canada this month, I thought including this inukshuk would be appropriate, particularly since this one looks like it just landed a perfect "10" in an aerial skiing competition...



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Can't miss our monthly farm animal...



Miller v. Taylor, 2010 ONCA 17

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Areas of Law: Appellate Procedure; Security for Costs

Under Appeal: Justice Cronk

The appellant appealed the decision of a single judge of the Court of Appeal that required the Appellant to post security for costs in order to proceed with his appeal. The order was made pursuant to Rule 61.06(1) (a), which provides that security for costs may be ordered where there exists good reason to believe that the appeal is frivolous and vexatious and where the appellant has insufficient assets in Ontario to pay the costs of the appeal. Neither party filed evidence as to the appellant's financial situation.

Held: Security for costs order set aside

The Court set aside the security for costs order. The Court determined that the second branch of Rule 61.06(1)(a) had not been satisfied with respect to the appellant's financial situation. The Court agreed with the appellant that the motions judge drew inferences from the trial judge's reasons and that such inferences were impermissible and insufficient evidence as to the appellant's assets. The trial judge had referred to cash flow difficulties faced by the appellant at the time of trial but there was no evidence that such difficulties continued. Further, the Court found that cash flow difficulties are not necessarily indicative of whether an appellant has assets.

Carevest Capital Inc. v. Limmer Corporation Inc., 2010 ONCA 17

Area of Law: Civil Procedure

Under Appeal: Mr. Justice Maranger

The respondent plaintiff sued the appellants for payment on a mortgage and related guarantees. Rule 24.1 of the Rules of Court requires parties to attend mediation within a stipulated time frame. Prior to attending a mediation session, the respondent moved for summary judgment. The motions judge determined that there were no contested facts and granted summary judgment. The appellants appealed on the basis that summary judgment is not available prior to parties attending the mandatory mediation session.

Held: Appeal dismissed[CLICK HERE TO ACCESS
ENTIRE JUDGMENT](#)

The appeal was dismissed. The Court engaged in a detailed analysis of mandatory mediation. Rule 24.1.09 permits a court to abridge or extend the time for attending a mediation session. One of the factors governing whether such an extension ought to be granted is whether one of the parties intends to bring a motion for summary judgment. There are no explicit prohibitions on moving for summary judgments in the Rules governing mandatory mediation. Finally, Rule 1.04 encourages an interpretation of the Rules that promotes an expeditious and cost-effective resolution of disputes. The Court determined that the respondent's motion was heard after the expiry of the time line established for attending a mediation session and therefore it was incumbent on the respondent to apply for a further extension of the time within which to attend a mediation session or to attend a mediation session. However, because the issue on appeal was the ability to bring the motion, and not the timing of the motion, the Court dismissed the appeal.



Hydro One Inc. v. Ontario (Financial Services Commission), 2010 ONCA 6

Areas of Law: Administrative Law; Pensions



The appellant, Hydro One Inc., initiated a number of reorganizing measures between 2000 and 2002, including the merger of two former affiliates. The appellant had a single pension plan for its employees, both unionized and non-unionized. As a result of the reorganizing measures, 126 employees ceased working for the appellant. Two non-unionized employees applied to the respondent Superintendent of Financial Services for a partial wind-up of the pension plan. Such a wind-up is contemplated by section 69(1)(a) of the *Pension Benefits Act*, which permits a partial or full wind-up of a pension plan at the discretion of the Superintendent, where an employer institutes a reorganization that affects a “significant” number of pension plan members. The Superintendent, exercising discretion pursuant to section 69(1)(d) of the *Act*, denied the application. The respondents

appealed to the Financial Services Tribunal (the “Tribunal”). The Tribunal evaluated the number of employees no longer working for the appellant due to the reorganizations using the two accepted methods for doing so: the number of employees who left due to the reorganization compared to the number of plan members in total, and the number of employees who left as an absolute number, not relative to the size of the plan. The Tribunal also used a third method of analysis, a “subset” analysis, whereby they compared the number of non-unionized employees who left to the number of non-unionized employees participating in the plan and found that 18% had left. The Tribunal considered this to be “significant” within the meaning of the *Act* and ordered a partial wind-up with respect to this subset. The Divisional Court agreed and Hydro One Inc. appealed.

Held: Appeal dismissed

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The Court evaluated the applicable standards of review and determined that the standard of correctness was applicable to the Tribunal’s interpretation of section 69(1)(d) of the *Act* because a question of law was at issue and the question of law was outside the expertise of the tribunal. The Court found that the standard of reasonableness was applicable to the way the Tribunal applied the law to the facts of the case.

The Court agreed that the subset analysis used by the Tribunal was appropriate, but that such analysis is limited to particular factual situations. The enabling legislation requires a fact-specific and contextual analysis, and in this case, the Tribunal appropriately applied the subset analysis to determine the significance of the corporate reorganization.

Rosenhek v. Windsor Regional Hospital, 2010 ONCA 13

Area of Law: Administrative Law

Under Appeal: Mr. Justice Quinn

The respondent hospital granted hospital privileges to the appellant doctor in 1984. Like other doctors at the community hospital, the appellant was not an employee of the hospital, but could admit and treat patients and was an independent contractor. The Board of Governors of the hospital (the “Board”) responsible by statute for revoking and suspending privileges revoked the appellant’s privileges in 1989, effective immediately. The Board later sent a letter to the appellant detailing the reasons for the revocation, which as the Court determined, were primarily due to personality conflicts. The appellant appealed the revocation to the Hospital Appeal Board that concluded that a re-hearing was required. Rather than a re-hearing, a *de novo* hearing was held where it was determined that the appellant’s revocation was without merit and violated the Board’s statutory procedural fairness obligations. The Board appealed the reinstatement of the appellant and the appellant brought an action for damages against the respondent. At trial, the appellant was successful in his action for damages and the trial judge found that the Board was liable for intentional interference with contractual relations.

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Held:

Appeal dismissed

The Court upheld the liability of the Board on the basis of misfeasance of public office rather than intentional interference with contractual relations. The Court found that a breach of statutory duty in relation to procedural fairness in and of itself does not provide a sufficient evidentiary basis for a finding of tortious liability. However, the Court found that where the decision of a quasi-judicial decision maker is so “clearly wrong” as it was in this case, it can provide evidentiary support for a finding of a breach of the duty of good faith.

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Griffin v. Dell Canada Inc., 2010 ONCA 29

Area of Law: Class Actions

Under Appeal: Madam Justice Lax

The appellant, Dell, was the defendant in a proposed class action brought by two representative plaintiffs who purchased allegedly defective computers from the appellant. The first plaintiff brought the class action and the motions judge denied the appellant's motion for a stay of the action in favor of arbitration and permitted a second representative plaintiff to join the action. The second plaintiff was a consumer within the meaning of the *Consumer*

Protection Act (the "CPA"), which prohibits mandatory arbitration clauses in consumer agreements. The first plaintiff purchased the computer for business purposes and was not a consumer pursuant to the CPA.

The motions judge rejected the appellant's claim that the mandatory arbitration clause in the standard form sales agreement with the plaintiffs governed claims by consumers. The motions judge declined to follow two 2007 Supreme Court of Canada decisions that

held that, under Quebec law, the substantive right of arbitration must overcome the procedural right to a class action, and that if an individual's claim is subject to arbitration, so must the claims of a group of individuals proceeding by way of class action. The appellant sought a reconsideration from the motions judge following a British Columbia appellate decision that concluded that the Supreme Court decisions were applicable in that province. The motions judge denied the appellant's request for a reconsideration.

Held: Appeal dismissed

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A five-member panel of the Court dismissed the appeal. On the question of the addition of a second representative plaintiff, the Court found that the second plaintiff purchased his computer prior to the coming into force of the CPA but that the computer failed after the CPA came into force. The Court concluded that arbitration was not allowed for the second representative plaintiff because all elements of the plaintiff's cause of action occurred after the CPA became effective on July 31, 2005.

In order to proceed by arbitration, the appellants sought a partial stay of the action by the non-consumer plaintiffs. The Court found that separating the groups of plaintiffs between consumers and non-consumers would be costly, take time, and would create a multiplicity of proceedings which ought to be avoided. The Court determined that the applicability of the Supreme Court's decisions was largely academic due to the introduction of the CPA's restriction on mandatory arbitration claims for consumer contracts.