Top 10 Decisions of 2020
Affecting Your In-House Practice

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PRESENTERS

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1. COVID-19

Government lockdown regulations: Are the Regulations open to challenge?

- Ontario's Superior Court upheld the *Reopening Ontario Act*'s distinction between department stores and "discount and big box retailers selling groceries".

> ***"These are policy choices made by the Ontario government during extraordinary times. The Court's role is limited to determining whether the provision at issue is authorized by the ROA, which it clearly is."***

Hudson's Bay Company ULC v. Ontario (Attorney General),
2020 ONSC 8046

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COVID-19

Takeaways

- Government regulation related to COVID-19 has been a moving target
- Despite inconsistency courts are inclined to defer to government choices
- There may be more to the story of the challenge to emergency government regulation

2. CONTRACT – DUTY OF GOOD FAITH

The Supreme Court has revisited the organizing principle of good faith in the context of the delayed exercise of a contract termination.

- The majority held that the duty of honest performance means that "parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract."
- Drawing the line between permissible non-disclosure of information relevant to termination and actively misleading conduct, the majority found that Baycrest's conduct did not fall on the side of innocent non-disclosure.

C.M. Callow Inc. v. Zollinger
2020 SCC 45

CONTRACT – DUTY OF GOOD FAITH

Takeaways

- The SCC in *Bhasin* spoke with one voice. This is a deeply divided decision with three sets of reasons.
- The court appears to be signalling a greater openness to expanding the reach of the organizing principle of good faith.
- To protect your organization, greater care / scrutiny to exercise of termination provision is advised
- *Wastech* decision from the BCCA was heard by the SCC with Callow still under reserve. More news to follow.

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3. INSOLVENCY

In *Chandos*, the Supreme Court recognized the anti-deprivation rule in bankruptcy proceedings for the first time.

- A sub-contractor, Capital Steel, went bankrupt. Its Trustee, Deloitte, tried to collect fees owing on CS's contract with Chandos Construction. But their contract had included a clause requiring CS to pay 10% of the contract price to Chandos if it became insolvent.
- Was that clause enforceable by Chandos, to block Deloitte's claim?
  - The anti-deprivation rule, at common law, prohibits contracts which remove value from the estate of the insolvent person, to the detriment of its creditors.
  - But that rule was not fully codified in the *Bankruptcy and Insolvency Act*.
- The Supreme Court upheld the creditor protection regimes in insolvency statutes by using the common law rule to invalidate the contractual clause.

Chandos Construction Ltd. v. Deloitte Restructuring Inc.,
2020 SCC 25

INSOLVENCY

Takeaways

The fight was primarily between the intent and effect of the clause.

The first Judge, and the minority at the SCC, found that the anti-deprivation rule reflected a common law policy against agreements intending to injure a third party. Since the clause here had a bona fide commercial purpose, it should be upheld, to give weight to *"freedom of contract, party autonomy, and the "elbow-room" … for the aggressive pursuit of self-interest"*.

The majority at the SCC found that an intention-based test would be difficult to apply, and would undermine the statutory scheme of the *BIA*. It was preferable to look at the effect of the clause – here, the insolvency created CS's debt to Chandos, and removed assets from CS's creditors: *"one can hardly imagine a more direct and blatant violation"* of the rule.

We can expect Courts to void contracts which circumvent the effect of insolvency statutes.

(The 4 year fight, by the way, was over $137,330.05)

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4. SECURITIES

<u>Question</u>: Is a promissory note "a… note or other evidence of indebtedness" (that is, "a security"), under the Ontario *Securities Act*?

Mr. Tiffin and his company had been found guilty by the OSC of soliciting investments without proper authorization. An Order was issued prohibiting them from trading in securities and from relying on exemptions in the *OSA*, and requiring restitution.

He then used his company to borrow $700,000 from six clients, and issued Notes with annual interest rates from 10-25%, secured by his "toy soldier collection". Was that wrong?

- **<u>Answer:</u> yes.** They were acquitted **at trial** based on a US securities law concept called "the family resemblance test", which included the motivation of the individual and the "reasonable expectations of the investing public". But the **appeal Courts** found that the US law was inconsistent with "*the plain text of the* [OSA]*, and the logic of the regulatory scheme*" – the statutory intent is to cast a broad regulatory net, to "catch and exclude".

On that reading, Mr. Tiffin was indeed caught.

Ontario Securities Commission v. Tiffin,
2020 ONCA 217

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SECURITIES

Takeaways

The significance of this decision is not (unless you are Mr. Tiffin), about the facts of the matter.

- The Court of Appeal found that the *OSA* "*defines key terms very broadly, and thereby captures a great many instruments and activities in its wide regulatory scope, and then provides for many exemptions from the Act's requirements … to tailor this regulatory scope to its purposes*."

- That analysis is fair warning to registrants (and their lawyers) about closely parsing the language of the *Act* to get to a desired (exculpatory) reading.

5. EMPLOYMENT

The Ontario Court of Appeal found that a valid termination provision was rendered unenforceable.

- An otherwise enforceable "without cause" termination provision in an employment agreement is rendered unenforceable where the employment agreement also contains a "just cause" provision that is in violation of the ESA.

> ***"An employment agreement must be interpreted as a whole and not on a piecemeal basis. The correct analytical approach is to determine whether the termination provisions in an employment agreement read as a whole violate the ESA. "***

Waksdale v. Swegon North America Inc.,
2020 ONCA 391 (leave to SCC denied, Jan. 14, 2021)

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EMPLOYMENT

Takeaways

- Leave to appeal has been sought and denied.
- Revisiting contracts is neither straightforward nor inexpensive but is now warranted.
- This decision has invalidated contractual termination provisions used by many employers in Ontario and as a result created a sizeable common law liability for existing workforce.
- Cause provisions remain important tools to protect against common law risk but they need to be precisely drafted to ensure ESA compliance.

6. ARBITRATION CLAUSE

The arbitration clause in Uber's standard form services agreement was found to be unconscionable and therefore unenforceable.

- Majority held that they would determine the validity of the arbitration clause rather than referring the matter to an arbitrator. They found the clause which required mediation and arbitration to be unenforceable on the ground of unconscionability.
  - "We see no reason to depart from an approach to unconscionability endorsed in *Hunter, Norberg* and in *Douez.* That approach requires both an inequality of bargaining power and a resulting improvident bargain. "

Uber Technologies Inc. v. Heller,
2020 SCC 16

ARBITRATION CLAUSE

Takeaways

- While the SCC said that a standard form contract does not necessarily establish inequality of bargaining power, going forward the link between standard form contracts and unconscionability will be easier to draw.
- Revisiting any arbitration clauses in standard form contracts consider:
  - Using plain language where possible
  - Ensuring that the commencement fee cannot be characterized as a bar to accessing arbitration (recovery of fee by successful party, waiver of fee or defendant undertaking to pay commencement fee)
  - Consider including more information about the arbitration process

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7. INTERNATIONAL LAW (in Canada)

The Supreme Court of Canada has opened the door to civil cases in Canada, against Canadian corporations, for alleged international human rights torts in foreign countries.

- Former Eritrean citizens, now resident in Canada, alleged that they had been conscripted by their government and, in essence, enslaved as workers in an Eritrean mine owned and operated in part by Nevsun, a Canadian corporation.
- They sued in British Columbia, alleging that Nevsun was liable under both "customary international law", and Canadian torts. Nevsun moved to strike the Claim.
- For the first time, the SCC allowed a domestic Claim for breach of customary international law (the *"phoenix that rose from the ashes of World War II and declared global war on human rights abuses"*):

> **" In the absence of any contrary [domestic] law, the customary international law norms raised by the Eritrean workers form part of the Canadian common law and potentially apply to Nevsun. "**

Nevsun Resources Ltd. v. Araya,
2020 SCC 5

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INTERNATIONAL LAW (in Canada)

Takeaways

- This decision could be taught in a law, politics, history and/or philosophy course. It is complex, and only the start – as a pleadings motion, it "only" decided whether the former workers' theories were even possible to litigate in Canada.
  [Two sets of dissenting Reasons disagreed, in whole or part, with the Majority.]
    - The "act of state doctrine" did not bar Canadian courts from assessing, in this case, the actions of a foreign state (7 Judges);
    - Breaches of customary international law can be actionable in Canada (5 Judges).
- Leaving aside the dense reasoning, the upshot is that Canadian companies can now be sued, in Canada, for their acts in foreign countries, regardless of (or because of?) the political, moral, and legal systems in place in those locations. Much uncertainty will surely follow.

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8. DEFAMATION – ANTI SLAPP

Ontario's Anti-SLAPP regime clarified:

- "In brief, s. 137.1 places an initial burden on the moving party – the defendant in a lawsuit – to satisfy the judge that the proceeding arises from **an expression relating to a matter of public interest.** Once that showing is made, the burden shifts to the responding party …..[to show] that there are **grounds to believe the proceeding has substantial merit and the moving party has no valid defence**….It is important to recognize that the final weighing exercise under s. 137.1(4)(b) is the fundamental **crux of the analysis**: as noted repeatedly the APR and the legislative debates emphasized the **balancing and proportionality between the public interest in allowing meritorious lawsuits to proceed and the public interest in protecting expression on matters of public interest.** Section 137.1(4)(b) is intended to optimize that balance."

Bent v. Platnick, 2020 SCC 23
1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22

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DEFAMATION – ANTI SLAPP

Takeaways

- Anti-SLAPP legislation is a significant hurdle for any person or organization wishing to commence a defamation claim in Ontario.
- Bringing a anti-SLAPP motion stays the underlying action and the motion must be heard within 60 days.
- Defendants should focus early on the strength of the defences available to the speaker and on the degree of harm suffered or damages incurred.

9. CLASS ACTIONS

The Supreme Court released a surprising class action decision, denying certification based on a practical assessment of the facts and the law. A culture shift (or shock)?

(They also tossed out waiver of tort, probably out of sheer frustration.)

- The plaintiffs sought a class action, alleging that video lottery terminals were addictive and deceptive (because they are prohibited under the Criminal Code as alike to "three card monte"), and that the Defendant licensing body had failed to warn of the dangers of VLTs.
- They pleaded various causes of action, including waiver of tort, but chose not to allege that specific harm had been caused to each patron by playing VLTs – a deliberate strategy to increase the likelihood of obtaining a certification Order by avoiding the necessity of proving individual harm.
- The SCC rejected that strategy, and the underlying legal foundation of the case:

> "… pursuing a breach of contract action [for] nominal damages in lieu of actual damages…would not further the principal goals of class actions…. "

Atlantic Lottery Corp. Inc. v. Babstock
2020 SCC 19

CLASS ACTIONS

Takeaways

- No Canadian class action Judge had ever been willing to decide whether waiver of tort was an independent cause of action – they just certified it for trial, *"to the detriment of the defendant, which is then practically compelled to pay a settlement to the plaintiff"*.

- The Court decided that the "culture shift" towards "timely and affordable access" to justice required decisions
  - waiver of tort is a choice of remedy, not a cause of action; and
  - VLTs are not "similar to three card monte"; and
  - breach of contract should have been pursued here for compensatory relief, not disgorgement.

Also: **"….the term waiver of tort is apt to generate confusion and should therefore be abandoned."**

(Dangerous thinking!)

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10. PRIVACY

An Alberta Motions Judge has an answer to the vexing modern legal question:

- **Is a criminal hack of a company's database of low-value personal information deserving of certification as a class action (and so, usually, compensation?)**

- A criminal hacker accessed the names, phone numbers and email addresses of about 800,000 Canadians. A ransom was paid, for an assurance of destruction of the data.
- The Plaintiff moved for certification on behalf of all affected Canadians, although no person had, in 4 years, come forward with proof of economic or psychological harm.
  - She argued that the Class should not be left with a right (to have their data protected) without a remedy, even if that remedy was "nominal" damages.
- The Judge found that it would not be "preferable" to certify, given the new culture of proportionality, and the need to weed out unmeritorious and *de minimis* claims.

Setoguchi v Uber B.V.,
2021 ABQB 18

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PRIVACY

Takeaways

The Judge read and discussed a full set of recent Canadian data breach class action case law (although he did not reference *Atlantic Lottery*).

The decision steps back and considers the goals of class actions, and takes a hard look at the utility of engaging the Court process and triggering the leveraging effect of certification (thereby encouraging a settlement), in a circumstance where:

> "**not only is there no evidence of harm or loss, there is evidence that there is no harm or loss.**"

This decision – both in content and outcome – is welcome news for companies reeling from the negative effects of a criminal breach; and a blow to plaintiff-side class action firms seeking to monetize this increasingly common occurrence, for their clients.

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Questions?

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