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INCREASING CORPORATE PENALTIES AND RISK MANAGEMENT[1]

— Frank Palmay[2] and Jeffrey Nagashima,[3] McMillan LLP.

Introduction[4]

During the recent global financial crisis and the ensuing recession, governments deployed large fiscal packages to stimulate their economies, leading to dramatic increases in public indebtedness. In the U.S. and U.K. alone, governments sank US$7 trillion into financial institutions.[5] Governments are now faced with paying down the debt incurred during the crisis in addition to challenges from an uneven economic recovery and obstacles such as aging populations or declining commodity prices. As such, governments have turned to new and innovative methods to raise funds, including prosecuting civil actions more frequently than ever before, levying larger and more frequent fines for corporate malfeasance, and creating incentive programs for corporate whistleblowers.[6]

Directors and officers should think critically about their business's operations to ensure that they have not committed, and are not about to commit, any 'corporate sins.' Insurance companies should audit the operations of the large companies they insure with a view to these 'corporate sins,' and corporate counsel should remain vigilant about potential risks, ensuring that risks, especially those related to the 'seven sins' enumerated below, are elevated to the highest level of decision-making within the business.

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[1] This paper is an update to "seven corporate sins as a source of government revenue and economic stimulus" by Frank Palmay and Candice Chan-Glasgow (April 2013), available at http://www.mcmillan.ca/seven-corporate-sins-as-a-source-of-government-revenue-and-economic-stimulus.

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[4] This article has been edited significantly for length. For the full version of this article, please see http://mcmillan.ca/Files/180673_Increasing%20Corporate%20Penalties.pdf.

[5] Augusto Lopez-Claros, "Policy Research Working Paper 6805 – Fiscal Challenges after the Global Financial Crisis – A Survey of Key Issues" The World Bank Development Economics Global Indicators Group (March 2014), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/03/17/000158349_20140317155632/Rendered/PDF/WPS6805.pdf.

[6] Gary S Lincenberg and Ariel A Neuman, "United States: white-collar criminal defence" GIR Insight (September 2014), available at http://globalinvestigationsreview.com/insight/chapter/7/united-states-white-collar-criminal-defence.

Rising Regulatory Aggressiveness

Since the financial crisis of 2009, there has been a clear trend towards larger fines for corporate malfeasance. As can be seen from the below sample of major fines in the U.S., since 2012, U.S. regulators have been able to levy over $10 billion of fines annually from only five cases a year.

Year	Entity	Fine
2012-2013	British Petroleum HSBC GlaxoSmithKline UBS Standard Charter	$4 billion $1.9 billion $3 billion $1.5 billion $667 million Total: $11.067 billion
2013-2014	JP Morgan Johnson and Johnson Deutsche Bank SAC Capital Royal Bank of Scotland	$13 billion $2.2 billion $1.9 billion $1.8 billion $610 million[7] Total: $19.51 billion
2014-2015	Bank of America Toyota BNP Paribas Credit Suisse Alstom S.A.	$16.65 billion $1.2 billion $8.9 billion $2.6 billion $772 million Total: $30.122 billion

Furthermore, governments have taken proactive steps to support increasing regulatory aggressiveness by enacting tougher legislation on white collar crime and awarding broader investigatory and penalty powers to regulatory agencies. For example, the U.K. enacted its own version of the *Foreign Corrupt Practices Act* ("FCPA"), the *UK Bribery Act*, and the U.S. enacted the *Foreign Account Tax Compliance Act* ("FATCA") to grant the Internal Revenue Service ("IRS") broader investigatory powers in pursuing tax evaders.

Evidence of the U.S. government's aggressiveness can be seen by how the U.S. deployed the *False Claims Act* in 2014 to recover an all-time record of $5.69 billion (and an aggregate recovery since 2009 of $22.75 billion),[8] the lifting of the three year hiring freeze at the U.S. Attorney's Office in 2014,[9] and comments by the chairwoman of the United States Securities and Exchange Commission ("SEC") in 2013 that certain defendants will no longer be allowed to settle actions without admitting or denying wrongdoing. Additionally, U.S. regulatory agencies are employing increasingly more aggressive tactics in their investigations, which were previously reserved for pursuing organized crime and sophisticated narcotics cases. For example, the investigation into senior Petro-Tiger executives for FCPA violations led to the general counsel wearing a wire to record future conversations.[10]

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[7] Please note that this fine was split between U.S. and UK regulators.

[8] Office of Public Affairs, "Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014", Department of Justice (November 20, 2014), available at http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014.

[9] *Supra*, note 6.

[10] John F. Savarese, "White Collar and Regulatory Enforcement: What to Expect in 2015" Harvard Law School Forum on Corporate Governance and Financial Regulation (February 5, 2015), available at http://corpgov.law.harvard.edu/2015/02/05/white-collar-and-regulatory-enforcement-what-to-expect-in-2015/.

Lastly, as corporations become increasingly global, regulators have begun to cooperate on an international scale. The LIBOR scandal prompted regulators to work together to investigate the depth of the benchmark manipulation. This led to the discovery of manipulation of other benchmark rates including foreign exchange rates. Another area where regulators are working together is in cross-border tax enforcement. This has been facilitated by the recent U.S. enactment of the FATCA.

Overall, it has become apparent that there is a clear trend towards increasing regulatory aggressiveness and larger penalties for violations of 'corporate sins.'

The Seven Sins and Their Associated Regulatory Penalties

Below are descriptions of recent regulatory penalties levied against corporations.[11] These recent penalties have been arranged according to each 'corporate sin' to give the reader a sense of the magnitude and aggressiveness with which regulators will pursue organizations for each 'corporate sin.'

Sin #1: Corruption and Bribery

There has been a number of high profile cases recently where companies accused of corruption or bribery were fined by regulatory agencies. The largest penalties for corruption and bribery have been imposed by the United States government, but other governments, such as Canada, have also levied large fines for corruption and bribery. From 2002 to 2014, the United States Department of Justice ("DOJ") and the SEC imposed some $4.4 billion in fines related to FCPA violations.

Sins #2 and #3: Money-Laundering & Sanctions-Breaking

Two other corporate sins in the news are money-laundering and sanctions-breaking. A few financial settlements in the area, such as those of BNP Paribas, HSBC Holdings and HSBC Bank USA, and ING Bank N.V., total over $10 billion in penalties and forfeitures.

Sin #4: Conspiracy

Two major global scandals have occurred recently regarding conspiracies to rate fix that have implicated a number of multi-national banks and generated billions for governments worldwide through fines.

The well-publicized London Interbank Offered Rate ("LIBOR") scandal involved banks manipulating the LIBOR rate from 2005 through 2009 to profit from trades or to appear more creditworthy. Rigging the rates affected millions of consumers and the amount of interest they paid during this time. Fines assessed totalled several billion dollars.

Following the LIBOR scandal, another scandal came to light involving many of the same major banks as the LIBOR scandal. The banks were caught colluding from 2008 to 2013 to manipulate exchange rates. As a result of this scandal, regulators hit six major banks with fines totaling approximately $4.3 billion. Interestingly, five of the banks received a 30% discount on their fines by regulators for settling early. Additionally, the U.S. Office of the Comptroller of the Currency ordered the same five banks to pay an extra $1.48 billion and the Swiss regulator FINMA ordered UBS to pay $139 million.

[11] For fuller details and specific examples, please see the complete article at http://mcmillan.ca/Files/180673_Increasing%20Corporate%20Penalties.pdf.

Sin #5: Tax Evasion

Tax evasion has become a government priority lately, particularly for the IRS, which is focused on offshore tax evasion. A recent example includes Credit Suisse's guilty plea in relation to conspiracy to aid and assist U.S. taxpayers in filing false income tax returns and other documents with the IRS.[12]

Sin #6: Misuse of client property

This 'corporate sin' relates to the handling of unclaimed property. Misuse of client property keeps assets from the government and prevents governments from being able to disburse the assets back to its citizens. States, federal agencies, and other organizations in the United States are holding over $58 billion in unclaimed property. Of that total, about $41.7 billion is being held by various states.[13] Where the money is not claimed by the entitled beneficiaries, it acts a source of revenue for the state. For example, unclaimed property is Delaware's third largest source of revenue. Between 2009 and 2012, Delaware raised $1.24 billion in revenue from unclaimed property.[14]

Sin #7: Mistreatment of Customers

The seventh and final corporate sin relates to the mistreatment of customers by various financial, insurance, and automotive corporations. Consequently, these corporations have been forced to pay billions in fines to regulators and consumer class actions. Overall, the relief to borrowers and direct payments to government bodies from lawsuits over mortgages, foreclosures, and fire-sale deals totals almost $127 billion.[15]

Recent issues with auto manufacturers have been widely publicized, with a $1.2 billion fine imposed on Toyota Motor Corporation by the DOJ, and a $35 million fine imposed on General Motors Co. by the NHTSA over how it handled the recall of 2.59 million small cars.[16] Additionally, Honda Motor Co. agreed to pay $70 million in fines for failing to tell the U.S. government about warranty claims and more than 1,700 injuries and deaths linked to potential defects in its cars.[17]

Most recently, Volkswagen has been in the news for allegedly falsifying diesel emission tests. It remains to be seen how this situation will unfold and whether this will result in any multibillion dollar fines or settlement.

What Counsel Can Do

In light of increasing regulatory aggressiveness worldwide, corporations must enhance their current risk management programs. Companies need to be pro-active in dealing with 'corporate sins' and focus on prevention and detection of violations. Once a company is charged, complying with an investigation can become a huge burden. For example, Wal-Mart's internal inquiry into FCPA violations cost $439 million over two years (2013-2014)[18] and Avon's internal

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[12] Office of Public Affairs, "Credit Suisse Pleads Guilty to Conspiracy to Aid and Assist U.S. Taxpayers in Filing False Returns", Department of Justice, available at http://www.justice.gov/opa/pr/credit-suisse-pleads-guilty-conspiracy-aid-and-assist-us-taxpayers-filing-false-returns.

[13] Melanie Hicken, "$58 Billion Unclaimed: Is Some of it Yours?" CNN Money (27 January 2013), available at http://money.cnn.com/2013/01/24/pf/unclaimed-money/.

[14] Vipal Monga, "Unclaimed? Delaware Gets It" The Wall Street Journal (29 January 2013), available at http://www.wsj.com/articles/SB10001424127887323644904578269910666010352.

[15] Christina Rexrode and Andrew Grossman, "*Record Bank of America Settlement Latest in Government Crusade*" The Wall Street Journal (August 21, 2014).

[16] Jeff Plungis and Tim Higgins, "GM to Pay Record $35 Million Fine Over Handling of Recall", BloombergBusiness (May 16, 2014), available at http://www.bloomberg.com/news/articles/2014-05-16/gm-said-to-agree-to-u-s-fine-over-ignition-switch-recall.

[17] Jeff Plungis, "Honda Fined Record $70 Million for Underreporting Injuries", Bloomberg Business (January 8, 2015), available at http://www.bloomberg.com/news/articles/2015-01-08/honda-fined-record-70-million-for-underreporting-injury-claims.

[18] David Voreacos and Renee Dudley, "Wal-Mart Says Bribe Probe Cost $439 Million in Two Years", Bloomberg Business (March 26, 2014), available at http://www.bloomberg.com/news/articles/2014-03-26/wal-mart-says-bribery-probe-cost-439-million-in-past-two-years.

FCPA inquiry cost $339.7 million over four years (2009-2012).[19] To prevent charges, companies should develop an effective risk management program. An effective risk management program is composed of two parts: (1) a strong compliance program, and (2) a strong 'tone from the top.'

A strong compliance program is key to the prevention of 'corporate sin' charges. In the event of charges, the "existence and effectiveness of [a] corporation's pre-existing compliance program" is one of nine factors that the DOJ considers in determining whether to charge a corporation for an FCPA violation and what penalty to impose.[20] Key factors in an effective compliance program are: (1) written policies, procedures and guidelines, (2) training and education, and (3) effective oversight with quick responses to detected offenses. The last point requires that companies create oversight positions, such as a chief compliance officer, and that personnel in these positions be given meaningful authority. Furthermore, it is important that companies continue to upgrade their compliance programs to respond to changing circumstances.

In Canada, one pivotal sentencing decision for violations of the CFPOA[21] is *R v. Griffiths Energy International*.[22] This case summarizes a number of mitigating factors the courts will consider when deciding penalties under the CFPOA. In *Griffiths*, the company paid a bribe of $2 million to a corporate entity owned by the wife of a foreign ambassador. Of importance is the court's statement that "Griffiths has instituted an effective, comprehensive and robust anti-corruption program such that it is unlikely that there will be any repetition of such conduct[23] … These are very significant mitigating factors."[24] Therefore, it appears that one mitigating factor the Canadian courts will take into account when determining sentencing in a white-collar criminal case is an effective compliance program.

The tone from the top refers to the expectations created by management and the board regarding compliance. Part of setting the tone requires that both management and the board adhere to the same written policies, procedures and guidelines as the other employees of the corporation. Furthermore, management and the board should be required to have compliance training and education. This will show employees that management holds itself to the same standards it holds the employees. Lastly, principled performance should be rewarded. Ethical employees should be rewarded for honest behavior and reporting compliance violations.[25]

Lastly, it is important to remember that directors and officers may be held personally liable. In many of the previous examples directors and officers were charged with civil and criminal penalties. For that reason it is important that directors and officers be provided with insurance and an indemnification agreement. Directors and officers insurance protect directors and officers acting in the scope of their managerial duties against the consequences of actual or alleged wrongful acts. However, it is important to remember that these policies contain exclusion policies for fraudulent, criminal or intentional non-compliant acts.

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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[19] Jaclyn Jaeger, "Analysis: The Rising Costs of FCPA Investigations" Compliance Week (March 4, 2013), available at https://www.complianceweek.com/blogs/enforcement-action/analysis-the-rising-costs-of-fcpa-investigations#.VPXnQeHDR5k.

[20] Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, "FCPA – A Resource Guide to the U.S. Foreign Corrupt Practices Act" Department of Justice, Securities Exchange Commission (November 14, 2012), available at http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf at page 62.

[21] *Corruption of Foreign Public Officials Act*, SC 1998, c. 34.

[22] *R v. Griffiths Energy International*, [2013] AJ No 412.

[23] *Supra*, note 22, at 19.

[24] *Ibid*, at 21.

[25] "Tone at the top: The first ingredient in a world-class ethics and compliance program" Deloitte (2014), available at http://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us-aers-tone-at-the-top-sept-2014.pdf.

LEGISLATIVE UPDATE

British Columbia

Franchises

On October 20, 2015, Bill 38, the *Franchises Act* (the "FA"), received third reading. The FA, among other things:

- applies, where the business operated or to be operated by a franchisee under the franchise agreement is wholly or partly in British Columbia, to:
  - (a) a franchise agreement entered into on or after the coming into force of section 2; and
  - (b) a renewal or extension, entered into on or after the coming into force of section 2, of a franchise agreement that was entered into before, on, or after the coming into force of section 2;
- does not apply to specified relationships;
- defines several terms, including franchise, franchisor's associate, franchisor's broker, material change, material fact, and prospective franchisee;
- provides that every franchise agreement imposes on the parties a duty of fair dealing in the performance and enforcement of the agreement, including the exercise of a right under the agreement;
- provides that the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards;
- sets out provisions regarding the right of franchisees to associate;
- mandates that a franchisor provide to a prospective franchisee a disclosure document that the franchisee must have received at least 14 days before the earlier of:
  - (a) the signing by the franchisee of the franchise agreement or other agreement relating to the franchise; and
  - (b) the payment by or on behalf of the prospective franchisee to the franchisor or franchisor's associate of any consideration relating to the franchise;
- sets out provisions regarding the delivery and content of the disclosure document;
- mandates the provision of a written statement of any material change, and sets out requirements regarding the timing of receipt thereof;
- details situations where the disclosure obligations do not apply;
- provides a franchisee with a right of rescission without penalty or obligation in specific circumstances;
- sets out the obligations of the franchisor or franchisor's associate after a rescission;
- provides that if a franchisee suffers a loss because of a misrepresentation in a disclosure document or statement of material change, or as a result of a franchisor's failure to comply with section 5 (which relates to disclosures), the franchisee has a right of action for damages against the franchisor, the franchisor's broker, the franchisor's associate, and every person who signed the disclosure statement or statement of material change (the "Document");
- provides that, subject to section 8(1), where a Document contains a misrepresentation, a franchisee who acquired a franchise to which the Document relates is deemed to have relied on the misrepresentation;
- provides that, subject to section 8(1), where a franchisor failed to comply with section 5 with respect to a statement of material change, a franchisee who acquired the franchise to which the material change relates is deemed to have relied on the information in the disclosure document;
- sets out exceptions and defences to liability;

- provides that a Document complies with section 5 despite a defect in form, a technical irregularity, or error (the "Defect") if the Defect does not affect the substance of the Document and the Document is substantially in compliance with the FA;
- provides that any purported waiver or release by a franchise or prospective franchisee of rights conferred by the FA or obligations imposed on the franchisor or franchisor's associate is void (although this does not apply to a waiver or release made in accordance with a settlement of an action, claim, or dispute); and
- provides for the making of regulations.

Certain sections of the FA also apply to a franchise agreement entered into before section 2 comes into force, and the FA comes into force by regulation of the Lieutenant Governor in Counsel.

Manitoba

Accessibility

On October 19, 2015, Man. Reg. 171/2015, *Customer Service Standard Regulation* (the "Regulation") under *The Accessibility for Manitobans Act*, CCSM, c. A1.7, was registered.

Among other things, the Regulation:

- explains that accessible customer service is provided when all persons who are reasonably expected to seek to obtain, use, or benefit from a good or service have the same opportunity to obtain, use, or benefit from the good or service;
- sets out timelines by which specified types of organizations are subject to sections 4 to 15 of the Regulation;
- requires organizations to establish and implement measures, policies, and practices regarding barrier-free access to the goods or services they provide, and to comply with same;
- sets out provisions regarding assistive devices, support persons, service animals, and an organization's built environment;
- mandates that organizations use reasonable efforts to ensure that, in their measures, policies, and practices, they provide a reasonable process for feedback;
- requires specified organizations to document certain information, provide notice that such documentation is available on request, and provide a copy of same on request;
- describes the obligations organizations have in respect of training about accessible customer service, and the maintenance of documentation in respect thereof; and
- sets out obligations regarding the accessibility of public events.

The regulation came into force on November 1, 2015.

Quebec

Pay Equity

The *Regulation to amend the Regulation respecting the report on pay equity*, MO 2015-001 (the "Amending Regulation"), has altered the scope of the employers who are required to file annual reports on pay equity. Since the coming into force of the Amending Regulation, which was filed on June 11, 2015 and took effect 15 days later, employers that:

(1) are registered under the *Act respecting the legal publicity of enterprises*;

(2) are subject to the obligation to file a yearly updating declaration under that Act; and

(3) have declared 11 or more employees in their previous annual declaration or other document standing in lieu of an updating declaration,

must file a report on pay equity, as must employers who are registered under the *Act respecting the legal publicity of enterprises*, do not have 11 or more employees or are exempt from the requirement that they file an annual updating declaration, but who have already declared that they are subject to the *Pay Equity Act*.

Prior to the coming into force of the Amending Regulation, the threshold number of employees for filing a report on pay equity was six. Certain other employers are required to file reports on pay equity regardless of the number of employees.

ON THE CASE

Commercial

Lien Bond Did Not Satisfy Contractor's Trust Obligations Under *Builders' Liens Act*

Supreme Court of Canada, September 18, 2015

The appellant general contractor, Stuart Olson Dominion Construction Ltd. ("Stuart"), subcontracted work on a construction project to the respondent, Structal Heavy Steel ("Structal"). Stuart alleged that there were delays attributable to Structal and withheld payment, indicating that it was using the unpaid amounts for back charges resulting from the alleged delays. Structal registered a builder's lien against the property. Stuart filed a lien bond in the full amount of the builder's lien. Structal approved the bond and vacated its lien. Subsequently, Stuart received amounts from the owner, but refused to make further payments to Structal, alleging, in part, that Structal was fully secured by the lien bond. Structal asked the owner to withhold from Stuart an amount equal to its past due invoices or face an action for violating the trust provisions of *The Builders' Liens Act* (the "BLA"). Stuart applied for a declaration that it had satisfied the BLA trust obligations. Structal sought an order that Stuart was required to make full payment of all past due invoices upon Stuart's receipt of the payments from the owner. The trial court found in favour of Stuart, concluding that Stuart's filing of the lien bond extinguished its trust obligations to Structal. The Court of Appeal overturned the trial court, concluding that the right to a statutory trust and the right to a lien were separate and distinct remedies under the BLA. Stuart appealed.

The appeal was dismissed. Section 56(1) of the BLA is unambiguous that security paid into court stands in place of the land against which the lien was registered. The registration of the lien can be ordered vacated when security is paid into court, freeing the land from the lien encumbrance, but the underlying claim remains. The trust provisions of the BLA, which are found in sections 4 to 9, create a different and more wide-reaching remedy. While the lien provisions do not impose obligations on contractors or subcontractors regarding funds received, the trust provisions provide that trust funds cannot be appropriated for other purposes until all subcontractors, and others, have been paid. Although the BLA was silent as to the interaction of the two remedies when both remedies were pursued at the same time, section 66 of the BLA, which provides for the joining of a trust claim and an action to realize a lien, contemplates that the lien and trust remedies may be pursued concurrently. Section 4(3) of the BLA, which restricts the contractor from diverting trust funds for its own use until subcontractors have been paid all amounts owing to them, also supported the conclusion that the filing of the lien had no effect on the subsistence of the statutory trust. A subcontractor has not been paid simply because a lien was filed or because security was posted in order to vacate the lien. An owner, contractor, or subcontractor who chooses to file a lien bond with the court instead of depositing the funds at issue must maintain the trust fund in addition to the bond.

Stuart Olson Dominion Construction Ltd. v. Structal Heavy Steel, 2015 SCC 43

Terms of Bank's Agreement Constituted Complete Defence to Claim for Reimbursement for Forged Cheques

Supreme Court of British Columbia, September 11, 2015

The plaintiff, D2 Contracting Ltd. ("D2"), opened a business bank account (the "Account") with the defendant, The Bank of Nova Scotia (the "Bank"), in January 2006. D2's two owners, Cooper and Copeman, were joint authorized signors on the Account, and Copeman maintained the Account and received monthly statements. Although the Bank could not locate the original Account documents, when the Account was opened, the Bank's standard form of documentation included a Financial Services Agreement (the "Agreement"). The Agreement dealt with, among other provisions, the cheque clearing system used by the Bank. Under paragraph seven of the Agreement, the Account holder was responsible for verifying the Account and had 30 days after the mailing of the statement to notify the Bank of errors, after which there was no claim against the Bank. Paragraph 13 of the Agreement limited the Bank's liability for the Account holder's loss in connection with the Bank's services, and specifically noted it had no liability for "forged, unauthorized or fraudulent use of services ... even if you or we did not verify the signature, instruction or authorization" (instruction was defined in the Agreement to include cheques). Cheques on the Account required two signatures. In April 2009, Cooper informed the Bank that Copeman had allegedly forged Cooper's signature on a number of cheques. D2 claimed that, between March 2006 and April 2009, Copeman had forged 594 cheques. In an undefended hearing, Copeman was found liable for fraud and D2 obtained a judgment of $1,289,600. D2 then commenced action against the Bank for the return of the funds it alleged were wrongfully withdrawn from the Account. The Bank argued, among other things, that D2's claim was completely answered by its failure to follow the verification requirements in the Agreement, and that, apart from contractual defences, Cooper had actual knowledge of Copeman's forgeries and failed to provide the Bank with timely notice. D2 argued, among other things, that the Bank had breached section 48 of the *Bills of Exchange Act* (the "Act") by honouring the forged cheques, and that the limitation of liability in the Agreement was unenforceable because of ambiguity. The Bank applied for summary trial to dismiss the claim.

The application was granted and D2's action was dismissed. Having regard to the totality of the circumstances, proceeding by way of summary trial was a fair process to achieve a just adjudication of the issues. On a balance of probabilities, and despite being unable to locate the signed Agreement, the Bank proved that the parties had entered into the Agreement: it accorded with sound commercial practices that the Account could not have been opened without Cooper and Copeman having signed a number of standard form documents. The Bank was not obliged to bring specific terms of the Agreement, including the payment clearing provisions, to the attention of Cooper and Copeman. Cooper's allegation that he did not know that the authenticity of the signatures on the cheques would not be verified in the cheque clearing process unless the cheque was negotiated at the home branch of the Bank was not a basis for finding that the Agreement was unenforceable: failure to read a contract before signing it is not determinative of whether a business person is bound by its terms. Section 48 of the Act was not a strict liability provision. Under that section, the Bank had no liability for honouring a forged cheque since D2 was precluded from recovery in this instance as a result of the liability limitations in the Agreement. Even applying a strict construction against the Bank, the wording of the Agreement as a whole was not ambiguous. Paragraphs 7 and 13 of the Agreement imposed on the Account holder the obligation to review and verify the statements and report errors within 30 days. The Bank's liability for forgeries after the 30-day period was clearly limited even if the Bank did not verify the signature. The evidence established that Cooper took no steps for almost three years to inform the Bank of the forgeries. He had received a compensation cheque as early as 2006 that did not bear his signature and yet did not inform the Bank. Cooper further acknowledged that in 2009, Copeman had signed payroll cheques in his absence and Cooper did not make an issue of his signature having been forged on such cheques. In any event, and under the circumstances, the Agreement provided a complete defence to D2's claims.

D2 Contracting Ltd. v. The Bank of Nova Scotia, 2015 BCSC 1634

Employment

Employer's Intention To Charge Employee for Damage to Equipment Was a Material Change to Employee's Contract

Supreme Court of British Columbia, May 5, 2015

Rothberger worked as a seasonal worker for Concord Excavating & Contracting Ltd. ("Concord") for 11 years, primarily as an excavator operator at an hourly wage. Between early spring to late fall, he often worked in excess of eight hours per day and 40 hours per week, and was paid no overtime for those additional hours. After Rothberger was involved in three incidents where his equipment was damaged, Concord added a note to his pay slip indicating that any subsequent loss or damage to his equipment would be deducted from his paycheque. Rothberger left a copy of the relevant sections of the *Employment Standards Act* in Concord's mailbox. In response, Concord sent Rothberger an angry email reminding him to check and maintain his equipment. Believing that he no longer worked for Concord, Rothberger walked off the job. He brought a wrongful dismissal action, claiming that the original note on his pay slip constituted a change to his terms of employment and that the second note was an implied threat.

The action was allowed. Rothberger was upset about Concord's intention to charge him for future equipment loss and was "brushed off" when he attempted to speak to his employer about it. The email response from Concord was threatening and provocative. The intent to deduct future costs from Rothberger's paycheque was an infringement of the *Employment Standards Act*. This was a material change to the employment contract and substantially affected Rothberger's rights. Concord did not make it clear whether Rothberger would be responsible for significant future costs. The change to his compensation package went to the heart of his employment contract. Rothberger was not required to remain employed until the deduction policy was implemented before he could treat his employment as at an end. Rothberger was constructively dismissed and he was awarded 12 weeks' wages, at 40 hours per week. There was a tacit arrangement between Rothberger and Concord that he would be rehired each spring, which made him a long-term employee.

Rothberger v. Concord Excavating & Contracting Ltd., 2015 BCSC 729

Federal Court Upholds Finding of Family Status Discrimination with Respect to Elder Care Obligations

Federal Court, May 7, 2015

As an employee of the federal government, Hicks was relocated from Sydney, Nova Scotia to Ottawa when his position became redundant. Hicks officially relocated to Ottawa on October 17, 2002; however, his wife and family did not relocate with him, due, in part, to his mother-in-law's serious health problems. His mother-in-law was living in an assisted living apartment at the time of Hicks's move and she eventually moved to a nursing home. Hicks applied for financial assistance from October 2002 until September 2003, under the Temporary Dual Residence Assistance ("TDRA") Directive of the Treasury Board. The claim for financial assistance was denied, as it could only be claimed in respect of a dependant, defined as someone "who has been living with the employee prior to the relocation". Hicks filed a grievance, which was denied. He brought a human rights complaint alleging discrimination on the basis of family status and disability. The family status complaint was allowed by the Canadian Human Rights Tribunal. The Attorney General of Canada brought an application for judicial review.

The application for judicial review was dismissed. The interpretation of family status and the legal test for finding a *prima facie* case of discrimination were subject to review on a standard of correctness. The remaining issues were reviewable on a standard of reasonableness. The Tribunal did not commit a reviewable error in concluding that family status included elder care obligations. The non-fulfillment of elder care obligations could attract civil and criminal responsibility, and elder care obligations were entrenched in societal values. The Tribunal correctly followed the test for finding a *prima facie* case of discrimination on the basis of family status. It was reasonable to find that Hicks made out a *prima facie* case of discrimination, since the relocation benefit was only available to dependants who were only temporarily sick or living with the relocated employee, which was underinclusive. The requirement was not *bona fide*, since the government failed to provide appropriate evidence to support its claim. The awards for pain and suffering and wilful and reckless conduct were reasonable.

Canada (AG) v. Hicks, 2015 FC 599

Worker Unsuccessfully Appealed Workers' Compensation Appeals Tribunal Decision Rejecting Charter Argument

Nova Scotia Court of Appeal, July 24, 2015

The appellant, Dale, worked as a corrections officer for 30 years. He stopped working in February 2008 and received short-term and then long-term disability benefits until June 2010, at which time he retired. In June 2010, Dale made a claim for workers' compensation benefits for post-traumatic stress disorder. His claim was denied on the basis that he had not suffered an "accident" as defined in section 2(*a*) of the *Workers' Compensation Act* (the "Act"). Stress is considered an accident under the Act if it results from an acute reaction to a traumatic event. It excludes claims for gradual onset stress (or chronic stress) as a compensable workplace injury. On appeal to the Workers' Compensation Appeals Tribunal ("WCAT"), Dale argued that this exclusion discriminated against him on the basis of a disability, thereby infringing section 15(1) of the *Canadian Charter of Rights and Freedoms* ("Charter"). The WCAT rejected that argument. The WCAT held that although the impugned provision drew a distinction on the basis of an enumerated ground of discrimination (disability), that distinction did not amount to discrimination because it did not create a disadvantage by perpetuating a prejudice or stereotype. Dale appealed the WCAT decision.

The appeal was dismissed. The appeal record did not provide an adequate factual foundation to allow the WCAT to consider whether the definition of "accident" in the Act violated section 15(1) of the Charter. The WCAT did not identify Dale's injury or condition. It issued inconsistent findings on whether his injury constituted a disablement and it did not make a finding of fact that the injury arose out of and in the course of employment. In addition, the evidence before the WCAT was nearly exclusively medical evidence. Dale had provided no other evidence to support his claim. The lack of evidence was fatal to his section 15(1) claim. It was premature for the WCAT to determine whether the exclusion of gradual onset injuries from the definition of "accident" in section 2(*a*) of the Act breached section 15(1) of the Charter. There was no evidence that persons suffering stress injuries which are "other than an acute reaction to a traumatic event" are stereotyped, stigmatized, or disadvantaged by society. Without such stereotyping or stigmatization, Dale's human dignity under section 15(1) was not violated and there could be no discriminatory distinction drawn by section 2 (*a*) of the Act.

Dale v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2015 NSCA 71

Q & A

How Can a Statement of Wages Be Given to Employees?

Most provinces/territories specify that the statement of wages must be in writing. In today's electronic world, employers may wonder if the statement of wages can be provided electronically.

Employment standards legislation in six jurisdictions—British Columbia, New Brunswick, Ontario, Prince Edward Island, Saskatchewan, and the Northwest Territories—specifically permits a statement of wages to be given to an employee electronically rather than in writing, so long as the employee has confidential access to the electronic pay statement and access to a printer to make a paper copy of the statement.

Legislation in other parts of Canada still reflects the paper-only world and has not yet been amended to include electronic forms of document delivery. Until legislation is amended, the statement of wages should be provided in writing on paper. Should an employer wish to get permission to deliver the statement of wages electronically, the employer should contact its provincial employment standards office and request a written authorization to do so.

WORTH NOTING

Ontario Is Seeking Feedback About Closing the Gender Wage Gap

The Government of Ontario is hosting a series of consultations this fall seeking public input as part of the development of a strategy to close the gender wage gap. According to the news release announcing the consultations, the consultations are intended to:

- examine how the roles of women at work, in their families, and in their communities are affected by the gender wage gap;
- understand how the gender wage gap specifically affects women in the workforce across the economic spectrum;
- assess ways in which government, business, labour, other organizations, and individual leaders can work together to address the conditions and the systemic barriers that contribute to the wage gap; and

- understand other factors that intersect with gender to compound the wage gap, and determine how those factors should be addressed.

Ontarians may participate by reading the Gender Wage Gap Strategy Steering Committee's consultation document, by attending one of the consultations, by providing feedback via email, or by making suggestions on Twitter using the hashtag #wagegapON.

The deadline for submitting feedback is January 15, 2016. More information is available at: http://www.labour.gov.on.ca/english/about/gwg/consultation.php.

Ontario's *Not-for-Profit Corporations Act* Delayed Until at Least 2017

Ontario's Ministry of Government and Consumer Services (the "Ministry") recently confirmed that the government is committed to bringing the *Not-for-Profit Corporations Act* (the "ONCA") into force at the earliest opportunity and will provide at least 24 months' notice before proclamation.

The ONCA was scheduled to come into force within six months of the passage of former Bill 85. Bill 85 contained a number of technical amendments to the ONCA; however, the Bill died when the provincial election was called in 2014. These technical amendments will need to be reintroduced before the ONCA will come into force.

Previously, the government had indicated that the ONCA was not expected to come into force before 2016. Recent changes to the Ministry's website stating that the government will provide at least 24 months' notice before proclamation means that the earliest the ONCA will come into force is now 2017.

Once in force, there will be a three-year transition period for existing corporations to make any necessary amendments to their incorporation documents.

CCCA AND OTHER EVENTS

7th Annual Class Actions Colloquium

December 1, 2015, 9:00 a.m. to 5:00 p.m., 20 Toronto Street, 2nd floor, Toronto, ON, or by webcast, $325 for CBA members, $460 for non-members, $165 for CBA student members, plus taxes

Chaired by Linda Fuerst of Norton Rose Fulbright Canada LLP and Peter Mantas of Fasken Martineau DuMoulin LLP, this colloquium will, among other things, cover hot issues and emerging trends in class actions, as well as offer a view from the bench.

Further details are available at: http://www.cbapd.org/details_en.aspx?id=ON_15CLA1201C.

The Six-Minute Business Lawyer 2015

December 4, 2015, 9:00 a.m. to 12:00 p.m., online, $210

Chaired by Michael Whitcombe of McMillan LLP, this program offers highlights of the last year in business law, covering developments related to crowdfunding, trends in mergers and acquisitions, and insight into the TSX private company share exchange.

Further details are available at: http://ecom.lsuc.on.ca/cpd/product.jsp?id=CLE15-0120800.

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