Commercial Times

May 2012
Number 538

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TASK FORCE POINTS CANADA TOWARDS A NEW PAYMENTS SYSTEM ENVIRONMENT

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In the 2010 Budget, the federal government established a Task Force for the Payments System Review (the "Task Force") to guide public policy on the evolution of Canada's payments system. The Task Force's report, *Moving Canada into the Digital Age* (the "Report"), released on March 23, 2012, was informed by a wide-ranging consultation with stakeholders about the quickly evolving digital environment and the challenges created by the existing payments system. Along with the Report, the Task Force published four policy papers that support the Report's key recommendations.

The Task Force recognized that Canada's payments system needs a revised legal infrastructure to fully engage in the digital economy of the 21st century. Canada's outdated payments system has failed to provide digital alternatives to paper cheques, failed to allow electronic invoice processing and payments reconciliation in real time, and lacks the ability to effect mobile payments in a way that protects users. The Task Force states that the existing payments system, with rules and infrastructure controlled by Canadian financial institutions, creates barriers to new entrants, is uncompetitive, and has failed to keep up with the current digital environment. Many jurisdictions, including European Union countries and emerging economies, have significantly outpaced Canada's

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transition to digital payments with negative implications for Canada's global competitiveness and interoperability.

The Task Force states that a modernized Canadian payments system could add as much as two per cent of GDP in productivity gains, or $32 billion in annual savings. It reported that studies carried out by the European Payments Council, Innopay, and the European Banking Association suggest that businesses, on average, realize a reduction in costs in the range of one to two per cent of revenue by switching from paper to e-invoicing and automating related supply chain processes. A new governance model for a national payments system is proposed to help realize the benefits of a digital environment.

How May the Canadian Payments Sector Change in the Future?

The Report and its four policy papers set out a new principles-based, inclusive governance model that defines the legislation necessary to update the infrastructure for Canada's payments system. If the government implements the Task Force's recommendations, key initiatives we can expect to see include:

- implementation of electronic invoicing and payments for all government suppliers and benefit recipients;
- partnering with the private sector to create a mobile ecosystem;
- legislation that will recognize and define the scope of the payments industry and require payments service providers to be members of the proposed governance regime;
- legislation to create a public oversight body ("POB") for the payments industry to ensure effective governance of the payments industry, to protect the public interest through principles-based oversight, and to provide redress when industry behaviour no longer inspires trust, or no longer enables access, competition, or innovation;
- industry collaboration to create a POB-approved self-governing organization ("SGO") with broad-based membership, including payments service providers and users, which will establish standards for the industry;
- an overhaul of the CPA, including its objects, governance, powers, business and financial models, and funding;
- revisions to the *Code of Conduct for the Credit and Debit Card Industry in Canada* to incorporate mobile payments; and
- the creation of a digital identification and authentication ("DIA") regime to underpin a modernized payments system and protect Canadians' privacy.

How Will the New Payments Industry Be Defined and Who Would Qualify as a Payments Service Provider?

The Task Force urges the federal government to enact legislation that would provide flexibility in defining the scope of a continuously evolving payments industry. It offers the following working definition of a payments system and a payments service provider:

> The payments system refers to arrangements that allow consumers, businesses, governments and other organizations to transfer monetary value from one party to another. It includes the institutions, instruments and services that facilitate the transfer of monetary value between parties in a transaction.

Function within the payments system, not institutional status, would define a payments service provider. The Task Force's Regulatory Advisory Group suggested that payments system providers would include financial institutions, network operators, and credit and debit card issuers and acquirers as well as new participants, such as online payment networks. Some participation could be voluntary, such as retail issuers of financial cards for services offered only through their own outlets, and parties that conduct payment services as independent contractors or as agents for payment services providers.

What Is Principles-Based Self-Governance for the Payments Industry?

The Task Force envisions a governance model that is flexible and adaptable, offering industry, including businesses and innovators of all sizes, as much rule-making authority as possible. The Task Force's Consumer Advisory Group identifies three core principles as the foundation for accountable payments system governance: trust of participants, accessibility by participants, and good value (the "Principles"). The core objectives of a national payments policy proposed by the Task Force are based on these Principles. For example, trust among participants would be generated by a system that is financially stable and safe from a risk perspective, is operationally robust, and is governed in a manner that allowed input from all types of participants. Payment systems should be accessible so that participants could choose among payment mechanisms. Good value would be advanced if the system operates in a way that delivers efficient costs and operates within a regulatory framework that is functionally neutral. These Principles would be recognized in legislation.

The Task Force proposes that the Minister of Finance (the "Minister") should be accountable for the achievement of Principles-based governance for the payments system. The responsibility, however, would be delegated to the POB and the payments industry.

What Is the POB's mandate?

The Task Force recommends the creation of a POB reporting to the Minister with delegated decision-making authority. The POB would further delegate much of its regulatory and policymaking mandate to a payments industry SGO that the POB would recognize and oversee. The POB would:

- assess and report to the Minister on the Canadian payments system and its participants and oversee the industry in a proportional, risk-based manner;
- set the terms and conditions for recognizing an SGO to ensure that all payments service providers are members;
- nominate or approve some or all of the SGO's independent directors;
- delegate registration and licensing authority to the SGO;
- have directive power to ensure that the recognized SGO complies with regulations and establishes practices consistent with the Principles. For example, the Task Force recommends that the POB have the power to stage interventions in the affairs of the SGO;
- provide recourse (an appeal process) for stakeholder conflicts not resolved within the SGO; and
- exercise the regulatory powers granted under legislation where there is no effectively functioning SGO.

What Is the SGO's Mandate?

Membership in the SGO would be mandatory for payments system providers and voluntary for payments system users. The SGO, once recognized by the POB, would develop and enforce codes, policies, and standards that are consistent with the Principles or with specific direction from the POB. Licensing and registration for payments system providers would be undertaken by the SGO. The SGO would coordinate the payments industry in determining a strategic direction for the payments system and in setting and enforcing policies and standards. The Report urges industry participants to take the lead in beginning the process of establishing a SGO.

What Will Happen to the CPA?

The Task Force recommends that the corporate structure of the CPA be reorganized to enable it to serve more effectively as the owner and operator of core payments infrastructure in a digital age. Financial institutions alone would no longer control the CPA. To allow for greater scope of activity in a digital environment, the CPA's governing legislation should be amended to update its governance, objects, metrics, funding and pricing model, and scope of activities. As a payments service provider, the CPA would be a member of the SGO. Thus, the CPA would be subject to oversight by the POB, not the Minister directly, and its activities would be subject to the standards, rules, and codes of the SGO.

What Are Other Legislative Implications for the Creation of a Modern Payments System?

The Task Force identified a range of other legislative implications that would have to be coordinated to create a modern payments system that is relevant in a digital age. For example, the Task Force encouraged the government to amend the *Bills of Exchange Act*, which governs cheques and other paper instruments, to make it less technical, to enhance consumer protection and to recognize advances in technology used for payments. The government should not prolong dependency on the use of cheques in Canada.

The Task Force also recommends that governments at all levels conduct a thorough review of their legislation and regulations to ensure that provisions do not preclude online transactions and thereby hamper the transition to a digital economy. As an alternative to requirements in legislation such as the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* to require individuals to be physically present for identification purposes, the Task Force encourages the adoption of a DIA regime as a more secure means of verifying identity. A DIA regime would also benefit identification requirements in various digital environments.

To assist with legislative synchronization, Policy paper C released with the Report suggests that an informal public policy forum of senior government officers should be created to ensure that regulatory and policy development is coordinated. Although the paper is not clear about this, it would appear that legislative and policy coordination would require the participation of federal and provincial governments. While much existing legislation that may impact on the payments system is in the federal sphere, such as the *Bills of Exchange Act, the Canadian Payments Act*, *the Payment Clearing and Settlement Act,* and the *Competition Act*, provincial legislation may govern emerging payments service providers, as well as contract formation and consumer protection issues for participants that are not federally regulated financial institutions.

How Will Governments and Stakeholders Respond to the Task Force Recommendations?

In the government's initial response to the Report, it indicated that it would establish a senior-level advisory committee with public and private sector stakeholders to inform the Department of Finance's ongoing review of emerging payments system issues and the Task Force's recommendations. The Department will also review the application of the *Code of Conduct for the Credit and Debit Card Industry in Canada* in consultation with stakeholders to ensure that it is adapted to the evolution of mobile payments in Canada. The government will review the governance framework of the payments sector, including the CPA, presumably giving consideration to the Task Force's key recommendations.

The Task Force has perhaps assumed a substantial degree of cooperation among the federal and provincial governments in the evolution of a modern payments system on the basis that substantial benefits will emerge from a coordinated and cooperative policy and legislative approach. Federal and provincial governments, however, may have separate roles to play in the creation of a legal framework for a digital payments system. There are no doubt substantial issues of national importance in the creation of a viable Canadian payments system suitable for the digital age where systemic risks are appropriately identified and managed and accountabilities are clear. There may also be a question whether a federal approach to the establishment of a national payments system could be defended as a modern expression of the federal power over bills of exchange. Yet many of the new payments service providers in a digital economy may not be federally regulated institutions, as payment instructions may be given not only by payments service providers holding deposit accounts, but also by emerging providers that move monetary value in other ways. Provincial governments thus may also have to act to support the emergence of a new governance model for the Canadian payments system.

The creation of a national payments system suitable for our digital present and future will require a significant degree of cooperation and coordination from all levels of government as well as a broad range of stakeholders — system participants and users alike. The Task Force has clearly identified the need to move forward and the cost of not doing so, and has proposed a governance model to achieve the benefits of a modern payments system. Through its consultation process, the Task Force has started the discussion. Governments and stakeholders now need to continue the dialogue and take action.

LEGISLATIVE UPDATE

Alberta

Alta. Reg. 72/2012, in force March 26, 2012, amended the *Energy Marketing and Residential Heat Sub-Metering Regulation*, Alta. Reg. 246/2005, under the *Fair Trading Act*.

Alta. Reg. 71/2012, in force March 26, 2012, amended the *Prepaid Contracting Business Licensing Regulation*, Alta. Reg. 185/99, under the *Fair Trading Act*.

Alta. Reg. 70/2012, in force March 26, 2012, amended the *Direct Selling Business Licensing Regulation*, Alta. Reg. 190/99, under the *Fair Trading Act*.

British Columbia

Bill 26, the *Forests, Lands and Natural Resource Operations Statutes Amendment Act, 2012,* received third reading on April 26, 2012 and Royal Assent on May 14, 2012. Bill 26 amends the *Personal Property Security Act*.

Bill 34, the *Limitation Act*, received third reading on April 26, 2012 and Royal Assent on May 14, 2012. Bill 34 makes a consequential amendment to the *Business Practices and Consumer Protection Act*.

Bill 37, the *Animal Health Act*, received second reading on April 30, 2012. Bill 37 amends the *Business Practices and Consumer Protection Act*.

Bill 48, the *Emergency Health Services Amendment Act, 2012*, received first reading on May 7, 2012. Bill 48 makes a consequential amendment to the *Business Practices and Consumer Protection Act*.

Manitoba

Bill 12, *The Consumer Protection Amendment Act (Motor Vehicle Work and Repairs)*, received first reading on April 26, 2012. Bill 12 amends *The Consumer Protection Act*.

Bill 16, *The Consumer Protection Amendment Act (Improved Enforcement and Administration),* received first reading on April 27, 2012. Bill 16 amends *The Consumer Protection Act*.

Nova Scotia

Bill 22, the *Mortgage Regulation Act*, received third reading on May 4, 2012. Bill 22 makes minor amendments to the *Consumer Services Act*.

Bill 65, *An Act to Amend the Consumer Protection Act, to Ensure Fairness in Cellular Telephone Contracts*, received third reading on May 11, 2012. Bill 65 amends the *Consumer Protection Act*.

Bill 114, *An Act to Amend the Consumer Protection Act* (S.N.S. 2011, c. 55), was proclaimed in force, May 1, 2012. Bill 114 amends the *Consumer Protection Act*.

N.S. Reg. 87/2012 amended the *Payday Lenders Regulations,* effective May 1, 2012.

Prince Edward Island

Bill 18, *An Act to Amend the Court Fees Act*, received first reading on April 20, 2012. Bill 18 amends the *Judgment and Execution Act*.

Quebec

Bill 70, *An Act to facilitate civil proceedings by victims of crime and the exercise of certain other rights*, received first reading on April 17, 2012. Bill 70 amends the *Civil Code of Quebec*.

Saskatchewan

Bill 12, *The Court Officials Consequential Amendments Act, 2011,* received third reading on May 9, 2012. Bill 12 makes consequential amendments to *The Creditors' Relief Act* and *The Executions Act*.

RECENT CASES

Wheat Board's Liability Upheld Where Board Misrepresented Wheat and Knew That Misrepresentations Would be Relied Upon

Manitoba Court of Appeal, December 14, 2011

This was an appeal by ConAgra Limited ("ConAgra") from a judgment finding it liable to the respondent, Pagnan S.p.A. ("Pagnan"), for breach of contract. The Canadian Wheat Board (the "CWB") appealed from a finding that it was liable for negligent misrepresentation and from the judgment against it entered in ConAgra's cross-claim. Pagnan cross-appealed from the quantum of damages awarded. In 1982, frost damage degraded a wheat crop. The CWB and the Canadian Grain Commission elected to market the damaged wheat under the specification "Wheat — ex. Special Bin" ("WSB"), on the basis that it possessed fair milling quality. ConAgra, a Canadian wheat marketer, was not provided with any additional information about WSB before it sold this wheat to Pagnan, an Italian corporation. Upon receiving the first shipment of WSB, Pagnan discovered that the wheat was not of fair milling quality. Pagnan sued ConAgra and the CWB.

At trial, the judge held that ConAgra breached a fundamental term of its contract with Pagnan by failing to select the best possible lots of WSB. The judge found that it was reasonably foreseeable by the CWB that its representations about WSB would be relied upon by purchasers of WSB abroad, as well as marketers like ConAgra. The judge also found that the description that WSB was of fair milling quality was inaccurate in respect of the wheat shipped to Pagnan. The judge awarded Pagnan and its customer, Albionex (Overseas) Limited, judgment for $4,642,392, representing their loss of profit, expenses, conversion to Canadian currency, and interest.

The appeals and cross-appeal were dismissed. The Court of Appeal held that CWB knew that its statement that WSB was of fair milling quality was inaccurate and also that the statement would be relied upon by companies like ConAgra and Pagnan. Upon discovering in 1982 that its sample was not representative of the average quality of WSB, the CWB should have provided this information to ConAgra and others, but failed to do so. The CWB had a duty of care to marketers and purchasers of the wheat. Pagnan lacked the expertise to evaluate the quality of WSB. There was therefore a special relationship between the CWB and Pagnan. The CWB's representations about the quality of WSB were negligently made. ConAgra clearly breached its contract with Pagnan to select the best possible quality of WSB for supply to Pagnan, based on the fact that the shipped wheat was of inferior quality. Pagnan failed to demonstrate that the judge erred in her assessment of damages.

Albionex (Overseas) Limited v. Canadian Wheat Board, 2012 CCLG ¶25-298

Payments to Respondents Not at Arm's Length to Bankrupt Company Were Fraudulent Preferences and Had To Be Repaid

Court of Queen's Bench of Alberta, March 21, 2012

The trustee in bankruptcy of Piikani Energy Corporation ("PEC") applied for an order setting aside certain payments made to 607385 Alberta Ltd. ("607"), Ho Lem, and McMullen as being fraudulent preferences under section 95 of the *Bankruptcy and Insolvency Act* (the "BIA"). The payments were made in the face of an application by the trustee, in his then capacity as an investigator of Piikani Investment Corporation ("PIC"), which was the sole shareholder of PEC, to freeze certain funds belonging to PEC. Ho Lem and McMullen were directors and officers of PEC. 607 was Ho Lem's corporation through which she provided services to PEC. PIC was incorporated to advise on investment opportunities for the Piikani Nation. PEC was one of the business entities to which PIC loaned money. The failure of PEC and other business entities to repay their loans resulted in financial difficulties for PIC.

An investigator was appointed under the *Canada Business Corporations Act* (the "CBCA"). The investigation extended to PEC as a subsidiary of PIC. Despite a recommendation that funds being held in trust for PEC be frozen, in December 2009, $150,000 was paid to Ho Lem through 607 as an "annual retainer" and $240,000 was paid to McMullen as a "severance payment." The trustee argued that Ho Lem, 607, and McMullen were non-arm's length creditors of PEC and that the payments were made to them while PEC was insolvent.

The application was allowed. McMullen and Ho Lem, and by extension 607, were not at arm's length to PEC. They were key employees and directors. As a result, the claims against them were brought in time for payments to non-arm's length creditors pursuant to section 95(1)(*b*) of the BIA. Ho Lem, 607, and McMullen were creditors of PEC at the time the payments were made; Ho Lem and 607 by virtue of the consulting agreement with PEC and McMullen pursuant to his employment agreement. PEC was insolvent in December 2009, when the payments were made. It was unable to meet its obligations and its liabilities exceeded its assets.

Ho Lem, 607, and McMullen did not satisfy the onus on them to show that the payments were not made with the intent to prefer them over other creditors. They failed to rebut the presumption in section 95 of the BIA. The payments constituted fraudulent preferences within the meaning of section 95(1)(*b*) and had to be repaid. As Ho Lem was not entitled to payment directly from PEC, the order for repayment was against 607. 607 continued to provide services to PEC until July 2010. It was entitled to set off the value of the contract to that date. 607 was ordered to repay $73,150. McMullen had to repay all $240,000.

Re Piikani Energy Corporation, 2012 CCLG ¶25-299

Court Upholds Trial Decision That Releases From Liability Are Not Unconscionable or Unenforceable

British Columbia Court of Appeal, March 15, 2012

This was an appeal from a judgment finding that a release signed by the appellants, Loychuk and Westgeest, was a complete defence to their negligence action. The respondent, Cougar Mountain Adventures Ltd. ("Cougar Mountain"), operated zip-lining tours. Loychuk and Westgeest had contracted with Cougar Mountain to take part in a tour. Both signed waivers releasing Cougar Mountain from all liability, including claims arising from Cougar Mountain's own negligence. Loychuk and Westgeest collided on the zip line and both were injured. Cougar Mountain admitted that the accident was caused by the negligence of its employees, but asserted that Loychuk and Westgeest had waived their cause of action.

The trial judge held that the releases were not unconscionable. The judge found that, having regard for the information about zip-lining on Cougar Mountain's website and the statements in the release as to the risks and dangers involved, it could not be said that the company had taken unfair advantage of Loychuk and Westgeest. The trial judge rejected the argument that the release failed for lack of consideration because it was not part of their respective contracts with Cougar Mountain when the tours were booked.

The appeal was dismissed. The Court of Appeal upheld the trial judge's finding that the releases signed were not unconscionable or unenforceable at common law. It was not unconscionable for the operator of a recreational-sports facility to require a person who wished to engage in activities to sign a release that barred all claims for negligence against the operator and its employees. If a person did not want to participate on that basis, then he or she was free not to engage in the activity. It was also not unfair for the operator to require a release or waiver as a condition of participating. The provisions of the *Business Practices and Consumer Protection Act* relied on by Loychuk and Westgeest did not lead to the invalidation of the release because the facts did not support a finding of unconscionability. Inequitable did not mean unconscionable. The consideration that Loychuk and Westgeest received for signing the release was being allowed to participate in the zip-lining activity. Whether either of them had read the statement on Cougar Mountain's website regarding the requirement to sign a waiver was immaterial.

Loychuk v. Cougar Mountain Adventures Ltd., 2012 CCLG ¶25-300

Student Loans Survived Bankruptcy; Some Repayment Expected Upon Applicant's Return to Work After Health Problems

Court of Queen's Bench of New Brunswick, March 9, 2012

This was an application under section 178(1.1) of the *Bankruptcy and Insolvency Act* for an order that the student loans of the bankrupt, Michel Gagnon ("Gagnon"), did not survive his discharge from bankruptcy. Gagnon obtained loans in 2002 and 2003 totalling about $9,000 to finance a course leading to a diploma in pharmacy technology, which he successfully completed. The outstanding loan amount of $7,008 was not released by his discharge. Most of Gagnon's employment since graduation had been related to his studies, but he had recent health issues that curtailed his ability to work full time. Gagnon had a hip replacement in July 2011 and faced further surgery in 2012 and had been unable to work since January 2012 because of a concussion sustained in a fall. His wife was employed.

The application was dismissed with leave to reapply after March 2013. The issue was whether Gagnon met the requirement for release of a student loan debt, namely that he had acted in good faith in connection with his liabilities under the debt and would continue to experience financial difficulty to the extent that he would be unable to pay. Once Gagnon returned to full-time work, he should be able to make a schedule of moderate payments and a reasonable agreement ought to be possible with the Canada Revenue Agency to pay an amount tendered that would not adversely affect the financial and general well-being of the members of Gagnon's household. If his prognosis or financial circumstances changed significantly, and he had made reasonable efforts to repay the loan, Gagnon could reapply to have the debt forgiven.

Re Gagnon, 2012 CCLG ¶25-301

Seven-Year Term Specified in Section 178 of BIA Limited to Course of Studies Financed by Loan in Question

Court of Queen's Bench of New Brunswick, March 30, 2012

This was an application by the bankrupt, Emmaline Mortimer ("Mortimer"), for relief pursuant to section 178(1.1) of the *Bankruptcy and Insolvency Act* (the "BIA"). The respondent, Canada Revenue Agency, sought a declaration that section178(1)(*g*)(ii) of the BIA should be interpreted to provide that the seven-year period specified therein be calculated from the date on which Mortimer ceased to be a student in any course of studies and not be limited to that for which the student loan in question was contracted. That position, if accepted, would mean that Mortimer had advanced her request pursuant to section 178(1.1) too soon. Mortimer obtained student loans between September 2004 and January 2009 to fund a bachelor of arts degree. She had previously obtained student loans between 1994 and 1998. She requested that the loans contracted for between 1994 and 1998 be considered for relief under section 178(1.1). The issue was whether the seven-year term mandated in section 178(1)(*g*)(ii) applied only to the course of studies financed by the loan in question or whether it was calculated from the termination of any subsequent period of study.

The request for a declaration was denied. The seven-year term mandated in section 178(1)(*g*)(ii) of the BIA applied to the course of studies financed by the loan in question. The total student loan debt for both periods of education might well place an individual, even with the improved career potential achieved by his or her most recent courses, in a situation of financial hardship such that repayment might be considered impossible and the totality of loans be discharged. However, if the advances made on the two distinct courses were kept separate, it might be entirely justified to liberate the individual from the first student loans that subsidized the less successful educational endeavour while insisting upon repayment of the second. That approach might well work to the advantage of federal and provincial agencies guaranteeing those loans. Mortimer was entitled to make her application under section 178(1.1) to discharge the loans made between 1994 and 1998.

Re Mortimer, 2012 CCLG ¶25-302

Superintendent's Levy Properly Retained Where Trustee Not Acting as Agent and Did Not Redeem Licences

Supreme Court of Nova Scotia, March 21, 2012

This was an application by McMullin and Associates Limited ("McMullin"), a secured creditor of the bankrupt Toby Zinck ("Zinck"), for a determination of whether the trustee in bankruptcy was right in retaining the Superintendent of Bankruptcy's levy under section 147 of the *Bankruptcy and Insolvency Act* (the "BIA") from the amount settled between the two as the payout of McMullin's secured claim. McMullin held security on Zinck's fishing licences. When the trustee found a buyer for Zinck's licences, it completed the sale and paid McMullin the amount of its secured claim less the Superintendent's levy of five per cent. McMullin objected to the payment of the levy and insisted that it was entitled to be paid the full amount as settled between the parties.

The application was dismissed. Under section 128(3) of the BIA, the levy was not payable if the trustee acted as agent, receiver, or mandatary for the secured creditor, or if the trustee redeemed the security by payment to the secured creditor. In this case, the trustee acquired the equity in Zinck's fishing licences by virtue of his assignment in bankruptcy. The trustee had an obligation to realize on the equity for the benefit of creditors. The trustee sought the cooperation of McMullin and the payout of the security was settled. The licences were sold and McMullin received the payout of the security less the Superintendent's levy. It was the trustee who effected the sale. It was not the creditor's sale; McMullin simply received the payout of its security in the course of the sale. The Court held that the trustee was not acting as an agent for McMullin. Nor was there a redemption. McMullin was not paid until the sale of the licences had been completed. Therefore, the levy was properly retained by the trustee.

Re Zinck, 2012 CCLG ¶25-303

Respondents Who Made Misleading Representations Designed To Deceive Canadians Ordered To Repay Monies Collected

Ontario Superior Court of Justice, March 1, 2012

This was an application by the Commissioner of Competition (the "Commissioner") for orders of restitution and administrative monetary penalties against the respondents. The Commissioner alleged that the respondents engaged in a scheme involving false and misleading representations, causing thousands of Canadian businesses, individuals, and organizations to inaccurately believe that the respondents were the well-known Yellow Pages Group ("YPG"). The respondents were not actually connected to YPG in any way. They operated Internet directory websites as a common enterprise throughout multiple jurisdictions in the world.

The Commissioner submitted that the particular victims in this case were induced to pay more than $2,000 each for services in circumstances where the victims thought that they were simply updating their existing records with YPG to obtain additional free Google advertising. More than 1,400 Canadians claimed to have been misled by the respondents' representations. The respondents submitted that they did not falsely or misleadingly represent a connection between their Internet business directories and YPG. A number of courts and regulatory authorities in different countries had already taken legal steps to shut down the respondents' practices.

The application was allowed. The Court found that the respondents had sent out unsolicited faxes that were clearly designed to create the impression that they were sent from YPG. Similar misrepresentations appeared in the respondents' domain names and invoices. The false or misleading representations were material as they intended to deceive and, in fact, did deceive many Canadians. The Court held that the contracts entered into between the respondents and Canadians were null and void. The respondents were required to publish corrective notices on their websites stating that they were not related to YPG and advising that their conduct was a violation of the *Competition Act*. A 10-year prohibition order was imposed.

The respondents were also required to make restitution by repaying all payments received from Canadians. The respondents' misleading conduct was extensive and there was little likelihood of self-correction. The respondents were continuing to engage in misleading conduct in Canada and had engaged in similar, if not identical, conduct in other countries. As a result, an administrative monetary penalty of $8 million was assessed against the respondents. The

respondents' bank was to transfer monies held on behalf of the respondents to the Commissioner.

Commissioner of Competition v. Yellow Page Marketing B.V., 2012 CCLG ¶25-304

Trial Necessary To Determine Enforceability of Mutual Release and Whether Defendant Provided Adequate Disclosure

Ontario Superior Court of Justice, March 12, 2012

The defendant, Prime Restaurants of Canada Inc. ("Prime"), brought a motion to strike jury notice and for summary judgment dismissing the claim of the plaintiffs, Thomas and Christine Dodd (the "Dodds"). The Dodds entered into a franchise agreement with Prime in 2003 to operate an East Side Mario's restaurant in Toronto. The Dodds' restaurant was not successful and Prime took it over in 2005. At that time, the parties entered into a mutual release, under which they released each other from any debts, claims, or actions. Also in 2005, the Dodds served Prime with a notice of rescission under the *Arthur Wishart Act (Franchise Disclosure), 2000* (the "Act"), which Prime believed was contrary to the mutual release.

In 2007, the Dodds commenced an action against Prime, claiming damages for breach of contract, negligence, misrepresentation, and rescission of the franchise agreement. Prime took the position that the action was barred by the mutual release and that the Dodds had waived a trial by jury under the franchise agreement. The Dodds claimed that the mutual release was not enforceable because it was unconscionable and void.

The motion was allowed in part. The Court held that a trial was necessary to determine the validity of the mutual release. In particular, a trial was necessary to determine whether each of the elements of the test for unconscionability had been met, specifically whether it was grossly unfair and improvident for the Dodds to sign the mutual release, and whether there was an overwhelming imbalance in bargaining power of which Prime took knowing advantage. A trial was also necessary to determine whether Prime had complied with disclosure requirements under the Act. However, there was no evidence that the franchise agreement was void *ab initio*. The waiver of the jury notice had been agreed to by the parties with the advice of counsel and, therefore, the waiver in the agreement was effective and the jury notice was struck.

Dodd v. Prime Restaurants of Canada Inc., 2012 CCLG ¶25-305


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