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Take Five

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ONTARIO EDITION

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Kaiser (Re), 2012 ONCA 838

Areas of Law: Bankruptcy and Insolvency; Solicitor-Client Privilege

~Disclosure of third party bankrolling bankrupt litigant presumptively privileged~

CLICK HERE TO ACCESS THE JUDGMENT

BACKGROUND

The appellant, Morris Kaiser, had been bankrupt for more than three years, and claimed to have been impecunious at the time of his bankruptcy. He made a number of trips to various casinos in the United States, gambling many hundreds of thousands of dollars in pursuit of this hobby, and made numerous cash withdrawals on credit cards allegedly paid for by a third party, Cecil Bergman, and by various companies under Bergman's control. The respondent Soberman Inc., Kaiser's trustee in bankruptcy, suspected that Kaiser was not impecunious at the time of his bankruptcy but, rather, that he was hiding assets from the trustee and using Bergman as a "straw man" to do so. Kaiser brought a motion to have Davis Moldaver LLP removed as solicitor for the trustee ("removal motion"). Newbould J. dismissed that motion on August 16, 2011, finding that the motion had been brought for tactical purposes to try to delay actions by the trustee in seeking to obtain a declaration that a third party, Bergman, was holding millions of dollars of assets in trust for Kaiser. Cronk J.A. dismissed an application for leave to appeal from the removal motion order. The trustee moved separately before Newbould J. for

an order compelling Kaiser and his lawyer Melvyn L. Solmon to disclose the identity of the person paying Solmon's legal fees respecting the removal motion ("second disclosure motion"). Kaiser opposed the second disclosure motion on the basis that the information sought was permanently protected by solicitor-client privilege. The motion judge ordered Kaiser and Solmon to disclose to the trustee the identity of the person who paid Solmon for his work on the removal motion. Kaiser appealed. The trustee moved to quash Kaiser's appeal because he had not sought leave as required by s. 193 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA").

Kaiser (Re), (cont.)

APPELLATE DECISION

The appeal was allowed the order below was set aside. The trustee's motion for an order directing Kaiser and Solmon to disclose the identity of the person who paid Kaiser's legal fees in connection with the removal motion was dismissed. Paragraph (e) of s. 193 of the BIA provides that an appeal lies to the Court of Appeal "in any other case by leave of a judge of the Court of Appeal." The issue raised is an important one for the practice and has implications beyond the four corners of this dispute. Accordingly, leave to appeal was granted pursuant to s. 193(e). Whether a court may order disclosure of the identity of a person paying the legal fees of a bankrupt in proceedings arising out of the bankruptcy depends upon whether that information is protected by solicitor-client privilege. The identity of the person paying Kaiser's legal fees on the motion to remove Davis's firm as solicitors of record was protected by that privilege and ought not to have been ordered disclosed. The prevailing law now appears to be that administrative information related to the establishment of a solicitor-client relationship – including a lawyer's bill and a client's ability to pay, and by extension, the source of the lawyer's fees – was presumptively privileged. The presumption may be rebutted by the party seeking disclosure.

COUNSEL COMMENTS

Kaiser (Re), 2012 ONCA 838

Comments provided by Brendan Hughes, Counsel for Respondent, Soberman Inc., as Trustee of the Estate of Morris Kaiser, a Bankrupt

Brendan Hughes

"The background to this recent Court of Appeal decision is over a decade of protracted litigation between Morris Kaiser and various entities which had been involved with Mr. Kaiser in various real estate investments. Over the years, this firm represented a number of the entities and individuals which were engaged in litigation with Mr. Kaiser. As a result, we garnered thorough experience and knowledge of Mr. Kaiser's operations and strategies.

Mr Kaiser, who was first petitioned in 1998, was adjudged bankrupt on October 17, 2009, with debts in excess of $30 million. In the case at hand, we represented Soberman Inc., the bankruptcy trustee of Mr. Kaiser's estate. At the time of his bankruptcy, Mr. Kaiser claimed to be impecunious. Despite this, the trustee discovered that subsequent to his bankruptcy, Mr. Kaiser had gambled away hundreds of thousands of dollars, made frequent trips to Las Vegas and other gambling destinations, made cash withdrawals from ATMs and generally maintained a lifestyle of means incongruent with his professed impecuniosity.

Further to the trustee's discovery of this information, a receivership application was brought to declare that Mr. Kaiser's longtime associate, Cecil Bergman, was essentially acting as a straw-man for Mr. Kaiser and providing him with whatever funds he desired. The origin of these funds was alleged to be Mr. Bergman's vast real estate holdings, which the trustee posited, were actually Kaiser assets being held in Mr. Bergman's name in order to defeat Mr. Kaiser's creditors.

What followed were attempts by Kaiser to derail the receivership process, the background of which is set out in the text of the Court of Appeal decision. What troubled the trustee was that Kaiser, while maintaining his claim of impecuniosity, seemed to have access

COUNSEL COMMENTS, Cont.

to unlimited means to fund the legal processes he commenced in the face of the receivership proceeding and his bankruptcy. In the Superior Court decision, Justice Newbould, ordered Mr. Kaiser and his counsel Melvyn Solmon to disclose the identity of the individual or entity which was funding Mr. Kaiser's apparently significant legal expenses.

In answer to Mr. Kaiser's argument that the identity of the "funder" was the subject of solicitor-client privilege, Justice Newbould found that the payment of the fees was in no way relevant to the merits of the removal motion and the disclosure sought could not be prejudicial to Mr. Kaiser. Therefore, according to Justice Newbould's reasons, the presumed prejudice that exists in this in this type of situation as enunciated by the Supreme Court in *Maranda v. Quebec* and *R v. Cunningham*, was rebutted.

On Appeal, Mr. Kaiser's counsel argued that under the 1982 Supreme Court decision of *Descoteaux v Mierzwinski* the information sought was subject to a permanent and absolute privilege. The Court of Appeal rejected the "permanent protection from disclosure" doctrine as espoused in *Descoteaux* and endorsed the more flexible and contextual approach taken in *Maranda* and *Cunningham*.

The Court of Appeal agreed that there was a rebuttable presumption of privilege in cases such as this where "administrative" or "peripheral" information was sought. The Court specifically found that the presumption may be rebutted by evidence showing that:

a) There is no reasonable possibility that the requested disclosure will lead to the revelation of confidential solicitor-client communications; or,

b) The requested information is not linked to the merits of the case and its disclosure would not prejudice the client.

Justice Newbould had considered these factors and found based on the record that the presumption had been rebutted. The Court of Appeal disagreed and by application of the above test, found that the identity of the "funder" was indeed the subject of privilege.

COUNSEL COMMENTS, Cont.

The trustee found itself concerned by the result as after three years, it had been unable to effectively administer Mr. Kaiser's bankruptcy in any meaningful way. Justice Newbould found that in the face of the bankruptcy, Mr. Kaiser and his counsel were "stonewalling in the extreme" and that Mr. Kaiser's action were specifically designed to frustrate the trustee:

> [4] In my view the motion is completely miscast and it is evident that it has been brought for tactical purposes to try to delay actions by the trustee in seeking to obtain a declaration that a third party, Cecil Bergman, is holding millions of dollars of assets in trust for Mr. Kaiser. It is quite evident that Mr. Kaiser, who has an obligation to the trustee to assist in locating assets belonging to the bankrupt estate, is taking every opportunity to refuse to provide information that could assist the trustee.

There is logic in the Court of Appeal's finding that Mr. Kaiser would suffer prejudice in the overall bankruptcy in that if the "funder" turned out to be Mr. Bergman, that information might assist the trustee in its receivership motion against Mr. Bergman. However, the trustee would argue that this prejudice should be evaluated in light of the specific findings that Mr. Kaiser was doing whatever possible to impede the administration of his bankruptcy estate with funds of unknown origin.

During the bankruptcy the Trustee is charged with administering Mr. Kaiser's finances. Mr. Kaiser is obliged to cooperate with the Trustee. The effect of this decision is that Mr. Kaiser, who was alleged to be hiding significant assets from the Trustee, was able to keep from the Trustee the source of funds available to Kaiser which he was using to directly impede the Trustee's administration thereby further thwarting the bankruptcy process.

In the larger picture, the Court of Appeal has clearly confirmed the "presumed" instead of "permanent" privilege that attaches to this aspect of legal fees. So, while a future trustee in this position may not be helped by the factual findings in the case, it may benefit from the clear adaption of a flexible approach and rebuttable presumption and be able to present its case accordingly within that paradigm."

COUNSEL COMMENTS

Kaiser (Re), 2012 ONCA 838

Comments provided by Melvyn Solomon and Cameron Wetmore, Counsel for the Appellant Morris Kaiser

Melvyn Solomon

Cameron Wetmore

"In this decision the Court of Appeal made several important clarifications that have significant implications for legal practitioners and their clients.

First, the Court clarified that, information (which it described as "peripheral information" or "administrative information") related to the establishment of the solicitor-client relationship, is presumptively privileged under the contextual approach adopted by the Supreme Court of Canada in *Maranda v. Richer.* The Court also provided several examples of the "peripheral information" that would require courts to consider the presumptive test.

Second, the Court synthesized the questions that must be considered when addressing the presumption from its previous decision *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* and the more recent Supreme Court of Canada decision *R v. Cunningham*. It is now clear that Ontario courts must be satisfied that disclosure of "peripheral information" will not directly or indirectly reveal a confidential communication, that the peripheral information sought is not linked to the merits of the case and its disclosure will cause no prejudice to the client, before the presumption of privilege can be rebutted.

The Court also clarified that a communication to a lawyer advising the lawyer how he or she will be paid is a confidential communication. Since the information sought in this case would reveal the contents of that confidential communication, the Court had no trouble finding that the presumption of privilege was not rebutted. However, the Court also clarified that when considering the potential prejudice of disclosure to the client, Ontario courts must take a broad view and consider

COUNSEL COMMENTS, Cont.

the entire "theatre of battle" rather than the more restricted view taken by the original Motion Judge.

When one looks at the presumptive analysis that has been adopted by the Court, from a practical point of view, it is difficult to imagine many circumstances where a person's adversary in ongoing litigation will be able to force disclosure of the "peripheral information" that gives rise to the presumption of privilege. If the adversary wants the information for a reason related to a proceeding involving the client (which proceeding must be considered broadly) such a request appears bound to fail. That this is so is a direct result of the sacrosanct principle that a client's choice to be represented by a lawyer must not be used against the client's interests. It is this principle that has driven the evolution of solicitor-client privilege in Canada into a fundamental right protected by the constitution to be kept as near to absolute as possible.

It is only circumstances like those in the *Ontario (Ministry of the Attorney General)* where limited peripheral information is being sought by journalists long after the final resolution of the legal proceedings that gave rise to the information, where the presumption of privilege is likely to be rebutted. Even then however, in light of the clarifications by the Court of Appeal in this case, the scope of information that arises from a solicitor-client relationship that will be accessible to persons outside that confidential relationship remains exceedingly limited."

Dembeck v. Wright, 2012 ONCA 852

Areas of Law: Family Law; Employment Law; Matrimonial Property; Severance Packages

~Spouse's employment severance package not deductible at date of marriage; reclassification of property violating tenets of Family Law Act~

CLICK HERE TO ACCESS THE JUDGMENT

BACKGROUND

The parties were married on December 30, 1998; they separated on April 19, 2007. There were two children in the family. Both children lived with the appellant wife, who was then 49. The respondent husband was 62. When the parties married, the wife was a full-time student and the husband was working for a company later acquired by Unilever. The wife then obtained her degree and an early childhood education certificate and started a daycare business, while the husband rose to a relatively senior position at Unilever. In April 2007, the husband's employment was terminated. Upon his departure from the company on April 16, 2007, he accepted a termination package and payout of his pension. The termination package totalled $190,000, before tax. This was the combined amount owing to the husband arising from Unilever's breach of the employment contract, agreed upon as 18 months' salary in lieu of notice ("common law damages") and eight weeks' pay under the *Employment Standards Act*, R.S.O. 1990, c. E.14 ("ESA severance"). The parties separated three days after the husband's employment was terminated. The trial judge allowed the husband a date of marriage deduction for the uncrystallized ESA severance portion of the termination package. The wife appealed, alleging that the trial judge erred in identifying $35,241.26, the ESA severance part of the $190,000 termination package, as property owned by the husband as of the date of marriage. The wife submitted that, like the common law damages portion, the husband's right to ESA severance was not property owned by him until his employment was terminated without cause, just prior to the date of separation.

APPELLATE DECISION

The appeal was allowed in part. The trial judge erred in finding that the husband's entitlement to ESA severance was property he owned on the day he married the wife. At issue was under what circumstances, if any, does a spouse "own" on the date of marriage an entitlement to a severance payment that he or she later receives? Despite the importance of defining property broadly within the context of *Family Law Act* ("FLA") proceedings, with one exception Ontario courts have consistently held that entitlement to severance pay is only property once it has crystallized. For a severance package to be considered property as of either of the two dates that form the basis of any equalization calculation, there must be a right or entitlement to it at that date. When the husband and the wife married, the husband had the right to look to his employer for payment in accordance with the provisions of the ESA, legislation which restricts the circumstances under which an employer is obliged to pay severance. It follows that, until his employment was terminated in circumstances where, according to the ESA, the employer was obliged to pay severance to the husband, he had no a right or entitlement to severance. Accordingly, the trial judge erred in concluding that the husband's accumulated ESA severance as of the date of marriage, was property owned by him at that point in time. The husband's argued in the alternative that his interest in the ESA severance part of the $190,000 retroactively became date-of-marriage property when his entitlement to the amount of ESA severance that had fully accumulated prior to marriage, crystallized before the date of separation. The question this argument raises is whether an interest that is not property when the parties marry can be retroactively reclassified as property after a subsequent event renders it certain. The wording of the FLA negates that assumption. Section 4(1) of the FLA defines property as including "any interest, present or future, vested or contingent, in real or personal property". There is nothing in this wording that gives the court jurisdiction to reclassify an interest as circumstances change. Reclassification of an interest that is not property at either of the date of marriage or the date of separation would be contrary to Ontario's mechanism for giving effect to the policy underlying modern family law legislation. To allow retroactive reclassification of property would be anything but orderly. It would inject a substantial dose of uncertainty into a statutory framework in want of none. It would also increase the consumption of limited resources of time, money and emotional energy that accompany the resolution of matrimonial disputes.

COUNSEL COMMENTS

Dembeck v. Wright, 2012 ONCA 852

Comments provided by Patrick J. Kraemer and Daniel W. Veinot, Counsel for the Appellant, Ella Dembeck

Patrick J. Kraemer

Daniel W. Veinot

"Our first piece of advice to anyone appearing before the Court of Appeal for Ontario – get the names of judges right if you feel inclined to address them by name – i.e. Justice Gillese, Justice Epstein and Justice Rouleau. You should not under any circumstances address Justice Rouleau as Justice Feldman notwithstanding that the court docket indicates the Honourable Justices Gillese, Epstein and Feldman are sitting. The Justices were all very charitable and overlooked the faux pas.

Justice Epstein authored the unanimous decision and we particularly liked her "big picture" approach to the case. To paraphrase the Honourable Justice starting at about paragraph 40 she asks "What is property?" The main issue in this case was all about property, the nature of property and how it is defined. More specifically it answered the question, "Is a severance payment property?" or more fully, is "Is a severance payment property for the purpose of calculating net family property under the *Family Law Act* (the "Act")?"

Justice Epstein rejected that a severance payment is property for two main reasons. The Honourable Justice first analyzed the definition of property under the Act and concluded that the fairly broad definition, "… any interest, present or future, vested or contingent, …" does not allow for a re-classification as circumstances changes. Second, she determined that any property must necessarily have a

COUNSEL COMMENTS, Cont.

value at both the date of marriage and the date of separation under the Act. She also cited that the certainty created by the Act would be undermined to allow a significant shift in what she termed a "tortuous definition" of property as argued by the husband. Here, she rejected that the husband had any future, contingent interest in a severance at the date of marriage. She further rejected, that once he was terminated, i.e., circumstances changed, the payment could be reclassified as an uncrystallized right to a payment at the date of marriage and some value at the date of marriage could be deducted from the actual payment received at the date of separation.

The highly respected family law judge, Justice Craig Perkins found at trial that yes, severance payment is property, or at least a portion of it under the *Employment Standards Act* (the "ESA"). Once it is determined to be property it must be valued at the date of marriage and at the date of separation like all other marital property. Our esteemed colleague, Mr. Elliott Berlin did a great job of peeling back the layers of valuation methods as it related to pension funds and how severance should be treated and calculated the same as a pension. Justice Perkins didn't completely buy those arguments but did arrive at a method for valuing the severance payment based on the rules under the ESA at the time of marriage and at the time of separation.

We believed the jurisprudence in this area was pretty clearly in our favour when we launched the appeal. There was one anomaly case, *Arvelin v. Arvelin*, [1996] O.J. No. 412 (Gen. Div.), and the present case has clearly set the record straight and will give guidance to family law practitioners. Severance pay is only property once it has crystallized i.e. once the cash is in your hand.

In this case the severance pay was substantial and was in the hands of the husband prior to separation date. There is no deduction for some value of the severance pay at the date of marriage.

This was an enjoyable case. The legal concepts were interesting and novel, opposing counsel was cordial, competent and a true but fair adversary. The judges on the bench at both levels were attentive, probing and insightful. We look forward to our next appearance."

Metropolitan Toronto Condominium Corporation No. 1352 v. Newport Beach Development Inc., 2012 ONCA 850

Areas of Law: Real Property; Condominium Law; Administrative Law; Ontario New Home Warranties Plan Act; Issue Estoppel

~Administrator's decision under Ontario New Home Warranties Plan Act not estopping civil action; complainant not required to submit matter to Licence Appeal Tribunal rather than launching civil action; purchase agreement clause not precluding civil actions in negligence, breach of contract, breach of statutory duty or breach of fiduciary duty~

CLICK HERE TO ACCESS THE JUDGMENT

BACKGROUND

The respondent Metropolitan Toronto Condominium Corporation No. 1352 ("Metro 1352") managed a luxury condominium project in Etobicoke near the shore of Lake Ontario. Metro 1352 alleged that the project had two major construction defects: the sanitary sewer system was not built properly, causing toilets in the condominium units to overflow and the units themselves to flood with sewage; and a systemic failure of the exterior cladding over the project, called the exterior insulated finish system ("EIFS"), has caused water penetration in the condominium units. Metro 1352 sought compensation for these two defects under the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. 0.31 ("Act"). The administrator of the Act, the respondent Tarion Warranty Corporation ("Tarion"), denied compensation. Metro 1352 sued appellant Newport Beach Development Inc. ("Newport"), the vendor and declarant of the project; appellant Canderel Stoneridge Equity Group Inc.("Canderel"), a developer related to Newport; appellant Salvatore

MTC Corporation No. 1352 v. Newport Beach Development Inc., (cont.)

Spampinato a.k.a. Sal Spampinato ("Spampinato"), an officer of Canderel; Enersys Engineering Group Inc., and Eric Pun, the engineers on the project; and Tarion. It asserted causes of action for breach of statutory warranty, negligence, breach of fiduciary duty and breach of contract. Newport moved for, *inter alia,* an order dismissing the action on the ground that the litigation was an abuse of process. Newport argued that Tarion's decisions denying warranty coverage could only be reviewed by an appeal to the License Appeal Tribunal. Either the doctrine of issue estoppel or the rule against collateral attack prevented Metro 1352 from re-litigating its claim by a civil action. The motion judge, Corrick J., disagreed and dismissed the motion in its entirety. Newport, along with Canderel and Spampinato, appeal the dismissal.

APPELLATE DECISION

The appeal was dismissed. Newport argued that allowing Metro 1352 to maintain this action against it and the parties related to it was manifestly unfair and amounted to an abuse of process. The argument consisted of claims for issue estoppel, since Tarion had made a final and judicial determination of Metro 1352's claims; collateral attack, since Metro 1352's civil action was an impermissible collateral attack on Tarion's decision; and section 23 of the purchase agreements between Newport and the homeowners, which precluded claims for negligence, breach of contract, breach of fiduciary duty, and any warranties apart from those provided for under the Act. Section 13(6) of the Act provides that the statutory warranties are in addition to any other rights a homeowner may have. Therefore, subject to Newport's argument on s. 23 of the purchase agreements, Metro 1352 was entitled to pursue its common law causes of action in the Superior Court. For the purpose of applying issue estoppel, Tarion's decisions were judicial and final decisions. However, the Court of Appeal exercised its discretion not to apply issue estoppel to the Tarion decisions because doing so would work an injustice. Tarion's mandate is to protect the rights of new homebuyers and ensure that builders abide by the legislation. An approach that promotes rather than limits the avenues a homeowner may pursue to obtain relief is consistent with that purpose. The Act does not contain any language to show that the legislature intended to preclude a civil action against the vendor on the statutory warranties and require homeowners to go to the Licence Appeal Tribunal. Although the Act does

MTC Corporation No. 1352 v. Newport Beach Development Inc., (cont.)

provide for an appeal to the Tribunal, the language of s. 16(3) is permissive. It says the homeowner is "entitled to a hearing by the Tribunal", not that he or she "shall" or "must" proceed before the Tribunal to the exclusion of any other forum. Newport further argued that Metro 1352's civil action was an abuse of process rests on the rule against collateral attack. Newport submitted that if Metro 1352 wished to challenge Tarion's decisions it was required to do so by an appeal to the Licence Appeal Tribunal, the body specifically established by the legislature to review warranty decisions. Challenging Tarion's decisions by an action in the Superior Court amounted to an impermissible collateral attack on those decisions. However, the Court of Appeal found that the scheme and language of the Act show that an appeal to the Licence Appeal Tribunal was meant to be permissive – not the exclusive forum in which a homeowner may seek relief for an adverse Tarion decision on warrantability. Although the availability of an appeal to a specialized tribunal with court-like procedures weighed against permitting a court action, the consumer protection purpose of the legislation and the convenience of having all parties and all claims in one forum weighed heavily in favour of permitting a court action. As for s. 23 of the purchase agreements,

this clause limited the warranties given by the vendor to the purchaser of the units to those expressed in Act. It did not exclude or limit a party's liability for negligence, breach of contract, breach of a statutory duty or breach of a fiduciary duty. It deals solely with warranties of workmanship and materials. Thus, s. 23 does not preclude an action for breach of contract, negligence or breach of fiduciary duty. The motion judge did not err by determining that Metro 1352's claims for breach of warranty for defects in the sanitary sewer system constituted a major structural defect. Newport had the burden of showing that it was plain and obvious the alleged deficiencies in the sanitary sewer system did not constitute a major structural defect. It cannot meet this burden for at least three reasons: Metro 1352 has pleaded that the sewer system did not function because it was originally constructed in contravention of the approved permit plans and the Ontario Building Code; if the exclusion to the

MTC Corporation No. 1352 v. Newport Beach Development Inc., (cont.)

definition of major structural defect in s. 1 of *Administration of the Plan*, R.R.O. 1990, Reg. 892 ("Reg. 892") was meant to exclude sewer systems, Reg. 892 could have said so expressly; and the Act and Reg. 892 expressly allow for compensation out of the guarantee fund for damage "in respect of a sewage disposal system". Finally,

Tarion contended that the motion judge erred by failing to hold that the EIFS claims were pleaded after the expiry of the limitation period. Under s. 4 of the *Limitations Act 2002*, S.O. 2002, c. 24, Sch. B, a claim must be pleaded within two years of the date that it was discovered. This submission fails, as the EIFS claims were pleaded in the Statement of Claim, which was issued on August 24, 2006. The Technical Audit Report dated November 26, 2001 and prepared by Halsall Associates Limited, cited in paragraph 9 of the Statement of Claim, referred to leaks through the doors of townhouses 11 and 22, leakage through the ceiling vent in the basement of townhouse 22 during heavy rain, and water pooling on all ground-floor patios of the townhouses. Furthermore, Newport's motion was premature because it had not yet delivered a statement of defence, and a limitation defence, like any other defence, must be pleaded.

COUNSEL COMMENTS

MTC Corp No. 1352 v. Newport Beach Development Inc., 2012 ONCA 850

Comments provided by Blaine Fedson, counsel for the Respondent, Metropolitan Toronto Condominium Corp. No. 1352

"I have been asked to comment briefly on matters that might be of interest to lawyers (well, condo lawyers) with respect to the Court of Appeal for Ontario ("OCA") decision in *Metropolitan Toronto Condominium Corporation No. 1352 v. Newport et. al. ("Metro Condo")*, which concerns claims by new Condominium Corporations ("Condos") for original construction deficiencies, and is summarized elsewhere herein. My comments are limited to claims for breach of the statutory warranties under the *Ontario New Home Warranties Plan Act* ("ONHWPA"), and its Regulations. Issues of exclusion/ disclaimer clauses, limitation periods and timelines, major structural defects and common law claims, etc., are beyond the scope of this brief commentary. (References to paragraphs of the decision in Metro Condo are in square brackets below.)

What is Important:

The most important determination by the OCA is that Condos can sue declarants and Tarion with respect to damages for breach of statutory warranty in Court.

Until Metro Condo, it was unclear whether Condos were required to proceed to the Ontario Licence Appeal Tribunal ("LAT") for recourse, where Tarion denied warranty claims in a 'decision letter' pursuant to sections 14 and 16 of the ONHWPA, or whether Condos could sue in Court, as:

> [4] … (the appellant) "Newport argued that Tarion's decisions denying warranty coverage could only be reviewed by an appeal to the License Appeal Tribunal. Either the doctrine of issue estoppel or the rule against collateral attack prevented Metro 1352 from re-litigating its claim by a civil action."

Unlike homeowners, Condos cannot avoid the 'Tarion claim / LAT process' by choosing not to make a claim to Tarion (and thereby avoiding the 'decision

COUNSEL COMMENTS, Cont.

letter' and appeal to LAT provisions of the ONHWPA in sections 14 and 16 respectively). That is because s.44 of the *Condominium Act, 1998*, requires all new Condos in Ontario to make construction deficiency claims to Tarion; it is not an option for Condos.

Fortunately, the OCA agreed with our condominium client that, having made a claim to Tarion, it was not thereby required to pursue the LAT appeal process and forego claims for breach of statutory warranty in Court, because that would "work an injustice" [40].

Possible advantages to Condos with the option of suing in Court, include:

1. Allowing Condos to maintain all of their claims - including a claim for breach of the statutory warranties - against all parties in one forum has the advantage of convenience [72].

2. The right to pre-hearing production and discovery, or the right to cross-examine representatives or witnesses [75].

Another possible advantage in pursuing such statutory warranty claims in Court rather than to LAT, is that significant engineering costs (and legal costs in part) may be recoverable in Court, whereas at LAT they generally are not.

Accordingly, while the expedient appeal to LAT process may work well with claims by individual owners for single homes, Condos with complicated claims worth significant sums based on extensive engineering evidence, may now feel free to pursue their statutory warranty claims in Court, thanks to the OCA in Metro Condo.

What is Interesting:

The OCA made it clear that Condos have a right to sue Tarion in Court as issue estoppel could not apply to Tarion as the 'decision maker' [66, 73, 83] (and collateral attack does not apply [93]). The only issue for the OCA was whether "a vendor such as Newport could rely upon issue estoppel when Tarion cannot" [74].

That means that if Newport could rely upon issue estoppel when Tarion cannot, then the plaintiff condominium would have no direct recourse against Newport for breach of Newport's own statutory warranty (administered by Tarion) in any

COUNSEL COMMENTS, Cont.

forum including LAT, where the condominium chose to sue Tarion in Court rather than appeal Tarion's decision to LAT, as it was entitled to [8, 19, 20].

Fortunately, however, the OCA decided that Newport could not rely upon issue estoppel and that the plaintiff condominium could sue it in Court for breach of statutory warranty, along with Tarion."

COUNSEL COMMENTS, Cont.

M T C Corp No. 1352 v. Newport Beach Development Inc., 2012 ONCA 850

Comments provided by David Outerbridge, Counsel for the Respondent Tarion Warranty Corporation

David Outerbridge

"The Court of Appeal's decision is an especially important one for owners of new homes in Ontario – including not only condominium corporations and unit owners, but also owners of freehold (detached) homes.

The owners of new homes in Ontario receive the benefit of the statutory warranties set out in the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 and its regulations (the "*ONHWP Act*"). The *ONHWP Act* is consumer protection legislation. The warranties are designed to ensure that builders and vendors of new homes are held to certain minimum standards of construction and customer service. Tarion Warranty Corporation is the non-profit corporation appointed by the Ontario government to administer this consumer protection regime.

The Court of Appeal decision confirms and reinforces certain core principles relating to the protections afforded by the *ONHWP Act*, and at the same time resolves a key area of uncertainty that had been created by conflicting decisions among the lower courts.

Reinforcing core principles under the *ONHWP Act*

1. Purpose of the ONHWP Act: Consistent with its recent pronouncements in *Tarion Warranty Corporation v. Boros*, 2011 ONCA 374 and *Tarion Warranty Corporation v. Kozy*, 2011 ONCA 795, the Court of Appeal confirmed the consumer protection purpose of the *ONHWP Act*. The Court described Tarion's mandate as being "to protect the rights of new home buyers and ensure that builders abide by the legislation" (para. 67).

2. The homeowner's ability to sue: Lower courts in Ontario had held since at least 1990 that a homeowner aggrieved by a Tarion decision on

COUNSEL COMMENTS, Cont.

warrantability had the option either: (a) to appeal the warrantability decision through an administrative process before the Licence Appeal Tribunal; or (b) to sue Tarion in the civil courts.

The builder in this appeal challenged that established case law, and asked the Court of Appeal to rule that there was no right to sue Tarion in court. Acting in support of the condominium corporation and consumers more broadly, Tarion opposed the builder on this issue – arguing that homeowners should be permitted to sue Tarion in court.

The Court of Appeal declined the builder's invitation, and affirmed the principle advanced by Tarion and the condominium corporation. The Court held that, primarily for policy reasons associated with the *ONHWP Act's* consumer protection purpose, homeowners may choose the remedial route that best serves their needs – either the more informal, expeditious route of an administrative law appeal, or litigation in the courts. The Court recognized the added benefits that a court action may afford for consumers, such as the ability to sue multiple parties, a greater range of available remedies, the absence of a legislatively-prescribed dollar cap on damages, and the ability to sue for secondary damages (paras. 61-76).

3. Limited remedies available against Tarion: While endorsing a homeowner's right to sue Tarion in court instead of engaging the available administrative remedies, the Court of Appeal confirmed the limitations that the *ONHWP Act* imposes on a homeowner's recourse against Tarion.

Regardless of whether the homeowner is in court or before the Licence Appeal Tribunal, the homeowner: (a) "has no claim against Tarion for any common law causes of action"; (b) may not make a claim for compensation from Tarion "for damage caused by someone other than the vendor"; and (c) "has no claim against Tarion for other damage [beyond the defect and damage to the features of the home caused by the defect], such as personal injury or property damage" (para. 13).

The Court of Appeal confirmed that the owner's recovery from Tarion is capped by dollar limits set out in a regulation under the *ONHWP Act* (para. 13). As the Court of Appeal stated: "Of course, the relief to which a homeowner would be entitled in an action against Tarion [for payment for breach of warranty] would be limited to the prescribed compensation for

COUNSEL COMMENTS, Cont.

breach of the statutory warranties under the *[ONHWP] Act* and Regulation 892" (para. 83).

Resolving uncertainty created by conflicting decisions below

The major clarification to the law that emerges from the Court of Appeal's decision is the Court's determination that warrantability decisions made by Tarion under the ONHWP Act are "judicial" and "final" decisions capable of giving rise to issue estoppel.

For several years, there had been conflicting decisions among lower courts in the province on this issue. Applying the principles set out by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, the Court of Appeal resolved the conflict: Tarion's warrantability decisions are judicial because they are made by a body capable of receiving and exercising adjudicative authority, they are required to be made in a judicial manner, and they are in fact made in a judicial manner (paras. 44-53). Tarion's warrantability decisions are final because, if not successfully challenged on review, they stand as the governing adjudication of the warranty question at issue (paras. 54-57)."

Brisco Estate v. Canadian Premier Life Insurance Company, 2012 ONCA 854

Areas of Law: Evidence; Hearsay Rule; Exceptions; Threshold Reliability; Statements of Deceased; Corroborative Evidence

~Hearsay statements of deceased in insurance claim admissible; sufficient corroborative evidence to satisfy s. 13 of Evidence Act~

CLICK HERE TO ACCESS THE JUDGMENT

BACKGROUND

The appellant, Canadian Premier Life Insurance Company ("Canadian Premier"), had insured the deceased Robert Brisco under a Group Accident Insurance Certificate issued to Sears Canada Inc. Canadian Premier contended that Brisco had cancelled the policy in a telephone conversation on August 25, 1998. Prior to August 25, 1998, Brisco held six insurance policies. Brisco died in January 2004 in an airplane crash, thus triggering the $1,000,000 insurance benefits for common carrier fatal accidents. The respondents Paul Brisco, Michael Jason Brisco, Robert Jeffrey Brisco, Kelly Brianne Brisco, and Brandon Andrew Brisco contended that Canadian Premier cancelled the policy by mistake and that Brisco intended to cancel a different policy. The respondents' case of mistake depended upon statements Brisco had made over several years after 1998 evidencing his belief that he had $2,000,000 in insurance. The trial judge admitted Brisco's

statements under the state of mind exception to the hearsay rule. Canadian Premier submitted that the evidence was inadmissible. In the alternative, it argued that there was no corroboration as required by s. 13 of the *Evidence Act*, R.S.O. 1990, c. E.23.

Brisco Estate v. Canadian Premier Life Insurance Company, (cont.)

APPELLATE DECISION

The appeal was dismissed. The issue to which the hearsay evidence was relevant was whether, on August 25, 1998, Brisco cancelled the accidental death policy that he had taken out some seven months earlier. The relevance of the hearsay lay in the proposition that the statements made by Brisco over the years after 1998 showed his continuing belief that he had two million-dollar policies. It can therefore be inferred that he did not cancel one of those two policies and that Canadian Premier mistakenly cancelled the policy. Brisco's statements, when considered with the confirmatory evidence, have sufficient threshold reliability to warrant their reception. Over many years and to several different people, Brisco referred to the existence of the two policies. There was no obvious motive for Brisco to lie to his children or brother. At least one of the statements, the statement to his son Jeffrey just before Christmas 2003, was made under circumstances of some solemnity: Jeffrey thought he was about to go to Afghanistan, and they were having a serious discussion about insurance. It is unlikely that Brisco would have forgotten that he cancelled a million-dollar policy. There was also some evidence that, considered cumulatively, tended to confirm the truthfulness of the statements, i.e. that Briscoe believed he still owned both $1,000,000 policies, and supported the inference that the accidental death policy was cancelled through Canadian Premier's mistake. Section 13 of the *Evidence Act* provides: "In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an … interested party shall not obtain a verdict … on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence." Section 13 is an exception to the general rule in most common law countries that the evidence of one witness is capable of meeting the burden of proof in civil or criminal proceedings. Section 13 is limited to circumstances in which the interested party claims as an heir, next of kin, executor, administrator or assignee and not simply because, coincidentally, the person happens to fall within one of these categories. In this case, the Brisco children do not claim as next of kin or heirs but under a contractual right as beneficiaries of an insurance policy. Since s. 13 has no application to the Brisco children, there is no need for corroboration of their evidence. The fact that the estate is involved does not mean that the evidence of the children must be corroborated. In any event, there is evidence that, when considered cumulatively, is capable of corroborating both the evidence of the children and that of the executor Paul Brisco.

FEATURE CLIENT ARTICLE

Tim Hortons Franchisees Must Be Content With Profits from Coffee, Not Food

by Michael I. Binetti
Affleck Greene McMurtry LLP

Tim Hortons franchisees have lost their challenge to Tim Hortons' "Always Fresh" model that allegedly reduced the profitability of donuts, TimBits, and other food items. In *Fairview Donut Inc. v. The TDL Group Corp.* the Ontario Court of Appeal upheld a lengthy lower court decision that on the one hand certified a class action against Tim Hortons, but on the other hand granted summary judgment in its favour and dismissed the action.

At issue was the requirement for Tim Hortons franchisees to purchase par-baked donuts and lunch menu items directly from Tim Hortons rather than making those items in store as had been the case. The franchisees argued that the requirement to purchase items directly from Tim Hortons had a negative impact on their profitability as the items were more expensive than in-store scratch-baked items such as donuts.

The Court of Appeal accepted the motion judge's opinion that it was not the profitability of individual items that was important in determining whether Tim Hortons had breached its contract with the franchisees, but rather the profitability and prosperity of the Tim Hortons system as a whole.

For example, the evidence on the motion was that the expression "Tim Horton System" was used some twenty-five times in the course of the franchise agreement, including a body of knowledge, trademarks, procedures and products, "all of which may be improved, further developed or otherwise modified from time to time". As part of that agreement, the franchisees agreed to follow the procedures specified by that system and to sell the products that are part of the system. [para. 427 of Superior Court of Justice decision]

The plaintiffs also argued that Tim Hortons was not acting in good faith towards its franchisees as required by the *Arthur Wishart Act (Franchise Disclosure)* at common law by centralising production of food items. On this point, the Court of Appeal again agreed with the motion judge, Strathy J., that there was ample evidence led that scratch-baking was unsustainable in the long run and that the move to centralized baking was beneficial for franchisees.

Unhelpful to the plaintiff franchisees was the evidence of eleven other franchisees, which

FEATURE CLIENT ARTICLE

was uniformly positive about the benefits of the Always Fresh centralized baking. They gave evidence that the Always Fresh method permitted them to bake as required throughout the day, allowing them to respond more effectively to customer demand and reducing the amount of "throws". They acknowledged that there had been an increase in food cost for the Always Fresh par-baked products, but said that this was offset by lower labour costs, reduced wastage, improved product quality and a much easier baking method. It was their overwhelming evidence that the conversion to Always Fresh was beneficial to the franchisees and had been an improvement in the Tim Hortons system. [para. 50 of Superior Court of Justice decision]

The plaintiffs had also amended their pleading to force a competition law theory onto their case. They alleged that Tim Hortons had, through the Always Fresh model and its distribution system, violated sections 45 (conspiracy) and 61 (price maintenance) of the *Competition Act* by using agreements and promises to fix, maintain or unreasonably enhance the prices of Always Fresh baked goods, thereby raising the prices significantly above market prices and reducing the profits of the franchisees. Strathy J. rejected both claims.

Strathy J. observed in his decision on the motion that "there is nothing civilly or criminally wrong with a franchisor selling a product to its franchisee at a price that results in a profit – even a substantial profit – to the franchisor." [para. 574 of Superior Court of Justice decision]

Strathy J. dismissed the plaintiffs allegations of retail price maintenance under s. 61 of the *Competition Act*. This provision, which has since been repealed, did not prohibit a supplier from making a large profit on product it sells, nor from raising its own prices. There was no evidence that Tim Hortons was trying to influence the prices at which its franchisees sold donuts (apart from a stipulated maximum price).

Similarly, the old section 45 did not prohibit the taking of excessive profits, Strathy J. observed. He found that there was no evidence of an anti-competitive effect from the prices charged to franchisees.

Finally, the plaintiffs' *Competition Act* claims were filed too late, since the latest that the plaintiffs could reasonably have discovered the alleged breaches of the *Competition Act* was more than two years before the claims were added. [para. 647 of Superior Court of Justice decision].

The costs of the appeal were fixed at $125,000.

Titova v. Titov, 2012 ONCA 864

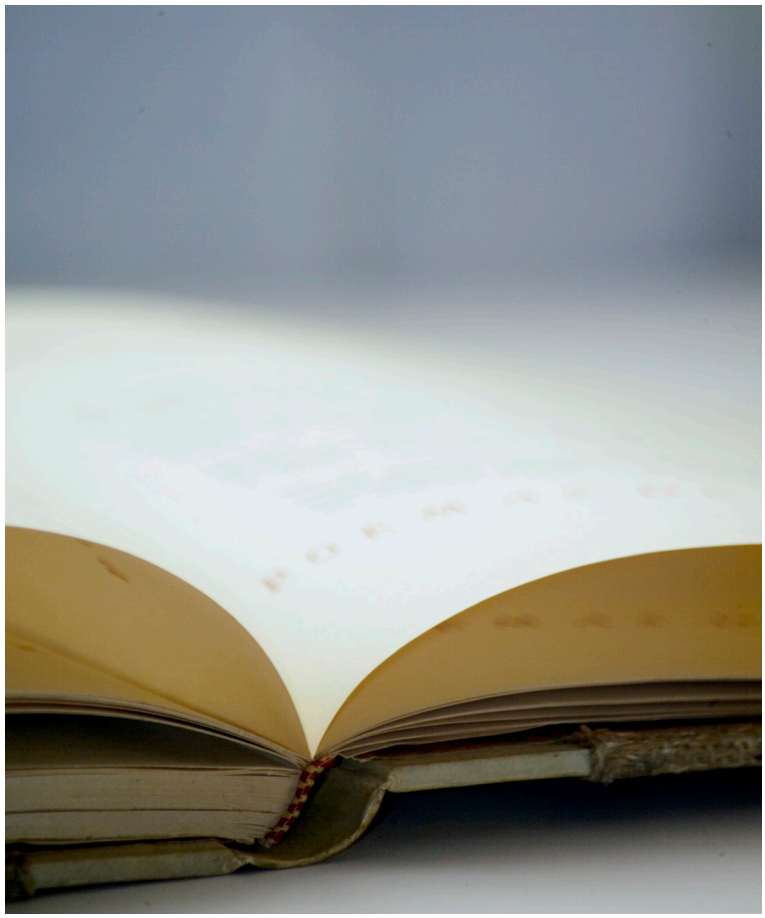
Areas of Law: Family Law; Child Support; Child Support Guidelines; Extraordinary Expenses

~Trial judge failing to properly apply extraordinary expenses provisions under Child Support Guidelines~

CLICK HERE TO ACCESS THE JUDGMENT

BACKGROUND

In 1985, the respondent mother's first child Anton was born. He was later adopted by the appellant father. In 1987, the parties married and, later that year, their daughter, Natasha, was born. Their youngest son, Andrew, was born in 1995. The parties separated in 2002 and entered into a separation agreement on May 13, 2003. In 2011, following a three-day trial over outstanding disputes, the judge noted the extended history of this case, dating back to 2002, and noted that the father had dragged the matter out. The trial judge ordered, in part, that, commencing November 1, 2008, the parties were to share s. 7 *Child Support Guidelines*, O. Reg. 391/97 ("Guidelines") expenses in proportion to their respective incomes with the mother paying 16% and the father 84%; arrears of child support were fixed at $18,349.49 and the father was ordered to pay $500 per month in respect of those arrears commencing



in December 2011 and continuing until paid in full. The father appealed, contending that the trial judge failed to apply s. 7 of the Guidelines; failed to consider and apply the applicable legal principles for awarding retroactive support; overruled a final order in relation to arrears; made substantive orders that were not requested by either party; committed palpable and overriding factual errors; and gave inadequate reasons.

Titova v. Titov, (cont.)

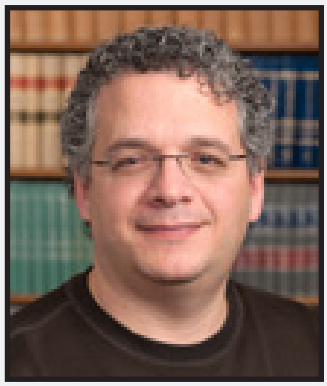
APPELLATE DECISION

The appeal was allowed. In awarding s. 7 special and extraordinary expenses, the trial judge calculates each party's income for child support purposes, determines whether the claimed expenses fall within one of the enumerated categories of s. 7 of the Guidelines, determines whether the claimed expenses are necessary "in relation to the child's best interests" and are reasonable "in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation." If the expenses fall under s. 7(1)(d) or (f) of the Guidelines, the trial judge determines whether the expenses are "extraordinary". Finally, the court considers what amount, if any, the child should reasonably contribute to the payment of these expenses and then applies any tax deductions or credits. The trial judge considered almost none of the relevant factors. There was no consideration of the parents' means, despite the fact that the mother's income, as reported in her income tax statements, ranged from a high of $67,250 in 2007 to a low of $18,500 in 2011. And while the father argued that the wife had undisclosed income, there was no discussion of this in the trial judge's reasons. There was also no discussion of the children's means and ability to contribute, or the reasonableness of the expenses. This was so even though, at the time of trial, Anton was almost 26 and Natasha was 24. There was also no explanation for the appropriateness of the non-sports-related s. 7 expenses. These non-sports-related s. 7 expenses included CAA membership driving lessons, school break camps, parking and college fees. The reasons were inadequate in providing any explanation of how the facts of this case interacted with the legislative test, or to provide for meaningful appellate review. As a result, the order for post-November 2008 extraordinary expenses as well as the order fixing the amount of the s. 7 expenses to be paid in the future cannot stand. The trial judge also failed to consider that the court should not normally order retroactive child support in the absence of a current child support entitlement. At the time of trial, Natasha and Anton were 24 and 26 respectively, and thus arguably no longer children of the marriage. Whether this fact precluded an award for retroactive child support should also have been considered.

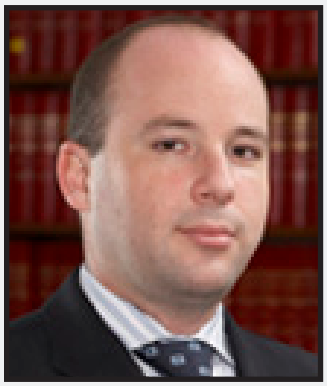
COUNSEL COMMENTS

Titova v. Titov, 2012 ONCA 864

Comments provided by Aaron Franks and Michael Zalev, Counsel for the Appellant, Boris Titov



Aaron Franks



Michael Zalev

"In the recent case of *Titov v. Titova*, the Ontario Court of Appeal overturned the trial judge's decision to award Ms. Titova $66,549.49 in retroactive child support ($18,349.49 for Table child support and $48,200 for special and extraordinary expenses) because, among other things:

> (a) The trial judge did not consider the necessary factors with respect to special and extraordinary expenses under s. 7 of the *Child Support Guidelines*;
>
> (b) The trial judge did not consider the factors for retroactive child support that were set out by the Supreme Court of Canada in *D.B.S. v. S.R.G.*, [2006] 2 S.C.R. 231 (S.C.C.); and
>
> (c) Although appellate courts are required to give "significant deference" to trial judges in family law cases and "must not place an impossible burden requiring perfect reasons on busy trial courts", the trial judge's reasons in this case "were inadequate in providing any explanation of how the facts of this case interacted with the legislative test, or to provide meaningful appellate review."

The Court of Appeal's decision in *Titov* is useful to have on hand because of the concise summary that the Court provided at paragraph 23 of its reasons of how special and extraordinary expenses are to be dealt with under the *Child Support Guidelines*:

> [23] In awarding s. 7 special and extraordinary expenses, the trial judge calculates each party's income for child support purposes, determines whether the claimed expenses

COUNSEL COMMENTS, Cont.

> fall within one of the enumerated categories of s. 7 of the Guidelines, determines whether the claimed expenses are necessary "in relation to the child's best interests" and are reasonable "in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation." If the expenses fall under s. 7(1)(d) or (f) of the Guidelines, the trial judge determines whether the expenses are "extraordinary". Finally, the court considers what amount, if any, the child should reasonably contribute to the payment of these expenses and then applies any tax deductions or credits.

The more interesting aspect of this case, however, was an issue that the Court ultimately declined to address. In 2008, the parties were engaged in litigation over whether Mr. Titov was overpaying or underpaying support to Ms. Titova. They ultimately agreed to resolve the issue by consenting to an Order that provided that there were no child support arrears owing as of October 30, 2008, and that there would be no adjustment (upwards or downwards) of any support payments that had been made prior to that date. In appropriate circumstances, this type of settlement can provide a reasonable way of resolving cases that involve serious questions about whether too much or too little support has been paid, especially where the amounts involved do not justify the cost and/or risk of a trial.

The trial judge in this case effectively overruled/varied the Order that provided that there would be no adjustments to child support prior to November 1, 2008. As a result, during oral arguments the Panel asked several pointed questions about whether and when a Court can Order a party to pay additional support for the period of time that predates an Order (or agreement) to the contrary. Unfortunately, however, we will have to wait to find out the answer, as the Court of Appeal ultimately declined to address the issue in this case."