

focus

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TRUSTEE USES OPPRESSION REMEDY

Access to the open ended remedies available in oppression actions will give trustees important new rights to attack illegitimate corporate activity without many of the restraints now imposed in reviewable transactions law. In *PricewaterhouseCoopers Inc. v. Olympia & York Realty Corp.*, the Ontario Court of Appeal said that **a trustee in bankruptcy was a proper person to make an application under the oppression remedy** provisions of the Ontario *Business Corporations Act* (OBCA). This appears to be a reversal of the Court of Appeal's earlier position in *Canada (Attorney General) v. Standard Trust Co.*

OYDL entered into a transaction with its wholly owned subsidiary, OYRC and OYRC's wholly owned subsidiary, OYSF. The transaction resulted in OYDL giving up a promissory note to OYRC which was found at trial to be worth approximately \$30-\$50 million. In exchange, OYDL received shares of OYRC which were found by the court to be worthless. OYDL later became bankrupt. The trustee in bankruptcy of OYDL brought an action claiming that the transaction: (i) was at a conspicuous undervalue and thus a reviewable transaction under the *Bankruptcy and Insolvency Act* (BIA) and (ii) constituted an act of oppression under the OBCA.

At trial, the judge agreed that the transaction constituted a reviewable transaction under the BIA because there was a conspicuous difference between the fair market value of what OYDL gave up and what it received. The trial judge also said that in the circumstances, this was a proper case to allow the trustee in bankruptcy to be a complainant for the purpose of seeking an oppression remedy. The transaction was oppressive

in that it unfairly disregarded the interests of the creditors of the bankrupt company.

The Court of Appeal agreed with both of the trial judge's conclusions. It said that **the oppression remedy under the OBCA confers on the court an unfettered discretion to determine whether an applicant is a proper person to commence oppression proceedings under the OBCA.** As a result of this decision, we can expect the oppression remedy to become a remedy commonly used by trustees.

If you would like to discuss the *Olympia & York Realty Corp.* case, please contact **Dan Dowdall** of our Toronto office at (416) 863-4700.

NEW DEVELOPMENTS IN PRIVACY LAW

On January 1, 2004, the *Personal Information and Electronic Documents Act* (PIPEDA) came into effect across Canada. PIPEDA is the federal government's legislation regulating personal information.

PIPEDA has applied to federally regulated organizations (e.g. banks, telecommunications organizations, railways) since January 1, 2001. As of January 1, 2004 **it applies to all organizations in the provincial sector carrying on commercial activity.**

However, the Act does not apply to provincially regulated organizations in those provinces which have enacted legislation substantially similar to PIPEDA.

At this time, only Quebec has legislation which has been determined by the federal government to be substantially similar. British Columbia and Alberta have also enacted privacy legislation which came into effect on January 1, 2004, but this legislation has not yet been determined to be substantially similar. Accordingly, the provincial legislation applies in those provinces, but so does PIPEDA.

PIPEDA continues to apply to all federally regulated organizations in Canada regardless of whether a province has enacted its own privacy legislation that is substantially similar.

Personal information under PIPEDA is very broadly defined.

It is all information about an individual except the person's name, business address, business phone number and business title. Accordingly, our understanding of what constitutes personal information should be very inclusive.

Organizations that are now regulated by PIPEDA (that is all organizations carrying on commercial activity in Ontario) should

- appoint a privacy officer,
- evaluate/assess what personal information they have collected, what they use it for and how they store it,
- develop policies based on this assessment, and
- provide training for their staff.

The time and effort spent to do the evaluation, develop policies and train staff will be a good investment as people become more aware of privacy rights and expect organizations to respect and observe these rights.

If you would like more information on PIPEDA, please contact **Curtis McDonnell** of our Toronto office at (416) 862-3460.

BUYER BEWARE

In a recent decision, a British Columbia **court protected the interests of a secured party in collateral that had been seized and sold by another party.**

In *New World Screen Printing Ltd. v. Xerox Canada Ltd.*, Xerox had leased various equipment to Photogenis. Photogenis had granted Xerox a secured interest in all present and future office equipment supplied by Xerox. Xerox had registered a financing statement in the BC Personal Property Registry to that effect. Xerox's collateral description was:

All present and future office equipment and software supplied or financed from time to time by the Secured Party (whether by lease, conditional sale or otherwise) whether or not manufactured by the Secured Party or any affiliate thereof.

Photogenis defaulted in its obligations to Xerox for an amount over \$76,000. It also failed to pay rent to its landlord. The landlord seized all of Photogenis' assets, including the equipment supplied by Xerox worth approximately \$75,000. Once Xerox learned of the seizure it notified the bailiff of its secured interest; however, the equipment was subsequently sold at auction to New World Screen Printing Ltd. for \$10,600.

New World argued that, under the BC *Personal Property Security Act*, Xerox's collateral description was inadequate. The court disagreed and said that the description acceptable. The court noted that there is a relatively low threshold for adequate written description of collateral.

The PPSA provides that a buyer takes goods sold in the ordinary course of business free of any security interest given by the seller. The court said that, in this case this provision of the PPSA did not protect the buyer because Photogenis was not the seller. The seller was one of the auctioneer, the bailiff or the landlord. Also the sale could not be said to be in the "ordinary course of business" of Photogenis.

In the end, the court said that New World purchased the equipment subject to the security interest of Xerox. The court did not determine the precise relief due to Xerox, although the parties may well have settled the remainder of the matter outside of court.

If you have any questions about this case or other matters under the British Columbia *Personal Property Security Act*, please contact **Janelle Dwyer** of our B.C. office at (604) 622-5163.

WHAT IS NEW AT FMC?

Dan Dowdall and **Stephen Gillespie** of our Toronto Financial Services Group with the assistance of **Natasha Wong** (articling student) recently co-authored a paper entitled, "The Latest Word on CCAA Interim Financing: DIP Financing and Alternative Financing Arrangements", which was presented at The Canadian Institute's 4th Annual Advanced Insolvency Law & Practice conference held on January 22, 2004.

Malcolm MacKillop of our Toronto Employment and Labour Group was recently certified as a specialist in civil litigation by the Law Society of Upper Canada.

Brian Carr of our Toronto Tax Group delivered a presentation at the Federated Press 5th Annual Taxation of Corporate Reorganization conference. His presentation was entitled "*Divisive Reorganization and Butterfly Transactions*" and examined the latest policy developments within paragraph 55(3)(b) of the Income Tax Act.