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***JONES V. TSIGIE*: ONTARIO COURT OF APPEAL RECOGNIZES TORT FOR THE INVASION OF PRIVACY**

RAHOOL P. AGARWAL AND PAMELA SIDEY

Introduction

In *Jones v. Tsigie*,¹ the Ontario Court of Appeal recognized the tort of “intrusion upon seclusion.” In doing so, Ontario became Canada’s only province with a fully articulated civil cause of action for invasions of privacy under the common law. Other provinces have an articulated civil cause of action that is statutory, so it is inaccurate to say it is the only common law province with a fully articulated civil cause of action—some others have one, but it is a statutory tort. The courts in those provinces have interpreted and are using that tort, though not necessarily in a uniform fashion.

While the specific facts of the case are narrow, the decision raises a number of interesting implications. In this article, we review the background of the case and the Court’s decision, and discuss three issues: (i) the potential for employers to be vicariously liable for intrusions into private affairs or concerns by their employees; (ii) the potential for class actions based on invasions of privacy; and (iii) conflict of laws and the enforcement of Ontario judgments for invasions of privacy in other Canadian provinces.

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Background

The appellant Sandra Jones, a bank employee, discovered that the respondent Winnie Tsige, an employee of a different branch of the same bank, had been secretly viewing her bank records. According to the evidence, Tsige had used her work computer to access Jones's banking information almost 200 times over a period of four years—conduct the Court described as “deliberate, prolonged and shocking.”² While Jones and Tsige did not know each other, Jones had formed a relationship with Tsige's ex-husband, which had prompted Tsige's snooping.

When confronted about the snooping by the bank, Tsige admitted that she had no legitimate reason to access Jones's bank records, although she explained that she was in a financial dispute with Jones's ex-husband and wanted to know whether he was paying his child support. The bank disciplined Tsige by suspending her for one week without pay and denying her a bonus.

Jones, however, sought a personal remedy. She commenced an action against Tsige for invasion of privacy and breach of fiduciary duty, and then moved for summary judgment. Tsige brought a cross-motion for summary judgment requesting dismissal of the action.

The lower court decision

Justice Whitaker, the motion judge, dismissed the fiduciary duty claim on the basis that Tsige owed no fiduciary obligation to Jones.

Justice Whitaker also dismissed Jones's claim with respect to invasion of privacy on the basis that no such tort existed in Ontario. He arrived at that conclusion by relying on the Court of Appeal's decision in *Eutenier v. Lee*, and specifically on Justice Cronk's statement that “[the plaintiff] properly conceded in oral argument before this court that there is no free-standing right to dignity and privacy under the *Charter* or at common law.”³ Justice

Whitaker held that Cronk J.A.’s statement was “binding and dispositive of the question” of whether the tort of invasion of privacy exists at common law in Ontario.

Jones appealed the motion judge’s dismissal of her claim for invasion of privacy to the Court of Appeal.

Decision of the Court of Appeal

In a unanimous judgment penned by Justice Sharpe (on a panel that also included Chief Justice Winkler and Justice Cunningham—Associate Chief Justice of the Superior Court of Justice, sitting *ad hoc*), the Court of Appeal reversed the lower court decision and granted Jones’s motion for summary judgment. The Court’s decision was based on its recognition of a common law tort for invasion of privacy.

The Court’s reasons were comprehensive, and included a review of American law, Ontario law, *Charter* jurisprudence and policy considerations. We review below the key parts of the Court’s analysis.

(i) The starting point: the American tort of intrusion upon seclusion

Justice Sharpe’s analysis began with a review of the American position on privacy-related torts. Most American jurisdictions accept four privacy torts, which have also been adopted in the American *Restatement (Second) of Torts* (2010).⁴ The four causes of action are (i) intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs; (ii) public disclosure of embarrassing private facts about the plaintiff; (iii) publicity that places the plaintiff in a false light in the public eye; and (iv) appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.

Of the four, Sharpe J.A. identified the first, “intrusion upon seclusion,” as the most relevant to the appeal before the Court. The *Restatement* describes this tort as follows:

*One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.*⁵

(ii) The state of Ontario jurisprudence

Justice Sharpe followed his review of American law with a consideration of the state of Ontario law with respect to recognizing a tort for invasion of privacy, and specifically the intrusion upon seclusion category. He held that while no Ontario appellate court had made a definitive statement on the existence of a cause of action for intrusion upon seclusion, Ontario lower court judges had routinely refused to dismiss claims for invasion of privacy at the pleadings stage, and some had awarded damages based on violations of the right to be free from intrusion upon seclusion. Justice Sharpe concluded that the case law left open the possibility that such a cause of action exists.⁶

The crucial analytical step for the Court was distinguishing its own judgment in *Eutenier*, which the motion judge had interpreted as denying the existence of a tort for invasion of privacy. To this end, Sharpe J.A. explored in detail the lower court proceedings in *Eutenier* for the context necessary to interpret the Court of Appeal’s *dicta* properly. The key point was that the plaintiff in *Eutenier* had pleaded her privacy interests only as particulars of other causes of action, or as the consequences allegedly flowing from the events that were the subject of the litigation. The Court in *Eutenier* held that those allegations could not be treated as stand-alone causes of action. Justice Sharpe held that the *Eutenier dicta* had to be interpreted in that context, such that Cronk J.A.’s statement—“that there is no free-standing right to dignity or privacy under the *Charter* or the common law”—was not an opinion on whether a cause of action for breach of privacy actually existed. Rather, the Court had simply clarified that the Divisional Court had erred in treating the plaintiff’s privacy allegations as stand-alone causes of action.⁷

(iii) Additional factors in support of recognition of a tort for invasion of privacy

Having concluded that Ontario law did not forestall recognition of a tort for intrusion upon seclusion, Sharpe J.A. identified several additional reasons in support of recognizing the tort as a cause of action in Ontario:

- (1) Canadian appellate courts have expressly held that privacy is a *Charter* value and should be afforded constitutional protection. In light of the principle that the common law should evolve in a manner consistent with *Charter* values, *Charter* jurisprudence provides significant support for the recognition of a civil cause of action for intrusion upon seclusion;⁸
- (2) Federal and Ontario privacy legislation does not address private rights of action between individuals. According to Sharpe J.A., “it would take a strained interpretation to infer from these statutes a legislative intent to supplant or halt the development of the common law in this area.”⁹
- (3) recognizing a cause of action for invasion of privacy in Ontario would be consistent with the state of the law in the United States and Commonwealth jurisdictions such as England, Australia and New Zealand;¹⁰
- (4) recent technological change, specifically the “routine collection and aggregation of highly personal information that is readily accessible in electronic form,” poses a “novel threat” to the privacy interests of individuals, and it is within the capacity of the common law to evolve to respond to this problem;¹¹ and
- (5) in the absence of recognizing a cause of action for invasion of privacy, Jones would be left without a legal remedy despite significant intrusions into her highly personal information. In Sharpe J.A.’s view, the law of

Ontario would be “sadly deficient” if that were the result.¹²

(iv) The Ontario tort of intrusion upon seclusion

The Court therefore confirmed the existence of a right of action for intrusion upon seclusion, justifying this recognition as an “incremental step” consistent with the role of the judicial system to develop the common law “in a manner consistent with the changing needs of society.”¹³

The Court adopted the following elements for the tort of intrusion upon seclusion defined in the *American Restatement*:

- (1) the defendant’s conduct was intentional or reckless;
- (2) the defendant invaded the plaintiff’s private affairs or concerns without lawful justification; and
- (3) a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.¹⁴

The Court made clear that proof of harm to an economic interest is *not* an element of the cause of action; therefore, intrusion upon seclusion is actionable without proof of tangible loss. Given the intangible nature of the interest protected, the Court stated that damages for intrusion upon seclusion would generally be no more than a “modest conventional sum” for cases in which no pecuniary loss has occurred. The Court fixed the range of damages at up to \$20,000.¹⁵

(v) Application to the case at bar

In applying the elements of the newly recognized tort to the case at bar, the Court held that Tsige’s conduct was an intentional, unlawful invasion of privacy and would be—unsurprisingly—viewed as highly offensive to a reasonable person. The invasion caused Jones distress, humiliation and anguish.¹⁶

The fact that Tsige's actions were deliberate, repeated and "arose from a complex web of domestic arrangements likely to provoke strong feelings and animosity" militated in favour of a higher damage award.¹⁷ On the other hand, Jones suffered no public embarrassment, harm to her health, welfare, social, business or financial position, and Tsige also apologized for her conduct and attempted to make amends; all of which favoured a lower damage award. After balancing the various factors, the Court decided that damages at the mid-point of the range were appropriate and awarded \$10,000.¹⁸

Implications

(i) Vicarious liability for employers

Jones raises the possibility of employers being held vicariously liable for their employees' breaches of privacy.

The Court addressed this issue in passing, stating that on the facts of the case Tsige's employer may have had a defence on the grounds that Tsige was acting as a rogue and contrary to the employer's internal policies. As a general matter, however, the Supreme Court's decision in *Bazley v. Curry* makes clear that employers can be held responsible for a broad range of their employees' activities, including intentional wrongful conduct that is outside of the scope of their employment.

The central holding in *Bazley* was that vicarious liability will be imposed on an employer for the wrongful conduct of an employee where a nexus exists between the wrongful act and the risk created by the employer's enterprise.¹⁹ In the context of the tort of invasion of privacy, the *Bazley* test creates a serious risk of liability that is significant for corporate employers who, as part of their business, hold large volumes of personal information. Their employees have regular and ready access to that information, and could feel compelled or encouraged to abuse their access to advance the company's business objectives. An employee at a social networking

website could view users' personal information to develop targeted advertising schemes, or a personal banker at a retail bank could access customers' transaction patterns and buying preferences to help market certain products. In both cases, a strong argument could be made under the *Bazley* test for tying the wrongful conduct of the employee to the employer. Of course, any actions would be subject to the implicit defence of "lawful justification," but what constitutes "lawful justification" remains to be defined in the context of the tort. Ultimately, the facts of any particular case will be determinative, but the risk of vicarious liability is certainly apparent.

(ii) Class actions based on invasions of privacy

Another issue to consider is the possibility of class proceedings based on invasions of privacy. The specific features of the tort of intrusion upon seclusion seem to make it especially amenable for class actions.

A central component of successfully certifying an action as a class action is the identification of common issues. A common issue is an issue that is necessary to the resolution of each class member's claim and that is a substantial ingredient of each class member's claim.²⁰ The threshold to satisfy the test for commonality is low; a common issue does not need to determine liability, but rather simply move the litigation forward in a significant way.

The tort of invasion of privacy presents several issues that could be advanced successfully as common issues in a certification motion. The vicarious liability of the employer (whether there was lawful justification for the intrusion of privacy, and whether the invasion is highly offensive to the reasonable person) are all issues that could be decided on a class-wide basis and advance the litigation on behalf of the class members. Allegations relating to a lack of corporate control over employees' actions or corporate policies that encouraged the intrusion

upon private information could also possibly be amenable to class-wide resolution, depending on the facts.

Whether or not such claims can be successful at trial, *Jones* appears to provide a new tool for advancing class actions that stand a good chance of succeeding at certification. Given the significant economic exposure faced by corporate defendants that are the subject of certified class actions, the tort of intrusion upon seclusion could be a very important development for the class action bar.

(iii) **Conflict of laws and enforcement of Ontario judgments**

Ontario is now the only Canadian common law province that has expressly accepted a stand-alone tort for invasion of privacy. Neither party in *Jones* sought leave to appeal to the Supreme Court of Canada, eliminating the possibility of establishing an invasion of privacy tort for all Canadian common law jurisdictions. Additionally, British Columbia, Saskatchewan, Manitoba and Newfoundland have enacted privacy statutes establishing a private right to bring a claim based on the violation of personal privacy, but none of these statutes provide a precise definition of what constitutes an invasion of privacy.²¹

This interprovincial inconsistency raises a question about the enforcement of judgments and conflict of laws, particularly because this cause of action is prone to multi-jurisdictional claims and default judgments. Justice Sharpe made express reference to the “novel threat” to privacy posed by new technology and the electronic storage of personal information. That threat is not constrained by provincial boundaries. It is reasonable to assume that, in the borderless, digital age, intrusions on the privacy of Ontario residents will often be perpetrated by individuals from other jurisdictions. Moreover, the Court’s decision to limit damages to a maximum of \$20,000 will also almost certainly lead to undefended claims and default judgments,

particularly for out-of-province defendants—the cost of retaining counsel and defending the action will often be disproportionate to the possible amount of an adverse judgment.

In such circumstances, the plaintiff is left with trying to enforce judgment in the province where the defendant is located or has assets. The key legal question is whether that province will enforce the Ontario judgment, given that there is no right of action for invasion of privacy in that province.

The rules of interprovincial comity established by the Supreme Court in *Morguard Investments Ltd. v. De Savoye* provide that judgments of one province should be given “full faith and credit” and enforced by Canada’s other common law provinces.²² *Morguard*, however, also states that a court may decline to enforce a judgment from another province, if doing so would contravene public policy.²³ It may be that enforcing a judgment based on a cause of action that does not exist in that jurisdiction could be viewed as inconsistent with public policy. A reasonable argument could be made that permitting the enforcement of an Ontario judgment for invasion of privacy effectively sidesteps any consideration or determination of the existence of the tort that has been or might be made by the courts and legislature of the enforcing province.

[*Editors’ note:* Rahool P. Agarwal and Pamela Sidey are both members of the litigation group of the Toronto office of Norton Rose Canada LLP. This article is written solely in their personal capacity.]

¹ [2012] O.J. No. 148, 2012 ONCA 32 [*Jones*].

² *Ibid.* at para. 69.

³ *Eutenier v Lee*, [2005] O.J. No. 3896 at para. 63 [*Eutenier*].

⁴ *Jones*, *supra* note 1 at para. 19.

⁵ *Ibid.*

⁶ *Ibid.* at para. 24.

⁷ *Ibid.* at para. 38.

⁸ *Ibid.* at paras. 43-46.

⁹ *Ibid.* at para. 49.

¹⁰ *Ibid.* at paras. 61-64.

¹¹ *Ibid.* at para. 68.

¹² *Ibid.* at para. 69.

¹³ *Ibid.* at para. 65.

¹⁴ *Ibid.* at para. 71.

¹⁵ *Ibid.*

¹⁶ *Ibid.* at para. 89.

¹⁷ *Ibid.* at para. 90.

¹⁸ *Ibid.*

¹⁹ *Bazley v. Curry*, [1999] S.C.J. No. 35, [1999] 2 S.C.R. 534 at para. 37.

²⁰ *Hollick v. Toronto (City)*, [2001] S.C.J. No. 67, [2001] 3 S.C.R. 158 at para. 18.

²¹ See *Privacy Act*, R.S.B.C. 1996, c. 373, s. 1(1); *Privacy Act*, R.S.S. 1978, c. P-24, s. 2; *The Privacy Act*, R.S.M. 1987, c. P125, s. 2(1); and *Privacy Act*, R.S.N.L. 1990, c. P-22, s. 3.

²² *Morguard Investments Ltd. v. De Savoye*, [1990] S.C.J. No. 135, [1990] 3 S.C.R. 1077 at para. 41.

²³ *Jones*, *supra* note 1 at para. 54.

SET THE CONTROLS FOR THE HEART OF THE SUN: ONTARIO COURT OF APPEAL ALLOWS *SECURITIES ACT* CLAIMS AGAINST FOREIGN-LISTED ISSUERS IN *CANADIAN SOLAR*

BRANDON KAIN

In a recent judgment that is sure to become a landmark in the growing field of Canadian securities class actions, the Ontario Court of Appeal has confirmed that the statutory cause of action for secondary market misrepresentations can be asserted against issuers whose shares are listed solely on a foreign exchange. The ruling in *Abdula v. Canadian Solar*¹ opens a deep gap between the Canadian and American approaches to the extraterritorial limits of such claims, and is likely to solidify Ontario's reputation as the new "hot spot" for securities class actions.

Background

Canadian Solar involves a proposed class action by an Ontario investor against an issuer and two of its officers/directors. The claim alleges liability under *inter alia* s. 138.3 of the Ontario *Securities Act*,² based on overstatements of the issuer's financial results in continuous disclosure documents and investor conference calls. The defendants brought a motion to dismiss the action prior to certification, including on the basis that s. 138.3 was inapplicable given the foreign elements involved.

The issuer in *Canadian Solar* is a *Canada Business Corporations Act*³ company whose shares are publicly traded on the NASDAQ alone, and its principal place of business—where the majority of its manufacturing operations and executives are situated—is in China. The disclosure documents in

question were filed exclusively with the United States Securities and Exchange Commission rather than any Canadian securities regulator, and the issuer is not a "reporting issuer" under the Ontario *Securities Act*. However, there are also several points of contact between the claim and Ontario (*e.g.*, (a) some of the impugned documents indicated that they were issued in Ontario; (b) the issuer has its registered and "principal executive" offices in Ontario; (c) the issuer has previously engaged in various business projects in Ontario and raised capital from Ontario investors through private placements; and (d) the plaintiff is an Ontario resident who purchased his shares from a computer in Ontario through a Canadian brokerage). It appears to have been conceded by the defendants on appeal that the issuer possessed a "real and substantial connection to Ontario," and the Court of Appeal expressly agreed with this proposition.⁴

In the court below,⁵ Justice Taylor found that the cause of action in s. 138.3 was applicable to the issuer on these facts. In doing so, he rejected the argument that the issuer could not be a "responsible issuer" as required by s. 138.3, which is defined in s. 138.1 as follows:

"responsible issuer" means,

(a) a reporting issuer, or

(b) any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded ...;

According to Taylor J., it was possible for the issuer to fall within subs. (b) of this definition, even though none of its shares are publicly traded on an Ontario or even Canadian exchange. As a result, the s. 138.3 cause of action extended to it.

The Decision

On appeal, the defendants focused on arguing that an implied limitation should be read into the definition of responsible issuer in s. 138.1, so that subs. (b) is restricted to “any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded *in Canada*.” The Court of Appeal rejected this implied limitation, and unanimously affirmed Taylor J.’s ruling.

The Court’s reasons, written by Justice Hoy, focus primarily upon the application of s. 138.1 to foreign-listed issuers as a matter of statutory interpretation. Justice Hoy reviewed much of the legislative history surrounding Part XXIII.1 of the *Securities Act*, together with the statutory context surrounding s. 138.1, and concluded that they do not disclose an intention to exclude claims against non-reporting issuers whose securities are not publicly traded on a Canadian exchange. In doing so, Hoy J.A. made three important points.

First, she rejected the argument that the Supreme Court of Canada’s ruling in *Unifund Assurance Co. v. Insurance Corp. of British Columbia*⁶ precludes s. 138.1 from applying to foreign-listed issuers. The Supreme Court in *Unifund* held that provincial legislation may be constitutionally inapplicable to extraterritorial matters that do not possess a “sufficient connection” to the enacting province. Justice Hoy found that a sufficient connection between the issuer and Ontario was present in *Canadian Solar*, observing:

I agree with the motion judge that here, unlike in Unifund, there is a sufficient connection between Ontario and Canadian Solar to support the application of Ontario’s regulatory regime to Canadian Solar. The general principles with respect to extra-territorial regulation do not require that the definition of ‘responsible issuer’

be interpreted as confined to issuers any of whose securities are publicly traded in Canada.

...

Unifund is clearly distinguishable from Mr. Abdula’s case. As stated by the motion judge at para. 43 of his reasons, Mr. Abdula’s case deals with an Ontario plaintiff seeking to have Ontario law apply to a defendant carrying on business in Ontario.

... It is a CBCA corporation with its registered office, its principal executive office and business operations in Ontario.

The subject matter of Part XXIII.1 is a remedy to investors for misrepresentation in certain issuers’ secondary market disclosure. In this case, at least some of that disclosure emanated from Ontario. That, together with the relationship of Canadian Solar to Ontario, constitutes a sufficient connection between Ontario and Canadian Solar to potentially subject Canadian Solar to a statutory cause of action pursuant to Part XXIII.1 of the OSA.⁷

Second, Hoy J.A. held that the possibility of overlapping claims in other jurisdictions did not mandate restricting s. 138.1 to Canadian-listed issuers. The fact that s. 138.7 of the *Securities Act* only reduces the cap on an issuer’s liability by the damages assessed under comparable legislation in other Canadian provinces and territories, but not by the damages assessed under foreign statutory claims like *SEC Rule 10b-5*,⁸ was not determinative:

The fact that s. 138.7 does not reduce the cap by damages assessed under s. 10(b) of the Securities Exchange Act of 1934 does not indicate that s. 138.3 is confined to issuers that are reporting issuers in a Canadian jurisdiction or issuers any of whose securities are listed on a Canadian stock exchange. A significant number of Canadian issuers are listed both on the TSX and an American exchange. Counsel for Canadian Solar agrees that such issuers fall within the definition of “responsible issuer”. They are exposed to litigation under both s. 138.3 of the OSA and s. 10(b) of the Securities Exchange Act of 1934. Damages assessed against them under s. 10(b) of the Securities Exchange Act of 1934 do not statutorily reduce the cap on their liability under s. 138.3 of the OSA. Section 138.3 applies even where the issuer may be sued in both Canada and the U.S.⁹

Third, the Court rejected the analogy to cases like *Pearson v. Boliden Ltd.*,¹⁰ which hold that the statutory cause of action for primary market misrepresentations (in provisions like s. 130 of the *Securities Act*) only applies where the distribution through which the investor acquires its shares takes place within the enacting province. According to

Hoy J.A., “[t]he reasoning in these cases is not applicable to the statutory cause of action for misrepresentations in secondary market disclosure.”¹¹

Potential Significance

Canadian Solar marks the first time that an appellate court has considered the extraterritorial reach of statutory secondary market claims in Canada. In doing so, the Court of Appeal rejected a bright line test that would preclude such claims from applying to non-reporting issuers whose shares are not publicly traded on a Canadian exchange. The significance of this ruling is at least twofold.

First, the approach taken in *Canadian Solar* stands in sharp contrast to the one taken by the United States Supreme Court in *Morrison v. National Australia Bank Ltd.*¹² In *Morrison*, the U.S. Supreme Court adopted a clear “transactional test” to the extraterritoriality of s. 10(b) of the *Securities and Exchange Act of 1934*¹³ and *Rule 10b-5* promulgated under it, which restricts such claims to situations involving “the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.”¹⁴ In doing so, the Supreme Court rejected decades of lower court jurisprudence that had adopted varying iterations of “(1) an ‘effects test,’ ‘whether the wrongful conduct had a substantial effect in the United States or upon United States citizens,’ and (2) a ‘conduct test,’ ‘whether the wrongful conduct occurred in the United States.’”¹⁵

Since the U.S. courts are thus no longer inclined to extend *Rule 10b-5* claims to foreign-listed issuers (as least where the plaintiff’s purchase of securities did not otherwise take place in the United States), the Ontario Court of Appeal’s model of extraterritoriality is considerably broader; indeed, it could make Canada the venue of choice for securities class actions involving issuers who are not listed on an American exchange. Further, because both U.S. and Ontario courts are now willing to apply their

respective statutory causes of action to issuers listed (and listed solely) on U.S. exchanges, there is a significant potential for overlapping and inconsistent results, which as the Court noted in *Canadian Solar* are not addressed under provisions like s. 138.7 of the *Securities Act*. This would seem contrary to *Unifund*, where the Supreme Court of Canada held that the principles of “order” and “fairness,” which inform the territorial limits upon provincial legislative power, require that “[s]uch ‘competing exercises’ of regulatory regimes ‘must be avoided,’” and cautioned that “[t]he cost of such regulatory uncertainties undermines economic efficiency.”¹⁶ It also seems inconsistent with the Supreme Court of Canada’s post-*Unifund* judgment in *British Columbia v. Imperial Tobacco Canada Ltd.*,¹⁷ where in upholding the constitutional validity of a statutory cause of action with extraterritorial effects, the Court emphasized that it “respects the legislative sovereignty of other jurisdictions,” and that “no territory could possibly assert a stronger relationship to that cause of action than” the enacting province.¹⁸

It is curious that the Court of Appeal did not directly address these constitutional principles of order and fairness in *Canadian Solar*. Indeed, despite purporting to find that the application of s. 138.3 to foreign-listed issuers is consistent with *Unifund*, the word “constitution” does not appear once in the Court’s reasons. The Supreme Court of Canada’s focus upon the constitutional issues raised by cross-border litigation in *Club Resorts Ltd. v. Van Breda*,¹⁹ a decision released shortly after *Canadian Solar*, suggests that there are deeper questions at stake here than the ones considered by the Court of Appeal.

Second, the Court in *Canadian Solar* offered very little guidance regarding precisely when foreign-listed issuer will possess a “real and substantial connection” with Ontario sufficient to justify the application of Part XXIII.1 of the *Securities Act*.

Instead, it simply listed several factors that were significant on the facts of the case—including the place where the plaintiff was resident, the place where the issuer had its offices, and the place where the misrepresentations were made—without attributing a particular or hierarchical weight to any of them. One wonders whether the Court’s judgment would have been different if the defendants had challenged the application of s. 138.3 to the issuer after certification, where the effective claimants may have included not just the Ontario-resident plaintiff, but also investors resident in other countries. Justice Hoy’s reasoning raises a critical question: could the fact that a foreign issuer possesses a significant asset in Ontario (e.g., a mine), such as to give it a “real and substantial connection” with the province in abstract terms, really permit a foreign claimant to assert s. 138.3 against the foreign issuer in respect of shares purchased on a foreign exchange?

In many respects, the test that emerges from *Canadian Solar* is similar to the “conduct” and “effects” tests previously applied by the U.S. courts, which were frequently maligned for the uncertainty and unpredictability they produced. It is to be hoped that courts in future cases will provide clearer guidance as to precisely what types and degrees of contact with Ontario are necessary in order for the s. 138.3 action to apply, possibly by building upon the Supreme Court of Canada’s recent decision in *Van Breda*. Presumably, there must come a point at

which the connection is too tenuous to sustain the claim, even if the issuer possesses some link with the province. As the U.S. Supreme Court said in *Morrison*:

... it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case.²⁰

[*Editor’s note*: Brandon Kain is a partner in McCarthy Tétrault LLP’s Litigation Group in Toronto, where his practice focuses on written advocacy and opinions.]

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¹ [2012] O.J. No. 1381, 2012 ONCA 211 [*Canadian Solar*].

² R.S.O. 1990, c. S.5 [*Securities Act*].

³ R.S.C. 1985, c. C-44.

⁴ *Canadian Solar*, *supra* note 1 at para. 9.

⁵ *Abdula v. Canadian Solar*, [2011] O.J. No. 4067, 2011 ONSC 5105, *aff’d supra* note 1.

⁶ [2003] S.C.J. No. 39, [2003] 2 S.C.R. 63 [*Unifund*].

⁷ *Canadian Solar*, *supra* note 1 at paras. 41 and 47-49.

⁸ 17 C.F.R. § 240.10b-5 [*Rule 10b-5*].

⁹ *Canadian Solar*, *supra* note 1 at para. 77.

¹⁰ [2002] B.C.J. No. 2593 (B.C.C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 29.

¹¹ *Canadian Solar*, *supra* note 1 at para. 82.

¹² 130 S. Ct. 2869 (2010) [*Morrison*].

¹³ 15 U.S.C. § 78j(b).

¹⁴ *Morrison*, *supra* note 12 at 2888.

¹⁵ *Ibid.* at 2879.

¹⁶ *Unifund*, *supra* note 6 at para. 71.

¹⁷ [2005] S.C.J. No. 50.

¹⁸ *Ibid.* at para. 38.

¹⁹ [2012] S.C.J. No. 17, 2012 SCC 17 [*Van Breda*].

²⁰ *Morrison*, *supra* note 12 at 2884, *emphasis in original*.

CROOKES V. NEWTON: HYPERLINKING, DEFAMATION LAW, AND FREEDOM OF EXPRESSION ON THE INTERNET

MATTHEW NIED

Introduction

In *Crookes v. Newton*,¹ the Supreme Court of Canada held that creating an Internet hyperlink to defamatory material on the Internet does not constitute publication of the defamatory material.

Although this decision may limit the remedies available to those harmed by Internet defamation, it will protect website operators, Internet search engines, and other Internet intermediaries from liability for publishing hyperlinks to defamatory material, provided that the hyperlinks are not presented in a way that repeats the defamatory material. This article discusses the decision's background, reasoning, and implications.

Background

The appellants, Wayne Crookes and West Coast Title Search Ltd. (collectively "Crookes"), brought numerous defamation actions against various individuals and organizations alleging that Mr. Crookes had been defamed in several articles on the Internet. After those actions were commenced, the respondent, Jon Newton, posted an article on his website that commented on the implications of Crookes's defamation suits for operators of Internet forums. Newton's article included hyperlinks to websites containing some of the allegedly defamatory articles that were the subject of Crookes's actions. Newton's article did not reproduce or comment on the content in those articles.

Crookes discovered Newton's article and advised him to remove the hyperlinks. When he refused, Crookes brought an action seeking damages for defamation on the basis that the hyperlinks constituted publication of the allegedly defamatory articles. There was evidence that Newton's article had been viewed 1,788 times, but no evidence as to

how many times, if any, the hyperlinks in the article had been followed.

Decision of the Supreme Court of Canada

The issue on appeal was whether creating a hyperlink to allegedly defamatory material constitutes publication of that material. The reasons of the six-justice majority, penned by Justice Abella, began by describing the evolution of the "publication rule." Under this rule, any act that had the effect of communicating defamatory words to a third person constituted publication. The breadth of activity caught by the publication rule over the years has been vast. For example, a person whose role was manually to operate a printing press was, in one older case, found liable for defamatory words contained in the publication, despite being unaware of its contents.

The majority observed that the harshness of the publication rule was later alleviated by the development of the "innocent dissemination" defence, which protects those who unknowingly play a role in the distribution of potentially defamatory material. Defendants such as booksellers and libraries may avoid liability if they had no actual knowledge of alleged libel, were not aware of circumstances that would give cause to suspect a libel, and were not negligent in failing to discover the libel.

Justice Abella also noted that, in recent years, the application of the publication rule has been tempered by cases that suggest that some acts of communication are so passive that they should not be considered publication. For example, English courts have held Internet service providers and search engines not liable as publishers, because they only played a passive instrumental role, and

acted without knowledge in the process of publishing the defamatory words. In other cases, courts have held that merely making a reference to defamatory material was not publication.

In light of these developments, the majority concluded that creating a hyperlink to defamatory material is not the type of act that constitutes publication. Modern realities make it necessary to interpret the publication rule to exclude references, such as hyperlinks, in order to accord with *Charter* values, recent jurisprudence, and the evolution of communications technology.

In declining to expose hyperlinks to the wide breadth of the traditional publication rule, Abella J. reasoned that hyperlinks are essentially content-neutral references to material that hyperlinkers have not created and do not control. Although a hyperlink communicates the existence of information, and may facilitate the transfer of that information, it does not, by itself, communicate information.

The majority's reasons focused on the important role of the Internet in promoting freedom of expression, and the importance of hyperlinks in facilitating access to information on the Internet:

[36] The Internet cannot, in short, provide access to information without hyperlinks. Limiting their usefulness by subjecting them to the traditional publication rule would have the effect of seriously restricting the flow of information and, as a result, freedom of expression. The potential 'chill' in how the Internet functions could be devastating, since primary article authors would unlikely want to risk liability for linking to another article over whose changeable content they have no control. Given the core significance of the role of hyperlinking to the Internet, we risk impairing its whole functioning. Strict application of the publication rule in these circumstances would be like trying to fit a square archaic peg into the hexagonal hole of modernity.

Justice Abella also recognized, however, that a hyperlink will constitute publication if it “presents content from the hyperlinked material in a way that actually repeats the defamatory content.” This might occur, for example, where a person inserts a hyperlink in text that repeats the defamatory content in the hyperlinked material. In these cases, the

hyperlink would be more than a reference; it would be an expression of defamatory meaning. This had not occurred in the case at bar, so the majority dismissed the appeal.

Chief Justice McLachlin and Justice Fish substantially agreed with the majority, but held that “a hyperlink should constitute publication if, read contextually, the text that includes the hyperlink constitutes adoption or endorsement of the specific content it links to.” In these cases, the hyperlink “ceases to be a mere reference and the content to which it refers becomes part of the published text itself.”

Justice Deschamps agreed with the result but disagreed with the approaches taken by the other justices. In her view, the blanket exclusion of all references from the scope of the publication rule erroneously treats all references alike. According to Justice Deschamps the majority's approach “disregards the fact that references vary greatly in how they make defamatory information available to [readers] and, consequently, in the harm they cause to reputations.” To address this concern, Deschamps J. proposed a nuanced and highly fact-driven framework under which a hyperlink would constitute publication if the plaintiff established two elements: that the defendant “performed a deliberate act that made defamatory material readily available to a third party in a comprehensible form,” and that “a third party received and understood the defamatory [material].”

To establish the first element under Deschamps J.'s approach, plaintiffs would need to demonstrate that the defendant played more than a passive instrumental role in making the information available, which would depend on numerous factors bearing on the ease with which the referenced information could be accessed. To establish the second element, plaintiffs would need to adduce direct evidence that a third party had received and understood the defamatory material, or convince the court to draw an

inference to that effect based on the totality of the circumstances.

Implications

Crookes presented the Court with a welcome opportunity to reconsider the proper balance between the competing interests of freedom of expression and the protection of reputation in the new context of Internet communications. Five years ago, defamation law leaned significantly towards protecting reputation. Today, as a result of *Crookes* and other landmark cases—such as *WIC Radio*² and *Grant*³—defamation law better protects and promotes the fundamental right to freedom of expression.

In *WIC Radio Ltd.*, the Court widened the scope of the defence of fair comment. In *Grant v. Torstar*, the Court created the new defence of responsible communication, which allows defendants to evade liability if they can show that they acted responsibly in reporting on a matter of public interest. In light of this jurisprudence, *Crookes* represents a further move by the Court to shape defamation law in a manner that provides increasingly broader accommodation to the value of freedom of expression.

The decision in *Crookes* could have unfortunate consequences in certain circumstances. As the Court recognized, the Internet’s borderless and far-reaching mode of publication has “tremendous power to harm reputation.”⁴ As a result of *Crookes*, a victim of Internet defamation who wishes to vindicate his or her reputation and prevent the spread of defamatory material only has a remedy against the person who created and controls the material—not persons who have referred their readers to it.

Interestingly, the majority was of the view that its approach creates “little or no limitation to a plaintiff’s ability to vindicate his or her reputation.” In certain circumstances, however, the majority’s approach may in fact create a heightened opportunity for abuse that significantly limits a plaintiff’s ability to vindicate his or her reputation. The creation

of a hyperlink is a means by which defamatory material can be rapidly disseminated. Defamatory material contained on an obscure website may, for example, receive the attention of a vast number of readers if a popular blogger hyperlinks to it. In these circumstances, the majority’s approach would provide that the plaintiff would have no action against the hyperlinker, even if the hyperlink was created with the malicious intent of spreading the defamatory words.

Such a situation would be especially troubling if the victim were also unable to pursue a remedy against the creator of the defamatory material because it was published anonymously—a common occurrence on the Internet. In addition, if the defamatory material were posted on a website operated in the United States, and the operator of that website passively hosted the material, American legislation could apply to immunize the website operator from liability.⁵ If the website operator refused to remove the defamatory material, the victim would be left without a remedy, the material would remain visible for the world to see, and the use of hyperlinks could cause the defamatory material to rise from obscurity to notoriety.

Although this concern might be alleviated by adopting the more contextual and nuanced approaches suggested by McLachlin C.J. and Fish J., and by Deschamps J., those approaches lack the welcome certainty of the majority’s bright-line rule. McLachlin C.J. and Fish J.’s test for publication is dependent on the presence of *indicia* of “adoption or endorsement,” the scope of which is inherently uncertain. Justice Deschamps’s approach is similarly fact driven. If either test applied, it would be difficult to predict in advance whether a hyperlink constituted publication. Uncertain exposure to liability might then deter the public from using hyperlinks, which could inhibit the Internet as a medium for free expression. This very concern likely drove the majority to establish its bright-line rule.

The concurring approaches would also have the undesirable effect of shifting the weight of litigation to defendants. Once a plaintiff establishes that the defendant has published defamatory statements, the onus shifts to the defendant to raise any available defences. Both the concurring approaches would lower the threshold to be met by plaintiffs in order to establish that the defendant has published defamatory statements. As a result, more Internet users would be thrown into the costly position of having to justify their conduct by reaching for the protection of a defence. Although the wide availability of defences for hyperlinkers may, as Deschamps J. suggests, “dissuade overeager litigants from having a chilling effect on hyperlinking,” it would not deter plaintiffs who wish to stifle criticism by intimidating defendants through costly litigation.

It is important to recognize that a defendant’s act of hyperlinking to defamatory material, although not sufficient in itself to create liability, may in certain circumstances be relevant to the availability of defences. In cases where a defendant is found to have published material defamatory of the plaintiff, evidence that the defendant also published hyperlinks to material defamatory of the plaintiff may constitute evidence of malice on the part of the defendant. Evidence of malice may prevent the defendant from establishing certain defences.

Lastly, the decision in *Crookes* may not be the final word on defamation liability for hyperlinks. The Court expressly left open the question of whether the same principles apply to embedded or automatic hyperlinks, which are links that automatically display linked material with little or no prompting from the user.⁶ These hyperlinks are distinguishable from user-activated hyperlinks, such as those at issue in *Crookes*, which require users to click on them in order to access the hyperlinked content.

Although the Court declined to comment on the legal implications of automatic or embedded hyperlinks, it appears that they would constitute publication, according to the majority’s reasoning, to the extent that they automatically make third-party content appear as part of the website that the hyperlinker controls.

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¹ [2011] S.C.J. No. 47, 2011 SCC 47, aff’g [2009] B.C.J. No. 1832, 2009 BCCA 392, aff’g [2008] B.C.J. No. 2012, 2008 BCSC 1424 [*Crookes*]. To succeed in a defamation action, a plaintiff must first prove that defamatory words were published.

² [2008] S.C.J. No. 41, 2008 SCC 40.

³ [2009] S.C.J. No. 61, 2009 SCC 61.

⁴ *Crookes*, *supra* note 1 at para. 37, citing *Barrick Gold Corp. v. Lopehandia*, [2004] O.J. No. 2329 (C.A.) at para. 32. For a discussion of the manner in which the Internet’s power to harm reputation may affect damage awards in Internet defamation cases, see Matthew Nied, “Damage Awards in Internet Defamation Cases: Reassessing Assumptions about the Credibility of Online Speech” *Alberta Law Review* (October 2010), cited in *Wilson v. Switlo*, [2011] B.C.J. No. 1800, 2011 BCSC 1287 at para. 505.

⁵ See *Crookes*, *supra* note 1 at para. 28, citing the *Communications Decency Act*, 47 U.S.C. § 230, which grants immunity to all Internet intermediaries who publish defamatory material, provided that the material was authored by a third party. Also see the *Speech Act*, 28 U.S.C. §§ 4101-4105, which requires American courts to decline to recognize or enforce foreign defamation judgments that conflict with American law, and which may, as a result, make it difficult to enforce Canadian defamation judgments in the United States.

⁶ The Supreme Court of Canada described embedded or automatic hyperlinks in the following way in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] S.C.J. No. 44, 2004 SCC 45 at para. 25:

Automatic links employ an embedded code in the Web page that automatically instructs the browser, upon obtaining access to the first site, to download a file from a second site. The user does not need to do anything but visit the initial site before information from the second site is ‘pulled’. A different legal issue may arise where the user must take action, such as to click the mouse button over the hyperlink, in order to obtain access to the information from the second site.

NEARCTIC NICKEL MINES INC. v. CANADIAN ROYALTIES INC. :
**EXÉCUTION EN NATURE, INJONCTIONS ET MESURES PROVISIONNELLES
 EN DROIT QUÉBÉCOIS DE L'ARBITRAGE**

STÉPHANIE BACHAND

Introduction

Dans l'arrêt *Nearctic Nickel Mines Inc. v. Canadian Royalties Inc.*¹, la Cour d'appel du Québec a suivi l'approche adoptée près d'un an plus tôt dans *Service Bérubé ltée c. General Motors du Canada ltée*² en confirmant le pouvoir des arbitres, en droit québécois, de rendre des ordonnances d'exécution en nature d'obligations contractuelles, dans la mesure où celles-ci ne constituent pas des injonctions. La Cour rappelle que le pouvoir d'émettre des injonctions relève quant à lui de la compétence exclusive de la Cour supérieure. En ce qui concerne les autres mesures provisionnelles, la Cour d'appel laisse entendre que les arbitres ont le pouvoir d'octroyer de telles mesures même lorsque la convention d'arbitrage est silencieuse à ce sujet. Bien que ces clarifications quant à la compétence des arbitres de rendre ou non des ordonnances d'exécution en nature, des injonctions et des mesures provisionnelles puissent sembler « évidentes » pour certains praticiens à l'extérieur du Québec, elles ont longtemps fait l'objet de débats en droit québécois. Nous discutons ci-après de cet arrêt attendu de la Cour d'appel et de ses implications.

Contexte

Les faits à l'origine de ce litige peuvent être résumés comme suit. Une entente de partenariat entre les parties pour l'achat d'une propriété et le développement d'un projet minier dans le Grand Nord québécois (« Entente ») prévoyait l'option pour le partenaire majoritaire (Canadian Royalties Inc., ci-après « CRI ») d'acquérir du partenaire minoritaire (Ungava Mineral Exploration inc., une filiale de Nearctic Nickel Mines inc., ci-après « Ungava ») une participation additionnelle de

10 % dans le projet à la condition d'obtenir une étude de faisabilité sans aucun frais pour Ungava. CRI finança l'étude et demanda à Ungava de lui céder 10 % de sa participation dans le projet. Ungava refusa au motif que l'étude n'était pas conforme à celle envisagée dans l'Entente, puisqu'elle ne couvrait pas, selon elle, l'ensemble des projets de développement.

Conformément à la clause d'arbitrage obligatoire prévue à l'Entente, le litige fut porté devant un arbitre. Celui-ci conclut que CRI avait rempli la condition prévue à l'Entente pour se voir céder une participation additionnelle de 10 % dans le projet minier et qu'elle avait droit à l'exécution en nature de cette obligation assumée par Ungava. L'arbitre ordonna donc à Ungava de céder ladite participation à CRI et de prendre toutes les mesures nécessaires pour effectuer cette cession.

Devant la Cour supérieure du Québec, Ungava contesta la demande d'homologation de la sentence présentée par CRI et en demanda l'annulation, au motif que l'arbitre avait outrepassé ses pouvoirs en rendant une ordonnance « de la nature d'une injonction », la Cour supérieure ayant compétence exclusive pour octroyer une telle mesure en vertu de l'article 751 du *Code de procédure civile*³. La Cour supérieure homologua la sentence et rejeta la requête en annulation. La Cour reconnut que seule la Cour supérieure avait compétence pour émettre des injonctions. Toutefois, la Cour indiqua que toutes les ordonnances d'exécution en nature ne constituent pas nécessairement des injonctions. D'une part, l'injonction relève du pouvoir discrétionnaire de la Cour, tandis que l'exécution en nature relève des termes du contrat. D'autre part,

le non respect d'une injonction peut être sanctionné par une amende ou l'emprisonnement, ce qui n'est pas le cas lorsqu'une partie fait défaut de se conformer à une ordonnance d'exécution en nature d'une obligation contractuelle. Le juge Fraiberg ajoute:

[187] If Quebec arbitrators could not give orders of specific performance of contracts not amounting to injunctions, they would be lame ducks and arbitration would not be taken seriously as an effective and complete means of resolving commercial disputes. This surely was not the intent of the 1986 legislative reform.

Cette décision de la Cour supérieure a été confirmée par la Cour d'appel du Québec, tel qu'exposé ci-après.

L'arrêt de la Cour d'appel du Québec

(i) La compétence des arbitres de rendre des ordonnances d'exécution en nature qui ne constituent pas des injonctions

La Cour d'appel note d'abord que le *C.p.c.* est silencieux quant au pouvoir des arbitres d'émettre des injonctions, contrairement à la *Loi de 1991 sur l'arbitrage* de l'Ontario, qui prévoit explicitement que les arbitres peuvent rendre des ordonnances d'exécution en nature et prononcer des injonctions⁴.

La Cour rejette toutefois la proposition selon laquelle les arbitres n'ont jamais le pouvoir, en droit québécois, de rendre une ordonnance « de la nature d'une injonction », soulignant qu'une telle interprétation irait à l'encontre de l'article 944.1 *C.p.c.*, qui confère aux arbitres « tous les pouvoirs nécessaires à l'exercice de leur compétence ». Suivant l'interprétation libérale adoptée par la Cour suprême du Canada, la Cour d'appel souligne que l'arbitrage est reconnu comme un mode alternatif de résolution des différends à part entière. Par conséquent, les décisions des arbitres doivent pouvoir être exécutées au moyen d'ordonnances d'exécution en nature suffisamment larges pour donner plein effet aux droits des parties, sans qu'il

soit nécessaire de recourir aux tribunaux de droit commun:

*[55] Determining as a general rule that an arbitrator never possesses the power to grant orders of an injunctive nature also seems incompatible with the terms of article 944.1 C.C.P., which provides that 'arbitrators have all for the necessary powers for the exercise of their jurisdiction [...]'. Furthermore, following the Supreme Court decision in *Desputeaux c. Chouette*, the scope of arbitration agreements must be interpreted liberally and the arbitrator's mandate should include all matter connected to the agreement or the questions in dispute. The arbitration process is understood to constitute a complete system of alternate dispute resolution. In my view, such a system would not be complete if it was unable to ascertain that its decisions be executed through comprehensive orders of specific performance.*

La Cour rappelle, comme elle l'avait fait dans *Service Bérubé*, qu'une ordonnance d'exécution en nature ne constitue pas nécessairement une « injonction » au sens de l'article 751 *C.p.c.* :

*[61] The better view, as suggested in *Service Bérubé ltée*, is that in contractual disputes, all orders of specific performance are not necessarily an 'injunction' according to article 751 C.C.P. In the present case, the parties at the outset conferred to the Arbitrator the power to determine the rights of the parties and order the execution of the agreement according to his declaration.*

Selon la Cour d'appel, afin de distinguer une ordonnance d'exécution en nature d'une injonction, il est nécessaire d'analyser la convention commerciale en question et le caractère véritable de l'ordonnance, en portant une attention particulière aux éventuelles sanctions pénales qu'elle pourrait comporter :

[63] In order to appreciate whether an arbitrator issued a particular order which would be tantamount to an injunction, one must look at the commercial agreement, determine the true intention of the parties and decide whether, in light of all the circumstances, the pith and substance of the order truly constitutes an injunction with all of its known penal implications or whether it is more of a declaratory nature which serves the purpose of giving full effect to the Arbitrator's determinations of the parties' rights.

[64] Lastly, I might add that when a judge of the Superior Court is called to decide whether an injunction should be issued according to article 751 C.C.P., he or she will determine whether there is any color of right and in cases in which a mandatory injunction is sought, whether the facts admit to it. The Arbitrator is not however concerned with any penal consequences, which is

fundamental with respect to an injunction order according to article 751 C.C.P.

En l'espèce, la Cour conclut que la question soumise à l'arbitre dans cette affaire s'apparentait à une action en cession de titres et que l'arbitre avait tout simplement ordonné à une partie de se conformer à ses obligations contractuelles, sans usurper la compétence exclusive de la Cour supérieure de rendre des injonctions en vertu de l'article 751 *C.p.c.*

(ii) La compétence des arbitres d'octroyer des mesures provisionnelles

En *obiter*, la Cour d'appel laisse également entendre que les arbitres ont compétence pour accorder des mesures provisionnelles, même lorsque la convention d'arbitrage est silencieuse à ce sujet. Selon la Cour, l'octroi de telles mesures par les arbitres n'est pas expressément interdit par le législateur québécois. Au contraire, ce pouvoir est spécifiquement prévu à l'article 17 de la *Loi type de la Commission des Nations Unies pour le droit commercial international (CNUDCI) sur l'arbitrage commercial international*⁵, dont les tribunaux doivent tenir compte lorsqu'ils interprètent les dispositions du *C.p.c.* relatives à l'arbitrage dans le cadre d'arbitrages interprovinciaux ou internationaux, en vertu de l'article 940.6 *C.p.c.* Rien ne semble justifier, selon la Cour, l'application de règles différentes dans le cas d'arbitrages domestiques:

[53] The records of the parliamentary debates surrounding the enactment of article 940.4 C.C.P. [(which provides that "[a] judge or the court may grant provisional measures before or during arbitration proceedings on the motion of one of the parties")] suggest that the legislature's intention was not to deprive arbitrators of the power to grant interim measures, but rather to confirm the courts' jurisdiction over that matter. While the arbitrator can clearly grant such remedies when provided for by the parties, questions remain as to the scope of the arbitrator's power when the parties' agreement is silent. It would be hard to believe that arbitrators would need specific authorization from the parties to grant provisional remedies. First, it would seem that the legislature could have explicitly excluded that power if it so

desired. Second, section 17 of the UN Model Law specifically allows for such measures. Seeing as this provision is incorporated to Quebec law with regards to inter-provincial or international arbitration, under article 940.6 C.C.P., why should domestic arbitration follow different rules?

[54] Once again, one should bear in mind that the revision of the Code of Civil Procedure's provisions on arbitration was completed to harmonize the Code with the Model Law. One must also realize that the scope of article 940.4 C.C.P. was never closely reviewed by the Superior Court and never considered by the Court of Appeal.

La Cour d'appel reconnaît toutefois qu'elle n'a toujours pas tranché cette question et n'en traite pas davantage dans cet arrêt.

Les implications de l'arrêt *Nearctic Nickel Mines*

L'arrêt *Nearctic Nickel Mines* s'inscrit dans le courant d'une interprétation moderne et libérale des conventions d'arbitrage, qui reconnaît l'arbitrage comme un mode de résolution de différends commerciaux à part entière, non moins légitime ou efficace que le recours aux tribunaux de droit commun⁶.

Les arbitres ont maintenant clairement le feu vert, en vertu du droit québécois, pour rendre des ordonnances visant l'exécution en nature d'obligations contractuelles et ainsi obliger les parties à une convention d'arbitrage à faire ou cesser de faire quelque chose, dans la mesure où ces ordonnances ne constituent pas des injonctions. Jusqu'à tout récemment, le pouvoir des arbitres de rendre de telles ordonnances d'exécution en nature n'était pas clairement établi en droit québécois, puisque celles-ci étaient souvent perçues comme des « injonctions ». Or, les tribunaux ont reconnu à maintes reprises que le pouvoir de rendre des injonctions relève de la compétence exclusive de la Cour supérieure, en vertu de l'article 751 *C.p.c.*⁷ Ainsi, en affirmant clairement que toutes les ordonnances d'exécution en nature ne constituent pas nécessairement des injonctions au sens de l'article 751 *C.p.c.*, la Cour d'appel reconnaît au moins aux arbitres le pouvoir

d'ordonner aux parties l'exécution en nature des obligations qu'elles ont contractées⁸ — un remède qui constitue tout simplement « le mode normal et général d'exécution des obligations »⁹ prévu au *Code civil du Québec*¹⁰. Les arbitres ne sont donc pas limités à ordonner le paiement de dommages-intérêts en cas d'inexécution d'une obligation contractuelle. Conclure autrement rendrait futile, dans bien des cas, le recours à l'arbitrage.

Les arrêts *Service Bérubé* et *Nearctic Nickel Mines* démontrent l'importance d'examiner la nature véritable des recours entrepris par les parties, sans s'arrêter à la manière dont celles-ci formulent les conclusions recherchées. Dans ces deux affaires, la Cour d'appel a conclu que les conclusions recherchées, bien qu'ayant la forme apparente d'une demande d'injonction, étaient plutôt de nature déclaratoire, portant sur le droit au renouvellement d'un contrat ou le droit à la passation de titre. La Cour insiste sur le fait que l'injonction se distingue, en partie, par la possibilité d'imposer des sanctions à caractère pénal en cas de non respect de celle-ci. Cette particularité est discutée davantage dans *Service Bérubé*, où la Cour précise que l'injonction est une mesure discrétionnaire et exceptionnelle qui sera généralement pertinente dans les situations où seule une contrainte pénale serait à même d'infléchir la conduite d'une partie, situations où les parties devront s'adresser à la Cour supérieure pour faire intervenir la force de l'État afin d'imposer le respect d'une obligation de nature privée. Malgré ces précisions apportées par la Cour d'appel, distinguer une ordonnance d'exécution en nature d'une injonction dans le contexte particulier de chaque affaire constituera certainement un défi de taille pour les arbitres et les tribunaux judiciaires dans le futur. Par ailleurs, comme la Cour d'appel a conclu que les ordonnances des arbitres n'étaient pas de la nature d'une injonction dans ces deux affaires, ses commentaires quant au pouvoir de l'arbitre d'émettre des injonctions restent théoriques et ne sont qu'un *obiter dictum*.

Dans l'arrêt *Nearctic Nickel Mines*, la Cour d'appel semble également vouloir corriger une lacune importante en droit québécois en mentionnant, en *obiter dictum*, que les arbitres auraient compétence pour octroyer des mesures provisionnelles même lorsque la convention d'arbitrage est silencieuse à ce sujet. Jusqu'à maintenant, les dispositions du *C.p.c.* ont été interprétées de manière à ne permettre aux arbitres d'octroyer de telles mesures que si la convention d'arbitrage ou les règles d'arbitrage choisies par les parties le prévoit expressément¹¹. Autrement, selon cette interprétation, les parties doivent s'adresser aux tribunaux judiciaires pour demander des mesures provisionnelles. Or, comme l'indique la Cour d'appel dans *Nearctic Nickel Mines*, l'article 940.4 *C.p.c.* ne viserait-il pas plutôt à confirmer la compétence des tribunaux judiciaires d'accorder des mesures provisionnelles (à défaut de convention contraire des parties), et non à priver les arbitres du pouvoir d'accorder de telles mesures? Cette disposition prévoit que « [a]vant ou pendant la procédure arbitrale, un juge ou le tribunal peut accorder, à la demande d'une partie, des mesures provisionnelles » — celles-ci ayant été interprétées comme incluant la nomination d'un séquestre, la saisie avant jugement, l'injonction, ainsi que les ordonnances de sauvegarde sous l'article 46 *C.p.c.*¹². Hormis l'injonction, qui relève de la compétence exclusive de la Cour supérieure en vertu de l'article 751 *C.p.c.*, aucune disposition n'interdirait expressément aux arbitres d'octroyer des mesures provisionnelles.

Par ailleurs, l'approche selon laquelle les arbitres ne peuvent ordonner des mesures provisionnelles que si ce pouvoir leur est expressément conféré ne semble pas correspondre aux besoins actuels de l'arbitrage conventionnel et se situe plutôt à contre-courant de la tendance moderne. À preuve, l'article 17 de la *Loi type* a été amendé en 2006 pour instaurer un véritable régime permettant aux arbitres d'ordonner des mesures provisoires, sauf convention contraire des parties, afin de

« préserver ou de rétablir le statu quo en attendant que le différend ait été tranché », « fournir un moyen de sauvegarder des biens qui pourront servir à l'exécution d'une sentence ultérieure », « sauvegarder les éléments de preuve qui peuvent être pertinents et importants pour le règlement du différend », ou encore, « prendre des mesures de nature à empêcher, ou de s'abstenir de prendre des mesures susceptibles de causer, un préjudice immédiat ou imminent ou une atteinte au processus arbitral lui-même »¹³. Ce régime prévoit notamment la reconnaissance et l'exécution par les tribunaux judiciaires des mesures provisoires ordonnées par les arbitres¹⁴. L'article 17 de la *Loi type* a été adopté dans toutes les juridictions canadiennes¹⁵, sauf au Québec. Les lois sur l'arbitrage adoptées dans plusieurs autres juridictions, ainsi que les règlements des plus importantes institutions d'arbitrage (dont la CCI, la LCIA et le CIRDI) prévoient également, pour la plupart, que les arbitres ont compétence pour ordonner des mesures provisoires¹⁶.

Au Québec, il est intéressant de constater que les dispositions de l'*Avant-projet de loi instituant le nouveau Code de procédure civile* prévoient que l'arbitre pourra « rendre toute décision provisoire ou propre à sauvegarder les droits des parties » et que celles-ci pourront, au besoin, « en demander l'homologation au tribunal afin de lui donner force exécutoire »¹⁷. Ces modifications, qui vont dans le même sens que les dispositions sur les mesures provisoires prévues à la *Loi type*, permettront certainement d'assurer une meilleure efficacité des arbitrages conventionnels.

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- ¹ *Nearctic Nickel Mines Inc. v. Canadian Royalties Inc.*, [2012] Q.J. No. 1639, 2012 QCCA 385 (C.A.) [*Nearctic Nickel Mines Inc.*], confirmant [2010] Q.J. No. 9791, 2010 QCCS 4600 (C.S.) (disponibles en anglais seulement).
- ² *Service Bérubé ltée c. General Motors du Canada ltée*, [2011] J.Q. no 2781, 2011 QCCA 567 (C.A.) [*Service Bérubé ltée*], confirmant *Dubois & Frères ltée c. General Motors du Canada ltée*, [2010] J.Q. no 2039, 2010 QCCS 962 (C.S.).
- ³ *Code de procédure civile*, LRQ, c C-25 [C.p.c.].
- ⁴ *Loi de 1991 sur l'arbitrage*, LO 1991, c 17, art. 31 (« Le tribunal arbitral tranche le différend conformément à la loi, et notamment selon l'equity, et peut ordonner des exécutions en nature, prononcer des injonctions et ordonner d'autres redressements reconnus en equity. »)
- ⁵ Commission des Nations Unies pour le droit commercial international, *Loi type de la CNUDCI sur l'arbitrage commercial international*, Doc. N.U. A/40/17, ann. I (1985) [mod. Doc. N.U. A/61/17, ann. I (2006)] (« Loi type »).
- ⁶ Parmi les décisions de principes les plus importantes reconnaissant l'arbitrage comme mode de résolution des différends « parallèle » au système judiciaire, mentionnons notamment les arrêts *Zodiak International Productions Inc. c. Polish People's Republic*, [1983] A.C.S. no 38, [1983] 1 S.C.R. 529, *Desputeaux c. Éditions Chouette (1987) inc.*, [2003] A.C.S. no 15, [2003] 1 R.C.S. 178 et *Dell Computer Corp. c. Union des consommateurs*, [2007] A.C.S. no 34, [2007] 2 R.C.S. 801.
- ⁷ Cette compétence exclusive de la Cour supérieure de rendre des injonctions a notamment été reconnue par la Cour suprême du Canada dans les arrêts *A.I.E.S.T., local de scène no 56 c. Société de la Place des Arts de Montréal*, [2004] A.C.S. no 4, [2004] 1 R.C.S. 43 (C.S.C.) et *Okwuobi c. Commission scolaire Lester-B.-Pearson*, [2005] A.C.S. no 16; *Casimir c. Québec (Procureur général)*; *Zorrilla c. Québec (Procureur général)*, [2005] 1 R.C.S. 257 (C.S.C.), ainsi que par la Cour d'appel du Québec dans les arrêts *Service Bérubé et Nearctic Nickel Mines*.
- ⁸ Voir également Dominic Dupoy, « La Cour d'appel confirme le pouvoir des arbitres consensuels d'ordonner l'exécution en nature d'une contrat » (14 avril 2011), Norton Rose Canada (commentaire de l'arrêt *Service Bérubé ltée*); Dominic Dupoy, « La Cour d'appel confirme le pouvoir des arbitres d'ordonner l'exécution en nature d'une contrat » (31 janvier 2011), Norton Rose Canada (commentaire de l'arrêt de la Cour supérieure dans *Nearctic Nickel Mines Inc.*) et Luis Millan, « Quebec CA clarifies arbitrators' powers » (17 juin 2011) *The Lawyers Weekly*, à la p. 12.
- ⁹ *Service Bérubé ltée*, au para. 85.
- ¹⁰ *Code civil du Québec*, LRQ, c C-1991, art. 1601 et ss.
- ¹¹ Voir notamment «Assemblée nationale, *Journal des débats — Commission permanente des institutions* (16 septembre 1986), pp. 556 et suiv. et 572 et suiv. (mentionnant que l'article 940.4 C.p.c. n'interdit pas aux arbitres d'octroyer des mesures provisionnelles lorsque les parties l'ont prévu expressément); voir également *Dubois & Frères ltée c. General Motors du Canada ltée*, [2010] J.Q. no 2039, 2010 QCCS 962 (C. Sup.), au para. 62: « Comme [l'art.] 940.4 [C.p.c.] ne fait pas partie des articles auxquels on ne peut déroger, force est de croire qu'on peut y déroger dans un écrit négocié, convenu et signé par les parties [...] »), conf. pour d'autres motifs par *Service Bérubé ltée c. General Motors du Canada ltée*, [2011] J.Q. no 2781, 2011 QCCA 567.

¹² Voir *Joli-Coeur c. Joli-Coeur Lacasse Avocats*, s.e.n.c.r.l., [2011] J.Q. no 771, 2011 QCCA 219, au para. 12.

¹³ *Loi type*, art. 17(2).

¹⁴ *Loi type*, art. 17 H.

¹⁵ Voir notamment, en Ontario, la *Loi sur l'arbitrage commercial international*, LRO 1990, c.I.9, art. 9.

¹⁶ Pour une revue des lois sur l'arbitrage adoptées par divers pays ainsi que des règlements des plus importantes institutions d'arbitrage, voir notamment : Kaj Hober, « Interim

Measures by Arbitrators », dans Albert Jan van den Berg, ed., *International Arbitration 2006 : Back to Basics? ICCA International Arbitration Congress*, The Netherlands, Iuger Law International, 2007, aux pp. 723 et ss.

¹⁷ Québec, Assemblée Nationale, *Avant-projet de loi instituant le nouveau Code de procédure civile*, 39^e lég. 2^e sess. (2011), art. 637. Voir également les art. 644 et 650, permettant l'homologation des mesures provisoires.

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