MINDEN GROSS LLP

Fall 2013

TOPICS:

Can a lease between a Landlord and Tenant *protect a Third Party hired by the Landlord from Liability?*

In *Williams-Sonoma Inc. v. Oxford Properties Group Inc.*, 2013 ONCA 441, Williams-Sonoma was a tenant at Yorkdale Shopping Centre when the mall was undergoing certain construction work. The landlord, Oxford Properties Group Inc., hired EllisDon Corporation as an independent contractor to perform the construction work. During the course of their work a vandal broke into Williams-Sonoma's third floor office space and opened a fire hose, leading to extensive damage of their premises and property. The resulting water damage was alleged to be approximately $7 million. Williams-Sonoma sued EllisDon for breach of common-law and statutory duty owed to the Tenant by failing to properly secure the area where the fire hose was located.

However, the Lease between the Landlord and all of the mall's tenants included a provision requiring tenants to obtain independent insurance for water damage. In addition, the Lease contained an exclusionary clause, s.8.3.1, which provided that "subject to 8.3.2 and 8.3.3, each of the Landlord and Tenant hereby releases the other and waives all claims against the other and those for whom the other is in law responsible with respect to occurrences insured against or required to be insured against by the releasing party, whether any such claims arise as a result

of the negligence or otherwise of the other or *those for whom it is in law responsible.*" [Emphasis added]. Based on this provision, EllisDon argued that the Landlord was responsible for their actions and the clause extended to them as a non-party.

The main analysis undertaken by the Courts (both Superior Court of Justice and the Court of Appeal) pertained to the doctrine of privity and interpretation of the phrase "in law responsible." Two cases, *London Drugs Ltd. v. Kuehne & Nagel International Ltd.,* [1992] 3 SCR 299 (SCC) and *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.,* [1999] 3 SCR 108 (SCC) analyzed the doctrine of privity of contract and determined that the doctrine should be relaxed in certain circumstances. *Fraser River* adopted and modified a test established in *London Drugs* and considered two factors in extending the doctrine of privity to a third party:

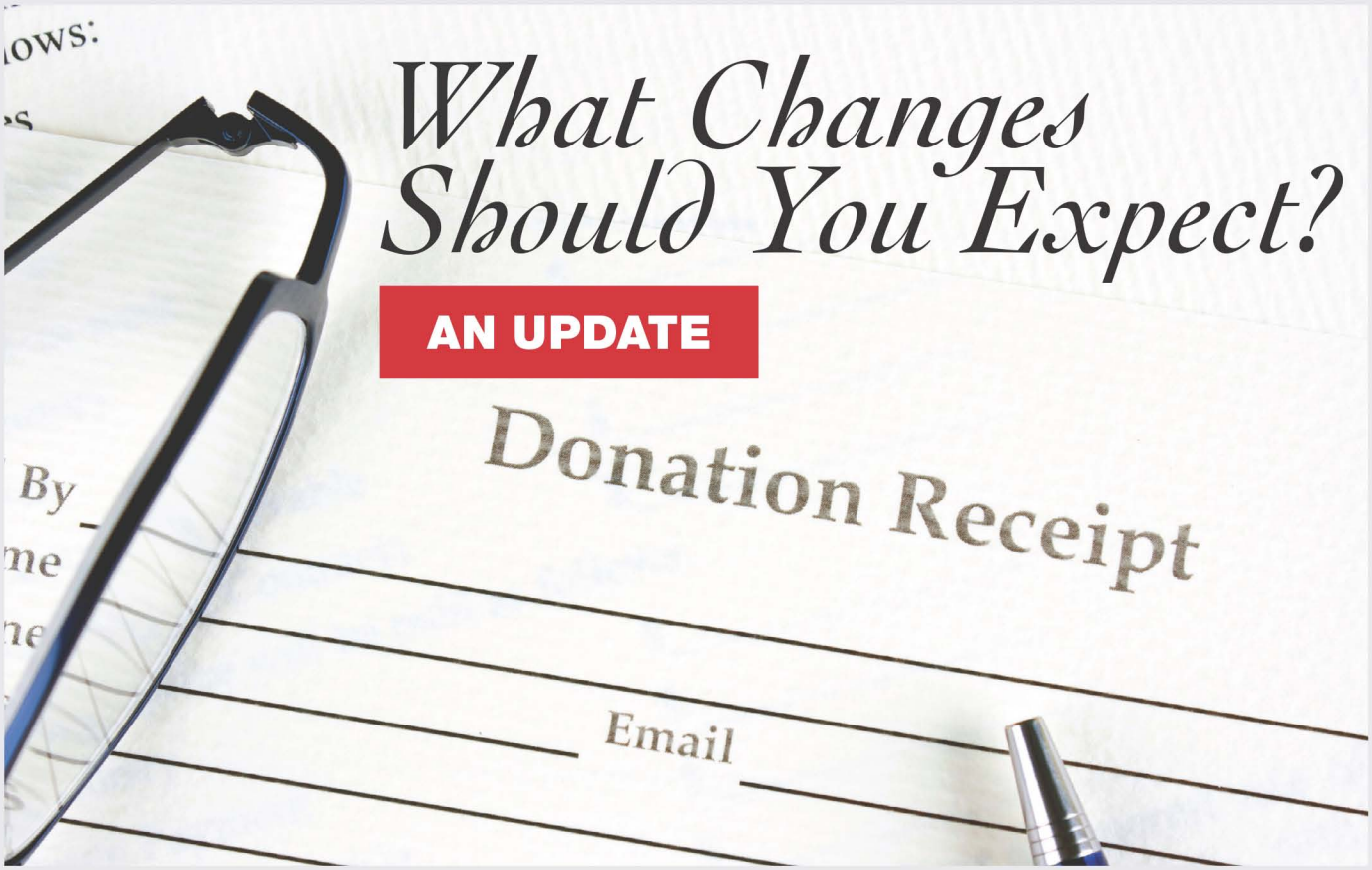
1. Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? and
2. Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general or the provision in particular, again as determined by reference to the intentions of the parties?

In considering the test established in *Fraser*, the motions judge concluded that the intention of the parties (Landlord and Tenant) was to extend s. 8.3.1 of the Lease to those parties involved in the renovation of the mall. EllisDon was contracted to do work in the mall, therefore the Landlord was responsible in law for them within the meaning of the Lease. Furthermore, EllisDon was performing the very activities contemplated in the impugned clause in the Lease. Therefore both parts of the test in Fraser were satisfied. The Court of Appeal agreed with the motions judge, and further analyzed the term "in law responsible." Under s. 8.4, the Landlord indemnified the tenants from loss occasioned by the Landlord's "officers, agents, servants, employees, contractors, customer or licensees," therefore taking responsibility for EllisDon, the contractor. Had water damage not been excluded by s. 8.3, the Landlord would have indemnified the Tenant and been responsible for the damage caused by the contractor. As a result, the Court determined that EllisDon was the responsibility of the Landlord and thus protected by the Lease.

This case demonstrates that the doctrine of privity may extend beyond the scope of the parties to a Lease and that a third party, who is not a party to the Lease, may be exculpated from liability by an exclusionary clause. Although the Landlord and Tenant contemplated water damage, evidenced by the provisions in the Lease requiring Tenants to purchase water damage insurance, the Tenant could not seek additional damages from a non-party. By way of including an exclusionary clause in a Lease, a non-party such as EllisDon, can be safeguarded by the Landlord from any liability arising from damage that stemmed from the non-party. Furthermore, language such as "in law responsible" can cast a wide scope and does not need to be accompanied by language specifically identifying parties that should fall within the parameters of the language.

Joshua S. Disenhouse
Student at Law
jdisenhouse@mindengross.com

CANADA & ONTARIO'S NEW not-for-profit Legislation:



this is an update to an article previously published in the Fall 2012 Minden Brief. Although the majority of the requirements have remained the same, there are some significant updates. The law has drastically changed for the not-for-profit ("NFP") corporation with the enactment of the Canada *Not-for-Profit Corporations Act* ("CNCA") and the passing of the Ontario *Not-for-Profit Corporations Act* ("ONCA"). The CNCA came into force on October 17, 2011 and it affects NFPs incorporated federally. The enactment of the ONCA has been delayed and is not expected to come into force until after July 1, 2014. This legislation will affect all NFPs incorporated in Ontario.

Prior to the enactment of the CNCA, federal NFPs were incorporated under and governed by the Canada *Corporations Act* ("CCA"). Ontario NFPs are currently incorporated under and governed by the Ontario *Corporations Act* ("OCA").

The ONCA and the CNCA are modeled on the Ontario *Business Corporations Act* ("OBCA") and the Canada *Business Corporations Act* ("CBCA"), respectively, which govern business corporations. This harmonization

of the NFP and for-profit laws will help clarify areas of the NFP legislation that previously lacked certainty, through the reference to settled cases in relation to business corporations.

The following is an updated summary of some of the more important aspects of both the CNCA and the ONCA.

Ontario Not-For-Profit Corporations Act

Once the ONCA comes into force, there is an automatic continuance of all existing non-share capital corporations as well as all special act corporations under Ontario jurisdiction, unless otherwise specified under their special act. A corporation will have three years to amend its by-laws to conform to the ONCA, after which, the by-laws will be deemed to have been amended in accordance with the Minister's template by-law. The Ministry form of by-law will only contain bare essentials and most corporations will want to tailor them to fit their own needs. Recent amendments to the proposed ONCA have provided for a mechanism whereby any valid provision in the by-laws of the NFP corporation will remain in effect until three years after the ONCA comes into force, at which point the provisions will become invalid, unless they are incorporated into new by-laws or the articles of the corporation pursuant to the ONCA. If the corporation is newly-formed under the ONCA, it will have 60 days after formation to approve a new form of by-law that conforms with the ONCA, otherwise the Ministry form will apply.

Additionally, with new requirements under the ONCA to provide for certain provisions such as membership classes and distribution of assets upon dissolution in the corporation's articles, the NFP corporations may find themselves in precarious situations unless they properly continue under the ONCA. Prior to the ONCA, these provisions used to be included in the corporation's by-laws; however, the ONCA now provides that such provisions will be invalid three years after the ONCA comes into force, unless they are transitioned into the corporation's articles.

If the NFP corporation is not a public benefit corporation[1] and its articles do not provide for the manner in which the corporation's assets will be distributed upon dissolution, the ONCA will automatically apply. As an example, where a NFP corporation under the OCA could provide in its by-laws that upon dissolution any remaining funds would be distributed to charities, under the ONCA, this provision must be stated in its articles, otherwise the ONCA provides that upon dissolution the remainder of its assets will automatically be allocated to the members.

An ONCA corporation may provide in its articles for a minimum or maximum number of directors or a fixed number of directors, but there is a minimum requirement of three directors.

The recent introduction of Bill 85 in June 2013 proposes certain amendments to the ONCA, one of which is that the ONCA will now require that an individual who is elected or appointed to be a director must consent in writing to hold office within 10 days after the election or appointment.

The ONCA reflects an objective standard of care as opposed to a subjective standard of care for directors and officers. The OCA does not speak on the subject of standard of care for directors and left the matter to the courts to interpret. This standard of care is now in tune with the standard of care for business corporations found in the OBCA and the CBCA.

The enactment of the ONCA also brings clarity to several areas of director responsibilities that were not clearly provided for in the OCA. Under the ONCA, a director must be appointed as the chair of the board of directors. Also, the ONCA specifically disallows a director to send a delegate or proxy to a directors' meeting in his or her place.

In addition to the benefits that are afforded to NFP corporations and their officers and directors as a result of the ONCA, there are new rights and remedies available to members. For example, the Act dictates that the by-laws must set out the requirements to become a member of the corporation and also that any termination of such membership must be done in good faith and in a fair and reasonable manner. It is highly recommended that the new by-laws of a NFP corporation provide for a proper procedure for the discipline of members so that a terminated or suspended member will have little grounds to challenge any disciplinary action undertaken by the corporation.

Additional member remedies now include an application for a compliance or a restraining order by a complainant or creditor, an application by an aggrieved party to have the registers or records of a corporation

[1] A "public benefit corporation" is a charitable corporation or a non-charitable corporation that receives more than $10,000 per financial year from specific public sources.

rectified, a dissent and appraisal remedy for certain corporations, the ability of a complainant to seek a court order for the commencement of a derivative action and a holder of 10% of the votes may requisition a meeting of members.

Canada Not-For-Profit Corporations Act

The CNCA contains very strict continuance provisions. It provides that any NFP that is currently incorporated under the old legislation, will have to apply for continuance under the new CNCA, otherwise the corporation will be dissolved on **October 17, 2014**. This continuance does not happen automatically and many federal NFPs may find themselves in difficulty next year if appropriate steps are not taken to continue.

Currently, under the CCA, Industry Canada must approve any by-law. A CNCA corporation still has to file copies of its by-laws with Industry Canada within 12 months of confirmation by the members, but these by-laws no longer need to be approved by Industry Canada. If the by-laws are not filed within this period, Industry Canada's form of by-law will apply.

A CNCA corporation may have a minimum of one director in contrast to an ONCA corporation. However, if the corporation is a soliciting corporation, as defined in the Act, it must have a minimum of three directors, at least two of whom cannot be officers or employees. It is also necessary under the CNCA for the articles of the corporation to specify a fixed number or a minimum and maximum number of directors. Like the ONCA, the CNCA also reflects an objective standard of care as opposed to a subjective standard of care for directors and officers.

While there are many similarities between the CNCA and the ONCA, there are also several provisions that are different. For example, the ONCA specifically permits *ex-officio* directors[2] , while the CNCA disallows this practice and provides that all directors must be elected by the members. Also, under the CNCA, the by-laws may provide for decisions to be made by consensus at meetings of directors and members as long as this term is defined, while the ONCA is silent on this point.

Another major difference between the ONCA and the CNCA is the fact that under the CNCA, members may enter into a unanimous members agreement to restrict the powers of the directors, similar to unanimous shareholders agreements under both the CBCA and the OBCA. In addition, the CNCA provides for a derivative action remedy for members in certain situations. The holders of 5% of the votes may requisition a meeting of members.

Conclusions

1. This brief overview of the CNCA and the ONCA demonstrates the important changes to the legislative framework of NFP corporations in Canada. With the enactment of these two Acts, there is significant harmonisation between the for-profit and NFP corporations.
2. Currently, Ontario NFP corporations are operating under outdated legislation that does not take into account modern corporate governance practices.
3. Directors, officers and members of NFP corporations should seek advice about the appropriate time for continuance (in the case of CNCA corporations) and start thinking about the changes that are needed to ensure that the corporation's governance arrangements are improved or updated to conform to the new legislation.
4. Minden Gross LLP can assist corporations to transition under the CNCA and the ONCA. Contact: Hartley R. Nathan, Q.C. or Ira Stuchberry.

Hartley R. Nathan, Q.C.
Partner
hnathan@mindengross.com

Ira Stuchberry
Associate
istuchberry@mindengross.com

[2] There are complicated mechanisms to "circumvent" this prohibition against *ex-officio* directors.

MINDEN GROSS LLP

BARRISTERS & SOLICITORS
145 KING STREET WEST, SUITE 2200
TORONTO, ON, CANADA M5H 4G2
TEL 416.362.3711 FAX 416.864.9223
www.mindengross.com

Firm News

Minden Gross LLP ranked as one of Ontario's Top 10 Regional Firms by Canadian Lawyer Magazine

Lawyers and in-house counsel from across Canada voted **Minden Gross LLP** as one of Ontario's Top 10 Regional Firms. Respondents' rankings were based on firms' regional service coverage, client base, notable mandates, service excellence, and legal expertise. Firms were required to have offices only in the province of Ontario and offer a wide range of legal services.

Mark Freake (Commercial Litigation and Insolvency), **Ira Stuchberry** (Business Law), and **Lisa Filgiano** (Trust and Estate Litigation) joined the firm as Associates.

Professional Notes

Stephen J. Messinger moderated a panel on "The Changing Landscape of the Retail Market: New Tenants, Urban Formats, and the Impact of E-Commerce" and **Stephen Posen** moderated a panel on "Recent Case Law: Implications for Leasing and Other Real Estate Activities" at the RealLeasing Conference held on October 2, 2013.

Hartley R. Nathan, QC is featured in the cover story "The Penang lawyer" in the September 2013 *Canadian Lawyer* magazine where he shares his passion for Sherlock Holmes.

Joan Jung was on the presentation panel for a LSUC seminar "The Annotated Partnership Agreement" on September 26, 2013.

Michael Goldberg hosted the first of four Tax Talks on September 18, 2013 for professional advisors that serve high net worth clients.

Congratulations to **Stephen Posen** and **Stephen J. Messinger** who were acknowledged by Lexpert as two of "Canada's Leading Infrastructure Lawyers" in September 2013.

Congratulations to **Reuben M. Rosenblatt QC, Stephen Posen, Stephen J. Messinger, Michael S. Horowitz, Adam L. Perzow,** and **Howard S. Black** for being ranked by their peers as part of the 2014 edition of *Best Lawyers in Canada.*

The Commercial Leasing Group participated in the ICSC Canadian Conference held September 16-18, 2013 in Toronto. **Stephen J. Messinger** was a committee member for this event.

Arnie Herschorn published his article "Awards of Punitive Damages for Breach of Contract" in the September 2013 issue of *The Advocates' Quarterly*.

Joan Jung, Michael Goldberg and **Matthew Getzler** joined the editorial board for the *Canadian Income Tax Act with Regulations.*

David Ullmann was quoted in the *Globe and Mail* article "Why Quebec may have to bear the cost of the Lac-Mégantic disaster" on August 9, 2013.

Timothy Dunn appeared on Sun News to discuss how Lac-Mégantic railway gets bankruptcy protection on August 8, 2013.

David Ullmann was quoted in the article "Tim Bosma case: Dellen Millard's mother sells family home for $1.2 million" in the Toronto Star on July 22, 2013.

Enjoy **Irvin Schein's** litigation blog at http://irvinschein.com/