



eLaw - Business Law Update

September 2010 - No. 44

ISSN 1916-3908

In This Issue

[Reasonableness of Transfer Pricing](#)

[Liability for Shares Survives Discharge From Bankruptcy: MBCA](#)

[New Legislation](#)

[Interim Guidance on Pending International Financial Reporting Standards](#)

[Challenging the Proposal for a National Securities Regulator](#)

[Risk Management](#)

[Fall CPD Programs: LSM](#)

[Skilled Lawyer Series: CBA](#)

[Business Law Publications](#)

Reasonableness of Transfer Pricing

Tax lawyers are reportedly pleased with the Federal Court of Appeal decision on transfer pricing in [Glaxosmithkline Inc. v. Canada](#), 2010 FCA 201. The Court of Appeal ordered the Tax Court to reconsider whether Glaxo Canada had paid a reasonable price for the pharmaceutical ingredients it purchased from its non-arms length supplier Adechsa. The lower court had agreed with CRA's assessment that the fee paid by Glaxo was excessive in comparison to the amount paid for the same drug by generic Canadian companies. The Court of Appeal found, however, that in not taking into account the license and supply agreements obliging Glaxo to purchase from Adechsa the Tax Court failed to apply the proper test in determining "the amount that would have been reasonable in the circumstances." The following articles discuss the case in more detail:

- [Transfer Pricing Reasonableness Standard Refined by the Federal Court of Appeal in Glaxosmithkline Inc. v. Canada \(2010\)](#), by Cris Best, posted August 13, 2010 on The Court;
- [Glaxo case sets principle for dealing with transfer pricing](#), by Julius Melnitzer, *Law Times*, September 27, 2010;
- [Canadian Court Overturns Decision on International Pharmaceutical Transfer Pricing Case](#), by John Tobin, *Torys*;
- [Federal Court of Appeal adopts a "business reality" test for transfer pricing analysis](#), by Ron Durand and Alan Kenigsberg, *Stikeman Elliott LLP*;
- [Case Comment: GlaxoSmithKline Inc. \(FCA\) - Elusive Valuations of Bundled](#)

- [Ruling offers reprieve for corporate tax strategy](#) by Jeff Gray, *The Globe and Mail*.

Liability for Shares Survives Discharge From Bankruptcy: MBCA

In [Garlicki \(Bankrupt\). Re](#), 2010 MBCA 73, the Court of Appeal considers the import of s.178(1)(d) of the *Bankruptcy and Insolvency Act* (the Act), which provides that an order of discharge from bankruptcy does not release the bankrupt from liabilities arising from "fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity." Among other things the court finds that for both defalcation and misappropriation "some element of wrongdoing, improper conduct or failure to account beyond an innocent breach (which would include a breach caused by negligence, incompetence or inadvertence) will be required before a fiduciary's liability will survive bankruptcy discharge." (para. 64) In this case, the respondent's failure to turn shares over to the appellant was deliberate and wilful and could not be excused by failure of the business relationship. It constituted a breach of trust and intentional refusal of a fiduciary to account for trust property. As such, the judgment for the value of the shares survived the respondent's discharge from bankruptcy.

New Legislation

Sections 1776 to 1782 and 1784 (August 27, 2010) and ss. 99 to 102 (September 1, 2010) of the [Jobs and Economic Growth Act](#), S.C. 2010, c. 12 are now in force.

And, sections of the [Economic Recovery Act \(stimulus\)](#) S.C. 2009, c. 31 (ss. 30, 31, 32(2) 33, 34, 41 and 42) affecting the Canada Pension Plan came into force September 1, 2010. Sections 25 to 29, s. 32(1) and ss. 35 to 40 will come into force January 1, 2012.

Section 3 of [The Consumer Protection Amendment Act \(Payday Loans\)](#), S.M. 2006, c. 31 (enacting ss. 139, 147, 152 to 154 and 156) will come into force on October 18, 2010 and ss.6 and 8 of [The Consumer Protection Amendment Act \(Payday Loans\)](#), S.M. 2009, c. 12 (enacting ss. 161.6 and 161.7) will come into force on October 18, 2010.

[Section 32](#) of [The Securities Amendment Act](#), S.M. 2007, c. 12 came into force June 30, 2010.

[Bill 15](#), *The Franchises Act*, received royal assent June 17, 2010 and will come into force upon proclamation. The bill is modelled on *The Uniform Franchises Act* prepared by the Uniform Law Conference of Canada and is similar to the legislation in place in Alberta, Ontario, New Brunswick and Prince Edward Island. It gives franchisees the right to recover losses caused by misrepresentation and requires franchisors to disclose financial information before entering into an agreement. It also imposes a duty on both sides to act in good faith and in accordance with reasonable commercial standards.

Interim Guidance on Pending International Financial Reporting Standards

Most smaller public companies are behind in their conversions to new international financial reporting standards according to author Andi Balla in [IFRS deadline turns on heat for companies](#), a recent *InHouse* article. With the January 2011 deadline to convert fast approaching lawyers who advise affected companies will be kept busy ensuring the legal requirements are met.

The Canadian Bar Association and the Auditing and Assurance Standards Board are [working together](#) to adapt the [Joint Policy Statement on Audit Enquiries](#) in light of the new standards. In August 2010 they issued [interim guidance](#) on how to deal with audit inquiries under IFRS. They are also holding an [online webinar](#) on the changing accounting landscape on audit inquiries on October 13, 2010.

Challenging the Proposal for a National Securities

Regulator

Debate on the evolving regulatory landscape has heated up since the May release of the [proposed Canadian Securities Act](#) (detailed in our June eLaw update). Both the [cover story](#) and [editorial](#) of the current *Canadian Lawyer Inhouse* discuss the merits of and opposition to the move to a national securities regulator. They note that a Supreme Court reference on the matter will be heard next April and that both the Alberta and Quebec governments have brought constitutional challenges to the federal proposal. The article also examines registration reform one year after the implementation of National Instrument 31-103 and continuous disclosure practices post-*Silver v. IMAX Corp.*

Risk Management

The shaky economy and an increasingly complex legislative and regulatory regime have made risk management a core practice for corporations and a growth area for lawyers according to those quoted in the *Canadian Lawyer Inhouse* article [A novel risk-management plan](#). Two webcasts, [Risk Management for Corporations](#), from CLE BC's Practice Points, and the fifth annual InHouse/ACC roundtable-[Risk management](#), show how lawyers can add value to the services they provide to corporate clients by participating in their risk management processes.

Fall CPD Programs: LSM

Be sure to register soon for these continuing professional development programs offered by the Law Society this fall:

[Privacy Law Update](#) - Presenter Brian Bowman will review the latest developments in the dynamic area of privacy law, including the most recent case law and upcoming legislative changes at this lunch program on October 5, 2010. [Register](#) to attend the program in person at the Law Society classroom or by teleconference.

[Writing to Win: Results-Oriented Writing for Busy Solicitors](#) and [Speaking to Win](#) - The Law Society is pleased to have nationally acclaimed lecturer and writer Steven Stark present these two programs on October 20, 2010. Registrants can attend either the morning or afternoon program, or register for both at a discount.

[HST in Manitoba? It's Already Here!](#) - Experienced accountants will discuss how HST and place of supply legislative changes in other provinces will impact Manitoba lawyers and their clients at this lunch program on October 26, 2010. [Register](#) to attend the program in person at the Law Society classroom or by teleconference.

Skilled Lawyer Series: CBA

The new CBA [Skilled Lawyer Series](#) offers courses designed to bridge the gap between theory and practice. The [Corporate Stream](#) features eight online programs dealing with corporate law fundamentals. The first program in the series, [Drafting for Business Lawyers](#), takes place on October 21, 2010.

Business Law Publications

These recent publications may be of interest to business lawyers:

- The article [Business Valuation](#), by Kiu Ghanavizchian, provides insight into the key factors that determine the worth of a business and reviews the business valuation methods in general use. It was posted August 2010 on Practice Points.
- A link to Ned Brown's article [Taking Security in Intangible Property](#) was posted July 28, 2010 on [PitbLAWg](#). It deals with what's involved in taking effective security in certain types of intangible assets.
- The CBA's [Business and Corporate Edition](#) September 2010 contains articles on [Canadian securities regulators' decisions on poison pills](#); [Amendments to National](#)

[Instrument 31-103](#); [The potential competition law implications of employee hiring practices](#) and [The proper grounds to challenge validity of a selection patent](#).

The Law Society of Manitoba provides this service solely for the benefit of and to support the competence of its members. Members should exercise their professional judgment in using or adapting any content.