

**Proposed National Securities Regulator Legislation Unconstitutional: SCC****Supreme Court Considers GAAR Again****One-Click Patent Case Continues: FCA****Crown on Equal Footing With Unsecured Creditors: MBCA****PIPEDA Amendments****Pending Anti-Spam Law****Business Law Publications****Winter CPD: LSM****2012 MBA Mid-Winter Meeting****Proposed National Securities Regulator Legislation Unconstitutional: SCC**

The proposed *Canadian Securities Act* "overreaches genuine national concerns" according to a unanimous Supreme Court in [Reference re Securities Act](#), 2011 SCC 66. The decision is a third victory for those provinces who oppose the establishment of a national securities regulator, following similar rulings in the [Alberta](#) and [Quebec](#) appeal courts. The court summarised its thinking at para.128:

...we accept that the economic importance and pervasive character of the securities market may, in principle, support federal intervention that is qualitatively different from what the provinces can do. However, as important as the preservation of capital markets and the maintenance of Canada's financial stability are, they do not justify a wholesale takeover of the regulation of the securities industry which is the ultimate consequence of the proposed federal legislation. The need to prevent and respond to systemic risk may support federal legislation pertaining to the national problem raised by this phenomenon, but it does not alter the basic nature of securities regulation which, as shown, remains primarily focused on local concerns of protecting investors and ensuring the fairness of the markets through regulation of participants. Viewing the Act as a whole, as we must, these local concerns remain the main thrust of the legislation - its pith and substance.

These articles discuss the decision:

- [Round III to the Provinces: Supreme Court Rejects Canadian Securities Act as Unconstitutional](#), Bennett Jones;
- [Canada: Supreme Court's Unanimous Ruling Sinks Canadian Securities Act \(But Leaves Much To Be Salvaged\)](#), McMillan;
- [Supreme Court Securities Act Constitutionality Ruling Throws Digital Laws into Doubt](#), Michael Geist; and
- [Supreme Court Rules Against Proposed Securities Act](#) and [Securities Ruling not a Total Blow to National Regulator](#), Osler Updates.

**Supreme Court Considers GAAR Again**

The Supreme Court of Canada has rendered a fourth decision on the interpretation and application of s.245 of the *Income Tax Act* (the anti-avoidance rule) in [Copthorne Holdings Ltd. v. Canada](#), 2011 SCC 63, upholding the Minister's reassessment for unpaid withholding tax and confirming that the GAAR is an objective test, not a "moral opprobrium" (para.65). The court found that a series of transactions (involving the treatment of paid up capital upon amalgamation and resulting in a tax benefit) defeated the underlying rationale of s.87(3) and were therefore abusive. These articles summarise the decision and discuss its implications for anticipatory tax planning:

- [When Tax Avoidance is Abusive: Elucidating the 'Spirit' of the Income Tax Act in Copthorne Holdings Ltd. v. Canada](#), The Court;
- [Implications Of Copthorne On Tax Planning](#), BLG;
- [Supreme Court Applies GAAR In Copthorne](#), Osler; and
- [Copthorne: Supreme Court of Canada's Latest Views on Statutory Interpretation and GAAR](#), Blakes.

**One-Click Patent Case Continues: FCA**

The Federal Court of Appeal has overturned the fall 2010 [Federal Court ruling](#) granting Amazon a patent for its one-click business method of internet shopping. The FCA sent the matter back to the Commissioner of Patents to re-examine the patent application on an expedited basis in accordance with its detailed reasons in [Canada \(Attorney General\) v. Amazon.com, Inc.](#), 2011 FCA 328. The court did agree, however, "that no Canadian jurisprudence determines conclusively that a business method cannot be patentable subject matter" (para.60). As indicated in the following articles, opinion seems to be divided on how the decision will affect patent law practice and on whether the matter is likely to end up before the Supreme Court:

- [Preserving the Amazon \(Patent\): Business Methods Patentable in Canada According to Federal Court of Appeal](#) by Professor Emir Crowne, University of Windsor - Faculty of Law, posted on SSRN;
- [Federal Court of Appeal Rules on Amazon.com's "One-Click" Patent - Business Methods Remain Patentable in Canada](#), McCarthy Tetrault;
- [Amazon fights for patent on 'one-click' Web shopping](#), *The Globe and Mail*; and
- [Federal Court of Appeal weighs in on business methods](#), Norton Rose.

**Crown on Equal Footing With Unsecured Creditors: MBCA**

In [BDO Dunwoody Ltd. v. Canada \(Minister of National Revenue\)](#), 2011 MBCA 93, the court dismissed the Minister of National Revenue's appeal of a lower court decision that income tax payments made by a debtor within three months prior to bankruptcy were fraudulent preferences under s.95 of the *Bankruptcy and Insolvency Act*. The applications judge was correct in finding that the MNR, the deemed preferred creditor, failed to rebut the fraudulent preference presumption by showing there was no dominant intent to prefer one creditor over another. The court specifically rejected two arguments of the MNR: that a payment to a creditor cannot be considered a preference unless there is some *quid pro quo*; and that payments to the MNR are entitled to the benefit of the Crown prerogative of being paid in priority to other creditors of equal degree. On the latter issue the court said that when s.141 and s. 95 of the *BIA* "are read contextually and in their grammatical and ordinary sense, harmoniously with the scheme and objects of the *BIA* and the intention of Parliament, ...s. 4.1 abrogates the Crown prerogative in s. 95 matters" (para.18).

**PIPEDA Amendments**

[Bill C-12](#), *An Act to amend the Personal Information Protection and Electronic Documents Act* (also known as *Safeguarding Canadians' Personal Information Act*), reintroduces proposed amendments to the *Personal Information Protection and Electronic Documents Act* (PIPEDA) designed to protect the privacy of Canadians during commercial transactions. The [legislative summary](#) and [backgrounder](#) explain the proposed changes and these articles discuss specific changes in detail:

- [Bill C-12 and "Lawful Authority" Under PIPEDA](#), Slaw;
- [Canadian Federal Government Revives Amendments to PIPEDA - What Canadian Businesses Need to Know About the Proposed Breach Notification Provisions](#), SnIP/ITs; and
- [Upcoming PIPEDA Amendments](#), Slaw.

**Pending Anti-Spam Law**

Many commentators are speculating on when (and even if) the [anti-spam legislation](#) (CASL) passed December 2010 will come into force, given the cool reception to the regulations introduced last summer and the recent SCC ruling in the [Securities Act reference](#). What is certain is that the legislation will not be in force anywhere near the predicted January 2012 date. Michael Geist [predicts](#) that we won't even see modified proposed regulations until July. For a flavour of the debate on the issue see:

- [Anti-Spam Law Draws Backlash](#), *Canadian Lawyer Inhouse*;
- [Anti-Spam Law Musings](#), Slaw;
- [Will it be illegal to recommend a dentist under Canada's new anti-spam law \(CASL\)?](#), Barry Sookman; and
- [Canada's Anti-Spam Legislation: Casting a Wide Net](#), Bennett Jones.

**Business Law Publications**

Recent publications that may interest business lawyers include:

- [Canadian Competition Law Review](#) - this comprehensive review published by the National Competition Law section of the Canadian Bar Association contains material from the University of Toronto Roundtable on Competition Policy Institutions, a competition law year in review, and several other articles on competition law topics.
- [Top Cases of 2011](#) and [Top 10 Deals of 2011](#), both from the January 2012 *Lexpert*, list their choices for last year's most important business law decisions and deals. [The Reluctant Hand-Off - What happens if partners can't be force to retire](#), from the same publication, discusses [Fasken Martineau DuMoulin LLP v. British Columbia \(Human Rights Tribunal\)](#), 2011 BCSC 713, a recent B.C. decision in which a law firm's mandatory retirement policy was challenged.
- [Fully Secured](#) - a Gowlings newsletter discussing securities law legislation and cases from across the country.

**Winter CPD: LSM**

- [Not-for-Profit Corporations Act Webinar](#) - Presenter Bruce King will review the provisions of the new *Canada Not-for-Profit Corporations Act* and regulations at a lunch hour webinar on February 8, 2012. Existing federal not-for-profits will have to transform to the new scheme within three years, but the legislation does not impact provincially incorporated organizations.
- Save the date for the return of the popular **Advanced One Day MBA For Lawyers** workshop, to be held April 19, 2012, from 9:00 a.m. - 4:00 p.m. Watch the LSM website for further details.

**2012 MBA Mid-Winter Meeting**

The Manitoba Bar Association's [Mid-Winter Meeting](#) will be held January 19-20, 2012 at the Fort Garry Hotel. The Business Law section is sponsoring the program **Shareholder Agreements I - Drafting and Advising on Shareholder Agreements for the Owner-Managed Enterprise** and **Shareholder Agreements II - Tax Issues to Consider in Drafting Shareholder Agreements**, with Tim Kurbis, Charles Guberman and Sergio Pustogorsky. Other programs that may interest business lawyers include:

- Contractual Interpretation: Substance and Practice;
- Innovative Strategies for Effective Communication;
- Cloud Computing - What's Behind the Fog Bank?; and
- Ethical Practice in the Electronic Age - The Use of Social Media.

For further details see the [registration form](#) or [brochure](#).

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