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LEGAL DEVELOPMENTS OF INTEREST TO BUSINESS IN ATLANTIC CANADA

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In this issue

Expanded Fines and Penalties for Environmental Offences: The New Federal Environmental Enforcement Act

On May 13, 2009, the federal Parliament passed Bill C-16, the *Environmental Enforcement Act* (the "*EEA*"), which received Royal Assent on June 18, 2009. At the same time, the federal government announced additional funding commitments to hire enforcement officers and to implement the *EEA*.

While the *EEA* had not been proclaimed into force as at December 7, 2009, because of the significant changes and the renewed government focus on prosecuting environmental offences, you will want your business to be prepared for the *EEA*'s legislative changes. The *EEA* will amend nine federal statutes in order to modify and enhance their enforcement mechanisms. Significant changes mandated by the *EEA* include the following:

Fines

The *EEA* amends the penalty provisions of certain federal statutes by both raising maximum fines and establishing minimum fines for certain serious environmental offences. It also sets out different levels of penalties for different classes of offenders, namely individuals, small and large corporations (based on gross annual revenues being $5 million or less), and small and large vessels or ships (based on deadweight tonnage being less than 7,500). For serious offences, fines for individuals can range from a minimum of $5,000.00 to a maximum of $1 million, while for large corporations and vessels the fines can range from a minimum of $100,000 to a maximum of $6 million.

Notably, directors, officers and agents of a corporation who direct, authorize, acquiesce or otherwise participate in the commission of an offence by the corporation can be personally liable for fines at the individual penalty level. This is the case even where the corporation itself is not prosecuted or convicted.

Fines collected will go to the Environmental Damages Fund where they will be used for purposes related to protecting, conserving and restoring the environment, or for administering the Fund.

Additional Penalties

The *EEA* also provides that where an offender is found to have benefited from an offence, the offender must pay an additional fine equivalent to the estimated value of the benefit. A court can also order an offender to surrender a permit or licence and place a time limit on re-applying for another permit or licence.

Other possible court orders under the *EEA* include, but are not limited to: requiring that the offender compensate an aggrieved person for property damage resulting from an offence or for the costs of rehabilitation; directing the offender to implement environmental regimes (such as pollution prevention or emergency plans); requiring the offender to submit to periodic environmental audits; or requiring the offender to perform community service or make investments in research on environmental protection, conservation or restoration.

Administrative Monetary Penalties ("AMPs")

In addition to the amended range of fines, one of the most significant changes contemplated under the *EEA* is the introduction of an AMP regime. This regime will involve the issuing of tickets to corporations for less serious breaches of environmental laws, for amounts no more than $25,000.00. This regime is intended to increase the efficiency of the enforcement process by avoiding lengthier, more complex and costly court processes.

While the amounts to be paid under AMPs are less than for offences in the normal course, they are nonetheless significant enough that corporations should be aware of their exposure to liability under AMPs. It is especially noteworthy that "due diligence" is not a defence to an AMP violation, as it would be for most regulatory offences.

Sentencing

In order to guide the sentencing process, the *EEA* sets out purposes for sentencing, including deterrence, denunciation and restoration, and/or making the offender pay for clean-up (i.e., "polluter pays"). The *EEA* also sets out aggravating factors that a sentencing judge must consider, including the offender's moral blameworthiness, profit or intended profit from the offence, prior history of convictions and subsequent conduct.

Limitation Period

Not only are the range of penalties under the *EEA* expanded, but the amount of time for the minister to bring an action is extended as well. The *EEA* will extend the federal government's limitation period for initiating environmental offences from two to five years from the date when the subject matter of the proceedings arose.

Notification and the Public Registry

The *EEA* also makes violations more public, which can impair a corporate offender's image and perhaps even impair its business more generally. A public registry containing information regarding all corporate convictions under the *EEA* will be maintained by the minister for at least five years. Furthermore, when a corporation has been convicted under the *EEA*, it will be ordered to notify shareholders of the facts of the offence and the punishment imposed.

Given the expanded range of fines and penalties under the incoming *EEA* (including for directors, officers or agents of a corporation), as well as the federal government's enhanced focus on investigating and prosecuting environmental offences, your business will want to ensure that it has appropriate policies and programs in place for environmental and pollution management, monitoring and prevention and responding appropriately where pollution has occurred. Effective preventative efforts are especially important in light of the introduction of AMPs, because even due diligence efforts will not act as a defence to such penalties. However, taking appropriate action in the event of a spill or other pollution can also help limit your exposure to liability.

If you have any questions regarding the changing environmental enforcement regime, or wish to discuss implementing a new or revised environmental plan for your business, please contact a member of our Natural Resources and Environmental Practice Group at your convenience.

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Spam about to be Canned?

Introduction

Spam is a problem common to businesses and their clients alike. The fact that spam filters are a standard component of all email programs, whether used for commercial or personal email, is proof enough. However, the problems associated with spam go beyond the annoyances of receiving a never ending flood of unsolicited junk emails. Spam has evolved as a means to deliver a broad range of malicious software that facilitates identity theft, fraud and the transmission of viruses.

To combat the growing realities of these threats, Parliament is close to passing Bill C-27 which would enact the *Electronic Commerce Protection Act* (*ECPA*). Originally tabled in April of this year, Bill C-27 is currently through its third reading in Parliament and in the final stages of review. This legislation aims to protect and promote the growth of electronic commerce by establishing measures to eliminate the dissemination of spam in Canada. However, the legislation as currently drafted will significantly impact how businesses can communicate to their existing clients as well as elicit business from new clients electronically.

Prohibited Activity

Under the *ECPA*, sending, causing or permitting to be sent a commercial electronic message would be prohibited unless the recipient has given their express or implied consent. An "electronic message" includes any text, sound, or voice message. Business to business communications are meant to be excluded from the *ECPA* regulations. However, where a business-client relationship exists between two businesses the legislation would seemingly apply to regulate electronic communications between them. Accounting firms, IT companies, wholesale suppliers and even law firms, for example, are all businesses who have business or corporate clientele and therefore any unsolicited email activity may potentially be caught by the *ECPA*.

Obtaining Consent

A business would be able to rely on implied consent in sending an electronic message where there is an existing business relationship between the business, as sender, and the recipient. An existing business relationship would be found where the sender and recipient have participated in a relevant transaction within the 18 months immediately prior to the sending of the electronic message. The entering into a contract or lease, the purchase of goods or services or the acceptance of business, investment or gaming opportunities by the recipient from the sender are instances where an existing business relationship would be established.

One practical difficulty which arises, however, is that if 18 months has passed so that there is no longer an existing business relationship (and therefore no implied consent), a business is prohibited from sending an email to that client requesting their express consent to continue receiving email communications from the business in order to re-establish the relationship.

Content of Permitted Messages

Any commercial electronic message sent would also have to conform with certain content requirements. Messages to clients must (i) identify the sender or the person on whose behalf the message was sent, (ii) provide contact information for those identified, and (iii) include an unsubscribe mechanism (either a hyperlink or a specified electronic address to which the unsubscribe request can be made).

Protection of Privacy – Spyware and Identity Theft

The legislation would also aim to prevent the collection of personal information through unauthorized access to computer systems (spyware). A person or business, in the course of commercial activity, would be prohibited from installing a computer program on another person's computer system without obtaining express consent. Furthermore, it would prohibit a person in the course of commercial activity, from causing an electronic message to be sent from that computer without express consent, even if consent was given for the installation of the program in the first place. The request for consent in this case must clearly and simply describe the function, purpose and impact of every computer program that would be installed if consent is given.

Prohibiting programs of this kind which infect computer systems is a valid step in eliminating a significant tool used for identity theft and fraud. Such programs often cause the system to transmit spam or confidential information of the user without their knowledge. But, this broad prohibition could also unintentionally impact legitimate software businesses. Anti-virus and anti-spam programs, for example, utilize automatic updates and remote installation mechanisms to ensure the user's computer system is protected against the latest threats. These programs are constantly communicating with the software manufacturer to receive these updates, often without the user's knowledge. These legitimate communications would potentially be prohibited under the *ECPA*, despite their being to the benefit of the user. Where the original terms of consent for installation of the program entitle the user to receive updates, the installation of those updates would not be prohibited.

PIPEDA and the Competition Act

Enacting Bill C-27 would result in some amendments to the *Personal Information Protection and Electronic Documents Act* (*PIPEDA*) and the *Competition Act* as well. The *PIPEDA* amendments would add provisions prohibiting: (i) collecting an individual's electronic address through the use of a computer program designed for that purpose and, (ii) collecting or using personal information by means of unauthorized access to a computer system. The amendments to the Competition Act would create new prohibitions against phishing. Phishing is a process where there is an attempt to have an individual give up sensitive personal information (e.g., credit card details) by posing as a legitimate entity in an electronic message. These amendments would directly target those who exploit the internet as a tool to mine data on consumer habits and interests as part of targeted advertising schemes to perpetrate fraud.

Penalties

Enforcement of this regime will fall under the purview of the Canadian Radio-television and Telecommunications Commission (CRTC) who will have power to impose administrative and monetary penalties for violations under the *ECPA*. They will also have powers to investigate alleged violations. Administrative monetary penalties for individuals may be set as high as $1,000,000 and as high as $10,000,000 for companies. Directors and officers of a company may also be held personally liable for violations if they participated in, directed or authorized the applicable decision. Employers may also be held personally liable for violations committed by their employees while acting within the scope of their employment. However, a due diligence defence would be available (i.e., if the company/employer had acted reasonably in trying to prevent the violation, such as by having established relevant policies to be followed by its employees).

A personal right of action would also be available to persons affected by a violation of the *ECPA*. The application may be made either to the Federal Court of Canada or the superior court of the province. A right of action would allow the affected person to apply for an order for compensation for actual loss, damages suffered or expenses incurred as well as a maximum of $200 for each violation (to a limit of $1,000,000 for each day the violations occurred). Directors and officers would also be exposed to liability if they participated in, directed or authorized the violation. Furthermore, the applicant may be entitled to monetary compensation merely upon demonstrating that a violation of the *ECPA* has been committed and not be required to prove fault or negligence as connected to the loss or damages suffered as would be required in a typical civil liability based action.

To best position themselves in anticipation of this anti-spam legislation coming into force, businesses should examine their existing policies and practices relating to communication with their clients to enable them to implement any needed changes now in order to avoid potential violations once it becomes law.

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Preparing a Business for Sale

For most owners of small and medium-sized businesses the sale or transfer of ownership of the business will be the most significant transaction in the lifetime of the owners. Generally, ownership of these types of businesses is either transferred to the next generation or sold to an arm's length third party. In either case, a well thought out plan for the transfer or sale prepared well in advance of the ownership change is critical. This article outlines some of the key considerations for owners in planning for the sale of their business to a third party, although some of the considerations discussed below could be applicable to next generation transfers as well.

Timing

Many business owners do not begin to contemplate a sale until the end of their working life draws near, or until ill health or disability forces them into a selling position. Preparing the business for a sale at the last minute can impact significantly the owners' ability to: (i) receive the highest possible purchase price, due to a lack of bargaining power caused by the necessity for a quick sale, and (ii) obtain optimum tax treatment on the proceeds of the sale, as many of the beneficial tax planning strategies available to a seller must be implemented years in advance of the sale in order to be effective. Therefore, it is critical that business owners plan for the eventual sale of the business years in advance so that they can receive the maximum benefit from their years of hard work once the sale eventually takes place.

While many business owners think that the time to sell invariably is just prior to retirement, it is suggested that owners should always have the possibility of sale in mind even from the earliest days of the business. It is often said that a wise investor never invests without having a clear exit strategy in mind. While most business owners need not have a sale in mind at the outset of their business, it is advisable for them to contemplate a sale as soon as the business is viable—not necessarily with a view to sell quickly, but rather to begin the ongoing process of ensuring the business is ready for sale at the optimum time. It is not possible to predict all of the business, personal, and other circumstances that will impact when that optimum selling time may be. The right time for a sale may be early in the life of the business, late in the life of the owners, or anywhere in between. Owners should have their business ready for sale at any time.

It can be common for owners that have decided to sell their business to "check out" mentally from the business at the moment the decision to sell is made. This lack of focus can have negative effects on the operation of the business—and its value to third parties. If owners view the progression of the business towards sale as a process that evolves over the life of the business, rather than simply as a single, final event, they will be more likely to maintain focus and have the business moving on the upswing at the time of sale, rather than the reverse.

Objectives of Sale

A vital but often overlooked step in the sale planning process is for owners to clearly identify their objectives in selling their business—what it is that they most want to get out of the sale. In some cases, owners are motivated purely by how much money they can put into their pockets through a sale—to be used as retirement income, funds for starting or investing in another venture, or otherwise. In other cases, the main goal of the owners may be to find a purchaser best suited to provide continuity for their business—not necessarily the one that will pay the highest price. Other owners may wish to stay on with the business after a sale in an advisory or consultancy capacity as a way to ease out of the business over time, and therefore may want to find a purchaser they can trust and with whom they can get along.

Once the goals have been defined clearly owners can then begin to prepare accordingly to help ensure their particular goals may be met on a sale, be it in the near or distant future. For example, if the goal is to sell only to the "right" purchaser, owners can begin to seek advice on the types of purchasers that may fit the requirements they are looking for rather than wasting time with offers from parties that do not fit their criteria. On the flip side, if the main objective is to maximize the sale price, owners can investigate what type of purchaser might be willing to pay a premium for the business—a competitor or strategic buyer, perhaps—and can then take necessary

steps to make the business more attractive to that type of potential buyer.

It is important to remember that owners' sale goals may change over time and should be revisited periodically.

Valuation

It is vital for owners to have a realistic and accurate understanding of the value of their business throughout the life of the business. It is not uncommon for owners to decide to sell, have a professional business valuation done, and be quite surprised (for better or for worse) at the actual value the business. For example, an owner wishing to retire on the proceeds from a sale may find him or herself in a tough spot if he or she had valued the business significantly above what the market will bear: do they proceed with the sale and adjust their standard of living in retirement accordingly, or do they keep running the business a few extra years in the hope that the business' value will increase in that time? Not an easy question to answer, but one that can be avoided with proper planning.

Not only should business owners always know the value of their business, they should seek to learn as much as possible about the key drivers of business valuation, so that they understand how various transactions and circumstances impact their business' value. This can help owners manage their business in accordance with their goals, especially, if their goals are to achieve the highest pay day possible upon a sale.

Internal Due Diligence

Owners should ensure that they make life as easy as possible for potential purchasers of their business. This can be done in part by keeping up to date and accurate records of the business that can be reviewed by parties interested in buying the business. Buyers can be turned off an otherwise solid business opportunity if they have difficulty accessing the documents required for their due diligence on the business. These documents include corporate records, shareholder agreements, employment agreements, financing agreements, key customer and supplier contracts, lists of owned and licensed intellectual property, etc. Owners should initiate a records management process from day one of the business whereby all relevant documents are stored and are easily accessible so that they can be produced to a potential purchaser quickly in order to keep the momentum of a potential deal going. Of course, in advance of disclosing this information to an interested buyer, the owners should obtain a non-disclosure agreement from the buyer.

As part of the internal due diligence process, owners should review their key agreements to be aware of how they could be affected by a sale of the business. For example, are there any change of control provisions in key supplier contracts that may kick in on a sale of the business? If so, how easy would it be to get consent of the supplier? Another example relates to a business' financing documents. Are there any penalties for early pay out of a credit facility or mortgage with the proceeds of a sale? When owners enter into these sorts of contracts or financing arrangements, they should always consider how they might impact the owners' ability to sell the business in the future.

In cases where there is more than one owner of a business, i.e., multiple shareholders of a company, it will be important for majority shareholders to ensure that a potential deal to sell the business cannot be thwarted by minority interests unwilling to sell. A useful tool in this regard is a drag-along provision in a shareholder agreement that permits a majority shareholder to compel a minority shareholder to sell his or her shares on the same terms offered to the other shareholders.

Business owners that have a solid grasp on the impact of their various business records and agreements on a potential sale will be in a better position to sell their business at the optimum time than those who have not considered those implications until a sale situation arises.

Ownership Structure

Owners are wise to ensure that the ownership structure of the business is set up to maximize the options for realizing tax benefits on the sale of the business. Often this involves a structure involving one or more operating companies, holding companies, and family trusts.

For example, owners will usually want to take advantage of the lifetime capital gains exemption available on the sale of shares of a qualifying company. In order to benefit from the exemption it may be necessary to transfer passive income assets such as investments out of the operating company to a sister company. It may also be necessary to transfer to a sister company assets not

wanted by the purchaser of the operating company. If the business is run as a sole proprietorship or partnership, it would be necessary to transfer the active business assets to an incorporated entity.

The use of family trusts in the ownership structure can be helpful in enabling family members of the owner to benefit from the proceeds of the sale and to multiply the benefit of the capital gains exemption.

Holding companies can be useful in some circumstances to allow owners to take advantage of tax-free intercorporate dividends, which can in some cases be incorporated as part of a sale transaction to help reduce the taxable capital gain arising on the sale.

In most cases, the required transactions need to be put in place years in advance of the sale in order to achieve the desired tax consequences on the proceeds of the sale.

Conclusion

Owners who are committed to continually ensuring that their business is best prepared for a sale are those most likely to receive the maximum benefit from a sale. Preparing the business for sale well in advance of a sale – whether anticipated or not – will help owners achieve their financial and other objectives of a sale so that they are justly rewarded for their years of hard work and commitment in growing the business.

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Business Disputes Corner

Place of Arbitration and Selected Jurisdiction Upheld by Court

Stewart McKelvey represented a manufacturer of industrial products who had entered into an agreement with a distributor. The distribution agreement's arbitration clause stipulated that any dispute was to be arbitrated under the United States Arbitration Act and that the arbitration was to be held in Atlanta, Georgia. A dispute arose and the manufacturer commenced the arbitration process under the United States Arbitration Act in Georgia. However, the distributor (located in Nova Scotia) opposed the commencement of the arbitration in Georgia and simultaneously brought an application before the Nova Scotia Supreme Court to change the venue of the arbitration from Atlanta to Halifax.

Andrew Fraser (Litigation Partner) and **Scott Campbell** (Litigation Associate), both of Stewart McKelvey (Halifax) successfully opposed the application on behalf of the manufacturer. The distributor argued that the United States Arbitration Act did not apply and that the arbitration should be heard in Halifax and proceed under Nova Scotia legislation. The Supreme Court of Nova Scotia dismissed the application and ruled that the parties should

be held to their bargain. The Court determined that there was no "strong case" or "exceptional circumstances" that would justify moving the arbitration from Atlanta to Halifax. The Court was not persuaded that evidence put forward by the distributor as to the location of witnesses, substantial connections to the Nova Scotia jurisdiction, and increased counsel fees and expenses was enough for it to change the venue. The manufacturer was also awarded its costs.

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Case Summary: *Greater Fredericton Airport Authority Inc. v. Nav Canada*

In addition to settling a dispute between Nav Canada and the Fredericton International Airport over who should pay for new navigation equipment installed in conjunction with the construction and extension of a runway at the Fredericton Airport, the recent decision of the New Brunswick Court of Appeal in *Greater Fredericton Airport Authority Inc. v. Nav Canada*, also provided a potentially significant incremental change in the common law of some note for any business litigant especially within the context of a construction contract dispute.

The Greater Fredericton Airport Authority (GFAA) and Nav Canada were parties to an Agreement known as an "Aviation Services Facilities Agreement" (ASFA). ASFA agreements are in place throughout Canada at airports and were originally entered into between the Federal Minister of Transport and Nav Canada to provide the terms governing responsibility for capital expenditures at those airports when Nav Canada assumed the responsibility for civil air navigation services at Canadian airports. The Minister's duties and rights under the ASFA were assigned to GFAA.

Specific to this dispute and pursuant to their ASFA, GFAA requested that Nav Canada "relocate" an instrument landing system (ILS) from its existing location at a runway to a new location at a different runway being extended under a construction project at the Fredericton Airport. The ASFA provided that if a requested "relocation" was part of any work at the Airport then, for all intents and purposes, the relocation was at the expense of the airport authority. In addition, the ASFA dictated that if Nav Canada decided to upgrade any navigation equipment, including the ILS at the airport, then the cost to upgrade and install any new equipment, as determined by Nav Canada, would be to the account of Nav Canada.

After the request for the relocation of the ILS at the airport, Nav Canada unilaterally decided that, rather than relocate the existing (dated) equipment, it made better economic sense, for several reasons, to replace a navigational beacon which was part of the existing ILS with other (newer) technology known as Distance Measuring Equipment (DME). After the installation of the DME, in conjunction with the new ILS on the new runway, a dispute arose between Nav Canada and GFAA as to who

was responsible to pay for the DME. Nav Canada's position was that the installation of the new DME was part of the requested "relocation" while GFAA's response was that Nav Canada should pay the acquisition cost for the DME, as the DME was new, was decided by Nav Canada to be best suited and was not a relocation of the existing ILS beacon.

Where the $6 million runway expansion was nearing completion, GFAA felt that it had no choice but to agree to pay for the DME, subject to its right to have the issue determined in court or by arbitration. GFAA wrote to Nav Canada indicating that it would pay for the installation cost of the DME but only "under protest". On the basis of that letter, Nav Canada completed the installation for which GFAA refused to pay.

The dispute, under the ASFA, was referred to arbitration. The Arbitrator (a retired judge) found that there was nothing in the ASFA which entitled Nav Canada to claim reimbursement for the cost of acquiring the DME which, from GFAA's perspective, should have been the end of the issue. However, the Arbitrator further found that the letter that GFAA wrote to Nav Canada, that it would pay for the DME "under protest", gave rise to a separate and binding contract and Nav Canada was entitled to recover the cost of the DME on that basis.[1]

The decision of the Arbitrator was appealed to the Court of Queen's Bench of New Brunswick by the GFAA. The Court of Queen's Bench Judge, in deciding the appeal of the Arbitrator's decision to award the cost of payment of the DME to Nav Canada, readily granted GFAA's appeal and reversed the Arbitrator's decision. The Judge found that the Arbitrator wrongly held that the "under protest" letter could be interpreted as giving rise to a separate (or any) agreement that GFAA would pay for the DME under the ASFA, or otherwise, and the intention of the "under protest" letter was that GFAA would only pay if it were found to be contractually responsible, after arbitration, pursuant to the ASFA.

Nav Canada, with leave, pursuant to the *New Brunswick Arbitration Act*[2] appealed the decision of the Judge of the Court of Queen's Bench, to the Court of Appeal.

In dismissing Nav Canada's appeal, the Court of Appeal characterized GFAA's "under protest" letter differently than both the Arbitrator and the Judge of the Court of Queen's Bench and found that letter was a (gratuitous) promise to pay for the DME and a variation to the ASFA and not a separate agreement (as found by the Arbitrator) or a requirement to pay for the DME under the ASFA. GFAA was not liable to pay Nav Canada anything for the installation by Nav Canada of the DME, where Nav Canada promised nothing in return for the airport authority's alleged promise to pay for the DME and GFAA was not contractually bound to pay for it under the ASFA. The Court of Appeal, in describing GFAA as an "unwilling and unrelenting victim", took the opportunity to examine, in detail, whether the traditional rule requiring "consideration" in support of a new agreement provided the full answer to the issue or whether there were good reasons to move away from the historic, common law strict application of the requirement for consideration in support of any contractual agreement.

The Court of Appeal noted the reality that existing contracts are frequently varied and modified in order to respond to contingencies and changes in circumstances not anticipated or identified at the time the initial contract was entered into and suggested, in line with commercial reality, that it became necessary at times to adjust the parties' contractual obligations and the law must protect those legitimate (changed) expectations that occur (after) contracts are entered into and before they are completed. According to the Court of Appeal, those variations should be enforceable.

The Court of Appeal further stated that courts should recognize that while some promises are gratuitous, and not supported by any monetary (or other) consideration, there may still be sound reasons to enforce those gratuitous promises, especially where an injustice would result (if the parties acted in good faith or to their detriment in relying on the enforceability of the modification to the contract) and, finally, that historic legal doctrines should not be frozen in time and to the extent that any "old" doctrines interfered with any policy objectives underscoring new changes, then change was warranted.

1. In addition, to GFAA's credit, the Arbitrator refused to order that GFAA had to pay for additional replacement components associated with the DME and the ILS which were included in the $223,000 bill for the DME provided by Nav Canada to GFAA, which were not itemized separately in the bill for the DME provided to the GFAA, holding that GFAA was, therefore, liable to pay Nav Canada only for the cost of the DME installed.
2. Note that an appeal under the Arbitration Act to the Court of Appeal had never been previously considered by the Court of Appeal.

In short, the Court of Appeal was willing to accept that a post-contractual modification, even one unsupported by consideration, could be enforceable so long as it was established that the variation was not procured under economic duress. This exception, economic duress, can often be found between contracting parties where bargaining power is unequal and pressure can be exerted to secure modification to an existing agreement in many contexts (i.e., material price modifications, labour shortages, or supply chain failures). GFAA had, indeed, plead economic duress as one of its reasons to avoid payment for the DME where Nav Canada was a sole source supplier of the DME equipment, the decision to include the DME as part of the new ILS was unilaterally made by Nav Canada and that GFAA was only informed of that decision after significant expenditures were made with respect to the completion of the $6 million runway project.

The Court of Appeal noted that GFAA clearly did not consent to the variation. Noting all of the circumstances and the "under protest" language in GFAA's letter, in the absence of any evidence that GFAA otherwise acquiesced to Nav Canada's demand for payment, the Court ruled in favour of the GFAA.

Although the Court of Appeal's statements that it was prepared to revisit whether (or not) post-contractual modifications were enforceable without additional consideration and that gratuitous promises, unsupported by consideration, may be enforceable in some circumstances, the basis of the Court of Appeal's decision did not require it to extend the law beyond its existing constraints. This does not mean, however, that in future, post-contractual modifications or gratuitous promises may not be susceptible to enforcement by the Courts. Therefore, an "incremental change" in the common law of the historic requirement for consideration to enforce such a gratuitous or post-contractual modification remains a possibility in future disputes.

Hugh Cameron of the Fredericton office of Stewart McKelvey represented GFAA throughout the proceedings.

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Case Summary: *WCI Waste Conversion Inc. v. ADI International Inc.*

This is a case of breach of contract. Stewart McKelvey acted for the successful plaintiff WCI Waste Conversion Inc. ("WCI"), which was awarded $4,306,399 in damages.

In June 2000, Island Waste Management Corporation ("IWMC"), the provincial crown corporation responsible for waste management, decided to implement a province wide waste management plan. This plan involved Islanders source separating their waste. The organic waste was to be composted in a new composting facility (the Central Composting Facility "CCF").

WCI partnered with ADI International Inc. ("ADI") to develop a response to IWMC's call for proposals for the CCF. WCI is a small firm with composting expertise. ADI is a larger firm that had design-build expertise and the necessary bonding capability. ADI lacked WCI's composting knowledge. Under the terms of the WCI-ADI agreement, if their proposal was successful, WCI would receive a fixed portion of the design-build price and would become the CCF operator for five years. The WCI-ADI proposal for construction and operation of the CCF was accepted by IWMC.

The CCF was to be a high rate facility. Key to this was the containerized composting system. The organic feedstock that was delivered to the CCF was loaded into insulated containers that were attached to an air duct that continuously measured temperature in each container and delivered air to the container depending upon these temperature readings. The purpose behind the containers is to facilitate the working of naturally occurring microbes that, in a normal feedstock environment, should cause a rapid heating of the compost. This heating phase is necessary to kill harmful pathogens in the material and render the compost safe for human and animal handling. This pathogen kill requires achieving a certain temperature for a prescribed time period and is known as the Process to Further Reduce Pathogens ("PFRP").

The organic waste being delivered to the CCF turned out to be profoundly acidic. The material being delivered to the CCF was 10 to 100 times more acidic than the acceptable limit for composting. This profoundly acidic feedstock inhibited the initial heating necessary for achieving PFRP. There were 48 containers available for the initial composting phase. For the CCF to receive all of the Island's organic waste, these containers needed to achieve PFRP at a sufficient rate.

The slow heat up problem, and its effect on the CCF being able to achieve the necessary throughput capacity, caused stresses and strains between the parties. ADI rejected the notion that the acidity of the feedstock was the reason containers were having trouble achieving PFRP. ADI became fixated on the ECS aeration system that WCI had specified for the CCF. On December 4, 2002, ADI terminated WCI from the design-build contract and operating agreement. ADI then proceeded to strip the ECS aeration system and installed an aeration system of its own design.

WCI sued ADI for breach of both the design-build and operating contracts. The court found that ADI had wrongfully terminated both contracts. The court found that the problem facing the facility was the profoundly acidic feedstock, not the WCI specified aeration system. The court found that, when ADI terminated the contracts, WCI had in fact solved the feedstock problem and was meeting throughput capacity in the CCF containers. Evidence of this success was provided to ADI prior to the terminations. Noteworthy, the court found that ADI's remediation of the CCF was "… unnecessary, ill advised and ineffective. It was a failure." The court found that, in ADI terminating WCI, IWMC had lost its best chance of having the facility produce the Category A compost that was required for the facility. The court awarded WCI damages for the breach of the two agreements.

Michael McGonnell and **John Mitchell** of Stewart McKelvey's Charlottetown office acted for WCI Waste Conversion Inc.

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