

Corporate Brief

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OSFI RELEASES FINAL GUIDELINE ON INTEGRITY AND SECURITY

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Following a consultation last year, the Office of the Superintendent of Financial Institutions (“OSFI”) released the final Integrity and Security Guideline (the “Guideline”) on January 31, 2024.^[1] The Guideline sets out OSFI’s expectations for federally regulated financial institutions (“FRFIs”) for adequate policies and procedures to protect against threats to integrity and security, with particular emphasis on technology and foreign interference. The Guideline is designed to work in tandem with other OSFI guidelines, including guidelines for corporate governance, technology and cyber risk management, and operational risk management, among others. FRFIs are expected to regularly assess existing policies and procedures against the expectations set out in the Guideline and the related guidelines to identify gaps and maintain effectiveness.

The Guideline identifies integrity and security as two distinct but related concepts, and provides details on OSFI’s expectations for both.

Integrity

OSFI defines integrity as “actions, behaviours, and decisions that are consistent with the letter and intent of regulatory expectations, laws, and codes of conduct.”^[2] The Guideline focuses on four ways of promoting integrity within the FRFI:

1. Ensuring that those in senior positions possess good character, and demonstrate integrity through their actions, behaviours, and decisions. Reference is made to Guideline E-17 Background Checks on Directors and Senior Management (“E-17”).
2. Fostering norms that encourage ethical behaviour, which includes valuing compliance, honesty, and responsibility. Reference is made to OSFI’s draft Culture and Behaviour Risk Guideline.
3. Ensuring sound governance to oversee important decisions of the FRFI, including business plans, strategies, risk appetite, culture, internal controls, oversight of senior management, and accountability mechanisms. The Guideline specifically notes the importance of compliance with the law, avoiding conflicts of interest, maintaining objectivity, ensuring security of assets and information, and the necessity of regular assessments. Reference is made to OSFI’s Corporate Governance Guideline.
4. Establishing an effective Regulatory Compliance Management framework. Reference is made to Guideline E-13 on Regulatory Compliance Management.

Security

OSFI broadly identifies security as “protection against malicious or unintentional external or internal threats to real property, infrastructure, and personnel (physical threats), and technology assets (electronic threats).”^[3] The Guideline focuses on six areas of interest:

1. Physical premises should be safe, secure, and monitored appropriately. Further details can be found in Guideline B-13 Technology and Cyber Risk Management (“B-13”) and draft Guideline E-21 Operational Resilience and Operational Risk Management (“E-21”).
2. Appropriate background checks should be conducted based on the risk factor of the employee or contractor, which should include education/professional credentials and references at a minimum. See also Guideline E-17.
3. Technology assets should be secured appropriately as outlined in Guideline B-13.
4. Standards of control for data and information should be established, including the creation of data classification that considers the FRFI’s vulnerability to malicious activity, undue influence, and foreign interference. Reference is made to Guidelines E-21 and B-13.
5. Risks posed by third parties must be assessed and identified based on their access to the FRFI’s physical premises, people, technology assets, and data and information. The assessment should be conducted both before engagement and on an ongoing basis. Further details can be found in Guideline B-10 Third-Party Risk Management.
6. When an FRFI identifies threats of suspected undue influence, foreign interference, or malicious activity, it should report to the appropriate authorities such as the RCMP and CSIS. Notification must also be provided to OSFI immediately. FRFIs should also document incidents that do not meet the reporting threshold.

Timeline

Implementation of the Guideline will occur in phases:

- Currently: Notify OSFI when reporting incidents to law enforcement or CSIS.
- By July 31, 2024: Submit a comprehensive action plan detailing how the FRFI will meet the new and expanded expectations for OSFI’s review.
- By January 31, 2025: Observe all new and expanded expectations, except for background checks.
- By July 31, 2025: Observe new expectations on background checks.^[4]

Takeaways

The Guideline integrates existing and draft OSFI guidelines to further enhance public confidence in the Canadian financial system. The emphasis on technology and foreign interference recognizes the new landscape that FRFIs operate in.

Once the Guideline is implemented, FRFI’s will need to have processes in place for conducting regular assessments of existing measures to ensure that the integrity and security of the FRFI is consistently maintained.

If you have any questions about the Guideline and next steps, please do not hesitate to contact us.

[1] OSFI releases final Integrity and Security Guideline

[2] Integrity and Security – Guideline

[3] Integrity and Security – Guideline

[4] Integrity and Security – Letter

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

Darcy is co-lead of McMillan LLP's financial services practice group. Her expertise includes all aspects of establishing insurance business in Canada, including obtaining requisite regulatory approvals at the federal and provincial levels. She also regularly advises auto, electronics and other manufacturers, warranty administrators, etc. on the borderline between insurance and non-insurance products. Darcy is recognized in Chambers in the area of insurance and as a Leading Practitioner in the Canadian Legal Lexpert Directory.

Zijian holds a JD from Osgoode Hall Law School and is currently articling at McMillan LLP. During his legal studies, Zijian served on Osgoode Faculty Council's Digital Innovation Committee and volunteered as an interpreter for the Community & Legal Aid Services Program. Prior to law school, Zijian worked with start-ups and emerging companies.

IN THE NEWS

Apostille Convention and Changes to Authentication Services

On January 11, 2024, Canada formally joined the Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents (the "Apostille Convention").

Upon announcement of Canada's intent to join the Apostille Convention on May 16, 2023, Global Affairs Canada stated that joining the Apostille Convention means that Canadians and Canadian corporations can submit Canadian public documents for an authenticity certificate called an apostille, allowing the documents to be used in any of the 124 member countries.

Relevant documentation includes birth certificates, marriage certificates, education records, export records, and corporate records.

The stated intent of joining the Apostille Convention is to give Canadians a "cost-effective, streamlined method for getting their Canadian public documents accepted abroad".

Authenticated documents will now include a standard certificate or apostille. Global Affairs Canada will be responsible for issuing apostilles for documents issued by the Canadian Government or notarized in specific provinces and territories including Manitoba, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, and the Yukon.

In Alberta, British Columbia, Ontario, Quebec, and Saskatchewan, competent authorities in these provinces will be responsible for issuing apostilles.

To view the Apostille Convention, please visit: <https://www.hcch.net/en/instruments/conventions/specialised-sections/apostille>

To view the member countries of the Apostille Convention, please visit: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=41>

Canadian Intellectual Property Office Publishes Guidance Manual on Patent Appeal Board Procedures for Rejected Patent Applications

In December 2023, the Canadian Intellectual Property Office published a Manual of Patent Appeal Board Procedures for Rejected Patent Applications under section 86(7) of the *Patent Rules* SOR/2019-251 (the "Manual"). When a patent application is refused, an appeal can be brought to the Federal Court which has the power to make a conclusion based on the evidence presented, provided that they are not overturning a discretionary decision (unless that discretionary decision was wrongly exercised).

The Manual sets out requirements for review on appeal and permissible amendments to rejected patents.

To view the Manual, please visit: <https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en/manual-patent-appeal-board-procedures-rejected-patent-applications>

New credential requirements for New Brunswick Financial Advisors and Financial Planners

The New Brunswick Financial and Consumer Services Commission (the “Commission”) is seeking comments on Rule TPA-001 *General* and Rule TP-002 *Fees* under the *Financial Advisors and Financial Planners Title Protection Act*, SNB 2023, c 3 (the “Act”), with an open comment period from January 11, 2024 until April 10, 2024.

The Act received Royal Assent on June 16, 2023 and requires professionals using the titles financial advisor and financial planner to have certain credentials. These titles were previously unregulated. The Commission will approve organizations as credentialing bodies, which will oversee those holding financial planner or financial advisor titles.

Rule TPA-001 *General* sets out the criteria for applications for approval of credentialing bodies as well as what credentials financial advisors and planners must have, including specific educational requirements. Rule TPA-001 *General* also sets out rules surrounding submitting annual returns and transitions for those currently holding financial advisor and financial planner titles. Applicants for credentialing bodies must demonstrate they have a governance structure, code of ethics, and professional standards, as well as expertise and resources to oversee credentialed financial advisors and planners. Financial advisors and planners must graduate from a program that will ensure they will deal with their clients honestly, fairly, and in good faith.

Rule TPA-002 *Fees* sets out fees payable to the Commission, exemptions, application fees for credentialing bodies, annual return late fees, annual fees, and recoverable expenses.

Comments can be provided in writing up until April 10, 2024 to:

Securities Financial and Consumer Services Commission
85 Charlotte Street, Suite 300
Saint John, N.B. E2L 2J2
secretary@fcnb.ca

To view Rule TPA-001 *General*, please see: https://www.fcnb.ca/sites/default/files/2024-01/TPA-001%20General%20Rule_1.pdf

To view Rule TPA-002 *Fees*, please see: https://www.fcnb.ca/sites/default/files/2024-01/TPA-002%20Fee%20Rule_2.pdf

Canadian Securities Administrators publishes new Access Model

On January 11, 2024, the Canadian Securities Administrators published finalized Amendments to Implement an Access Model for Prospectuses of Non-Investment Fund Reporting Issuers amending National Instrument 41-101 *General Prospectus Requirements*, National Instrument 44-101 *Short Form Prospectus Distributions*, National Instrument 44-102, *Shelf Distributions*, National Instrument 44-103, *Post-Receipt Pricing*, Companion Policy 41-101CP to National Instrument 41-101, Companion Policy 44-102CP to National Instrument 44-102, Companion Policy 44-103CP to National Instrument 44-103, and National Policy 47-201 *Trading Securities Using the Internet and Other Electronic Means* (the “Amendments”). The Amendments will come into effect on April 16, 2024.

The amendments provide for a new access model for the delivery of prospectuses for reporting issuers other than investment funds. Issuers can now provide access to prospectuses rather than delivery requirements. Delivery will be deemed to have occurred once the prospectus is provided online and accessible on SEDAR+ (Canadian Securities Administrators’ web-based system used to file and disclose information). In British Columbia, Quebec, and New Brunswick, the documents must be provided and accessible on SEDAR+ and investors must be alerted that the document is now accessible through SEDAR+.

The Amendments also clarify that delivery of prospectuses is still permitted, but not required, a request for copies of a prospectus will not affect the calculation of the period where a purchaser or subscriber's rights must be exercised, and that the two-day time limit to send a copy of preliminary prospectuses is removed.

To view the Amendments, please visit: <https://www.securities-administrators.ca/news/csa-announces-final-amendments-and-changes-to-implement-an-access-model-for-prospectuses-of-non-investment-fund-reporting-issuers/>

Canada Border Services Agency Changes How they Collect Taxes and Duties on Commercial Imports

As of May 13, 2024, the Canadian Border Services Agency Assessment and Revenue Management ("CARM") will become the official system or record that importers and trade chain partners will use to pay taxes and duties.

Companies will need to register on the CARM Client Portal and prepare to account for imported commercial goods before May 13, 2024. To prepare, companies should register with the CARM and delegate a business account manager (and a back-up business account manager).

Upon implementation of the newer system, importers will no longer be able to use security clearance from their customs broker's Release Prior to Payment program. Importers will be required to post their own financial security with the options of a financial security instrument for 50% of their highest monthly accounts receivable (minimum financial security of \$25,000 per import program) or a cash deposit for 100% of their highest monthly accounts receivable.

In May 2024, a new Commercial Accounting Declaration ("Declaration") will be implemented as digital documentation accounting for imported goods into Canada, replacing the current forms in place. This Declaration is not intended to impact the release process.

Importers must also ensure they post Financial Security Agreements or security deposits on the online CARM client portal. Paper copies of this information will no longer be accepted.

Companies that import commercial goods must ensure they are getting ready to comply by the May 13, 2024 coming into force date of the new requirements.

To view further details about registering for the CARM, please visit: <https://www.cbsa-asfc.gc.ca/services/carm-gcra/menu-eng.html>

Canadian Securities Administrators Consults on Investment Funds Pertaining to Crypto Assets

From January 18, 2024-April 18, 2024, the Canadian Securities Administrators will be consulting on proposed amendments to National Instrument 81-102 *Investment Funds* and Companion Policy 81-102CP (the "Amendments") pertaining to reporter issuer investment funds that seek to invest directly or indirectly in crypto assets.

As of June 2023, there were 21 Public Crypto Asset Funds in Canada with net assets exceeding \$3 billion total.

The stated intent of the Amendments is to provide clarity respecting investments in crypto assets, particularly concerning allowable crypto assets to invest in, restrictions, and custody of crypto assets.

The Amendments propose the following changes:

- Only alternative mutual funds and non-redeemable investment funds would be permitted to buy, sell, hold, or use crypto assets directly or invest indirectly in crypto assets through specified derivatives;
- A Recognized Exchange Requirement, only permitting investments in crypto assets recognized by a securities regulatory authority;
- Prohibitions on using crypto assets in securities lending, repurchase transactions, or reverse transactions;

- Prohibitions on using money market funds to buy or hold crypto assets;
- Prohibitions on buying or holding crypto assets that are not fungible; and
- Requirements to keep crypto assets in offline storage, maintain insurance for assets in their control, obtain reports assessing the crypto custodian's internal management and controls, deliver audit report to the fund, and maintain systems for receipt, validation, review, reporting and execution of instructions from the fund.

Interested stakeholders should submit their comments by April 17, 2024.

To view the Amendments, please visit: https://www.osc.ca/sites/default/files/2024-01/csa_20240118_81-102_rfc_crypto-assets.pdf

LEGISLATIVE UPDATE

Federal

CBCA Amendments Now in Force Requiring Certain Information to be made Publicly Available

On January 22, 2024, Bill C-42, *An Act to amend the Canada Business Corporations Act and to make consequential and related amendments to other Acts* (assented to November 2, 2023) ("Bill C-42") came into force requiring that certain information must be made publicly available on the Corporations Canada website.

The stated intent of Bill C-42, as stated by François-Philippe Champagne, Minister of Innovation, at the House of Commons on March 31, 2023, is to create a public beneficial ownership registry for federally incorporated businesses with the overall aim of a regime that will combat money laundering and tax evasion and improve Canadian's trust in the marketplace and make Canada a leader in corporate transparency.

The new requirements of Bill C-42 are as follows:

1. An individual is considered an individual with significant control if they have direct or indirect influence that gives them "control in fact" of the corporation or if they have direct or indirect control over share that have 25% or more of voting rights attached or shares equal to 25% or more of the corporation's outstanding shares measured by fair market value.
2. The Individuals with Significant Control Register (the "Register") must include the following information about each individual with significant control:
 - a. Name;
 - b. Birthdate;
 - c. Address;
 - d. Jurisdiction;
 - e. Date they became or ceased to become an individual with significant control;
 - f. Description of how they qualify; and
 - g. Citizenship.
3. The information on the Register will be made publicly available on the Corporations Canada website excepting the date of birth, citizenship, and country of residency. Information may also be removed where the individual with significant control is under the age of 18 or if an application is accepted detailing that making this information available would cause a threat to safety.

4. Corporations must take reasonable steps to ensure their Individuals with Significant Control Register is accurate and updated.
5. Corporations must submit this information with their annual tax returns, within two weeks of changes made to the Register, when incorporating, when amalgamating, or during continuance to a federal jurisdiction.

Corporations should take the time now to ensure that they are in compliance with the above requirements and that all information is up-to-date and accurate.

To view Bill C-42, please visit: <https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c42.html>

RECENT CASES

Single Court Of Appeal Judge Can Determine Whether Party Has Right Of Appeal Under Bankruptcy and Insolvency Act.

Court of Appeal for Ontario, December 20, 2023

Medcap Real Estate Holdings Inc. (“Medcap”) was declared bankrupt. Cardillo was Medcap’s principal, and its largest known asset was a commercial building with five mortgages registered against the property. The first mortgage was registered to Sun Life Assurance Company, but Cardillo contended it was assigned to one of his related companies, 2503866 Ontario Ltd (the “250 Mortgage”). A second mortgage was registered to Heffner Investment Limited, a third and fourth mortgage were registered to Scott Wilson and Physiomed Health Holdings Inc. that Cardillo contended were assigned to him, and a fifth mortgage to Bennington Financial Corp. The property’s main tenant was Bodypro Gym, a Cardillo-related entity, and there was a lease to another Cardillo-related party, 1869541 Ontario Inc. (“186”). Cardillo and 250 brought an action for foreclosure under the 250 Mortgage, a declaration that Cardillo was the assignee of the two Physiomed mortgages and a declaration attaching them to the 250 Mortgage. The Trustee, B. Riley Farber Inc., moved for an order declaring void the lease amendment agreement between Medcap and 186 as an undervalued transfer (the “TUV Motion”). The Trustee and the non-Cardillo-related mortgagees challenged 250’s rights under the first mortgage. After 250 purported to take possession of the property under the 250 Mortgage, the Trustee moved to transfer the foreclosure action, or some aspects of the 250 Mortgage dispute, to the Toronto region to be adjudicated at the same time as the Trustee’s TUV Motion in the bankruptcy proceedings. The appellants brought a cross-motion to transfer the bankruptcy proceedings to Hamilton. The motion judge granted the Trustee’s motion, in part, and dismissed the cross-motion, finding that the 250 Mortgage dispute should be adjudicated as a trial of an issue in the bankruptcy proceedings. The appellants brought an application for leave to appeal.

The application for leave to appeal was denied. The motions judge did not determine any substantive rights of the parties, she simply directed where adjudication of the parties’ respective rights in the 250 Mortgage dispute should occur. Since the motion judge’s directions were purely procedural, the appellants had no right of appeal under s. 193 of the Bankruptcy and Insolvency Act (“BIA”). Only a panel of three judges have the jurisdiction to “quash” an appeal, but respondents often bring motions before a single judge of the Court of Appeal seeking directions about whether leave to appeal was required under s. 193. A single Court of Appeal judge can determine whether a party has a right of appeal or requires leave to appeal, and if leave was required, whether it should be granted. Subsection 193(e) expressly authorizes a single appellate court judge to determine whether leave to appeal should be granted, where leave to appeal is required. A single judge can determine whether a party should be permitted to initiate an appeal, but does not determine an appeal, which requires a panel of not less than three judges. When a party seeks to appeal an order or decision under the BIA, any rule requiring a three-person panel must give way, as a matter of paramountcy, to the operation of the decision-making process embedded in s. 193 of the BIA, which provides a single appellate judge with the power to decide. The Court of Appeal had the authority to hear and determine the Trustee’s motion in this situation. The appellants were not granted leave to appeal under s. 193(e) of the BIA, as the proposed appeal did not raise an issue of general importance to the practice in bankruptcy or insolvency matters, it lacked merit, and it would hinder the progress of the bankruptcy proceedings.

2023 ACLG ¶180,161
2023 BCLG ¶179,585
2023 CCLR ¶1201,742
2023 CCSG ¶152,022
2023 OCLG ¶152,398

Failure To Pay Interest On Shares To Former Employee Did Not Amount To Breach Of Duty Of Good Faith.

Court of Appeal for Ontario, October 4, 2023

The appellant worked for Geo. A. Kelson Company Limited (“Kelson”) and participated in an Employee Share Purchase Plan by purchasing 40,500 shares in Kelson. Under the Plan, when employees retired or their employment ended, any shares would be sold back to Kelson at “Fair Value”. In January 2017, the appellant sold his shares back to Kelson in accordance with the terms of the Share Ownership Agreement and resigned soon afterward. Under the Agreement, Kelson could repay the value of the shares, plus interest, over a period of ten years. Kelson paid 10 per cent of the purchase price on closing, and the balance, plus interest, was to be paid in annual installments of not less than 10 per cent of the purchase price. The appellant received six payments between 2017 and 2021, with the first including principal only, and interest being made on two payments in 2018 and one in 2019. The 2020 and 2021 payments did not include interest. Kelson informed the appellant that the interest was amortized over the remaining term, and even though he received interest in the amortized amount in 2018 and 2019, Kelson issued the appellant T5 forms with significantly higher amounts than the interest the appellant was actually paid. The appellant brought an application that Kelson repudiated the Agreement and breached its obligation of good faith, claiming Kelson failed to pay interest on overdue payments, did not pay an outstanding installment in a timely fashion, and failed to communicate. Kelson conceded that interest was owed on the principal payments and agreed to rectify the T5s, although the parties disagreed on the amount of overdue interest to be paid. The application judge held that Kelson did not breach its duty of good faith or repudiate the Agreement, ordered Kelson to pay interest on any principal balance outstanding for the balance of the term, pay overdue interest from 2017 to 2021, assist the appellant in resolving tax issues, pay partial indemnity costs, and pay post-judgment interest. The appellant appealed.

The appeal was allowed, in part. The application judge used the correct legal test in finding there was no breach of the duty of good faith. The application judge found that the appellant voluntarily resigned six months after selling his shares, Kelson’s conduct was not oppressive or unfair, the appellant received two annual payments in 2018 so Kelson’s approach to interest payments had some merit, Kelson was on track to pay off the debt early, and poor communication by Kelson did not amount to bad faith. Kelson’s refusal to pay interest did not amount to repudiation of the Agreement. A failure to pay a minor portion of the money owed was not repudiation, which occurs where a party demonstrates an intention to not be bound by a contract, with such conduct depriving the innocent party of substantially the whole benefit intended under the contract. Kelson continued to pay annual installments of the principal owing but failed to pay some of the accompanying interest payments, and this did not constitute repudiation of the Agreement, given the significant principal payments the appellant received. Kelson undertook to pay the outstanding interest, and there was no palpable or overriding error in the application judge’s findings. The application judge found that Kelson breached its contractual obligations by failing to pay interest owed under the Agreement, and accepted Kelson’s calculation of outstanding interest owed. The application judge concluded that Kelson did not breach its duty of good faith or repudiate the Agreement, but ordered Kelson to pay costs, given the delay in paying the interest owing. It was proper to order Kelson to perform the remainder of the contract, since paying the overdue interest would put the appellant in the position that he would have been in had the breach not occurred. The requirement for Kelson to pay interest in the amount “as agreed” did not create uncertainty, and was enforceable, as it referred to Kelson’s undertaking to pay interest on the past annual payments and future annual payments as calculated in its expert report. The application judge erred in failing to award pre-judgment interest, and it was ordered at the rate set out in the Agreement.

2023 ACLG ¶180,162
2023 BCLG ¶179,586
2023 CCLR ¶1201,743
2023 CCSG ¶152,023
2023 OCLG ¶152,399

Decision By Chambers Judge On Application To Amend Statement Of Claim Was Final And Did Not Require Leave To Appeal.

Court of Appeal for Saskatchewan, August 31, 2023

K+S Aktiengesellschaft [K+S AG], K+S Potash Canada GP and K+S Legacy GP Inc. (collectively, “KSPC”) signed two contracts with Aecon Mining Construction Services (“Aecon”), one in 2014 and the other in 2015. Aecon brought an action against KSPC to recover amounts they claimed were owing under the contracts. Aecon alleged that KSPC breached certain contractual obligations requiring it to revise the sequence, means, and methods of performing contract work, accelerate the work to avoid expanding the schedule for construction, and incur significant extra cost to complete the work. Aecon alleged that, at least with respect to the 2014 contract, KSPC confirmed the extra acceleration costs would be reimbursed to induce Aecon to proceed with the work prior to being paid. Aecon alleged that KSPC never intended to pay for the work. K+S AG represented to the public and capital markets in 2014 that the project would be built within budget and by its completion date, even though it had been warned by Aecon that the project would be delayed by at least four months. K+S AG continued to represent to its shareholders and investors in public financial documents that the budget and timeline for the project were on track, even when delays had materialized. KSPC entered into an interim agreement with Aecon requiring KSPC to assess Aecon’s claim for compensation for accelerated work and pay 75 per cent without prejudice, which Aecon claimed was a ploy to induce it to complete the work while concealing K+S AG’s financial misrepresentations. Aecon applied to amend its statement of claim to add K+S AG as a defendant and add causes of action in conspiracy and inducing breach of contract against KSPC and K+S AG. The chambers judge allowed the claim of inducing breach of contract but rejected the claim of unlawful means conspiracy based on misrepresentations to the public markets. Aecon brought an application for leave to appeal.

The application for leave to appeal was dismissed, and Aecon could serve and file a notice of appeal. While there is a general right of appeal from decisions of the Court of King’s Bench, no appeal is available from an interlocutory decision unless leave to appeal is granted. A notice of appeal should be filed when it is apparent that the King’s Bench decision in issue was final, and an application for leave to appeal should be filed when it is apparent that the decision at issue was interlocutory. In cases of genuine uncertainty, a prospective appellant may file a notice of appeal and deal with the question of leave when it is raised or can seek leave to appeal conditional on a finding that leave was required while also filing an application to determine whether leave was required. A respondent may apply to the court to have a notice of appeal struck on the basis that leave was required, or the court itself may raise the issue. If the court determined that leave to appeal was required, it may grant leave *nunc pro tunc*, if doing so was appropriate and possible. Leave to appeal may be conditional on finding that leave was required and include an application to determine whether leave was necessary. If it is determined that leave was not required, a chambers judge will dismiss the appeal because they have no jurisdiction to grant leave, and the prospective appellant could file a notice of appeal if the applicable appeal period had not expired, or the chambers judge may extend time for filing the notice of appeal. In this situation, Aecon filed an application for leave to appeal, but also argued the chambers decision was final and leave was not required. While not fully consistent with the above approach, it was an acceptable way for Aecon to proceed, given the uncertainty. Aecon sought to advance two claims for conspiracy, one involving the allegation that KSPC and K+S AG conspired to breach the contracts, and the second involved K+S AG’s representations to the public markets. The chambers judge’s decision was final, as he conclusively determined the issue of K+S AG’s representations to the public markets in the respondents’ favour, and Aecon could not establish liability for damages on that basis. An order refusing to allow an amendment to a statement of claim, like an order striking an existing pleading, were final decisions as they precluded the plaintiff from pursuing a cause of action. The chambers judge refused to allow Aecon to plead unlawful means conspiracy based on alleged misrepresentations to the public markets, which was a final determination in favour of the respondents and

against Aecon. Therefore, the part of the chambers judge's decision Aecon was concerned with was final and did not require leave to appeal.

Aecon Mining Construction Services v. K+S Potash Canada GP

2023 ACLG ¶180,163

2023 BCLG ¶179,587

2023 CCLR ¶1201,744

2023 CCSG ¶152,024

2023 OCLG ¶152,400

Creditor Required To Obtain Leave To Appeal Of An Order In Bankruptcy Proceedings.

Court of Appeal of Alberta, October 23, 2023

Mantle Materials Group, Ltd. ("Mantle") operated gravel pits, some of which were subject to Environment Protection Orders ("EPO") issued by the province. Travelers Capital Corp ("Travelers") financed Mantle's purchase of equipment, and Mantle granted Travelers a purchase-money security interest over the equipment, which was designed to have first priority. Mantle was required to file a notice of intention to make a proposal under s. 50.4 of the Bankruptcy and Insolvency Act ("BIA"). Mantle was granted an order extending time to make a proposal, and various charges on the bankrupt estate were approved, including the priority of those charges, and the approval of paying certain pre-filing debts to creditors whose support was required to perform environmental reclamation work integral to the pending proposal. The application was granted without prejudice to the priority of the charges Travelers held over the equipment until the chambers judge released his reasons regarding Travelers' priority claim. Mantle's intended proposal did not allow payment to any creditors prior to Mantle satisfying its end-of-life obligations from EPOs. Travelers claimed priority with respect to security in certain equipment and claimed its ability to realize on its security should not be postponed until after remediation work had been completed. The chambers judge amended his order to provide that the various approval charges on the bankrupt's estate had priority over Travelers' security interest in the equipment. Travelers applied for a declaration that leave to appeal was not required, or alternately applied for permission to appeal the order.

The application for leave to appeal was dismissed. Travelers was required to obtain leave to appeal. Subsection 193(c) of the BIA provided a party could appeal any order "if the property involved in the appeal exceeds in value ten thousand dollars". While Travelers was owed over \$1 million, s. 193(c) was not satisfied simply where the value of the property exceeded \$10,000. Travelers had not proven the value of the equipment at issue, or that its recovery was in jeopardy. It sought to appeal an order extending time to make a proposal, approving various charges on the bankrupt estate, and approving payment of certain pre-filing debts. This order was procedural in nature, and s. 193(c) did not apply to give Travelers a right to appeal. Under s. 193(e), a court must consider whether the point on appeal was of significance to the practice and the action itself, whether the appeal was prima facie meritorious or frivolous, and whether it would unduly hinder the progress of the action. Leave should only be granted if the judgment appeared contrary to law, amounted to an abuse of judicial power, or involved an obvious error causing prejudice for which there was no remedy. An application for leave to appeal required a point of significance for which there was at least an arguable case, which was not the situation here. Travelers argued that the equipment over which it had a secured interest was not affected by an environmental condition or damage and it should not have to wait for Mantle to complete its environmental obligations prior to realizing on its security. However, abandonment and reclamation obligations are binding "on the bankrupt estate", not the type of asset. The equipment on which Travelers had a security interest was part of Mantle's gravel production business and was being used in the reclamation efforts. Mantle's only business was gravel production, and it had no assets unrelated to those operations. An appeal would also unduly hinder the progress of the action. Section 195 automatically stays proceedings until an appeal is disposed of, which would cause significant harm to Mantle since it was required to complete the EPOs prior to winter freeze setting in.

Mantle Materials Group, Ltd v. Travelers Capital Corp

2023 ACLG ¶180,164
2023 BCLG ¶179,588
2023 CCLR ¶1201,745
2023 CCSG ¶152,025
2023 OCLG ¶152,401

Buyer Of Property Failed To Obtain Subdivision Approval And Order Of Specific Performance Of Contract Was Granted.

Court of Appeal for British Columbia, December 22, 2023

Dominic Vanier’s mother sold a 10-acre tract of land to Powerblock Management Corporation (“Powerblock”), although she wished to retain title over the portion of the property that her family home was located. She wanted her son, who lived in the family home, to ultimately become the registered owner of the family residence lot. Unless the land was approved for subdivision, sales of parts of land were prohibited, and the municipality had not approved the property at issue for subdivision. Powerblock believed it could obtain approval after sale and transfer the family residence lot back to her. Schedule E of the contract of sale contained an option to purchase and did not stipulate what would occur if the property was not subdivided. Vanier’s mother requested terms in the contract indicating that the option to purchase be registered, and if subdivision did not occur that title to the property would reconvey to her. These terms were incorporated into the contract, but not into Schedule E. Vanier’s mother was paid the purchase price, and Schedule E was filed as an option in the Land Title Office, but it did not contain any other schedules, and Powerblock did not file the “obligation” to transfer the entire property to Vanier’s mother or amend Schedule E to reflect this. Vanier’s mother assigned her interest in the option to purchase to her son, which was registered with the Land Title Office. Five years later, Powerblock was granted a two-year extension to Schedule E to obtain approval for subdivision and an option to extend for another two years at Vanier’s option. The option to further extend was not exercised, and subdivision approval was never obtained. Powerblock brought an application to cancel the option to purchase, even though subdivision approval had not been obtained and it could not transfer the family residence lot to Vanier. Vanier brought a claim for specific performance of the contract of purchase and sale, and Powerblock brought an application to dismiss. The judge determined that Schedule E was unclear and should be interpreted within the context of the parties’ intentions. Vanier established that the family home property was unique to him and granted the remedy of specific performance as provided for under the contract. Powerblock appealed.

The appeal was dismissed. The judge correctly outlined the legal framework applying to the interpretation of the contractual documents, including the contract, Schedule E, and the option to purchase. There was no basis to interfere with the conclusion that Schedule E was not a stand-alone agreement and that an order of specific performance should be granted to Vanier in the circumstances of the case. Vanier’s mother received \$950,000 when she sold the property, and Vanier continued to live there, and paid Powerblock certain expenses related to his occupation. The judge ordered that the entire property be conveyed to Vanier, not just the family residence lot, given that the property had not been subdivided. However, Vanier’s mother had received the agreed upon purchase price for the entire property. The issue of what consideration should be paid, if any, by Vanier to Powerblock for the transfer of clear title to the property should be returned for the judge to determine.

0994660 B.C. Ltd. v. Vanier

2023 ACLG ¶180,165
2023 BCLG ¶179,589
2023 CCLR ¶1201,746
2023 CCSG ¶152,026
2023 OCLG ¶152,402

CORPORATE BRIEF

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