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No Money Down: Too Good to be True?

By: Daniel G. Edmondstone and Janine MacNeil, McMillan LLP

The Commissioner of Competition's willingness to commence proceedings continues. On July 9, 2013, the Commissioner commenced proceedings in the Superior Court of Justice (Ontario) against Leon's Furniture Limited and The Brick Ltd. (The Brick is now controlled by Leon's). Leon's and The Brick operate large chains of furniture stores across Canada.

The Statement of Claim alleges that Leon's/The Brick made false or misleading representations in their advertisements when they made statements such as "don't pay a cent! Not even the taxes! For [...] months!*" The Commissioner alleges that the representations are false or misleading in that they convey the impression that consumers can purchase a product and take it home without having to pay anything until a later point in time. In addition, the Commissioner alleges that such representations convey the general impression that consumers can take advantage of the deferred payment option without paying more than if they paid for the product in full at the time of the purchase. It is alleged that there are various upfront charges not properly disclosed, including administrative, processing, delivery, electronic disposal or recycling fees as well as a membership fee in certain circumstances. In line with the prior Commissioner's focus on the ineffectiveness of certain disclaimers, it is alleged in this proceeding that disclaimers presented were "lengthy, in fine print, typically situated far away from the associated representations". It is also alleged that the disclaimers were inconsistent and indirectly contradicted the representations' literal meaning as well as the general impression conveyed.

Perhaps the most curious aspect of the Statement of Claim is the pleading with respect to "drip" pricing. The Federal Trade Commission in the United States has described "drip" pricing as a pricing technique in which firms advertise only a portion of a price and reveal other charges to the customer as he or she goes through the purchasing process. The Commissioner pleads in his Statement of Claim that "drip pricing triggers a number of common behavioural biases, including:

1. Price anchoring - consumers "anchor" to the piece of information they think is most important (i.e., the advertised price). They then fail to adjust their perception of the value of the offer sufficiently as more costs are revealed;
2. Loss aversion - consumers see a low price and make the decision to buy the good, which shifts their reference point because they

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imagine already possessing the good. Later, when they realize that there are additional costs and charges, it is more difficult for them to give up the good that they already view as theirs; and

3. Commitment and consistency - consumers have a desire to be consistent with their previous actions so once they've started the purchasing process they are less likely to walk away."

The Commissioner then pleads that the advertiser's reviewable conduct exploited these behaviours, and immediately asks for the defendants to be ordered to pay restitution in an amount to be determined. This will raise an interesting question as to whether and what amount of restitution is appropriate for misleading advertising that lures a customer into a transaction but where, during the process of the transaction itself, that consumer is given full disclosure of all the charges and payments required. If we assume that Leon's/The Brick complied with their obligations under provincial consumer statutes with respect to disclosure of credit and other terms, then the consumer will have received exactly what he/she agreed to, at a price that was known to them. The fact that a consumer might not have considered entering into such a transaction with that retailer absent the attractiveness of the advertising does not give rise to a need for restitution in the same manner as cases involving goods that are sold that do not perform the functions advertised (e.g. fraudulent weight-loss products), or goods that are not as valuable as advertised (e.g. a ring advertised as 18 carat gold that is actually only 14 carat gold).

Under section 74.03(4) of the *Competition Act*, it is not necessary to establish "any person was deceived or misled" to establish liability. Also, it is long settled in Canadian misleading advertising law that the determination of the meaning of an advertisement is a question of law. Thus, the Commissioner's reliance on consumer psychology can only be pleaded to support an argument that restitution is acquired because consumers effectively lose their ability to choose freely in the face of this advertising. The determination by the Superior Court of Justice as to the validity of the Commissioner's psychological theories will be interesting to follow.

Also, this case, if it proceeds to trial, may allow for some determination of the extent to which compliance with provincial consumer laws that mandate contractual and credit disclosure in great detail could be seen as due diligence for the purposes of the *Competition Act*.

The defendants had not filed any formal response to the allegations at the time of the writing of this bulletin.

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The fragile protection of qualified privilege when reporting misconduct

By: Jean-Claude Killey, Paliare Roland Rosenberg Rothstein LLP

A recent Superior Court decision addresses the difficult issue of the limits of qualified privilege in protecting reports of sexual abuse.

Qualified privilege is a defence to a defamation claim, allowing a defendant to escape liability for otherwise defamatory statements. It applies where a defendant establishes that he or she had an interest (sometimes also characterized as a "duty") to make the impugned

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statement, and the person or persons to whom the statement was made had a corresponding interest in receiving it. The classic example is where a person makes a report of an alleged crime to the police. A successful claim of privilege can be defeated if the plaintiff proves malice on the part of the defendant.

Judges often remark that the privilege attaches to the occasion on which the statement is made, and not to the statement itself.

This oft-quoted formulation is somewhat misleading, however, insofar is it shifts attention away from what is actually said. The content of the statement cannot really be separated from the occasion on which it is made when analysing whether the privilege applies. As the case of *Vanderkooy* shows, a defendant may make a statement on an otherwise privileged occasion, but exceed, in the content of the statement, the bounds of what the privilege will protect.

Vanderkooy v. Vanderkooy et al, 2013 ONSC 4796, is the unfortunate case of an uncle who sued his nieces and brother (their father) in defamation, as a result of allegations of sexual abuse made by the nieces against him. The allegations were of a historical nature, dating to the time when the two families lived across the road from each other, and the nieces frequently slept over in their cousins' bedroom in their uncle's home.

The nieces counterclaimed for sexual assault and battery, and intentional infliction of mental distress. The central factual issue of the case was therefore whether the alleged abuse had occurred.

Justice A.J. Goodman found that the alleged abuse had not been proven on a balance of probabilities, a finding that disposed of both the defendants' counterclaim, and their defence of truth (or, in the legalese of defamation, "justification").

It was not seriously disputed that the allegations the nieces had made were defamatory of the uncle (in that they would injure his reputation in the mind of an objective observer, and were presumed by law to be false). The only significant legal issue to be determined, therefore, was whether the nieces had disseminated their allegations on an occasion of qualified privilege.

Justice Goodman accepted that the defendants' statements to their immediate family members accusing their uncle of sexual abuse could be protected by qualified privilege. Revealing the accusations to their father and mother was justified on the basis of the closeness of the relationship between the defendants and their parents, and the common interest of the parents and children in providing emotional support to each other. Much more problematic for the defendants, however, was that, after having confronted their uncle with their accusations and failed to achieve any kind of resolution, they emailed their accusations to a broader group of family members that included other aunts, uncles and cousins. The defendants failed to justify why they had a similar interest or duty to share the allegations more broadly with their more distant relatives, and failed to establish any other reciprocal duty between them and their more distant relatives that justified sharing the allegations.

However, the fatal blow to the qualified privilege defence came when the defendants added, to their family-wide email, the words "we do not want anyone else to be sexually abused." According to Justice Goodman, these added words "strongly inferr[ed] that [the plaintiff] was a continuing child molester in 2006, and [were] not germane to any reciprocal duty or interest on the occasion in sending the email."[1]

Not only did these words bring the defendants' statements outside the protection of the privilege by exceeding the scope of what the reciprocal duty required the defendants to report, but, in a passage of the decision that is relatively brief compared to the otherwise detailed and lengthy reasons, Justice Goodman also found them to be actuated by malice: "when they added the dire warning that 'we do not want anyone else to be sexually abused', in the context of the timeframe [in 2006]; the statement was dishonest and excessive with respect to the facts as known at the time, and without substantiation to the seriousness of the matter."[2]

The plaintiff uncle was ultimately awarded $125,000 in damages, a relatively hefty award by Ontario standards, reflecting the significantly damaging effect that allegations of sexual abuse will generally have.

Qualified privilege can be a fragile protection against a defamation lawsuit. Focusing too much on whether the "occasion" is privileged can also lead defendants into trouble. A claim of qualified privilege can easily fall away where the content of a defendant's statement exceeds what the occasion will protect. In order to be well protected, people who wish to report the alleged misconduct of someone else should give careful consideration, when doing so, to how they will characterize the duty or interest they have in making the report (is it in the public interest? is there a moral or legal duty?), what their duty does and does not require them to report, and to whom their duty does and does not require the allegations be reported.

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[1] para. 199.
[2] para. 210, square brackets in original.

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A JOLT to American Tourism (And Estate Tax?)

By: Ian M. Hull, Hull & Hull LLP

If approved, the effect of proposed American legislation may have significant implications for Canadians owning U.S. situs assets upon death. The legislation in question, the *Jobs Originated through Launching Travel Act*[1] (the "JOLT Act") of 2013, increases the maximum time-limit Canadian's can spend South of the border, without requiring a visa, from 182 days to 240 consecutive days. However, living in the U.S. for over 182 days still triggers U.S. residency[2], which may result in tax exposure[3]. The possible effects of this proposed legislation on estate planners and Canadians is discussed below.

Current Law:

Tax effects in Canada resulting from an extended stay lasting up to the new 240 day limit potentially include activating a departure tax[4] and provincial health care coverage could also be lost.

Even more daunting is that, from the American perspective, Canadians partaking in extended stays in the U.S. could become subject to tax on their worldwide income as well as being subject to U.S. estate tax on their worldwide assets in death. This effect is especially significant and illustrated by the JOLT Act's colloquial name, "the Canadian Retiree Visa", due to its allure for senior citizens who wish to spend greater amounts of time in second homes located in the U.S. during retirement years.

Extended stays at such a late stage in life significantly raise the potential for U.S. estate tax claims.

Pre-JOLT Act Caselaw:

The case of *Estate of Robert A. Jack v. United States*[5]demonstrates American Court's willingness to impose income and estate tax on Canadians. The case involved the taxation of the estate of a Canadian resident who worked in the U.S. on a temporary work visa for approximately two-thirds of the year, consistently returning to Canada for the summer months. The U.S. Federal Court found that the Canadian resident was subject to U.S. estate tax on his worldwide income, as well as upon his assets in both Canada and the U.S. Consequently, American courts appear to justify pulling estates traditionally considered outside of American jurisdiction into the U.S. tax web.

These effects are especially important given the growing amount of real estate purchased by Canadian's in the U.S. due to the relative value of the Canadian versus the U.S. dollar in recent years, coupled with the comparatively low cost of housing as a result of the sustained and weak U.S. economic climate.

The case of *The Estate of Kahn v Commissioner*[6]demonstrates circumstances in which American courts have found that an individual is domiciled in the U.S. for estate tax purposes. Salient facts include that the individual in question was a Pakistani citizen whose family lived in Pakistan throughout his time in the U.S. The deceased returned to Pakistan to die; did not purchase a return ticket to the U.S. upon exiting the country; filed exclusively non-resident U.S. income tax returns; and by the date of death in Pakistan, had let his U.S. re-entry permit expire. The Tax Court acknowledged that the intentions of the deceased regarding his choice of domicile could not be determined posthumously; and because of the lack of expressed intent by the deceased, the court imposed U.S. estate tax on his estate.

It is therefore possible that American courts will conclude that an individual remained domiciled in the U.S. for estate tax purposes if they were both physically present in the U.S. for the requisite time period; and the intent to abandon their U.S. domicile was not clearly expressed prior to death. Similar findings appear possible even if the deceased abandons their U.S. domicile, where evidence demonstrates that they had no intention ever to return.

The JOLT Act and Other Relevant Legislation:

In order for a Canadian to take advantage of the extended stay provisions in the JOLT Act, the requirements delineated in Section 4503 of the Act must be met. Significantly, the Act only applies to a Canadian who, "owns a residence in the United States or has signed a rental agreement for accommodations in the United States for the duration of the alien's stay in the United States."

The determination of whether someone is a U.S. resident, and therefore subject to American estate tax on worldwide assets owned at death, is based upon a simplistic test[7] . The focus of the test is on the intention of the individual to domicile in the U.S. based on an examination of all of the facts and circumstances involved.

The unique set of estate tax laws in the U.S. lead to the complexities involved in end-of-life planning when an estate holds U.S. situs assets. While most nations only apply a worldwide estate tax if the taxpayer in question is a resident of the country, the U.S. tax-web extends to American citizens, and variations therein, regardless of their residency at their date of death.

Intricate wording of the American *Internal Revenue Code*[8] provides that, "A 'resident' decedent is a decedent who, at the time of his death, had his domicile in the United States. A person acquires a domicile in a place by living there, for even a brief period of time, with no definite present intention of later leaving." The word 'resident' is therefore interpreted to mean 'domiciled', as opposed to an 'income-tax resident'.

The breadth of this interpretation may allow for the application of American Federal estate tax on individuals seeking to take advantage of the JOLT Act's leniency regarding extended stays in the U.S.

Consequences for Canadians:

By virtue of section 4503 mentioned previously, the U.S. *Immigration and Nationality Act*[9] is amended to provide that a spouse of an alien[10] entering the U.S. via the JOLT Act provisions is able to take advantage of the same extended-stay clause, provided all of the other requirements, apart from the ownership or renting of a residence, are met.

Such legislative action could encourage Canadian couples to spend greater amounts of time South of the border. For estate planners, this means that options to avoid otherwise devastating U.S. estate taxes should be considered.

Possible Strategies to Avoid Tax Consequences:

Trust Structures:

One possible method to partially avoid the fallout of U.S. estate tax on worldwide assets that estate planners may want to consider, is through a structure known as an AB Trust: a living trust with an AB provision. Such an instrument effectively allows for the reduction in the size of the taxable portion of an estate in death.

An AB Trust is a very flexible and easily revocable entity, which allows a couple to withdraw assets in life. However, upon the death of one of the partners, the trust becomes irrevocable and splits into 2 trusts:

A) The A trust contains the assets of the surviving partner, who is able to access both the principle and the income contained therein;

B) The B trust contains the half of the estate designated to the deceased partner, where the surviving partner is also able to access the principle and income of the trust.

Upon the death of the surviving partner, the property contained in both the B and the A trust passes to the designated beneficiaries of the trusts.

This use of such a dual trust structure potentially prevents the assets of the B trust from ever being considered part of the surviving partner's estate, and as a result, those assets are not necessarily subject to estate tax upon the death of the surviving partner. While the assets held in the A trust are clearly part of the surviving partner's estate, by utilizing the separation of assets otherwise flowing to the surviving partner, the amount of capital subject to estate tax upon the death of the surviving partner may be greatly reduced.

It must be noted that the use of discretionary trusts presents certain disadvantages, including that the partner financing the trust must waive any rights to the property invested in the trust as they cannot be the beneficiary or the trustee of such a trust.

Those hoping to take advantage of any form of trust structure should ensure that they retain competent legal counsel in the jurisdiction in which such a trust would be established.

Statute:

A further consideration for estate planners is that *The American Taxpayer Relief Act*[11] (the "ATRA") provides for an indexed estate tax exemption now set at a lofty $5 million. This exemption is also 'portable', meaning that a married couple is able to take advantage of two sets of exemptions cumulatively, where any unused portion of the exemption upon the death of one spouse is transferred to the surviving spouse.

For Canadians, by virtue of the Canada-U.S. Income Tax Convention[12], there may be an indirect benefit regarding U.S. estate tax on U.S. situs assets where no estate tax is payable if the total worldwide value of the estate in question is under $5 million due to the ATRA's heightened exemption.

Conclusion:

Until precedent and dialogue regarding the effects of the JOLT Act in the U.S. and Canada develop, clearly worded wills and trust deeds, and careful estate planning, should be paramount in the minds of practitioners who deal with Canadian clients that spend significant amounts of time in the U.S. It is imperative that estate practitioners warn such clients about lengths of stay across the border, and caution that the JOLT Act could potentially develop into an aggressive attempt at widening the web of U.S. estate tax.

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[1] H.R.1354 - 113th Congress.
[2] *Internal Revenue Code*, Section 7701(b)(7) defines presence in the U.S. as any day that an individual is physically present in the U.S. or any part of the day, apart from days commuting from the U.S. to Canada or Mexico. Click here for the full version of IRC s 7701.
[3] The day-count for the visa (240 days) being different from the day count for tax purposes. U.S. income tax is levied on anyone present in the U.S. for over 182 days in the calendar year; or alternatively, if the Substantial Presence Test (*Internal Revenue Code*, Section 7701 (b)(3)) is met, the formula being: 1) if the number of days one is present in the U.S. during the current year is over 30, add 100% of these days and move to step 2; 2) add 1/3 of the number of days one was present in the U.S. during the prior year; 3) add 1/6 of the number of days one was present in the U.S. two years prior. If the sum is over 182, then the individual is considered a resident in the U.S. and is thereby subject to U.S. income tax on worldwide income. See: here for the test delineated further by the Internal Revenue Service.
[4] Subsection 128.1 (4)(b) of the *Income Tax Act* (the "ITA") provides that when a taxpayer emigrates from Canada, they are deemed to dispose of property owned at the time in Canada and thereby receive the fair market value of the deemed proceeds of disposition. These proceeds are applied as the new cost of the same property to the taxpayer via deemed reacquisition of said property via s128.1(4)(c) of the ITA
[5] 54 Fed. Cl. 590 (2002).
[6] T.C. Memo 1998-22 (1998).
[7] The test for U.S. Estate Tax is more subjective and circumstance based than for U.S. Income Tax (see footnote 1). For Estate Tax purposes, an individual is resident if: 1) they live in the U.S. even for a brief time; and 2) have no definite present, or future, intention to move - where all salient facts and circumstances aid in the determination.
[8] *Internal Revenue Code*, Section 2001 (US Code - Title 26).
[9] *Immigration and Nationality Act* (8 U.S.C. 1184), at section 214.
[10] The American Bar Association had previously proposed a definition of 'domiciled alien' for the purposes of estate tax; however, that proposal is not currently the subject of any active discussion.
[11] *The American Taxpayer Relief Act*, 2012, (126 Stat. 2313).
[12] *The Canada-United States Tax Convention*, 1984, (SC 1984, c 20).

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Sunrise Propane Decision Emphasizes Importance of a Preventive System in Proving Due Diligence

By: Jack Coop, Partner and Rebecca Reasner and Lorraine M. Chan, Associates, at Osler Hoskin & Harcourt LLP

In a recent lengthy decision (135 pages), the Ontario Court of Justice convicted Sunrise Propane Energy Group Inc. and 1367229 Ontario Inc. (the Companies), and their directors, Shay Ben-Moshe and Valery Belahov (the Directors), of multiple offences under the Ontario *Environmental Protection Act* (EPA) and *Occupational Health and Safety Act* (OHSA). The decision in Ontario (Ministry of Labour and Ministry of the Environment) v. Sunrise Propane Energy Group Inc., 2013 ONCJ 358, suggests that it may not be easy to establish a defence of due diligence to a regulatory offence in the case of an inherently dangerous activity. In such a case, a successful due diligence defence will need to demonstrate that a preventive process is in place to avoid the harm, whether or not it was possible to predict the precise manner in which that harm would come about.

Background

The charges arose out of a series of explosions at the Sunrise Propane facility in the city of Toronto on August 10, 2008, which left one worker dead and required approximately 12,000 residents to evacuate their homes. The explosions started while workers at the Sunrise Propane facility were performing a truck-to-truck transfer of propane. According to the Fire Marshal, a propane leak led to the explosion, likely caused by a hose failure; but the specific source of the ignition was never determined. The Companies were charged under the EPA with discharging contaminants that caused an adverse effect, and both the Companies and Directors were charged with failing to comply with the provincial officer's cleanup order (Order). Charges were also brought under the OHSA.

As the charges brought against the defendants under the EPA and OHSA were strict liability offences, the Crown had an obligation to establish the *actus reus* (or guilty actions) of the offence, with the burden then shifting to the defence to establish due diligence. Much of the Court's analysis focused on whether the due diligence defence had been made out, but there was also some dispute over the precise *actus reus* that the Crown needed to establish for some of the offences.

The Companies and the Directors were convicted of all charges, except for one of the five counts that related to their failure to comply with the provincial officer's Order. In making its decision, the Court relied on several agreed statements of facts, as well as extensive evidence provided during 17 days of trial. It is interesting to note that while the specific cause of the explosions was never determined, the Court found liability on the basis that all possible causes were within the control of the defendants.

The Charges Under the EPA

Discharge of a Contaminant

The Companies were charged with violating s. 14 of the EPA, which prohibits discharging or causing or permitting the discharge of a contaminant into the natural environment, if the discharge causes or may cause an adverse effect. "Contaminant" is defined under the EPA as "any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from human activities that causes or may cause an adverse effect."

The Court agreed with the Crown's position that the *actus reus* for this offence had been proven by the agreed statement of facts, which set out that (a) contaminants (including heat, vibration, sound, gas vapour, smoke and solids such as asbestos, dust, metal fragments and other debris) had been discharged from the facility into the natural environment; and (b) the discharged contaminants caused several adverse effects, including injuries to individuals and damage to property. The insurance policy clearly showed that the Companies were in control of everything that happened at the site, and therefore the Court could conclude that they "caused or permitted" the discharge within the meaning of the Act.

With regard to the defence of due diligence, the Court accepted that foreseeability of the harm was relevant, but that the issue was not whether the defendants could have foreseen the particular event that occurred. Rather, the issue was whether or not the defendants could have foreseen that a propane leak could result in an explosion. The Court determined this was foreseeable.

In assessing whether the defendants had taken reasonable steps to prevent the discharge offence from occurring, the Court noted that the defendants had failed to comply with an Order by the Ontario Technical Standards and Safety Authority (TSSA) prohibiting truck-to-truck transfers of propane and had failed to provide oversight of drivers or put a preventive maintenance system in place. Despite some evidence of a general atmosphere of safety, the Companies were still required to take reasonable steps to address specific deficiencies, particularly those that were pointed out by an inspector.

The Court accepted the defendants' argument that there was some evidence of "officially induced error" - namely, that a TSSA fuel safety inspector permitted non-compliance with the TSSA Order prohibiting truck-to-truck transfers. However, this inducement lasted only a short period of time and was overtaken in June 2007 by a province-wide TSSA Code that forbade the practice.

The Court held that the Companies had not established due diligence in the circumstances, and they were found guilty of contravening s. 14(1) of the EPA.

Provincial Officer's Order

Sunrise Propane was also charged and convicted of four out of five offences in relation to a provincial officer's Order that was issued after the explosions. In addition, each of the Directors was charged and convicted of failing to take all reasonable care to prevent the corporation of which they were Directors from contravening the Order.

As part of the agreed statement of facts, the parties agreed that after the propane explosions, a Ministry of Environment provincial officer issued a provincial officer's Order against the two corporate defendants, requiring them to immediately take a series of steps, including confirming that the Companies were willing to comply with the Order; providing notification if the Companies could not comply with the Order; verifying that a qualified consultant had been hired to carry out the Order; cleaning up the surrounding residential area impacted by the explosion; and providing a written cleanup plan. Separate counts were laid against the companies for their failure to comply with each of these provisions. The Order was never appealed to the Environmental Review Tribunal.

At the outset, the Court noted that an order issued by a provincial officer is presumptively valid. If the defendants wanted to attack the Order, they should have availed themselves of the appeal process provided, under the EPA. The defendants were aware of how to challenge the Order but chose not to do so. As a result of the rule against "collateral attacks" enunciated by the Supreme Court in *Consolidated Maybrun*,[1] the defendants could not challenge any provision of the Order as "unreasonable."

The defendants argued that it was impossible for them to comply with the Order because the deadlines imposed by the Order were too stringent and had already passed by the time they received the Order. However, the Court did not accept this defence, holding that their obligation to comply with the Order was ongoing, and continued even after the expiry of the deadlines.

The argument of the defendants that they relied on mistaken legal advice from their lawyer that the deadlines in the provincial officer's Order could be amended was also rejected by the Court. Ignorance of the law was no excuse.

The argument of the defendants that their lawyer had notified the Ministry that they would not comply with the Order was accepted on the facts. In other words, the defendants proved that they had been duly diligent with respect to this one count. As a result, the defendants were convicted of four of the five counts of failing to comply with the Order.

In addition, the two Directors were convicted of violating s. 194(1) of the EPA - failing as directors of the corporate defendants to take all reasonable care to prevent the corporations from contravening an Order under the EPA.

The Charges Under the OHSA

In addition to the charges under the EPA, Sunrise Propane was also charged and convicted of contravening ss. 25(2)(a) and (h) of the OHSA. In making these determinations, the Court emphasized the importance of preventive processes, particularly in a dangerous workplace (i.e., "a yard filled with propane where a leak would cause explosions"). It did not matter whether the precise mechanism by which the explosions were triggered could not have been predicted. According to the Court's comments, these preventive processes should ensure that (a) employees receive appropriately detailed information, instruction and supervision, which may include a process to obtain assistance when a supervisor is not available on the worksite; and (b) the organization complies with its regulatory requirements and safe industry practices.

The Court determined that Sunrise Propane failed to provide appropriate information, instruction and supervision to Mr. Saini, the deceased worker, regarding the safe work practices and recognition of hazards associated with propane storage, dispensing and handling, and regarding appropriate emergency response to propane leaks. In this case, there was no record of training and none of the three individuals who provided training to employees was able to testify that he had provided training to Mr. Saini. There was some suggestion that Sunrise Propane's records had been destroyed in the fire, but there was no evidence of any kind of ongoing training whatsoever. On the basis of this evidence and the fact that Mr. Saini had run toward the explosion instead of away from it, the Court inferred that Mr. Saini had not received proper information and instruction. The Court also found that Mr. Saini was effectively left in charge of the propane filling station, even though he had little experience and was authorized only to fill up taxis; there was also no procedure in place for him to contact someone for assistance. With regard to the due diligence defence, the Court emphasized that it was not sufficient that Sunrise Propane took safety seriously in general. Given the danger inherent in handling propane, Sunrise Propane was required to establish a high degree of attention to detail, as well as to put in place processes that would address day-to-day issues and mitigate the inevitable mistakes caused by human error.

Sunrise Propane was also charged and convicted of failing to take every reasonable precaution in the circumstances for the protection of a worker by moving two 2,000 USWG[2] tanks without proper approval from the TSSA. Although there was no evidence that the movement of the tanks played any role in the explosion, the Court held that this action was highly risky behaviour that may have resulted in a very dangerous situation. The defendants' failure to establish a system to ensure compliance with the requirements of the TSSA contravened their obligation to ensure that the propane facility was installed and operated in accordance with regulatory requirements and safe industry practice.

Conclusion

This is an important decision and could result in significant fines under both statutes. The sentencing hearing is currently scheduled for December 9, 2013. While fines are available, it is unlikely that the Court will be able to impose any jail terms on the Directors, because these appear to be first convictions, which under s. 194(1)(f) of the EPA do not attract a jail term. Furthermore, it is currently uncertain whether the defendants will appeal the verdict.

This case confirms the importance of establishing and documenting a preventive system to comply with obligations under public welfare legislation such as the EPA and OHSA. The more dangerous the activity, the more difficult it will be to establish due diligence, absent such a preventive system. Even if the particular incident could not have been foreseen, or the risk of a particular hazard materializing is small, due diligence will require significant steps to be taken to avoid that harm if there is a large potential for harm.

In addition to these quasi-criminal prosecutions, the Companies and Directors have also been named as defendants in an ongoing class action that was certified on July 23, 2012[3] which could result in a significant award of damages for the residents and other individuals affected by the 2008 explosions. As the Court in Sunrise Propane noted, residents who were displaced by the explosions suffered lost wages and were forced to pay out-of-pocket expenses for temporary shelter and clothing. Significant structural damage was also caused to two local elementary schools and local businesses.

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[1] *R. v. Consolidated Maybrun Mines Ltd*., [1998] 1 S.C.R. 706.
[2] United States water gallons, a unit of measurement for liquid propane.
[3] *Durling v. Sunrise Propane Energy Group Inc*., 2012 ONSC 4196.

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