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Charter of Rights and Freedoms

The Ontario Court of Appeal has delivered its ruling in *Susan Doe v. Canada (Attorney General)*. In this case the appellant appealed against the dismissal of her application for a declaration that the definition of "assisted conception" in the *Processing and Distribution of Semen for Assisted Conception Regulation* infringed the Canadian Charter of Rights and Freedoms. The regulation imposes restriction on donors and requires screening and testing of semen for use in artificial insemination under a clinical setting. It excluded men over 40 years and those highly susceptible to HIV and hepatitis, including gays from donating semen. However, it allowed excluded donors to still make donations subject to testing of their semen for disease and six month quarantine of such semen and retesting requirements. The regulation did not apply to women who used semen from their spouses or sexual partners to conceive. The appellant who is a lesbian has selected a gay man as a sperm donor for her assisted conception procedure. The gay man did not want to take advantage of the part of the regulation that would have allowed him to still be a donor. He opposed the idea of storing/quarantining of his semen. Nonetheless, he and two other organizations were granted intervener status. They supported the appellant's main argument:That the regulations in issue violated her equality rights and her right to liberty in regard to compromising her ability to determine the father of her child. Further, that the restrictions in the regulations discriminated against her and the members of the homosexual community and promoted the view that they were less worthy as parents.

Upholding the lower court's rejection of the appellant's arguments, the court of appeal affirmed that restriction of the age of donors to 40 years was justified on health grounds as semen from men above that age are subject to genetic mutation. Similarly, the court found the restriction that applied to homosexual men was also justified on health grounds and did not promote the view of discrimination as canvassed by the appellant. The court also found that non application of the regulation to women inseminated with sperms from spouses or sexual partners is not discriminatory because such women are presumably exposed to the health risks associated with semen from their spouses or sexual partners.

Civil Procedure

In *R. v Radwanski*, Justice Roccamo of the Ontario Superior Court considered an application by the accused for an order requiring the Crown Attorney's Office to provide outstanding items of disclosure. The applicant, who was the former Privacy Commissioner of Canada, was charged with fraud over $5000 and breach of trust by a public officer. He sought a hard copy of every document or file contained on three hard drives in the possession of the Crown, as well as a copy of the forensic software used by the crown to view the data on the hard drives. In the alternative, he requested and order that the Crown pay for the costs of the defence to acquire a copy of the software and to be trained in its use.

The applicant argued that the Crown was obliged to make basic disclosure, which would include making the documents available in a readily accessible form. The Crown witness, a staff sergeant with the RCMP testified that the hard drives seized "contained between 150 to 160 gegabytes [sic] of information." (para 8) He also testified that printing out paper copies of documents in 20 gigabytes of storage would "result in a pile of paper the height of the CN Tower." (para 8) It was the view of the witness, based

on a summary review of the data in the hard drives, that using the forensic software, the data was not relevant to either the Crown or the defence.

The Crown had offered to allow the defence to view the hard drives at RCMP premises on computers equipped with the forensics software. There was existing precedent for providing this form of access. Roccamo J. found that this offer satisfied the Crown's disclosure obligation. It remained open to the defence to hire their own trained forensic expert to view the data. He concluded that there were no exceptional circumstances that would warrant ordering the Crown to pay for a copy of the relevant software for the defence.

Company Law

The Ontario Superior Court of Justice has delivered its ruling in *Vallée v. Pickard*. In this case Vallée and Pickard were joint founders, equal shareholders and directors in a company called Pythian, an Ottawa based remote database management and services company. They have each brought applications pursuant to s. 241 of *Canada Business Corporations Act* (CBCA) alleging that each other's actions were oppressive, unfairly prejudicial or disregarded their respective interests. They acknowledged that there was a deadlock that required the assistance of the court to resolve. But they did not ask for the company to be sold as a going concern or to be wound up or be liquidated. Vallée has a litany of complains against Pickard ranging from the latter's abandonment of his professional responsibilities, unilateral changing of the partnership agreement, interference with Vallée's agreed area of responsibility, withholding of cheques to ordering staff to take instructions from him (Pickard) only. However, Pickard's main claim against Vallée was that the latter continually attempted to encroach in the sales area which was Pickard's area of exclusive responsibility by an agreement of both parties. According to him, that was the root of all conflicts between the parties. After leaving the company twice for a "cooling off" period following disagreements with Vallée, who was managing the company, Pickard returned to give instructions that undermined Vallée's authority.

The court found that Vallée actively wanted to be involved in sales area which by agreement between the parties was part of Pickard's responsibilities and that this was at the root of their broken relationship. Even though it was not his area of agreed responsibility the court found that as the president of the corporation who "created and developed most of the computer software products which Pythian used to deliver its remote database management services to clients" (¶ 26), Pickard could residually act as Manager on Call, despite Vallée's attempt to assign the position to another officer. After reviewing the conducts of the parties in detail, the court found that none of them amounted to oppressive conduct. However, it found that there was apparent irreconcilable deadlock. Consequently, it held that it is just and equitable to dissolve or wound up the company. It found that in the circumstance, an alternative remedy to liquidation pursuant to section 241(3) of the CBCA was more appropriate.

The court held that Vallée's attempt to encroach on Pickard assigned role was a wrong conduct that fanned the conflict. However, Pickard occasional abandonment of his role in the company counterbalanced Vallée's conduct. Noting that Pickard was the corporation's president who developed most of its software and that both parties were equal shareholders, the court held that there was no basis for discriminating against the parties or preferring one over another and consequently, they have legitimate expectation to be treated equally by the court in regard to who will exclusively takes over the company and on what terms. The court held both parties should submit sealed bids to purchase the shares of each other and that the highest bidder shall be entitled to purchase the shares of the other shareholder.

Defamation

A B.C. COURT HAS AWARDED DAMAGES FOR INTERNET defamation in *WeGo Kayaking Ltd. v. Sewid*. The defendant in the case operated a web site on which he made defamatory comments about two companies offering kayaking eco-tours. In his decision, Macaulay J. noted that kayaking eco-tourism is an industry which is heavily reliant upon the internet to attract business.

The defendant argued that he was not responsible for the website, and that instead it was operated by another person, Ms. Westergaard. The court accepted

evidence of an ongoing personal relationship between the parties, who had children together, and who lived together for parts of the year. Macaulay J. noted that "the website was all about Mr. Sewid and his businesses, not about Ms. Westergaard and her business." (para 36) The defendant, Mr. Sewid, also denied authoring several emails that were entered into evidence and that contained statements that indicated his comments about the plaintiffs company on the website were motivated a desire to "punish the plaintiffs for not continuing to do business with him." (at para 46). Macaulay J. found that he had, in fact, authored the emails, noting: "The tone and grammar is similar to his manner of verbal communication. The content is highly personal. It is very unlikely that someone else would have drafted the e-mails and sent them in his name." (at para 39).

Macaulay J. found that the statements on the website were defamatory, and he rejected the defense of fair comment put forward by the defendant. In assessing general damages he noted that the category could include "social damage and possible economic damage which may result but which cannot be expressly proven." (at para 90, citing *Brown v. Cole* (B.C.C.A.)). The Court of Appeal in *Brown v. Cole* had noted that particular attention needed to be paid to this kind of damage where publication took place in the mass media. Macaulay J. noted that "the potential audience reach creates a parallel between multiple internet publications and publications in the mass media." (at para 90) In assessing the economic loss suffered by the plaintiffs, he accepted evidence of a decline in bookings for kayak tours after the first publication of the defamatory comments. He also noted: "The downwards spike in guests for both plaintiffs in 2005 was attributable to the publication and republication of the villageisland.com website. There were no other identifiable factors to explain such a drop within weeks after the website came online." (at para 117)

The British Columbia Supreme Court has delivered its ruling in *Creative Salmon Co. v. Staniford*. The plaintiff is salmon fish farming company in Clayoquot Sound near Tofino in BC. It is committed to farming salmon organically with reduced environmental impact. It mainly farms indigenous species of salmon, the Chinook, as opposed to Atlantic salmon. All of Creative Salmon's sites are approved by government and rigorously regulated. In June of 2005, the defendant, who was hired by Friends of Clayoquot Sound (FOCS), an environmental NGO, to run its campaign against salmon farming in Clayoquot Sound became aware of a Canadian Food Inspection of Agency (CFIA) report. The latter found trace elements of malachite green (0.33 per billion) in a fish farmed by Creative Salmon. Malachite green is an artificial agent used in hatcheries as fungicide. It is not approved for fish destined for consumption in Canada, even though levels of the agent are tolerated in some countries' consumer fish stock. This agent is also used as industrial dye and applied in pulp, paper and textile industries.

In response to the CFIA report, Creative Salmon voluntarily took concerted steps, including suspension of all fish sales, to investigate the veracity of the claim. It also subjected samples of its fish to analysis. The outcome did not corroborate the CFIA report thereby raising some doubt about its accuracy. Creative Salmon confirmed that none of its feed supplies had ever used malachite green. However, there is reason to believe that even if malachite was found in the plaintiff's stock, it does not necessarily mean that the plaintiff directly or deliberately introduced it. There is probability of other potential sources of the agent. As part of its practice, the plaintiff maintains that its production, market and general consumption fish stock have been antibiotic-free since the October of 2001. It did not make such claims in relation to its brood stock or its entire operation. These and several other claims by the plaintiff were posted in its website.

However, in two separate press releases, the defendant challenged the credibility of the plaintiff's claim and marketing strategy in regard to the issue of malachite and antibiotic-free claims. Among other things, the defendant charged that the issue of malachite contamination undermines the plaintiff's claim to being organic and chemical-free salmon farmer. He also alleged that the plaintiff's "reputation has been well and truly shattered with the Ministry of the Environment's damning revelations of antibiotic use" (¶ 4). In all, the defendant claims in his press releases and interviews that plaintiff was dishonest and that it falsely advertised its practices, indulged in fraudulent misrepresentation to the members of the public, endangered the marine environment, and infringed the *Competition Act*. The

court rejected defendant's defense which were based on justification, reasonableness, truth, privilege, and contributory negligence. It found that the defendant "knew at the time he authored the press releases that if a Creative Salmon fish was contaminated, that did not mean that Creative Salmon had either used or introduced malachite green into its operation" (¶ 42). Also, the court found that the defendant knew that plaintiff's claim for antibiotic-free fish did not extend to its brood stock. For the court, although Mr. Staniford's "purported motive was to serve public interest … he did not give a balanced or complete view either in press releases or his subsequent interviews. His real motive was to build public opposition to salmon farming, particularly organic salmon farming…he used intentionally inflammatory words and withheld facts in order to achieve his goal … [he] was motivated by malice" (¶¶ 91-3). His action negatively affected local patronage of plaintiff's organic salmon. Consequently, he was found liable for general and aggravated damages.