THE NAVIGATOR

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Requiring Employee be Resident is Discriminatory

The Human Rights Tribunal of Ontario has recently held (*1) it was discrimination on the basis of “citizenship” to require a successful job applicant to be able to work in Canada “on a permanent basis”.

The applicant was a student at McGill University in Quebec completing his engineering degree (mechanical) with an interest in the energy sector. He was an international student and his visa permitted him to obtain a work permit for on-campus part-time work and for full time work during regular breaks between academic terms. Aside from internships, for which he obtained temporary social insurance numbers (SIN), the applicant did not work (on or off campus) while he was a student.

On graduation, with a letter from his University attesting to completion of his credits for his degree, the applicant became eligible for a “postgraduate work permit” (PGWP) for a fixed term (3 years). The PGWP would permit him to work full time, anywhere and with any employer in Canada. The applicant anticipated that he would attain permanent residency status within three years and thus be able to settle and work in Canada indefinitely. The applicant was among graduates from participating Canadian universities who, under a special immigration program involving the federal and Ontario government, were permitted to obtain work in Canada and be processed in-land for permanent resident status.

In a nutshell, the applicant learnt from more senior students that Imperial Oil recruiters required graduate engineers to have permanent residency or citizenship to be eligible to apply for a permanent full-time job as Project Engineers. The applicant testified that he believed that one of his friends did not proceed past the first round of interviews because he answered truthfully that he did not have the required permanent status. On the contrary, the applicant gave a positive response repeatedly to Imperial Oil representatives’ questioning regarding his eligibility to work in Canada on a permanent basis and progressed through every step of Imperial Oil selection process for an entry level position as Project Engineer, starting with Imperial Oil on-campus recruitment, online application form and through to interviews

FIRM AND INDUSTRY NEWS

- **Gordon Hearn** will be presenting a paper on "Canadian Food Safety Law and Regulation in the Transportation Chain" at the Clark Hill Strasburger "2018 Food Forum" in Dallas, Texas on November 7, 2018.

- **Ontario Trucking Association** 92nd Annual 2018 Conference and Dinner in Toronto on November 7-9. **Kim Stoll** will be attending the annual dinner representing the firm.

- **Gordon Hearn** and **Louis Amato-Gauci** will be representing the Firm at the Transportation Law Institute being held in Louisville, Kentucky on November 9, 2018.

- **Kim Stoll** will be attending the Women in International Shipping and Trade Association – Canada 20th Anniversary Event. Kim is the Vice-President Central Region of Wista Canada, November 14th, Montreal.

- **Rui Fernandes, Carole M. Wallace,** and **Jaclyne Reive** will be holding a Legal Updates Seminar in Leamington Ontario on Friday November 23, 2018.

- **Canadian Board of Marine Underwriters** Fall Conference, November 27th, 2018, Toronto. **Rui Fernandes** and **Gordon Hearn** will be presenting an update on Marine and Cross-Border Trucking law.

- **Passenger & Commercial Vessel Association** Annual Meeting November 28 to 30, 2018 Hull Quebec. **Rui Fernandes** will be speaking on a panel on "Cannabis in the Workplace."

- **Grunt Club Annual Dinner** December 7th, 2018, Montreal. **Rui Fernandes** will be attending representing the firm.

during a site visit at the prospective refinery work location. His “positive” responses were in fact false.

As the applicant was ranked first among the candidates, he was offered a job with certain conditions that he had to fulfill to accept the job offer by a stipulated deadline. As part of accepting the job offer, the applicant was asked to provide proof of his eligibility “to work in Canada on a permanent basis” by way of (1) Canadian birth certificate (2) Canadian citizenship certificate or (3) Canadian certificate of permanent residence (permanent resident card). This eligibility to “work in Canada on a permanent basis” is sometimes referred to as the “permanence requirement” or Imperial Oil policy in this decision. He was unable to provide the required proof to accompany his acceptance of the job offer by the deadline. Imperial Oil rescinded the job offer. The rescission letter, on its face, invited the applicant to re-apply if he became eligible to work in Canada on a permanent basis in the future.

In response to the Human Rights application, Imperial Oil also stated that the job offer was rescinded because of the applicant’s misrepresentation of his status throughout the hiring process. He had lied to interviewers during the process when asked if he met the residency requirement.

Section 1 of the Human Rights Code provides:

> Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability. [Emphasis added]

Section 16 of the Code provides:

> **16** (1) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law. R.S.O. 1990, c. H.19, s. 16 (1).
>
> **Idem**
>
> (2) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship or lawful admission to Canada for permanent residence is a requirement, qualification or consideration adopted for the purpose of fostering and developing participation in cultural, educational, trade union or athletic activities by Canadian citizens or persons lawfully admitted to Canada for permanent residence. R.S.O. 1990, c. H. 19, s. 16 (2).
>
> **Idem**
>
> (3) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship or domicile in Canada with the intention to obtain Canadian citizenship is a requirement, qualification or consideration adopted by an organization or enterprise for the holder of chief or senior executive positions.

The Tribunal found that the “permanence requirement” was discrimination based on the ground of “citizenship”. It held that while a definition of “citizenship” is not contained in the *Code*, a reading of the three defences available under section 16 of the *Code* indicates that the legislature contemplated that any requirement, consideration etc. that distinguished among individuals on the basis of either “Canadian citizenship”, “permanent residence” status or “domicile in Canada with intention to obtain citizenship” is discrimination unless the requirement is imposed or authorized by law, or the other criteria are met for each of three defences. More specifically, in the Tribunal’s view, Imperial Oil requirement amounted to a direct breach of the *Code* when it distinguished among job candidates who were eligible to work in Canada on the basis of

citizenship and created categories of "eligible" and "ineligible" for progressing through Imperial Oil's screening process. Imperial Oil's requirement was not excused by s.16(1) of the *Code* as Imperial Oil was not adhering to a requirement that was authorized or imposed by law. The further defence available for corporations under s.16(3) of the *Code* was also inapplicable in the circumstances of an entry level position ("as opposed to chief or senior executive position").

The Tribunal further ruled that the fact that Imperial Oil's requirement distinguished on the basis of "Canadian citizenship" and "permanent residence" did not change the analysis to being a distinction based on "immigration status". It was sufficient that Imperial Oil's requirement cited "Canadian citizenship" as a criterion to engage the prohibited ground of "citizenship" the *Code*.

Finally, the Tribunal found that the dishonesty of the applicant in his responses to Imperial Oil regarding his eligibility to work on a permanent basis was not relevant to deciding whether the *Code* was breached. It was sufficient to find that Imperial Oil's decision to not hire the applicant was tainted by the permanence requirement.

Rui Fernandes

Follow *Rui M. Fernandes on Twitter @RuiMFernandes* and on Linkedin. See also his blog at http://transportlaw.blogspot.ca

Endnotes

(*1) *Haseeb v. Imperial Oil Limited*, 2018 HRTO 957.

2. Doing Business in Canada – Part 13 (*1) – Real Property

Land ownership in Canada is held by governments, Indigenous groups, corporations, and individuals. The majority of all lands in Canada are held by governments as public land and are known as Crown lands. About 89% of Canada's land area (8,886,356 km) is Crown land, which may either be federal (41%) or provincial (48%); the remaining 11% is privately owned. Since the provinces have jurisdiction over "property and civil rights", each province and territory has developed its own rules and procedures regarding privately held land registration. For historical reasons, Québec has maintained a civil law system (based on a civil code) that is quite different from the common law system maintained by all other provinces.

Land Registration Systems

Each Canadian province has its own system for registering interests in real property. In Ontario, for example, there are two land registration systems: registry and land titles. The older of the two is the registry system, which merely provides for the public recording of instruments affecting land and does not guarantee the status of title. In the land titles registry title to land within this system is guaranteed by the province. Where the land titles system applies, each document submitted for registration is certified by the province and, until this certification is complete, the registration is subject to amendment at the request of the registry officials. Registration systems in other provinces vary. All provinces have been working to modernize their systems and moving to electronic registration.

Common Forms of Ownership / Interest

Canadian real estate transactions typically involve the following common forms of ownership/interest in real property: freehold, condominium, mortgage/charge, easements and leasing. In Québec, where the real property regime is based on civil law concepts, these forms of ownership/interest in real property all have their equivalents, but other types of interests, based mainly on surface or building rights, also exist. Developments on Aboriginal lands are subject to a unique set of legal regimes governing ownership interests and security arrangements.

A co-ownership arrangement is typically used where joint and several liability is not desirable. The advantages to using a co-ownership arrangement include the following: (i) each co-owner receives its own share of the revenues and pays its own share of expenses; (ii) each co-owner decides its own capital cost allowances, subject to the rules in the *Income Tax Act*; and (iii) each co-owner can sell, mortgage or otherwise separately deal with its interest.

Condominium ownership is a form of real estate ownership where the owner receives title to a particular unit and has a proportionate interest in certain common areas. Legal advice is needed to ensure that condominium projects satisfy all local policies and legislative requirements.

Limited partnerships, REITs (real estate investment) trusts and even some corporations will often structure their business affairs so that a separate entity, usually a single purpose corporation, holds registered title to real property as "bare trustee," "agent" or "nominee" for the beneficial owner.

Planning

All Canadian provinces regulate property development to some degree, and often this regulation occurs at the municipal level. Official plans, zoning bylaws, development permits, subdivision bylaws and servicing bylaws are the primary means by which municipalities control land use and development.

Restrictions on Ownership

There are few restrictions on the ownership of land in Canada by non-residents. At the federal

level, foreign investment in Canadian real estate, such as in apartment buildings, office complexes and shopping centres, is regulated by the *Investment Canada Act*. At the provincial level, provinces such as Alberta, Saskatchewan, Manitoba, Prince Edward Island and Québec impose limitations on the ownership by non-residents of certain types and/or amount of land. For example, in Québec, a non-resident (individual, corporation or any other legal entity) is not entitled, directly or indirectly, to acquire farm land except with the authorization of the *Commission de protection du territoire agricole du Québec*. In addition, all provinces require corporations that have been incorporated in other jurisdictions to be licensed or registered in the province if they carry on business in that province. The concept of "carrying on business" is a broad one, and in most cases includes holding an interest in real property. Many provinces impose substantive restrictions on foreign corporations.

Taxation

A transfer of an interest in land may attract provincial and/or municipal transfer or registration taxes, as well as the federal goods and services tax ("GST") or, in the case of Québec, a separate tax which is equivalent to the federal GST. In addition, certain provinces levy sales taxes that may apply to the transfer of the interest in land and/or any associated chattels.

Each province (and some municipalities) has the authority to impose transfer or registration taxes, and accordingly the amount of such taxes vary from province to province and sometimes from municipality to municipality. The City of Toronto, for example, has recently mandated an additional land transfer tax for conveyances within the city that is roughly equivalent to the Ontario land transfer tax (resulting in what is essentially a doubling of the total land transfer tax payable when real property is conveyed in Toronto).

The *Income Tax Act* contains provisions that protect Canada's ability to collect taxes when a non-resident disposes of "taxable Canadian property" (which includes, among other types of property, real property situated in Canada).

Proceeds of Crime Legislation and Real Estate Developers

In January 2008, new amendments and regulations with respect to the federal *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* were made. These came into force on Feb. 20, 2009, and address transactions involving, among other groups, real estate developers (generally defined as those who sell new developments to the public, other than in the capacity of a real estate broker or sales representative). The amendments impose mandatory reporting and recordkeeping requirements on real estate developers, who are obligated to report suspicious transactions, large cash transactions and any property in their possession that is owned or controlled by terrorists.

Rui M. Fernandes
Follow *Rui M. Fernandes on Twitter @RuiMFernandes* and on Linkedin. See also his blog at http://transportlaw.blogspot.ca

Endnotes
(*1) This article is part 13 of 17 parts dedicated to a review of doing business in Canada. Subsequent articles will include, Environmental Laws, Taxation, Insolvency, Litigation and ADR.

3. Canadian Federal Not-For-Profit Corporations: Compliance After Conversion

In 2011, Canada introduced its new modernized statute setting out the rights, restrictions, and governance requirements for federal not-for-profit corporations (“NFPs”): the *Canada Not-For-Profit Corporations Act* (“CNCA”). The CNCA replaced Part II of the *Canada Corporations Act* (the “CCA”), the governing legislation for federal corporations without share capital, which had been in place since 1917, with some changes implemented over the years. The CNCA represented a major overhaul and modernization of the governance provisions for federal NFPs. (*1)

When the CNCA came into force, existing federal NFPs had three years to complete the transition process to the CNCA in order to avoid dissolution. While many NFPs completed the basic transition process, some NFPs may not yet have updated their bylaws to avoid contradiction with the provisions of the CNCA, or may still be operating based on old procedures, which may be more onerous than those allowed under the CNCA.

Federal NFPs who made this transition should confirm whether they are in compliance with the provisions of the CNCA that differ from the CCA. In some cases, amendments to an NFP’s bylaws may be necessary. (For example, one of the areas of non-compliance that we see the most often is with respect to how much notice corporations must give to its members prior to an annual meeting being held.) An overview of some of the key differences follows below; however, we recommend that you consult the CNCA and its regulations for full details or speak with our office it you have any concerns.

Soliciting Corporations

One of the new features of the CNCA is the introduction of a “soliciting corporation”, meaning a corporation that has income of over $100,000 in a single financial year from a public source, which includes donations or gifts from non-members, grants or other financial assistance from a government, or money received by another corporation that would be considered a “soliciting corporation”. Once a corporation is considered to be in the “soliciting” category, it will remain that way until it has had three consecutive years where it has received an income of less than $100,000 from public sources. (*2)

Once a corporation has determined that it should be designated as “soliciting”, the following rules apply to it:

(1) Financial reporting: copies of the corporation’s annual financial statements must be provided to the Director – distribution is not limited to the board of directors and the members. (*3) Corporations with more than $250,000 in gross annual revenue must have a public accountant conduct an audit of its financial statements. (*4)

(2) Number of directors: a soliciting corporation cannot have fewer than three directors, at least two of whom are not officers or employees of the corporation or its affiliates. (*5)

(3) Distribution of Assets upon Liquidation: the corporation must distribute its property on dissolution to a “qualified donee” (as defined in the *Income Tax Act*) who has been selected and set out in the articles. If the articles are silent, then the court must approve the proposed distribution (*6). This also applies to registered charities and to corporations that meet the requirements of 235(1)(c) (gifts or donations as outlined above in excess of $10,000 in any fiscal year during the five year period prior to dissolution).

(4) Unanimous member agreements: soliciting corporations are not allowed to have such agreements in place that restrict the powers of the directors to manage, or supervise the management of, the activities and affairs of the corporation. (*7)

Records

The requirements regarding which records must be kept by an NFP have not changed substantially; however, the rules regarding access to those records have changed. The board of directors has access to all corporate and accounting records, while the members and creditors of the NFP have access to its articles, bylaws, member meeting minutes, debt register and director and officer registers. (*8) The members have access to the member list, but only where they submit a statutory declaration advising of the reason for requesting the list. Furthermore, the list can only be used for certain purposes, such as: influencing member voting; requisitioning of members' meeting; or, the broader category of "any other matter relating to the affairs of the corporation". (*9) Under the CCA, any person who submitted such a declaration could obtain a copy of the member list.

Corporate Finance

Key changes in this area include: allowing the board to borrow money without special permission from the members and without adding specific language to the bylaws; allowing the board to set annual membership dues; and stating that members are not liable for the NFP's liability except where liability arises and they are acting in a different capacity on behalf of the NFP (for example, as a director). (*10)

Additionally, the NFP's property (including revenues) cannot be distributed to the members, directors, or officers except in "furtherance of the [NFP's] activities or as otherwise permitted by the [CNCA]". This allows directors to be paid for their services and reimbursed for their expenses incurred on behalf of the NFP. (*11)

Directors and Officers

The CCA did not clearly identify the duties and liabilities of directors. It also only provided a very limited due diligence defence. The CNCA indicates that the duties of the directors of an NFP include:

(1) the duty to act honestly with a view to the best interests of the NFP;
(2) the duty to exercise the care, diligence and skill of a reasonably prudent person;
(3) the duty to disclose any conflict of interest; and
(4) the duty to comply with the CNCA, articles, bylaws and any unanimous member agreement. (*12)

Section 148(1) of the CNCA states that the officers shares these same duties as the directors. Both the officers and directors are explicitly entitled to a due diligence defence where they exercised the care, diligence and skill that a reasonably prudent person would have in a comparable situation. (*13)

Directors are also required to advise the Director within 15 days of changing their address for service; whereas, this information was previously only collected once a year under the CCA, through the annual return. (*14)

Bylaws

The CNCA sets out a specific procedure to follow to amend an NFP's bylaws. This process no longer includes obtaining approval from the Minister, as was the case under the CCA. However, NFPs are still required to file a copy of any such changes with the Director within 12 months of the changes being made. (*15)

In order to make a fundamental change to the bylaws, the same procedure as an amendment to the articles of an NFP must be followed – meaning that these changes are only effective when approved by a majority of not less than 2/3 of the members who cast votes on the resolution. This would include changes to membership conditions or classes, the method of giving notice of a members' meeting or the manner of voting. (*16)

The CNCA also sets out specific rules and procedures for providing members with notice of a members meeting and procedures regarding voting and absentee voting. It specifies multiple options for notice and voting, including “modern” options, such as by electronic means, under certain circumstances. (*17)

Financial Statements

The CCA required an auditor to conduct a review of the corporation’s financials but did not otherwise discuss their preparation or distribution. The CNCA now sets out that the annual financial statements must be prepared according to Canadian generally accepted accounting principles (GAAP) and also indicates that copies must be distributed to the members of the corporation each year, prior the annual general meeting. (*18)

Public Accountant and Review of Financials

Part 12 of the CNCA has now replaced sections 130 to 132 of the CCA with respect to the appointment of an accountant and the level of review of financial statements.

Depending on whether a corporation is a solicitor corporation and whether its gross annual revenues meet certain thresholds, corporations have the option of appointing a public accountant or dispensing with that appointment. Those factors also determine whether the corporation can obtain a compilation of its financial statements, or whether the public accountant must conduct a review engagement or an audit engagement. In some cases, the corporation’s members may resolve to have an audit engagement conducted instead of a review engagement, and vice versa. (*19)

Liquidation and Dissolution

The CCA did not set out a liquidation procedure for not-for-profit corporations, and such corporations were required to apply the provisions of the *Winding Up and Restructuring Act* if they wished to dissolve or liquidate. However, if the corporation had no assets, debts, liabilities or other obligations, it had the option of surrendering its charter under the CCA. The CNCA includes provisions that are similar to the *Canada Business Corporations Act*, which set out steps that must be followed if a corporation wishes to revive itself or to voluntarily dissolve or if the Director calls for an administrative dissolution for non-compliance or if a court supervised liquidation and dissolution is required. (*20)

Upon dissolution, if the articles do not provide a statement with respect to dissolution, if the corporation is not a soliciting corporation, or if the corporation is not a registered charity, then any remaining property is to be divided into as many equal shares as there are memberships in the corporation and distributed at the rate of one share to the holder of each membership.(*21)

Next Steps

Not-for-profit corporations that are governed by the CNCA should conduct a review of their existing bylaws and ask the following:

- have the bylaws been updated since conversion?
- do the bylaws allow for modern methods of communication?
- do the bylaws comply the requirements that are mandatory under the CNCA?
- do the procedures for governance set out in the bylaws match the expanded and modernized options for governance allowed under the CNCA?

If the answer to any of the above-noted questions is “no” or could be “no”, the corporation should consider revamping its bylaws to ensure that it is in compliance with the CNCA and that it is taking advantages of the modern rules of governances that the CNCA has created for these corporations.

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Endnotes:

(*1) Many of the comments related to the CCA in this article are based on Corporations Canada's analysis of the CCA, as described in Corporations Canada's "Background paper - *Canada Not-for-profit Corporations Act*" dated January 26, 2012, available online: < https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs05170.html >

(*2) *Canada Not-for-profit Corporations Act,* SC 2009, c-23, s 2(5.1) ("CNCA")

(*3) *Ibid.,* s 176.

(*4) *Ibid.,* s 189.

(*5) *Ibid.,* s 125.

(*6) *Ibid.,* s 235.

(*7) *Ibid.,* s 170.

(*8) *Ibid.,* s 22.

(*9) *Ibid.,* s 23(7).

(*10) *Ibid.,* ss 28, 30, and 36.

(*11) *Ibid.,* s 34.

(*12) *Ibid.,* ss 148(1)(a), 148(1)(b), 141, and 148(2).

(*13) *Ibid.,* ss 149 and 150.

(*14) CNCA, s 134, and s 29 of the Canada Not-for-profit Corporations Regulations (SOR/2011-223, the "Regulations")

(*15) CNCA, s 153, and s 60 of the Regulations.

(*16) CNCA, s 197.

(*17) *Ibid.,* ss 160-171.

(*18) CNCA, s175 and s 75 of the Regulations.

(*19) CNCA, ss 181, 182, 188 and 189.

(*20) *Ibid.,* ss 219-233.

(*21) *Ibid.,* s236.

4. More "Interest" in Solar Power: Ontario Court of Appeal shows flexibility in interpreting the *Interest Act*

Claims for interest, whether for loans or for any unpaid sums of money under a contract, are a pervasive commercial reality. To those for whom the amount obtained in interest is a particularly important concern, care is warranted when drafting the provisions that determine the rate of interest to be paid. It is especially important to avoid falling afoul of section 4 of the *Interest Act*, (*1) which provides that:

> Except as to mortgages on real property or hypothecs on immovables, whenever any interest is … made payable at a rate or percentage per day, week, month, or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of five per cent per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which the other rate or percentage is equivalent.

In other words, although interest can be stated to be calculated at less than yearly rates, if the *equivalent* annual rate is not *also* stated in the contract, the party seeking payment of interest will be limited to no more than 5% annual interest, regardless of what rate was agreed.

Although this provision has traditionally been interpreted quite narrowly in favour of the party seeking to avoid payment of interest, the Court of Appeal for Ontario has signaled an inclination towards greater flexibility in its recent decision in *Solar Power Network Inc. v. ClearFlow Energy Finance Corp.* (*2).

The Facts

In the *ClearFlow* case, ClearFlow had advanced financing to Solar Power Network, a company that installed solar panels for both residential and commercial use. Because businesses of this kind have both high input costs and are inherently risky, ClearFlow required a relatively high rate of interest in return for granting financing. Its loan agreements with Solar Power Network thus required payment of interest at the rate of 12% per year, compounded and calculated monthly, which rate doubled in case of default. ClearFlow also charged, in connection with its loans, a one-time administration fee ranging between 1.81% and 3.55%, depending on the type of loan. Finally, ClearFlow also charged a "discount fee" of 0.003% that was calculated daily every day the loan was outstanding, with unpaid amounts being rolled into the principal of any renewed loan.

Solar Power Network borrowed significant amounts from ClearFlow to sustain its operations and quickly fell into financial difficulty. In its efforts to reduce its interest obligations, Solar Power Network made an application to the Superior Court of Justice for a declaration that *all* interest under its various loans from ClearFlow should be capped at 5% per year because the fees charged amounted to "interest" under the *Interest Act*. Since these fees were not stated at an annualized rate, it argued, ClearFlow's loan agreements had breached section 4 of the *Interest Act*, and therefore it was not entitled to more than 5% per year interest on all of its lending.

The application judge disagreed with Solar Power Network that the administration fee was interest. However, he took a different view with respect to the daily discount fee of 0.003% and granted the relief Solar Power Network sought on this basis. In so ruling, he applied the now settled test for what can be considered "interest." Regardless of how it is described, a payment under a loan will be considered "interest" if three criteria are satisfied: 1) it is compensation for the use of money owed by another person; 2) that compensation relates to the principal amount due; and 3) it accrues over time. He concluded that the discount fee was interest because it accrued on a day-to-day basis, and because it was not otherwise tied to any specific event; that is, it was therefore compensation for the use of money.

The application judge also considered whether the discount fee had been stated as an annual rate. He concluded that it had not. Although the loan agreements contained a "formula" for recalculating this fee on an annualized basis, he ruled that this did not satisfy the requirement of being an "express statement" of an annual rate, as the *Interest Act* requires. Significantly, only some of ClearFlow's loans to Solar Power Network contained this formula.

As a result, the court reduced *all* interest under the loans to an annual 5% rate. While admitting that imposing this rate on the entire principal loaned by ClearFlow appeared "harsh," and even "draconian," he reasoned that this was nevertheless the outcome dictated by the provisions of the *Interest Act*, and further was "in keeping with the consumer protection purpose of the legislation." (*3). ClearFlow appealed.

The Appeal

On appeal, the Court of Appeal for Ontario confirmed the application judge's findings regarding the administration fee, agreeing that it did not qualify as interest. It further concurred with the finding below that the 0.003% discount fee *was* interest. One of the reasons given by the application judge for why the formula for calculating the annual rate for the discount fee did not qualify as an "express statement" for the purpose of the *Interest Act* was that, although this could be easily calculated as being 1.095% simply by multiplying the rate by the number of days in a year, because the loans could be compounded at between 90 to 180 day intervals, simply multiplying by 365 would not correctly state the *effective* rate of annual interest.

The Court of Appeal disagreed with the application judge on this issue. For one, it ruled that because section 4 of the *Interest Act* requires "an express statement of the yearly *rate* or percentage of interest …" the word "rate" must mean something other than "percentage." It took this to mean that formulas are an acceptable statement of "rate," and noted the fact that numerous prior court decisions had already, and correctly, accepted this interpretation. Also, it rejected the application judge's reasons regarding the effect of the provisions that allowed the discount fee to be compounded on renewal. It reasoned that, since whether or not the discount fee would actually be subject to compounding depended on a contingent, and therefore uncertain, event (*i.e.*, on whether the loan was actually renewed or not), simply multiplying the rate by 365 could not be seen as a misstatement of the effective rate of annual interest.

In complex financing agreements between sophisticated parties such as the ones at issue in *ClearFlow*, then, the Court of Appeal has sent a clear message that the common commercial practice of including annualizing formulas will not be considered to be offside section 4 of the *Interest Act*. Perhaps the most interesting part of the decision, however, was its ruling on those ClearFlow loan agreements that lacked this annualizing formula.

The Court of Appeal agreed with the application judge that the ClearFlow promissory notes that lacked this annualizing formula offended section 4 of the *Interest Act*. The application judge believed that he was therefore bound by the language of the statute in such a case to reduce *all* interest under those promissory notes to 5% per year. The Court of Appeal disagreed, reasoning as follows:

> In my respectful view, avoiding the possibility envisioned by the application judge does not require imposing a harsh and draconian result in the circumstances of this case where there plainly was no attempt to subvert the law. This case involved a commercial transaction between parties of equal bargaining power who inadvertently and only marginally ran afoul of s. 4. There was no evidence of intention to break the law, of any unfairness in the agreement, or of one party taking advantage of another. To secure the funds it required, Solar Power knew that it had to pay a high rate of

> interest. The discount fee represents a tiny fraction of the interest that is otherwise payable and falls well below the 5% maximum interest allowed by s. 4. To limit all interest payable to 5% would, as the application judge recognized, result in a substantial windfall to Solar Power. (*4)

In the result, instead of applying the *Interest Act* in the manner of the application judge, the Court of Appeal ruled that it "would interpret the phrase "any interest" in s. 4 to refer *only to interest that is not stated as a "yearly rate or percentage.""* (emphasis added) (*5). In short, since the 12% and 24% rates in the loan agreement were stated in annual terms, these were insulated from the ruling, and therefore would *not* be subject to the 5% cap. Also, since the only offending rate was the 0.003% discount rate, as that rate was less than 5% per year, it, too was unaffected by the Court's decision. Thus Solar Power Network was obliged to pay all interest due under its agreements.

Conclusion

The decision has sweeping implications for commercial lenders, while at the same time still leaving considerable doubt as to how this statutory requirement will be interpreted in the future. Without question the Court of Appeal was strongly motivated to reach a result that avoided giving Solar Power Network a "substantial windfall." Its means of getting there could well generate more problems than it solves, however.

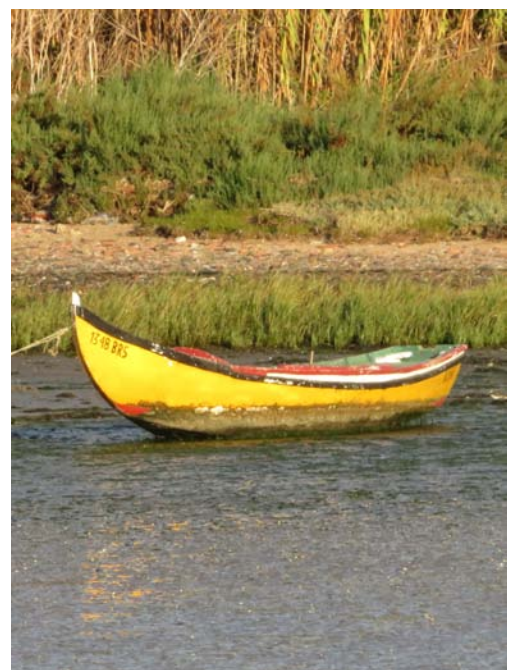
For now, it seems, about the only thing that is clear is that the common practice of including formulas for determining the annual rate of interest in a loan agreement can be relied on by lenders as generally enforceable. It is difficult to understate the significance of this finding, since the result would appear to be that, for any loans having multiple "interest-like" components, if only one is found to be non-compliant with section 4 of the *Interest Act*, the danger that *all* interest might be capped at 5% per year is greatly reduced. In other words, the possibility of the "harsh" result imposed by the application judge in *ClearFlow*, where complex interest formulas are involved, is now significantly less likely.

Whatever wisdom there may be in the Court's declining to apply the literal statutory wording in cases where it appears there "was no evidence of an intention to break the law," the result would seem to indicate that the very same words of the *Interest Act* may be applied very differently depending on who the borrower and lender are. Whether advisable or not, the Court has indicated that, where loans are made for a business purpose between sophisticated parties, they will now face far less risk of breach of the *Interest Act* than when a "consumer" is the borrower. Thus, while sophisticated commercial borrowers and lenders can breathe somewhat more easily, those dealing with ordinary consumers must still exercise the usual caution where interest is concerned.

Oleg M. Roslak

Endnotes

(*1) *Interest Act*, R.S.C. 1985, c. I-15.
(*2) 2018 ONCA 727 [*ClearFlow*].
(*3) *Solar Power Network Inc. v. ClearFlow Energy Finance Corp.*, 2018 ONSC 7286 at para. 93.
(*4) *ClearFlow* at para. 78.
(*5) *ClearFlow* at para. 80.



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