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## Canada

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# REGIONAL DEVELOPMENTS

## Canada\*

In 1989 significant developments occurred in the competition law field, in the validity of provincial restrictions against “national” law firms, as well as with respect to the validity of exclusion of liability clauses in private contracts.

### I. Private Remedies in Canadian Competition Law

In a unanimous judgment, the Supreme Court of Canada dismissed a challenge to the constitutionality of section 31.1 of the Competition Act, 1986.<sup>1</sup> Section 31.1 provides that “[a]ny person” who has suffered loss or damage as a result of conduct in violation either of Part V (the criminal offense provisions) or of an order of the Competition Tribunal (in respect of the reviewable matters in Part VII) may recover damages from the person who engaged in such conduct.<sup>2</sup> Unlike the corresponding provision in the United States under which treble damages are available, section 31.1 limits recoverable damages to the loss actually suffered (plus costs).

The issue before the court in *General Motors of Canada Ltd. v. City National Leasing*<sup>3</sup> was whether section 31.1 was within the legislative competence of the Federal Government. Historically, federal anticombiners legislation in Canada had been upheld as a valid exercise of the federal power over criminal law. In addition there had always been speculation that such provisions could also be upheld under the federal “trade and commerce” power. Complicating the matter is a long line of cases that have construed the provincial power over “property and civil rights” very broadly. The regulation of particular industries (other than

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1. Competition Act, Can. Stat. ch. 26, § 31.1(1986) [hereinafter section 31.1].

2. *Id.*

3. 1 S.C.R. 641 (1989); No. 19724.

those expressly allocated to the Federal Government) has always been a matter of exclusive provincial competence. Similarly, federally created civil causes of action have been held to be unconstitutional where they intruded into areas of exclusive provincial jurisdiction.

The Supreme Court held that the competition statute was a valid exercise of both the criminal law power and the "general branch" of the federal trade and commerce power. In so upholding the statute, the court noted that competition laws, to be successful, must be national in scope. In practice, provincial regulation of this aspect of the economy would mean no effective regulation.

Moreover, section 31.1 was viewed as an "integral part" of the statutory scheme. Unlike the civil cause of action in the federal Trade Marks Act<sup>4</sup> (struck down as unconstitutional in 1976), section 31.1 was not merely "tacked on" to the statute, but was functionally related to its general objective of deterring anticompetitive behavior. The court referred to the American experience as evidence of the effectiveness of private enforcement of competition laws.

The *City National Leasing*<sup>5</sup> decision has important implications for the constitutionality of the merger review provisions added in 1986, and currently is being challenged in *Alex Couture Inc. v. A.-G. Can.*<sup>6</sup> It would appear that it will be difficult to establish that the merger review provisions are an unconstitutional intrusion into provincial jurisdiction.

Now that the validity of section 31.1 is settled, it is likely that the provision will be used more extensively. In addition, since section 31.1(2) provides that evidence of a conviction under Part V is prima facie proof of the fact that the relevant conduct was engaged in (for the purposes of section 31.1(1)), those prosecuted for the commission of Part V offenses are likely to be considerably more reluctant to plead guilty. A guilty plea will now carry with it a virtual certainty of additional civil liability.

## II. Exclusion of Liability Clauses

The Supreme Court of Canada has clarified the law regarding the enforceability of clauses limiting or excluding liability in the event of a breach of contract. The reasons of both Dickson C.J.C. (La Forest, J., concurring) and Wilson J. (L'Heureux-Dube, J., concurring) in *Hunter Engineering Co. v. Syncrude Canada Ltd.*<sup>7</sup> would appear to have put to rest permanently the doctrine of "fundamental breach" in Canada.

The original doctrine of fundamental breach was first propounded in English jurisprudence by Lord Denning in the 1950s. Lord Denning's view was that, whatever the clearly expressed intention of the parties to a contract might be, no

4. Trade Marks Act, Can. Stat. ch. T-10 (1970).

5. *General Motors of Canada Ltd. v. City Nat'l Leasing*, 1 S.C.R. 641 (1989); No. 19724.

6. 16 Q.A.C. 161 (1988).

7. 1 S.C.R. 426 (1989); No. 19773, 19950.

exclusion clause could ever relieve a party from liability where the breach was "fundamental," i.e., such as to go to the "root" of the contract. This "rule of law" approach was overruled by the House of Lords, once in the 1960s, and subsequently in the 1980 decision in *Photo Production v. Securicor Transport Ltd.*<sup>8</sup> The House of Lords held that, while there was no rule of law such as Lord Denning advocated, there was a rule of construction whereby very clear language would be required before the court would conclude that an exclusion clause was actually intended by the parties to operate in the event of a "fundamental" breach.

One problem, even with the latter approach, was that it was difficult to predict when a court might characterize a breach as "fundamental." Indeed, in *Hunter Engineering* itself, different levels of courts disagreed on this question. Another problem was that the doctrine diverted attention from consideration of what Dickson, C.J.C., termed the real issue, i.e., whether the relevant clause was "unconscionable."

*Hunter Engineering* involved a number of contracts for the supply of gearboxes. In one of these contracts, the supplier had purported to exclude all liability for consequential damages. The question was whether such a clause could be relied upon. Dickson, C.J.C., held that parties should always be held to the terms of their bargains unless the agreement is "unconscionable." Unconscionability, moreover, requires some element of either "sharp practices" or inequality of bargaining power. Thus, in the case at bar, as the parties were both "large and commercially sophisticated companies," and there was no evidence of any pressure, the term was to be enforced, without regard to whether the breach could be characterized as "fundamental."

Wilson, J., took a slightly different approach, but concluded that "where there is no inequality of bargaining power . . . the courts should as a general rule give effect to the bargain freely negotiated by the parties."

The reasons in *Hunter Engineering* indicate a substantially reduced risk of courts' striking down exclusion clauses. Where there is no evidence of "sharp practices" or inequality of bargaining power, parties to a contract can now be fairly confident that clauses excluding or limiting liability will be enforced by the courts, even in situations where the breach goes to the "root" of the contract.

### III. National Law Firms

A recent decision of the Supreme Court of Canada (*Black v. Law Society of Alberta*),<sup>9</sup> has opened the door to the establishment of "national" Canadian law firms. Prior to this decision, law firms in Canada were prevented by provincial

8. 2 W.L.R. 283 (1980).

9. 1 S.C.R. 591 (1989); No. 19889.

law society restrictions from forming partnerships that transcended provincial boundaries.

The facts giving rise to the *Black* case are quite simple. The respondents proposed to establish a Calgary law firm. Some partners of the firm were resident in Toronto, but all lawyers in the firm were members of the Law Society of Alberta. In addition, all members of the Calgary firm were to be members of a Toronto firm. The Law Society of Alberta responded by enacting two rules. Rule 154 provided that members of the Alberta Law Society were prohibited from entering into partnership with anyone who was not both a member of the Law Society of Alberta and ordinarily resident in Alberta. Rule 75B prohibited members of the Law Society from being partners in more than one firm.

The respondents argued that these rules violated the rights granted to citizens and permanent residents of Canada in section 6(2)(b) of the Canadian Charter of Rights and Freedoms.<sup>10</sup> Section 6(2)(b) provides that such persons have the right “to pursue the gaining of a livelihood in any province.”<sup>11</sup>

La Forest, J., writing for a majority of the court, held that these rules were indeed an infringement of the section 6(2)(b) right. The rules “severely restricted” nonresidents of Alberta in the way in which they could practice law in Alberta. While it was perfectly legitimate for a province or provincial law society to insist that only members of the relevant law society be permitted to practice law in the province, there was no legitimate justification for prohibiting nonresident members from entering partnerships with resident members. Such a prohibition, according to La Forest, J., effectively shut nonresident members out of the practice of law in Alberta, since it prevented association with “the people who would be their most valuable link to the Alberta legal community.” Nonresidents were thereby “seriously restricted” in their ability to gain a livelihood in Alberta. The right granted by the plain words of section 6(2)(b) was therefore infringed.

The court considered the possibility that, notwithstanding this violation of section 6(2)(b), the rules could be upheld as a “reasonable limit” on this right pursuant to section 1 of the Charter.<sup>12</sup> On balance, however, the court held that the restrictions imposed by rules 154 and 75B constituted a disproportionate response to a number of the Law Society’s concerns. The court dismissed arguments that the quality of legal services delivered in Alberta might be compromised, and that local competence and expertise might be diminished by the existence of interprovincial law firms.

Since the decision in *Black*, a number of large legal partnerships in Canada have established branch offices outside their home province. While provincial law societies may impose distinctive admission requirements, the *Black* decision

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10. Constitution Act of 1982, part I, 116 Can. Gaz. 1808, part II (1982)[hereinafter Charter].

11. *Id.*

12. *Id.* §1.