Woolgar VanWiechen Ketcheson Ducoffe LLP NEWS & NOTES

Occasional ramblings from the lawyers at WVKD LLP

Volume 1, No. 2
March, 2009

We practice in Toronto, Ontario. It is our hope that we are able to provide snapshots of the law and the practice of civil and commercial litigation in Toronto through these notes, hopefully with a light touch and the occasional dash of local flavour.

**The Disclaimer:** Nothing in these ramblings is legal advice, should be relied on by you as such, or makes us your lawyers. You should retain and consult counsel of your own choosing for any particular situation.

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**Sometimes Written Contracts Mean What They Say, Sometimes They Don't**

There are so many examples in the dusty bookshelves of Ontario law that could illustrate this statement that it's hard to know where to begin. These are issues that the lawyers at WVKD deal with every day. The recent decision in *Royal Bank v. El-Bris Limited* is an example of some of them. El-Bris was a land developer and RBC was its banker. In 1992, RBC agreed to increase El-Bris' line of credit to $700,000. Ellis, the president of El-Bris, provided a personal guarantee to RBC, guaranteeing this amount. He also provided a collateral mortgage on his home in the same amount. There was not a term in the mortgage specifying that it was provided as security for the guarantee. Rather, it specified that it was provided *in addition* to any other security provided, and that payment under other security did not affect Ellis' obligations under the mortgage. The terms of the guarantee also did not refer to the mortgage, but simply provided that Ellis would pay RBC up to $700,000. Although we are not told in the case report, presumably both the guarantee and the mortgage also contained clauses stating that the written agreement was the "entire agreement" between the parties.

After 1992, the debt of El-Bris to RBC increased so that, by 2003, El-Bris owed RBC $3.5 million, but was insolvent. RBC claimed against Ellis on both the guarantee and the collateral mortgage. Ellis paid $700,000 and obtained a discharge of the mortgage. RBC demanded an additional $700,000 under the guarantee. The issue was whether Ellis was liable to pay $700,000 under each contract (a total of $1.4 million), or only $700,000. Both the guarantee and the mortgage imposed a $700,000 obligation on Ellis, and they were separate agreements. If written contracts mean what they say, Ellis would have to pay RBC $1.4 million. This was RBC's position, bolstered by the argument that an experienced businessperson like Ellis should not be able to avoid clear obligations by *rectifying* agreements to eliminate those obligations.

However, Ellis won the day. The trial judge found that the documents (the mortgage and the guarantee) did not accurately reflect the agreement Ellis and RBC had made – the written contracts did not mean what they said – to limit Ellis' liability to RBC to $700,000. The Court of Appeal agreed, holding that both parties had mistakenly executed written agreements setting out two unconnected obligations totaling $1.4million when they had intended Eliis' liability to be only $700,000. The Court of Appeal found that in these circumstances of mutual mistake, rectification of the written terms of an agreement to reflect the agreement actually made was acceptable.

In another recent case**,** arguably on the same theme, MB Ltee. was owed money on unpaid invoices by MacDonald. MacDonald and MB entered into a written agreement in which MacDonald acknowledged the debt and gave "possession" of a machine to MB. It seems that in the written agreement MacDonald "released" the machine to MB and MB agreed to return the machine to MacDonald once the debt was paid. The debt was not paid. MB sued. MacDonald took the position that the machine was held in full satisfaction of the debt and that MB should take ownership of it.

The court disagreed. The written agreement (this time) apparently meant what it said – the machine was to be returned on payment, not given as payment. Judgment for the dollar amount of the debt plus interest was given in favour of MB Ltee. See *Marcel Baril Ltee. v. 929454 Ontario Ltd. et al.*

Remember then, as our partner Mark Woolgar has been known to mutter: Sometimes the written agreement isn't the agreement, but only evidence of the agreement. That evidence can be neutralized by enough other evidence that shows a mutual understanding of differing terms and mutual mistake by the parties as to what the printed page says. It is counsel's job to marshal and present that evidence effectively. That is one thing good counsel can and should be able to do.

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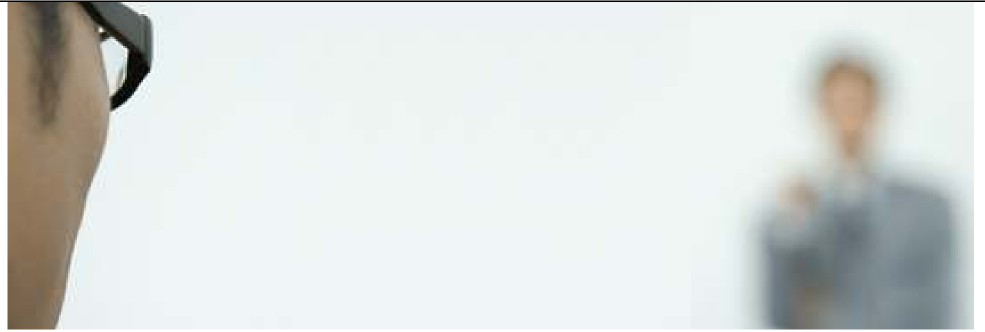

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## Client and Firm News

### Our Clients

Congratulations to WVKD clients **Steam Whistle Brewing**, **Klick! Communications**, and **G.A.P. Adventures**, each named by the Financial Post among the 50 Best Managed Private Companies in Canada.

Congratulations also to our client **Aecon,** which has earned its reputation for industry leadership in civil, industrial, nuclear and utility construction and was recently recognized as one of the *50 Best Employers in Canada* as surveyed by Hewitt Associates and published *by Report on Business Magazine*.

Undoubtedly their success brings its own satisfaction but it is rewarding and important to be recognized as well. We salute these great companies and take a small measure of pride in their achievements.

To learn more about these great Canadian success stories please use these handy links to visit their websites:

**www.klick.com**

**www.steamwhistle.ca**

**www.aecon.com**

**www.gapadventures.com**

### Our People

Our friend and long-time colleague Sally Hill has retired from practice. We will miss Sally and wish her all the best. Sally has left her residential real estate practice in the capable hands of our colleague, the equally engaging Flora Poon. Flora is available to assist on your next purchase, sale or refinancing. She can be reached at fpoon@woolvan.com or at 416 867 8806

For more information on any of the ramblings above, please contact us:

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