

Take Five

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ALBERTA EDITION



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Pendosi Holdings Ltd. v. The Forzani Group Ltd., 2011 ABCA 171

Areas of Law : Contracts; Injunction; Trademarks

Under Appeal : Justice McMahon

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THE JUDGMENT**BACKGROUND**

The appellant in this case was The Forzani Group Ltd. The respondent was Pendosi Holdings Ltd. In April 2004, Nevada Bob's International Inc. granted Pendosi the exclusive license to use certain trademarks associated with the Nevada Bob's Golf brand within Victoria, British Columbia, where Pendosi owns and operates a retail store. In December 2004, Forzani acquired the rights to the name and trademark of Nevada Bob's in Canada and thus assumed the rights of the licensor under the agreement with Pendosi. Forzani sold golf-related merchandise throughout

Canada using the Nevada Bob's Golf trade name primarily through its Sport Check stores. As the Pendosi Agreement prohibited Forzani from using the Nevada Bob's brand in Victoria, Forzani sold golf merchandise at its two Sport Check stores in Victoria under the name "Golf Experts". Realizing that the Pendosi Agreement was an obstacle to implementing a nationwide marketing campaign to promote the Nevada Bob's Golf brand, Forzani terminated the Pendosi Agreement effective November 30, 2010. Pendosi sought a permanent injunction to prohibit Forzani from terminating the Agreement as well as damages for alleged breach of contract, breach of fiduciary duty and breach of duty of good faith. Pendosi further sought an injunction prohibiting Forzani from selling golf merchandise in Victoria. Pendosi first filed suit in British Columbia but Forzani required that the action be commenced in Alberta pursuant to the terms of the Agreement. Pendosi applied for an interlocutory injunction to prevent Forzani from terminating the Agreement so that Pendosi could continue using the Nevada Bob's brand in Victoria while the dispute was in litigation. Forzani cross-applied for security for costs. Applying the tripartite test for an interlocutory injunction,

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Pendosi Holdings Ltd. v. The Forzani Group Ltd., (cont.)

the chambers judge found that Pendosi satisfied all three requirements. First, Pendosi raised an arguable issue in that the Agreement did not allow termination at will by Forzani and there was no allegation that Pendosi had breached any of its obligations under the Agreement. Second, Pendosi established that it stood to suffer irreparable harm if the Agreement was terminated. And, third, Pendosi would suffer greater harm if the termination was

not enjoined as it could put Pendosi out of business and prevent it from regaining its market share even if it prevailed in the main action. The chambers judge issued an interlocutory injunction prohibiting Forzani from terminating the agreement so that Pendosi could continue using the Nevada Bob's Golf name in Victoria. The chambers judge found no basis for requiring Pendosi to post security as fortification of its undertaking. Forzani appealed the order arguing that the chambers judge erred in finding irreparable harm based on speculative factors such as the potential loss of Pendosi's investments in marketing the Nevada Bob's Golf brand. Forzani further contended that the chambers judge erred in rejecting expert opinion that Pendosi's damages could be calculated. Forzani also maintained that Pendosi should have been ordered to fortify its undertaking by posting a security because its liabilities exceeded its assets.

APPELLATE DECISION

The appeal was dismissed. The Court of Appeal agreed with the chambers judge that Pendosi stood to suffer irreparable harm as it could not continue its business as a retail golf outlet if Forzani was allowed to use the Nevada Bob's brand in its stores in Victoria. The Court likewise upheld the finding of the chambers judge that if Pendosi lost the right to use the Nevada Bob's brand, then regained it after a successful trial, market confusion and customer uncertainty would make it very difficult for

Pendosi to regain its market share. The Court ruled that the chambers judge did not err in rejecting the expert opinion on the calculation of Pendosi's damages as such computation was based on unpredictable variables. As regards the issue of fortification, the Court upheld the chamber judge's finding that Forzani had not established that it would suffer a significant loss as a result of the injunction. Moreover, there was no evidence to support Forzani's claim that Pendosi had insufficient assets. The Court of Appeal observed

that the relative strength of a case may determine whether fortification is warranted. It explained that where an applicant barely makes out an arguable issue to be tried, the court would be more inclined to order fortification. In this case, however, Pendosi had clearly established an issue to be tried; there was no allegation of any breach of the Agreement and Forzani's only basis for terminating the Agreement was an implied right under the contract. Thus, the chambers judge properly exercised his discretion in refusing to grant fortification.

Gratton v. Shaw, 2011 ABCA 175

Areas of Law : Statute of Limitations; Damages

Under Appeal : Justice Belzil

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THE JUDGMENT](#)**BACKGROUND**

The appellant was Mr. Gratton and the respondent was Mr. Shaw. The appellant retained Mr. Shaw as counsel in an action for damages arising out of an alleged assault on the appellant by an operator of a ride at the Klondike Days Exhibition in 1990. The respondent settled the claim for \$75,000 without any admission of liability. In 2002, the appellant sustained another injury and retained another lawyer to investigate whether the appellant could claim compensation. The appellant requested a copy of the Klondike Days case file from the respondent so that his new counsel could review the medical reports on his knee injury. The respondent made the file available to the appellant for inspection on September 24, 2002. On October 17, 2002, the appellant's new counsel advised the respondent in writing that

the new counsel had been retained by the appellant to commence an action against the respondent for failing to properly represent him in the Klondike Days action. He outlined the alleged inadequacies in the respondent's handling of the Klondike Days action including the respondent's failure to advance a claim for loss of future income. The statement of claim against the respondent was filed on October 19, 2004. The respondent filed a defence stating that the action was barred by the statute of limitations. The Master summarily dismissed the claim for being time barred. He held that as early as September 2002, or by October 17, 2002 at the latest, the appellant already knew through his counsel the cause of action against the respondent. On appeal, the chambers judge concurred with the Master's findings and dismissed the appeal. He held that by late September 2002, the appellant had actual knowledge of the material facts that formed the basis for his cause of action against the respondent. Although the appellant did not have all the information as to impact of the other medical issues on his cause of action by October 19, 2002, he nonetheless knew about the respondent's alleged inadequacies in the Klondike Days action. The chambers judge held that the discoverability rule did not require perfect knowledge of the facts constituting the cause of action. It was enough that the plaintiff knew the material facts upon which his cause of action was based. The appellant appealed

Gratton v. Shaw, (cont.)

further to the Court of Appeal arguing that the chambers judge erred in equating suspicion of a cause of action with knowledge of a cause of action. He contended that the

chambers judge misapprehended his counsel's letter to respondent dated October 17, 2002. He also claimed that the chambers judge failed to properly appreciate the facts.

APPELLATE DECISION

The appeal was dismissed. The Court of Appeal ruled that contrary to the appellant's contention, the chambers judge did not equate suspicion with actual knowledge. Rather, the chambers judge found that the

appellant had actual knowledge of the material facts upon which his cause of action was based. The Court also agreed with the chambers judge's finding that the letter dated October 17, 2002 was evidence of the appellant's prior knowledge of the material facts. The Court found no error in the chambers judge's appreciation of the facts as there was sufficient evidence showing that the appellant's new counsel was aware of the existence of a cause of action against respondent at least two years before the statement of claim was filed.

***Burcevski v. Ambrozic*, 2011 ABCA 178**

Areas of Law : Res Judicata; Abuse of Process; Divorce; Property Division; Costs
Under Appeal : Justice Kent

[CLICK HERE TO ACCESS
THE JUDGMENT](#)

BACKGROUND

The appellants in this case were Mr. Burcevski and his real property company, Voodoo Enterprises Ltd. The respondent was Ms. Ambrozic. Mr. Burcevski and Ms. Ambrozic were married in 1970 and divorced in 1978. Ten years after the divorce, Ms. Ambrozic sued her ex-husband claiming among other things that he took advantage of her and deprived her of her right to marital assets. After trial, the judge found that during her marriage to and divorce from Mr. Burcevski, Ms. Ambrozic could not read, write or speak in English. She did not receive anything upon the divorce. The trial judge found that besides fraudulently concealing material facts from Ms. Ambrozic, particularly those pertaining to her interests in marital properties, Mr. Burcevski also wrongfully

converted assets owned by Ms. Ambrozic. Based on these findings, the trial judge ruled in favour of Ms. Ambrozic and awarded her an undivided one-third interest in a parcel of farm land. Mr. Burcevski appealed, claiming, inter alia, that Ms. Ambrozic lied about the services she rendered to his company, Voodoo Enterprises Ltd., and about being unable to communicate in English. The Court of Appeal upheld the conclusions and findings of the trial judge. Mr. Burcevski sought leave to appeal to the Supreme Court but his application was denied. In 2009, Mr. Burcevski filed an action claiming that Ms. Ambrozic fraudulently misled the trial judge in the previous litigation. He alleged that during the divorce proceedings, Ms. Ambrozic received \$83,350.00 and two properties as settlement. He attributed his failure to raise these matters in the previous action to memory lapse, health issues and his inability to communicate in English. Ms. Ambrozic applied for summary judgment on the ground that Mr. Burcevski's allegations had already been raised and passed upon in the previous action. The chambers judge dismissed the new action as an abuse of process. She determined that res judicata barred the relitigation of issues already decided in the prior action. The chambers judge also awarded enhanced costs to Ms. Ambrozic. The appellants appealed the disposition, arguing that the chambers judge misapprehended the evidence and erred in awarding enhanced costs.

*Burcevski v. Ambrozic, (cont.)***APPELLATE DECISION**

The appeal was dismissed. The Court of Appeal held that the chambers judge properly exercised her discretion in considering the appellants' action as an abuse of process. The Court agreed with the chambers judge that the purported new evidence was not sufficient to substantiate the appellants' claim of fraudulent misrepresentations by the respondent in

the previous action. The proposed evidence would not have changed the outcome of the earlier litigation. The Court sustained the award for enhanced costs in favour of the respondent as the alleged fraud was not proven and the appellants had only paid \$85,000 of the \$312,000 costs awarded in the previous proceedings. The enhanced costs were also warranted because *res judicata* was established and the respondent was forced to relitigate. The Court further awarded extraordinary costs in favour of the respondent and restored the order of the chambers judge removing the *lis pendens* from the properties awarded to the respondent in the first action.

brilliant [bril-yuhnt]

– **adjective**

1. having or showing great intelligence, talent, quality, etc.

See also:

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Grundstuecksverwaltungsgesellschaft MBH v. Hanne, 2011 ABCA 185

Areas of Law : Foreign Judgments; Undertakings; Cross-Examination

Under Appeal : Justice Mahoney

[CLICK HERE TO ACCESS THE JUDGMENT](#)**BACKGROUND**

The appellant was Dr. Hanne. The respondent was SHN Grundstuecksverwaltungsgesellschaft MBH & CO. Seniorenresidenz Hoppegarten-Neuenhagen KG, a German company. The respondent obtained a money judgment against the appellant in Germany for breach of trust and sought to enforce the judgment in Alberta where appellant resided. The appellant filed his defence, arguing that the German judgment was not properly obtained and that it was contrary to Canadian principles of substantive justice. The matter was set for summary trial. The appellant filed the affidavit of Dr. Bröcker Meub

in support of its application to enforce the German judgment. Dr. Bröcker Meub was the respondent's managing director as well as its counsel in the German litigation. At the cross-examination on the affidavit, the respondent requested several undertakings from Dr. Bröcker Meub. The deponent answered some of the undertakings but declined to answer the rest because the questions were irrelevant. The chambers judge held that the enforcement of foreign money judgments did not require the interpretation of foreign law or the examination of the merits of the foreign action. The chambers judge rejected the appellant's claim that the German judgment was inconsistent with Canadian notions of natural justice and found insufficient evidence to support the appellant's contention that the German proceedings were unfair. The chambers judge sustained the deponent's refusal to answer some of the undertakings, holding that the questions were irrelevant because they related to the merits of the foreign judgment which could no longer be reconsidered in the enforcement action. The chambers judge found

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Grundstuecksverwaltungsgesellschaft MBH v. Hanne, (cont.)

that two of the outstanding undertakings related to the German court process and the deponent's role as both a party and counsel in the German proceedings. Nine other undertakings related to the transactions between the parties and the merits of the German proceedings while the remaining three undertakings pertained to the criminal

action filed against the appellant. The chambers judge limited the scope of the deponent's cross-examination to questions that were relevant to the enforcement of the German judgment, excluding those that related to the merits of the foreign proceedings. On appeal, the appellant argued that the chambers judge erred in refusing to compel the deponent to answer the outstanding undertakings or to be further cross-examined. He contended that the chambers judge also erred in not addressing the issue of relevance and materiality and in determining whether the foreign judgment should be enforced.

CONFLICT OF INTEREST? REFERRAL?



- Estate Litigation
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*Grundstuecksverwaltungsgesellschaft MBH v. Hanne, (cont.)***APPELLATE DECISION**

The appeal was dismissed. The Court of Appeal agreed with the chambers judge that in an action to enforce a foreign money judgment, neither the correctness of the judgment nor the merits of the parties' respective positions in the foreign action are relevant. The Court held that for a party to effectively resist enforcement of a foreign judgment, it must establish that there was fraud in the foreign proceedings or that the judgment is inconsistent with Canadian public policy or that it violates Canadian notions of natural justice. The Court rejected the chambers judge's conclusion that the appellant must first substantiate a defence against the enforcement of the foreign judgment before he can ask relevant questions or request appropriate undertakings. The Court also disagreed



with the judge's ruling that the cross-examination of the deponent should be limited simply because it was a summary trial. The Court explained that in an action for enforcement of a foreign judgment, the questions and requests for undertakings must at least be relevant to one or more of the previously outlined defences and must not have the effect of re-examining the merits of the foreign judgment. As the outstanding undertakings had no relevance to any of the possible defences available to the appellant, the deponent cannot be compelled to answer them.

Synergy Group (2000) Inc. v. Alberta (Securities Commission), 2011 ABCA 194

Areas of Law : Securities Law; Statutory Interpretation; Contracts
 Under Appeal : Alberta Securities Commission

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THE JUDGMENT](#)

BACKGROUND

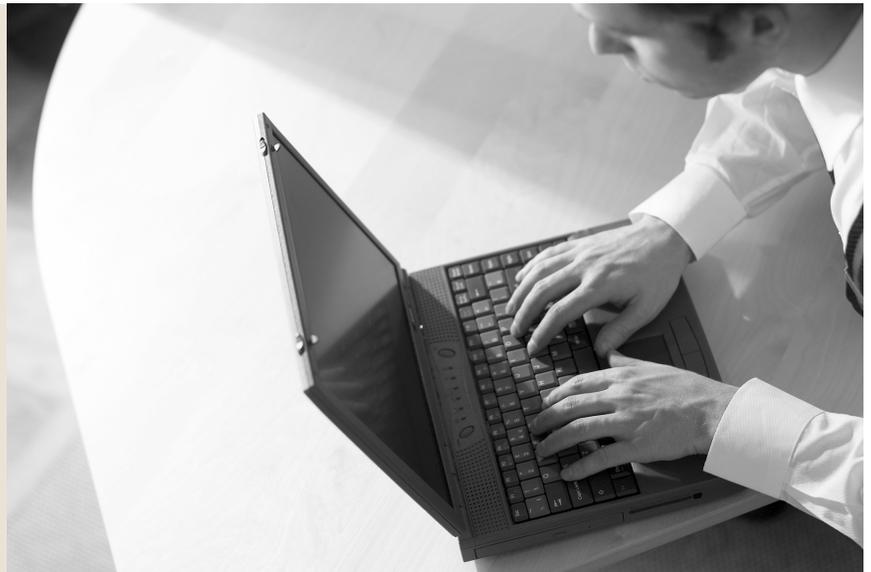
The appellant in this case was Synergy Group (2000) Inc. (“Synergy”). The respondent was the Alberta Securities Commission. Synergy marketed the Alternative Tax Strategy Program to help individuals minimize their tax liabilities. Under the Program, Synergy sold units for \$1,000 each to Alberta purchasers. The participants were made to sign three one-page contracts: the Unit Purchase Agreement, the Business Referral Agreement and the Transfer Agent Agreement. Synergy kept 20% of the sales proceeds as commissions and forwarded the rest of the funds to Integrated Business Concepts Inc. (“IBC”), which in turn loaned the money to small and medium-sized businesses. In exchange for the loans, the participating businesses

agreed to give 5% of their net profits and 100% of their losses to Independent Business Consulting Association (“IBCA”). The participating businesses tended to generate losses which were pooled and distributed among the purchasers of the units. This allowed the losses from the businesses to flow through to the unit purchasers, allowing them to claim the losses and reduce their income tax liabilities. The Commission investigated the scheme and found that Synergy engaged in illegal trade and distribution of securities. The Commission considered the units sold under Synergy’s Tax Program as securities because they allowed the purchasers to acquire an interest in any profits or earnings of the participating businesses. The unit purchasers were found to have bought into the Tax Program with

the primary expectation of being able to use the losses of such businesses to reduce the unit purchasers’ tax liabilities. The Commission found that the documents signed by the unit purchasers to participate in the Tax Program constituted evidence of an interest in profits and earnings and thus should be classified as a security within the meaning of the law. The Commission also considered the arrangements under the Tax Program as investment contracts which were subject to registration and prospectus requirements. It held that Synergy acted contrary to public interest and caused damage to the integrity of the Alberta capital market when it illegally traded in the Tax Program without complying with the registration and prospectus requirements.

*Synergy Group (2000) Inc. v. Alberta (Securities Commission), (cont.)***APPELLATE DECISION**

The appeal was dismissed. The Court of Appeal held that the Commission did not err in construing securities laws broadly in the context of the evidence. The Court observed that evidence established that the contracts with Synergy allowed unit purchasers to acquire interests in the pooled profits and losses of businesses to reduce the purchasers' income tax liabilities. As such, the contracts were correctly considered by the Commission as evidence of an interest in profits or financial gain, and thus fell within the definition of the term "security". The Court held that Synergy should not be allowed to circumvent securities laws through the use of minimal documentation for its transactions. The Court



of Appeal agreed with the Commission that the Tax Program was an investment contract because the unit purchasers invested money in the Program to profit from reduced tax liability, there was a pooling of investments into a common enterprise, and the resulting financial gains were derived from the efforts of persons other than the investors themselves. The Court rejected Synergy's claim that the Commission breached the principles of procedural fairness when it made findings as to the involvement of IBC, IBCA, and the participating businesses in the investment scheme.