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Publisher's Special Release Note 2020

The pages in this work were reissued in September 2020 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the September 2020 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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This resource is a practice-oriented how-to guide to business transactions. It features commentary, materials and precedents covering: the buying and selling of a business; the family trust; shareholders' buy-sell agreements; Investment Canada; tax implications of a business purchase/sale; incorporation; executive compensation, and employment law. It also refers to pertinent sections of the *Income Tax Act* and Interpretation Bulletins.

This release features updates to the case law and commentary in the following Chapters: 1 (Choice of Business Form), 3 (Use of the Family Trust), and 9 (Employment Law).

Highlights:

- **Franchise – Fitness Studios – COVID Pandemic Forcing Change in Business Model – Franchisor Delivering Online Program Directly to Members –-Franchisee Operating Own Fitness Studio When Lockdown Lifted – Franchisor's Motion for Injunction Denied – Issue of Fundamental Breach –** Where the franchisor of fitness studios, due to the COVID pandemic, changed the business model to a virtual exercise system offered directly by the franchisor, and following the lifting of the COVID lockdown, a franchisee purported to terminate the franchise agreement and operate its studio under a different name, the franchisor's motion for an interlocutory injunction was dismissed as the fundamental breach of the franchise agreement was in issue. In this case, the plaintiff franchisor of fitness studios changed the business model as a consequence of the COVID pandemic's impact on in-studio fitness. The franchisor responded to the pandemic by rolling out an online at home exercise program as a method of offering exercise programming to members. The franchisees were not permitted to offer the virtual programming to their members or complete with the franchisor's program, which became a major source of contention. The franchisor, recognizing the fundamental changes in which the franchise system operated, circulated a draft amending agreement to the franchisees. The defendant franchisee and its principals refused to sign, taking the position that the franchisee should have been entitled to offer the online fitness programming to their 400 members, and that the franchisor was competing with them. The franchisee purported to terminate the franchise agreement based on fundamental breach of the franchise agreement by the franchisor. Following the lifting of the COVID-19 lockdown, the defendants re-opened their fitness studio under a different name. The franchisor claimed that the defendants were operating a competing business in contravention of the non-competition covenant in the franchise

agreement. The franchise agreement was scheduled to end in three months. The franchisor brought a motion seeking an interlocutory injunction to prevent the defendants' continuing breach of the franchise agreement. The franchisor's motion was dismissed.

It was clear that defendants' actions in opening and carrying on a new fitness studio from the current location was in direct contravention of the franchise agreement. The non-competition covenants in the franchise agreement were not void for uncertainty, and were not in contravention of public policy, and they were in force. At the same time, the defendants raised a serious issue as to whether franchisor's program that it directly marketed to the franchisee's members, when combined with the financial restructuring inherent in the program, and the major changes to the role of the franchisee, and severe restrictions on the franchisee's opportunity to earn revenue, undermined the fundamental underpinning of the franchise arrangement. Moreover, there was only a short period of time remaining in the term of the franchise agreement, and it would not be possible to have the issues brought to trial prior to the expiration of the agreement. An interlocutory order would likely serve to finally determine or render moot at least some of the issues in dispute, and in such circumstances, the franchisor should be required to establish a strong *prima facie* case to obtain the interlocutory injunction.

The franchisor failed to meet the burden of demonstrating a strong *prima facie* case that the franchise agreement remained in full force and effect. The franchisor also failed to show a balance of convenience favoured granting the interlocutory injunction. Both parties would be harmed by the injunction. The franchisor failed to establish clear evidence of irreparable harm if the interlocutory injunction was not granted. The fundamental question was whether the franchise agreement continued to survive or whether there was a fundamental breach, as the defendants claimed. A court ordered closure of the fitness facilities during the pandemic for non-health related reasons created a very poor public optic. Where an injunction would interfere with the defendants' ability to earn a livelihood, the appellate jurisprudence required a strong *prima facie* case, not just a serious question, and the franchisor failed to show it had one. The evidence on the motion failed to establish the franchisor met its burden of demonstrating a strong *prima facie* case that the agreement had not been fundamentally breached. The balance of convenience did not favour granting an interlocutory injunction: *Greco Franchising Inc. v. Franco Milito et al.*, 2021 CarswellOnt 7958, 2021 ONSC 3950, [2021] O.J. No. 2987 (Ont. S.C.J.).

- **Human Rights – Human Rights Complaint – Employee Subject to Collective Agreement Jurisdiction of Arbitrator Appointed Under Collective Agreement – Whether Exclusive Jurisdiction —** Where an employee filed a human rights complaint alleging that the employer failed to adequately accommodate her addiction disability, the exclusive jurisdiction of a labour arbitrator appointed under the collective agreement and empowered by provincial labour legislation extended to adjudicating the human rights dispute arising from the collective agreement. In *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 (S.C.C.), reversing *Northern Regional Health Authority v. Manitoba Human Rights Commission et al*, 2017 CarswellMan 458, 2017 MBCA 98, [2017] M.J. No. 274, [2018] 1 W.W.R. 77, 2018 C.L.L.C. 230-009, 27 Admin. L.R. (6th) 95, 416 D.L.R. (4th) 385, 43 C.C.E.L. (4th) 16, 88 C.H.R.R. D/1 (Man. C.A.), reversing *Northern Regional Health Authority v. Manitoba (Human Rights Commission)* (2016), 2016 MBQB 89, 327 Man. R. (2d) 284, [2016] M.J. No. 127, 84 C.H.R.R. D/67, 33 C.C.E.L. (4th) 323, 2016 C.L.L.C. 230-031, [2016] 11 W.W.R. 297, 2016 CarswellMan 155 Edmond J. (Man. Q.B.), the employee was suspended for attending work under the influence of alcohol. After the employee disclosed her alcohol addiction, and refused to enter into an agreement requiring that she abstain from alcohol and engage in addiction treatment, her employment was terminated. The employee's union filed a grievance and her employment was reinstated on substantially the same terms as the agreement the employee had refused to sign. Shortly thereafter, the employee's employment was terminated for an alleged breach of those terms. The employee filed a discrimination complaint with the Manitoba Human Rights Commission, which was heard by an adjudicator appointed under *The Human Rights Code*, C.C.S.M., c. H175. The employer contested the adjudicator's jurisdiction, arguing that *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, recognized the exclusive jurisdiction in an arbitrator appointed under a collective agreement, and that this extended to human rights complaints arising from a unionized workplace. The adjudicator disagreed, finding that she had jurisdiction because the essential character of the dispute was an alleged human rights violation. She went on to consider the merits of the complaint and found that the employer had discriminated against the employee.

  On judicial review to the Manitoba Court of Queen's Bench, the reviewing judge found an error in the adjudicator's characterization of the essential character of the dispute, and set aside her decision on the issue of jurisdiction. The Manitoba Court of Appeal allowed the employee's appeal. It agreed that disputes concerning the termination of a union-

ized worker lie within the exclusive jurisdiction of a labour arbitrator, including alleged human rights violations. Nevertheless, it held that the adjudicator had jurisdiction in this case and remitted the matter to the reviewing judge to determine whether the adjudicator's decision on the merits of the complaint was reasonable. The employer appealed to the Supreme Court of Canada, and the appeal was allowed, and the reviewing judge's order was reinstated in part. The adjudicator did not have jurisdiction over the employee's complaint. Where labour legislation provided for the final settlement of disputes arising from a collective agreement, the jurisdiction of the decision maker empowered by that legislation — generally, a labour arbitrator — was exclusive. Competing statutory tribunals might carve into that sphere of exclusivity, but only where such legislative intent was clearly expressed. In the instant case, the essential character of the employee's complaint fell squarely within the labour arbitrator's mandate, and there was no clear express legislative intent to grant concurrent jurisdiction to the human rights adjudicator over such disputes. The reviewing judge's order setting aside the adjudicator's decision should be reinstated.

ProView Developments

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