THE LAWYERS WEEKLY

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# Mandatory minimums branded ineffective, overly constraining

Upcoming Supreme Court cases could revisit Charter arguments

**CRISTIN SCHMITZ**
OTTAWA

The Supreme Court should stem the rising tide of mandatory minimum penalties by taking a "more robust" approach to the *Charter*'s protection of fundamental justice and ban on cruel and unusual punishment, according to a new report which says Canadians can't afford the rising social, financial and legal costs of mandatory minimum penalties (MMPs).

As the high court prepares to hear pivotal Crown appeals in November of the Ontario Court of Appeal's decisions in *R. v. Nur* and *R. v. Charles*—which last year struck down two mandatory minimum penalties for firearms possession—a would-be intervener in those test cases, the B.C. Civil Liberties Association, this month rolled out "More Than We Can Afford: The Costs of Mandatory Minimum Sentencing."

The 86-page report aimed at lawyers and policymakers maps the legal landscape and surveys the costs, policy considerations, and court challenges associated with MMPs. Its findings indicate that besides failing to deter crime, MMPs do not achieve their objectives of promoting certainty, transparency and fairness in the justice system.


**British Columbia Civil Liberties Association counsel Raji Mangat's report on mandatory minimum penalties says they fail to deter crime and don't promote fairness in the justice system. She is seen above in Vancouver.**
ALISTAIR EAGLE FOR THE LAWYERS WEEKLY

On the contrary, MMPs shift discretion in sentencing away from judges, whose decisions are public and reviewable, to prosecutors, whose decisions are tactical and largely beyond review. They also disproportionately affect marginalized Canadians, including aboriginals and the poor and mentally ill, the report notes.

"The BCCLA is extremely concerned about the unjust, disproportionate outcomes of mandatory minimum sentencing," said the

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# Judge slams counsel, then recuses himself

**CRISTIN SCHMITZ**
OTTAWA

A cloud of uncertainty looms over the appeal of an important Tax Court transfer-pricing decision after the trial judge took the "absolutely unprecedented" step of publicly defending himself and his decision against what he called "deliberately misleading" allegations in the appeal factum.

Tax Court Justice Patrick Boyle's Sept. 4 reasons for deciding to recuse himself from further involvement in the multi-million-dollar case of *McKesson Canada Corp. v. The Queen* have sparked debate about whether the factum in question exceeded the bounds of acceptable appellate advocacy, and whether the judge moved from arbiter to advocate when he wrote 45 single-spaced pages contesting and correcting what he argued are demonstrable "untruths" in the factum.

Justice Boyle wrote that he was "deeply troubled" by a number of McKesson's assertions in the factum appealing his 2013 ruling upholding transfer-pricing adjustments made by the Canada Revenue Agency under s. 247 of the *Income Tax Act*.

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# News

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# Appeal courts may raise own issues 'rarely,' rules top court

'Injustice' threshold established in Alberta drugs acquittal

**CRISTIN SCHMITZ**
OTTAWA

The Supreme Court of Canada has reined in the discretion of appellate courts to raise issues on their own initiative.

Justice Marshall Rothstein's 7-0 ruling Sept. 12 restored the acquittals of Mohammad Mian on charges of possessing cocaine for the purpose of trafficking and possessing currency obtained through crime.

In *R. v. Mian* [2014] S.C.J. No. 54, the top court held that the Alberta Court of Appeal was wrong when it overturned Mian's acquittals and ordered a new trial in 2012 on the basis that the trial judge relied on evidence from an improper cross-examination of a police detective — an issue that the appeal court raised on its own motion.

That issue (on which the Crown and defence were asked to make submissions) could not have affected the trial's outcome and, as such, there was no "realistic risk of an injustice occurring" if the appeal court had not raised it. Therefore the appeal court did not meet the threshold for raising a new ground of appeal at its own behest, the Supreme Court held.

"Of essence here is that courts cannot be seen to go in search of a wrong to right," Justice Rothstein observed. He cautioned that appeal courts may raise new issues "only in rare circumstances" when "failing to do so would risk an injustice.

"Where there is good reason to believe that the result would realistically have differed had the error not been made, this risk of injustice warrants the court of appeal's intervention."

He went on to set out the procedures a court should follow in exercising that power.

> "[L]awyers can reasonably expect that when they advance an appeal, that the appeal is going to be decided on the issues that they frame...I think it will enhance the predictability of the appeal process when a party advances an appeal.
>
> **Daniel Song**
> Sprake Song & Konye

> There's a great deal of discretion [left with the court] and so on, but ultimately 'Let fairness be your guide' is kind of the golden rule.
>
> **Ron Reimer**
> Crown counsel

In the wake of *Mian*, "lawyers can reasonably expect that when they advance an appeal, that the appeal is going to be decided on the issues that they frame, and it will only be in 'rare circumstances,' where the court has said there is 'a risk of injustice,' that the Court of Appeal will be permitted to intervene," said Mian's counsel Daniel Song, of Vancouver's Sprake Song & Konye. "I think it will enhance the predictability of the appeal process when a party advances an appeal."

Song suggested that similar principles will apply in the civil context.

The Supreme Court was not presented with evidence that appeal courts across Canada frequently inject themselves into appeals. But the intervener Alberta Crown did highlight a significant number of criminal appeals in which Alberta's Court of Appeal has been raising issues at its own behest.

Counsel for the respondent federal Crown, Ron Reimer of the Public Prosecution Service of Canada in Edmonton, said the judgment is Canada's version of *Greenlaw v. United States*, 554 U.S. 237 (2008), in which the U.S. Supreme Court held that an appeals court determining an offender's sentencing appeal could not, of its own motion and absent a prosecution appeal, increase the offender's sentence.

Justice Ruth Bader Ginsburg emphasized in that case that the principle of party presentation, under which courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present" is an important part of the adversarial system.

Reimer said the Supreme Court of Canada "has taken an approach which I think is fairly similar to *Greenlaw*."

"I don't know that they have changed the law to any great degree in this respect," he said. "What I think is perhaps new coming out of it is some procedural rules in terms of what fairness demands to ensure that this doesn't put the parties in an unfair position. There's a great deal of discretion [left with the court] and so on, but ultimately 'Let fairness be your guide' is kind of the golden rule."

Justice Rothstein noted that when a judge or appeal panel departs from the principle of party presentation to inject itself into a case, it can be seen as intervening on behalf of one of the parties, thus impugning the court's impartiality. On the other hand, judges are obliged to ensure that justice is done.

Restricting the court to raising a new issue only when failing to do so would risk an injustice is a sufficiently flexible test, "while also providing for an appropriate level of restraint" to maintain the impartiality of the court, Justice Rothstein wrote. "The court should also consider whether there is a sufficient record on which to raise the issue, and whether raising the issue would result in procedural prejudice to any party."

He stressed that this discretion is always limited by the requirement that raising the new issue cannot suggest bias or partiality on the part of the court.

When an appellate court raises a new issue, there must be notification and opportunity to respond. Counsel may wish to simply address the issue orally, file further written argument, or both. The underlying concern should be ensuring that the court receives full submissions on the issue.

# News

# A dumb idea threatens both lawyers, clients

Opinion

MURRAY TEITEL

In August the Canadian Bar Association recommended that non-lawyers be allowed to own law firms. If this proposal is accepted by the provincial law societies, shares in law firms could be traded on stock exchanges and controlling interests could end up in the hands of hedge-fund managers gambling on derivatives, or, in the case of underperformers, in the grip of vulture funds.

It is a dumb idea. The practice of law is not just a business; it is primarily a profession, the essence of which is that the lawyer puts the client's interest above his or her own.

While the CBA has 37,000 members, it's like the Canadian Union of Postal Workers or the United Church of Canada where a tiny number of activists, who are the only ones driven enough to put in the time, take over the leadership.

No one should assume that a scheme like the one described above has or would gain traction among individual lawyers, any more than it would be correct to assume that normal postal workers or congregants support boycotting Israel.

The difference between the CBA leaders and the leaders of the other two groups is that the latter are ideologues who get involved in order to promote their political agendas, while the former tend not to be ideologically driven but take on this public service (which it is when it is not making things worse) for other reasons. Some undoubtedly see it as a career-enhancing move. Some may do it because they are the types who just always have to be doing something useful.

A corporation has only one duty and that is the maximization of value to the shareholders. To that end, corporations will go to extraordinary lengths. Those in the resource extraction business have been known to destroy habitats and poison people living in the vicinity of their activities. Those pushing consumer goods will often sell people garbage they don't need and spend tens of millions on advertising to convince them they do.

And therein lies the irreconcilable tension between the duties of lawyers to their clients and the duties of lawyers as employees of a publicly-traded corporation. Ethically, the lawyer wants to put the interest of the client above that of the shareholder, whereas the shareholder wants only to maximize earnings.

It is not difficult to imagine how this could play out. For example, large firms all have big estate and trusts departments whose clients include children of rich parents fighting over estates. When properly funded these suits can go on for years and generate millions of dollars in fees.

Lawyers have a duty to point out to these clients that what they are really fighting about is what this one did to that one when they were six and four years old respectively, and whom Dad liked more. They should be encouraged to seek counselling and reconcile. And lawyers routinely do that, foregoing enormous billings when clients listen to them.

The bottom line is that lawyers already experience enough pressure putting the interests of their clients above their own. Adding a further force working to undermine legal ethics will turn a once honourable profession into a business no different from peddling brassy makeup or shoddy appliances.

Beyond that, who in their right mind would want to invest in a law firm? As the Heenan Blaikie saga demonstrates, a law firm is no more than its lawyers. And any one of them is free at a moment's notice to pack up and move elsewhere. Shares of a law firm have little inherent value.

They own no patents, scant equipment, no real estate as a rule, no utilities, no licences to exploit natural resources.

It is difficult to find anyone who will benefit from turning law firms into publicly-traded companies other than stockbrokers and investment-fund managers. They will see an opportunity to earn commissions trading the shares and profit by correctly betting on their future upward or downward movement. The losers will be the clients of those practitioners who think of law not only as a means to make a living but as a way of doing something meaningful.

***Murray Teitel practises matrimonial, civil and estate litigation in Toronto.***

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# Bad faith claim award adjusted

CHRISTOPHER GULY

Following Supreme Court of Canada guidance on bad-faith insurance claims, the Ontario Court of Appeal recently upheld punitive damages and lowered mental-distress ones awarded against an insurance company already on the hook for damages in failing to pay disability benefits to a claimant.

In *Fernandes v. Penncorp Life Insurance Co.* [2014] O.J. No. 4039, the appeal court dismissed the insurer's appeal of $200,000 in punitive damages awarded last year to Avelino Fernandes by Superior Court Justice Peter Hambly.

After twice injuring his lower back from two repeated falls in late 2004, Fernandes, now 49 years old, could no longer work and had to close his bricklaying business in Kitchener. Although he didn't pay into employment insurance or a provincial workers' compensation plan, he had purchased disability insurance from Penncorp in 2002 that would provide him with $3,000 in monthly total disability benefits for two years if he were

Fife

unable to work at his own occupation as a result of injuries.

Fernandes only received payment between February and July of 2005 when Penncorp claims advisor Janet Mayo terminated benefits, after saying that surveillance video showed he was working around his house, but she did so without relying on any medical evidence that the respondent was "other than totally disabled," as the appeal court noted.

Although Mayo made the decision in August 2005, she didn't inform Fernandes of it until five months later. In 2007, he commenced the action against Penncorp that proceeded to trial last year.

Justice Hambly concluded that based on medical evidence, Fernandes met the total-disability definition in the policy he held and awarded him $236,773 in damages for breach of contract plus the return of premiums paid. That amount wasn't challenged at appeal.

The trial judge also granted Fernandes aggravated damages — but without providing any reason quadrupled the amount requested to $100,000, citing in his reasons how Penncorp "humiliated" Fernandes, made him dependent on his common-law spouse and caused him "great mental distress" in failing "to pay him what it contracted to pay him."

In awarding $200,000 in punitive damages against Penncorp — which argued they were unwarranted — Justice Hambly concluded that the appellant "demonstrated bad faith" in handling Fernandes's

**Measured, Page 10**

# News

## Awards

- **Michal Fairburn** of *Stockwoods LLP* has been presented with the 2014 Catzman Award for Professionalism and Civility. Fairburn, who joined Stockwoods after two decades as general counsel with Ontario's Crown Law Office-Criminal, is a past director of the Advocates' Society and a fellow of the American College of Trial Lawyers. The Catzman Award, created in 2008, recognizes knowledge, integrity and dedication to the legal profession.

## Moves

- **Michael Burns** has joined the Toronto office of *Borden Ladner Gervais* as part of the firm's securities, capital markets and public companies group, with a practice focusing on securities law, hedge funds and structured products. Burns, called to the Ontario bar in 1992, is chair of the Canadian chapter of the Alternative Investment Management Association.
- Personal injury mediator **Peter Robinson** of St. Catharines, Ont., has joined the mediation panel at **ADR Chambers**, and is available to conduct mediations throughout the London, Hamilton, Niagara and Toronto regions. Robinson also specializes in product liability and life and disability insurance.
- **Clifford Hart** has joined *Borden Ladner Gervais* as a partner in the firm's labour and employment group. Hart, called to the bar in Alberta in 1988 and Ontario in 1991, was previously at Miller Thomson.
- **Sylvie Demers** and **Despina Mandilaras** have joined the Montreal office of *Lavery, de Billy* as associates in the firm's litigation group. Demers and Mandilaras were called to the Quebec bar earlier this year.

# Man's grow-op convictions set aside

Trial judge shifted burden of proof, appeal court rules

**KIM ARNOTT**

The Ontario Court of Appeal has set aside convictions in a marijuana grow-op case after determining that the trial judge erred in finding that "proven facts" must underlie scenarios suggesting the innocence of the accused.

In 2012, Justice Peter Hryn of the Ontario Court of Justice convicted Thu Van Bui of charges related to producing and trafficking marijuana, as well as firearm offences.

During the trial, police testified that they had found a sizable grow operation in a house owned by Bui and his wife, and arrested Bui when he arrived at the house with a key in his pocket.

A search of the sparsely furnished property turned up utility bills addressed to the couple, items of men's and women's clothing, and seven prescription pill bottles in the names of six different individuals. One of the bottles had Bui's name on it, for a prescription issued to him in 2006.

As well, police found a loaded semi-automatic handgun and ammunition hidden under the mattress in the only bed in the house.

Justice Hryn determined that the key issue was whether Bui, who had owned the property for five years, had knowledge and control of the items in the house.

Noting that the evidence in the case was circumstantial, the judge cited the rule in Hodge's Case that "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts."

In finding Bui guilty of all charges, Justice Hryn ruled, "There are no proven facts upon which I can infer that some imagined person other than the accused, controlled the marijuana grow operation in the accused's house without the accused's knowledge. Such a conclusion would be speculative, and not a rational conclusion. The Crown has proven the accused's guilt beyond a reasonable doubt."

> "The concern is that the judge has suggested the need for there to be proven facts underlying other alternate explanations, and that reverses the burden of proof.
>
> **Lisa Dufraimont**
> Queen's University

In a unanimous finding, Ontario Court of Appeal Justices Robert Sharpe, Janet Simmons and Gladys Pardu allowed Bui's appeal on grounds that the trial judge's position regarding the proven facts was an error that led him to shift the onus of proof to the defence.

Noting that the Supreme Court of Canada made it clear that the rule in Hodge's Case is not "an inexorable rule of law in Canada" in its decision in *R. v. Cooper* [1978] 1 S.C.R. 860, Justice Simmons added, "Further, the rule's reference to requiring 'proven facts' to ground alternative explanations is problematic because there is no obligation on an accused to prove any facts.

"Although I acknowledge that the Crown's case that the appellant was at least a participant in the grow operation was strong, the trial judge's erroneous approach to assessing the evidence could well have tainted his assessment of this issue."

The court ordered a new trial on the grow operation charges, but entered acquittals on the firearm charges related to the handgun after finding that the judge's conviction on those counts was an unreasonable verdict.

Justice Simmons pointed to a lack of evidence linking the accused to the weapon, as well as the possibility, based on the pill bottles and clothing, that someone else may have been in the house and hidden the gun in the bed without the knowledge of the accused.

Despite Supreme Court of Canada rulings in *Cooper*, and more recently in *R. v. Griffin* [2009] S.C.J. No. 28, indicating that there is no special rule for the standard of proof in circumstantial evidence cases, the concept continues to be resurrected, said Lisa Dufraimont, an associate law professor at Queen's University.

"Really what we have is that the rule in Hodge's Case — a rule that the Supreme Court of Canada has repeatedly distanced itself from and essentially said doesn't apply in Canada — keeps reaching from beyond the grave and affecting the reasoning of judges, and that's what happened in this case."

Regardless of the type of evidence in a case, it needs to be clear that the standard of proof beyond a reasonable doubt has been applied, she added.

"It's not that the court is saying that (guilt is) not an available conclusion in this case," said Dufraimont. "The concern is that the judge has suggested the need for there to be proven facts underlying other alternate explanations, and that reverses the burden of proof."

That reversal of the burden of proof clearly doomed the trial judge's finding, agreed Scott Cowan, a criminal lawyer based in Goderich, Ont.

"If he had said, 'I find the defence's position to be fanciful and speculative in the face of a strong Crown case, and I'm satisfied beyond a reasonable doubt,' I think his conviction would stand.

"It's a nice little case to remind us about the burden of proof."

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# News

## **Change:** Group wants Supreme Court to push back

**Continued from page 1**

reports' author, BCCLA counsel Raji Mangat. "Even as crime rates are falling and are at their lowest point since the early 1970s, the Canadian government persists in enacting costly, punitive sentencing measures."

Mangat called for evidence-based, effective policy reform, including redirecting the hundreds of millions of dollars earmarked for more prosecutions and incarceration to crime prevention measures such as improving education, health care and other social supports.

The Supreme Court also has a critical role to play by revising its approach to determining whether a sentence violates the *Charter*'s s. 12 protection against cruel and unusual punishment, Mangat said.

It is "very difficult for a lawyer to make the argument that an MMP constitutes cruel and unusual punishment," she told *The Lawyers Weekly*. "It has to be grossly disproportionate [and] that's such a high standard to meet, yet the *Criminal Code* also tells us that proportionality in sentencing is the fundamental principle of sentencing. And so what has happened, in terms of how the law is developing, is that judges are basically forced to accept that unless a sentence can be considered so grossly disproportionate that it shocks the conscience of the community it's OK for it to be disproportionate."

Mangat said that in determining whether a sentence is grossly disproportionate to the individual offender, the top court has moved away from "a robust individualized consideration" of such factors as the gravity of the offence, the personal circumstances of the offender, and the particular circumstances of the case, "to an increasingly deferential and generalized assessment of legislative intent."

She suggested that in the *Nur* and *Charles* appeals, the court could "reinvigorate" its approach by integrating a range of offender characteristics and mitigating factors into its analysis.

Moreover, the court's "limited view" of how to take into account the actual effect of the punishment on the offender should also be expanded "to consider the disproportionate impact incarceration may have on certain offenders such as Aboriginal and racialized offenders, women and offenders with mental health concerns," she argued.

Mangat said the court could also give the *Charter*'s s. 7—which guarantees the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice—a role in protecting against unfit, excessive sentences that fall short of s. 12's gross disproportionality standard. (The Ontario Court of Appeal held in *Nur* that constitutional challenges to MMPs must be determined only under s. 12.)

This could be done by the Supreme Court recognizing a new principle of fundamental justice—proportionality in sentencing. This principle would guarantee a proportionate sentence, rather than barring only a grossly disproportionate sentence.

Mangat pointed out that the top court opened the door to this possibility in its unanimous ruling in *R. v. Ipeelee* [2012] S.C.J. No. 13, where Justice Louis LeBel observed that "proportionality in sentencing could aptly be described as a principle of fundamental justice under s. 7 of the Charter."

Given the test cases and federal election next year, "there is an opportunity for the legal community to really be pushing back on the fact that these types of measures are metastasizing," Mangat said.

But Gannon Beaulne of Toronto's Bennett Jones, co-author with Lincoln Caylor of a recent Macdonald-Laurier Institute paper on MMPs, argued that MMPs can be useful sentencing tools.

"This debate in general has become very politicized—it's about picking sides," he said. "Do you agree with this mandatory minimum? Is it proportionate? And that maybe misses the point of the wider discussion which is that, in the context of the rule of law, do mandatory minimums as such help or hinder an accused's, or the public's, ability to look forward and understand what the consequences of a certain crime would be?"

Beaulne said that if MMPs are "properly used" (he describes himself as "agnostic" about whether they are) they aid predictability.

"The rule of law requires laws to be ascertainable in advance, and clear in every respect, and MMPs, by setting a stable sentencing floor, allow for a very recognizable range of sentences for the commission of a given offence. It puts the accused and the public on notice of what the likely sentencing range is. Now contrast that with a situation where the judge has complete discretion. It's much difficult to look at a crime and say: 'This is what I'm going to be sentenced to if I break that law.'"

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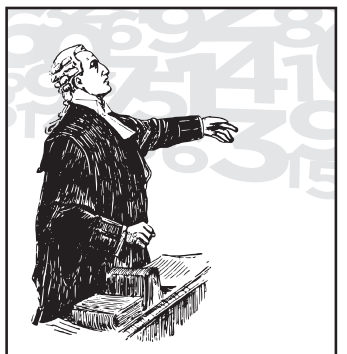

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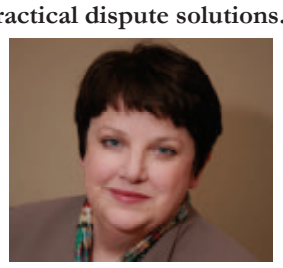

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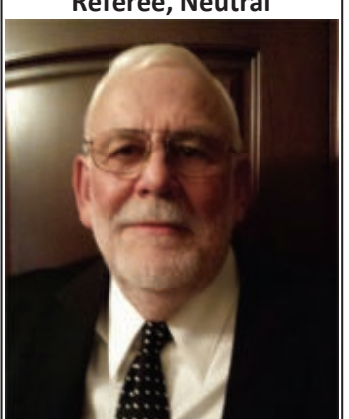

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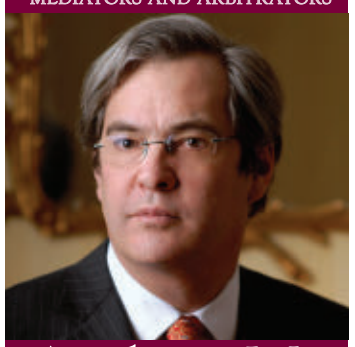

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## News

# Rec hockey player to appeal conviction for on-ice hit

GEOFF KIRBYSON

An Ottawa beer league hockey player has appealed an aggravated assault conviction that arose from an on-ice collision that left his opponent unable to work two-and-a-half years later

Last month, Ontario Court Justice Diane Lahaie sentenced 31-year-old Gordon MacIsaac to 18 months' probation for what she deemed a "deliberate blindside hit" on Drew Casterton, during an Ottawa senior men's hockey league game in March 2012.

The impact of the collision left Casterton with a concussion, facial scars and a number of broken teeth. The injuries also seriously impacted his ability to earn a living, he alleges. In his statement of claim in his civil lawsuit seeking $600,000 in damages, Casterton alleges his personal training business earned gross revenue of $82,000 in the 22 months prior to the incident. Since then, however, he claims he has only a limited ability to work and he has only earned $13,000.

MacIsaac denies intentionally injuring Casterton and filed a statement of defence in the civil case. He has appealed the criminal conviction.

MacIsaac's lawyer, Ottawa-based Pat McCann, says the grounds of appeal include Justice Lahaie erring on the issue of applied consent as well as making her own findings of how the play in question developed when there wasn't any such evidence.

Justice Lahaie found that MacIsaac left his feet and intentionally applied force while colliding

with Casterton during the game.

Pat Knoll, a professor of law at the University of Calgary, said the rules of engagement for these beer league games are strictly no-contact.

"None of the participants had consented to any kind of contact of that nature. The law on this is pretty clear. In sports such as soccer, lacrosse and football, the participants consent to a certain level of contact that can result in bumps and bruises or even a broken leg. What happened here is that (MacIsaac) acted in such a way that he caused serious bodily harm to another individual," he said.

In the statement of claim, Casterton also alleges he suffered soft tissue injuries to his neck, spine and jaw from a hit to the head. He also claims that regular headaches keep him from socializing with friends.

There are many similarities between this incident and the much-publicized case in which Todd Bertuzzi, then of the Vancouver Canucks, attacked Steve Moore from the Colorado Avalanche from behind in 2004, inflicting serious injuries that ended the rookie's career.

> "It seems so clear. If you're deliberately attempting to hurt somebody, you're outside of the protection and you shouldn't be surprised if you find yourself facing an assault charge.
>
> **Michael Bates**
> Ruttan Bates

"It's exactly the same," said Michael Bates, a Calgary-based criminal lawyer and partner at Ruttan Bates. "It's a guy who took it too far. The courts have struggled from time to time when they have these cases before them because there's a level of violence that is accepted in hockey that isn't in other sports.

"It seems so clear. If you're deliberately attempting to hurt somebody, you're outside of the protection and you shouldn't be surprised if you find yourself facing an assault charge."

The primary difference between the two cases is NHL games have multiple camera angles that document any offence, while there's unlikely to be anything but camera-phone videos at any recreational league game.

Bates doesn't think the MacIsaac case will have a chilling effect on behaviour in beer leagues around the country. One Calgary-based league has a note on its standard registration form that says, "By the way, we've all got to go to work in the morning."

"The reality is the vast majority of people who play in these leagues don't want that kind of stuff happening. They're out there for recreation. They don't care if they win or lose the game. I hope the effect will be people realize you can't lose your cool and attack a guy," he said.

Knoll disagreed, believing there will be a chilling effect. He says beer leaguers need to be careful not to intentionally cause serious bodily harm to other players.

"If restraint isn't imposed by the law, we're going to see people seriously injured or even killed in some of these events," he said. "It's those people who think they can get away with causing serious bodily harm in non-professional sports events who better look out. That's simply not going to be tolerated by the law anymore."

Knoll said he wouldn't be surprised to see more cases like this come forward as the future victims are buoyed by Justice Lahaie's ruling.

"Some people who have been injured (in the past) have not proceeded with litigation and there hasn't been prosecution. That has come to an end. Those thugs and on-ice goons who think for a moment that they're going to get away with this anymore better think twice. There (are) always a couple of nutbags on each team. I hope for their sake and others that this (decision) gets out to them," he says.

The fact that there has been a conviction in the criminal case, pending the appeal, of course, does not constitute any proof in the civil case. However, Knoll believes it's a significant factor because the original decision in the criminal case established proof beyond a reasonable doubt of the intention to cause bodily harm.

"That's very good leverage for the plaintiff to acquire a settlement or advance the civil litigation because (the civil) standard of proof is on a balance of probabilities," he said.

While it's possible to run a civil case and come to different findings of fact than in a criminal case, Bates says that's no guarantee there will be the same outcome. Different evidence could be admitted in the two cases, and different witnesses called to give testimony. However, a conviction in a criminal offence can be introduced as evidence in a civil case.

"It's hard to overcome that if it was proven beyond a reasonable doubt that you committed assault that now you're only having to prove it on a balance of probabilities," he said.

# **Measured:** Damages are not to be punitive, judge stresses in ruling

**Continued from page 3**

claim, and that Mayo's "adversarial approach [was]…highhanded, malicious, arbitrary or highly reprehensible misconduct."

The appeal court agreed, citing that:

- Mayo terminated benefits contrary to the medical evidence and without support from surveillance evidence;
- Penncorp failed to formally advise Fernandes about the termination of his benefits until five months after the fact;
- Mayo "attempted to shut down" Fernandes's claim with a four-month payment of partial disability benefits that never materialized;
- And after terminating his benefits, Penncorp only paid him the remainder more than six years later, despite knowing Fernandes could never return to his bricklaying occupation.

Writing for the majority, Court of Appeal Justice Sarah Pepall referenced two landmark decisions regarding punitive damages — *Whiten v. Pilot Insurance Co.* [2002] S.C.J. No. 19, and *Fidler v. Sun Life Assurance Co. of Canada* [2006] S.C.J. No. 30 — in which the Supreme Court of Canada said that a breach by an insurer's contractual duty to act in good faith will constitute an independent actionable wrong.

However, on the mental-distress damages in *Fernandes*, the Ontario Court of Appeal held that the $100,000 award — five times higher than what the appellant suggested — was "inordinately high and entirely disproportionate" in light of evidence that showed other circumstances beyond Penncorp's conduct contributed to the respondent's psychological distress.

"Mental distress damages are to be compensatory, not punitive," wrote Justice Pepall in the ruling, agreed to by Justices Russell Juriansz and Katherine van Rensburg, which lowered that damages award to $25,000, an amount Fernandes had sought.

Kitchener trial lawyer Daniel Fife, who served as Fernandes' co-counsel, said the decision highlights the duty good faith insurers owe to their insured and serves as an important ruling on long-term disability claims.

"In looking for opportunities to settle a claim, an insurance company can't be unfair to their insured, particularly if they're very vulnerable and in need of benefits," said Fife, a specialist in civil litigation.

In *Fernandes v. Penncorp* [2013] ONSC 1637, Justice Hambly noted that a vocational assessment of Fernandes, a Portuguese immigrant with the equivalent of an eighth-grade education, found him to have limited English literary and computer skills and poor math ability.

Penncorp's counsel was unavailable for comment.

Western University insurance law professor Craig Brown said the ruling is another reminder that "insurers have to be careful and lawyers have to advise them accordingly in giving fair consideration to all facts surrounding a claim, and not to be unduly hasty in rejecting it or delaying it unnecessarily," and risk facing a bad-faith judgment and punitive damages as previously outlined by the Supreme Court of Canada.

"Plaintiff lawyers will also need to have a case well documented as far as mental distress or the conduct of an insurer is concerned to establish that an insurer acted without due regard to the facts of a claim and resisted it unfairly if they're going to be found to be in bad faith. Here the appeal court reiterated what the Supreme Court set in terms of the type and amount of damages," said Brown, who also serves as counsel to Toronto insurance litigation firm Thomas Gold Pettingill.

"The other lesson from this case is that if a plaintiff's lawyer is going to make a claim for mental distress, it has to demonstrate that it happened and that it's really out of the ordinary if they want damages beyond the $20,000 range set out in *Fidler*."

# News

# ‘Prescriptive regime’ lays out energy framework

LUIS MILLAN

Quebec’s Minister of Energy and Natural Resources has discreetly issued an order that establishes a prescriptive regime for oil and gas exploration on the province’s biggest island, sending a clear signal that the province is open for business in the energy sector.

The regime, adopted in late June under the Quebec *Mining Act*, spells out rules and conditions for exploration work on the remote and sparsely populated Anticosti Island, owned almost entirely by the provincial government except for a small village of 240 people. Core analysis taken from the Macasty shale formation on Anticosti revealed that it potentially holds between 30 billion and 50 billion barrels of oil, making it the largest oil resource in Quebec. However, the reserves can be released only through hydraulic fracturing, which blasts chemically-laced water to break rock containing oil or gas.

The prescriptive regime, unveiled several weeks after Quebec’s new Liberal government pledged a measured and responsible development of the hydrocarbon industry, came as a surprise to industry legal experts. It will likely lead to a wider framework applicable to any province-wide oil and gas exploration activities in the future, according to Jean Piette, a senior partner and chair of the environmental law group at Norton Rose Fulbright Canada.

“The prescriptive regime came out of nowhere,” noted Piette, widely described as the father of environmental law in Quebec. “The government clearly intends to enforce tight controls on these activities, and not the give the industry a free pass. The regime seeks to assure the public concerned about this new industrial activity, and ensure that its environment and its resources will be protected through the measures included in the regime.”

Quebec has been wary about exploiting its unproven oil and natural gas resources. Public fears about hydraulic fracturing led to a moratorium on shale gas drilling and fracturing in 2011 in the lowlands of the St. Lawrence River. But when former Parti Quebecois Premier Pauline Marois announced in February that the provincial government would move ahead with oil exploration on Anticosti Island — the province pledged $115 million to finance drilling for two separate joint ventures in exchange for rights to 50 per cent of the licences and 60 per cent of any commercial profit — it signalled a shift in its energy strategy and highlighted its contradictory stance: fracking for oil on Anticosti is allowed, but is banned for natural gas in the St. Lawrence lowlands.

> The government is saying we have resources and are open for business but we have to do it in a respectful and thoughtful way, and that explains the prescriptive nature of the regime.
>
> **Daniel Bénay**
> McCarthy Tétrault

While the Liberal government recently announced it would honour the separate exploration deals struck between its Parti Québécois predecessors and oil juniors Pétrolia Inc., Junex Inc., and Corridor Resources, it is expected to wade through its incongruous energy position by adopting a cautious approach to oil and gas development that hinges on new studies and legislation before any production takes place. The provincial government said it will conduct a strategic environmental assessment on Anticosti and across the rest of the province that will lay the groundwork for an industry-wide framework expected to be sanctioned by a new law specifically tailored to the hydrocarbon industry. The prescriptive regime is a positive first step, says Daniel Bénay, a partner in business law group with McCarthy Tétrault in Montreal.

“When the Quebec government published the order in council, they wanted to say that this is a new game,” said Bénay. “The government is saying we have resources and are open for business but we have to do it in a respectful and thoughtful way, and that explains the prescriptive nature of the regime. That’s what this is all about.”

Under the prescriptive regime, ostensibly based on industry best practices, only stratigraphic surveys may be conducted on Anticosti Island. A holder of an exploration licence will be required to provide to the ministry a detailed outline of the work planned, certified by an engineer, at least 15 days before beginning work. The program must include a cost estimate and a site rehabilitation plan, a mitigation plan, an emergency measures plan, and one to protect forests against fire. The licensee will also be required to prove that the work takes into account the region’s geology, and must provide a performance guarantee equal to 10 per cent of the estimated cost of the work.

“The conditions are not more onerous than other conditions regarding exploration work,” said Bénay. “Some of the players are not happy but most of them are.”

Not everyone is convinced that the prescriptive regime is a step in the right direction. The *Mining Act* was designed to provide the minister with administrative control over the extractive industry and not to protect the environment, which is governed by the Quebec *Environmental Quality Act*, pointed out Hugo Tremblay, a law professor at the Université de Montréal. The laws have different aims and approach issues differently, added Tremblay.

“I can’t say that the ministerial order responds to the environmental concerns that might be present,” said Tremblay, a legal environmental expert.

The ministerial order represents in some ways the ad hoc approach taken by jurisdictions across the country, added Tremblay.

“Environmental law and natural resources law in general and at the moment, and in Quebec particularly, is a regulatory law that changes very quickly depending on the big projects that are at the table. It’s law but when you think about it, if you change a rule to fit your purpose every time something new comes up, then does it really provide some rule of conduct that you have to abide by?”

# Focus

FAMILY LAW




# Going it alone

## Survey paints troubled picture of litigants who represent themselves



**Nicholas Bala**
**John-Paul Boyd**

There is growing concern about the increasing numbers of family law litigants without representation, regarding the negative effects for these vulnerable individuals and their children, and about the costs for the justice system. Our recent survey of Canadian lawyers and judges confirms this is a serious and growing problem, but also reveals that the issues related to self-representation are complex and defy simple solution. While judges are striving to be fair to these who are self-represented, these litigants face significant challenges but also impose costs on those who have lawyers.

With the support of the Canadian Research Institute for Law and the Family and the collaboration of Rachel Birnbaum, we surveyed the lawyers and judges attending July's National Family Law Program at Whistler about a number of issues, including self-represented litigants. About a third of those attending participated in the survey.

The 176 respondents, 13 per cent of whom were judges, were from across Canada. Though the West was somewhat better represented—not surprising given the locale of the conference—there were no significant differences in the responses by region. Respondents were quite senior, with an average of 18 years' experience in their current profession.

In the past year, 15 per cent of lawyers' cases and 46 per cent of judges' cases involved a self-represented party for all of the litigation process. Further, 78 per cent of respondents reported that in their experience the number of self-represented family litigants increased over the past three years; only one lawyer reported a decrease.

The vast majority of respondents said the primary reason litigants represent themselves is because they can't afford to retain, or continue to retain counsel. However, half also said that some litigants choose to proceed unrepresented because they believe that they know enough to manage their case themselves. Further, 41 per cent said that some litigants think that counsel will increase the time and cost necessary to resolve their case, and 24 per cent thought that some believe that hiring counsel will exacerbate the adversarial nature of their case. Almost half of respondents think that men tend to be self-represented for somewhat different reasons than women, with women having primarily financial reasons for not having a lawyer, and men being more likely to proceed without a lawyer in the belief that this would not negatively affect the outcome for them.

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**Focus** FAMILY LAW

# Crafting a marriage contract that sticks

**Steven Benmor**

Marriage contracts, or "pre-nups," are meant to be relied upon when a couple separates. But how likely are they to be upheld? Here are some tips to increase the chances that the pre-nup will survive scrutiny.

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### Confidentiality

Pre-nup negotiations should not be multi-party. Even though the wealthier family may be the underlying reason for the contract, only the soon-to-be-married's and their counsel should be involved. This will avoid claims of undue influence or duress.

### Financial disclosure

Next to the discomfort of asking a fiancée to sign a pre-nup is the discomfort of providing full financial disclosure of each spouse's assets and debts. This is especially challenging if the wealth that is to be protected consists of shares of a privately held company. Forcing a valuation of a business can be cumbersome and costly. Nonetheless, it is preferable to incur a defined cost in advance, than risk an unpredictable and more costly result in the future (eg. order setting aside, costly retrospective valuation, sizeable equalization payment and large legal bill).

### Sunset clause

Pre-nups are often signed before a myriad of known and unknown future events. Newlyweds typically are about to start their lives together, have children, buy a home, build assets and grow as individuals and as a family unit. Moreover, there are many unknown eventualities such as changes in employment or career, relocation, failed pregnancies, late or multiple childbirths, medical or psychological impediments, religious decisions and other future events that simply cannot be anticipated. With so many opportunities for unpredictable future events, a sunset clause allows the couple to secure protection for smaller durations of time and, by doing so, increases the likelihood that a pre-nup will be upheld.

### Define protected assets

Far-reaching protections in pre-nups that leave the entire wealth of a family to one spouse (however originally obtained) increase the likelihood that the contract will be set aside. If the motivation is to protect shares of a privately held company, ownership of family real estate, a matrimonial home purchased before marriage or an interest in a trust, limit the protection to these defined assets and allow all other rights and obligations to be determined by current law.

### Joint assets

Allowing spouses to build joint assets achieves fairness, balance and a greater likelihood that the contract will be upheld. But ensure that the spouses' actions and financial dealings parallel the terms of the contract. Avoid any spillover of protected assets to joint assets, and vice-versa.

### Spousal support

If the contract addresses spousal support sums and duration, they should be scaled to the number of years of marriage and reflect the family's accustomed standard of living. Avoid a closed release of spousal support for no or little payment in cases where it is likely that a court would grant support, as it places the clause and the entire agreement at risk.

### Matrimonial home

It is advisable that a matrimonial home purchased after marriage be held and shared jointly, irrespective of equal or unequal contributions to its purchase. Ensure that monies protected by the pre-nup are not deposited into the matrimonial home in any way. If one spouse purchased the matrimonial home before marriage, the pre-nup may protect such interest so long as such provision does not limit the other spouse's possessory rights.

### Chattels, gifts and inheritances

Whether it be gifts from one another, the engagement ring, wedding gifts or any home furnishings purchased or received before or during marriage, make sure the pre-nup includes guidelines for the sharing of chattels. It is also important to set out a method to determine what was received individually, versus what is a joint asset.

### Create a parallel estate plan

It is critical that the wills and Powers of Attorney parallel the terms of the pre-nup and that those documents be re-done, if and when the contract expires and/or is re-negotiated. Discuss with estates counsel the suitability of the spouses naming one another as attorney in the Powers of Attorney, or trustee or beneficiary of wills.

### Ink on the wedding dress

A pre-nup is a process that is laden with emotion, as it typically occurs simultaneously with the planning of the wedding. It is not uncommon for a spouse to challenge the validity of a pre-nup many years or even decades after it was signed. Claims by the weaker spouse may include a lack of (or inadequate) financial disclosure, lack of (or poor) legal advice and representation, undue influence, duress, *non est factum*, misrepresentation and fraud. Pressure to sign a pre-nup within hours or days of the wedding, also known as "ink on the wedding dress" is most regularly used to void a pre-nup. Accordingly, the discussion of the pre-nup should be a far distance from the wedding date, should be managed carefully, slowly, fairly and with special consideration given to the weaker spouse.

***Steven Benmor is a fellow of the International Academy of Matrimonial Lawyers, a certified specialist in family law and chair of the Ontario Bar Association's family law section. He can be reached at steve@benmor.com.***

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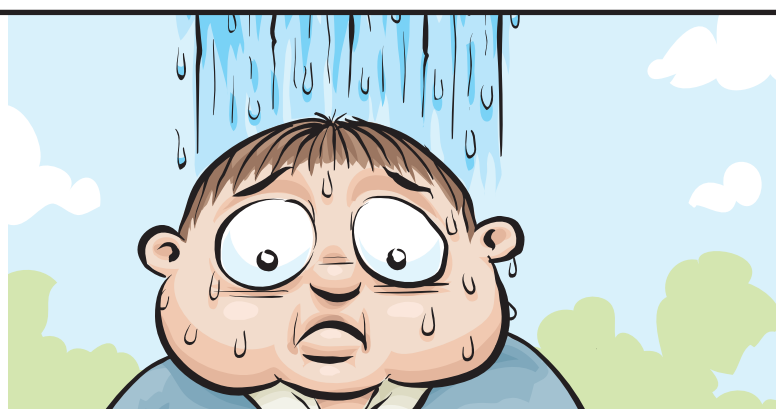

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## If you do the crime, don't post online

As a convicted felon recently found out, there is a lot of truth to the proverb that no good deed goes unpunished. Jesean Morris, 20, wanted for an outstanding warrant by Omaha police, was caught on a tip from someone who saw a video of him taking the ALS Ice Bucket Challenge, reports www.omaha.com. Morris, who had been on parole for a 2010 felony conviction for assault and use of a firearm during a crime, failed to keep his parole officer informed of his whereabouts and a warrant was issued for "absconding." In a fit of civic mindedness, Morris took the ice bucket challenge and posted a video of it to Facebook. To make matters worse, Morris allegedly gave the arresting officers a false name and birth date, spat on one of them and damaged the patrol car. He was booked on the original warrant plus suspicion of criminal impersonation, resisting arrest and assaulting an officer. Bail was set at a chilling US$40,000. – **STAFF**

**Focus** FAMILY LAW

# Courts have wide discretion for noncompliance


**Michael Stangarone**
**Ryan Kniznik**

A litigant who fails to obey an order or follow the Ontario *Family Law Rules* may find themselves subject to the wide discretion of the court to "deal with the failure by making *any order* that it considers necessary for a just determination of the matter." [Emphasis added.] The foregoing discretion, embedded in amended subrule 1(8) and new subrules 1(8.1)-(8.3) which came into force on Jan. 1, provides the court with the ability to craft creative remedies to address noncompliance. As stated by Justice Joseph Quinn in *Hughes v. Hughes* [2007] O.J. No. 1282, the word "including" contained within subrule 1(8) illustrates that the listed sanctions "are not the only arrows in the court's quiver."

The availability of creative remedies for noncompliance was stressed by Justice Deborah Chappel in *Levely v. Levely* [2013] O.J. No. 753, wherein she stated that a "judge should be as creative as necessary in crafting remedies so as to ensure that the noncompliance identified and the resulting damage to the other party are addressed as fully, justly and quickly as possible." The emphasis on utilizing creative remedies to address noncompliance is important in light of the pronouncement from the Ontario Court of Appeal in *Hefkey v. Hefkey* [2013] O.J. No. 1697, that the "civil contempt remedy is one of last resort" and it "should not be sought or granted in family law cases where…other adequate remedies are available." Consequently, while contempt is a remedy under subrule 1(8), other adequate remedies to address noncompliance should be sought prior to contempt.

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> [A] judge should be as creative as necessary in crafting remedies so as to ensure that the noncompliance identified and the resulting damage to the other party are addressed as fully, justly and quickly as possible.
>
> **Justice Deborah Chappel**
> Ontario Superior Court of Justice

In *Ignjatov v. Di Lauro* [2014] O.J. No. 3415, Justice Alison Harvison Young crafted a creative remedy to address the mother's failure to comply. In *Ignjatov,* the parties entered into minutes of settlement which required the mother to consent to the children's participation in First Communion and Confirmation religious sacraments which were to be organized by the father, and to consent to any preparation necessary to take part in the ceremonies. The father planned the First Communion and scheduled plans for the Communion weekend. He provided the mother with five months' notice of the important milestone. Despite the mother being made aware of the plans and never expressing any issues with the date, she removed the children from school on the day before the First Communion and cancelled the event via an e-mail sent the night before at the very last minute.

Justice Harvison Young found the mother's "abrupt cancellation of the First Communion" to be "shocking conduct," and found that the mother's conduct in general "reflects a systematic attempt to minimize and marginalize the father's role in his children's lives." The court further stated that "given the fact that…the Mother's conduct was a serious and unjustifiable breach of the Minutes, and reflects an unfortunate pattern of conduct on her part, it is important that it be sanctioned and that she understands that such actions will have consequences." The court accordingly ordered the rescheduling of the Communion, a police enforcement clause if access was denied again, a non-disparagement order prohibiting the mother from involving the children in adult issues, and child-appropriate cellphones programmed so that the father could reach his children while in her care. The mother had prevented telephone access and had even changed her phone number without giving the father the new number. The children had reported that the mother and her husband had called the father names such as "donkey." The mother was also ordered to pay $1,261.76 to the father for the costs incurred as a result of her cancelling the festivities of the First Communion weekend.

In *Myers v. Myers* [2014] O.J. No. 1350, Justice Helen MacLeod-Beliveau resorted to subrule 1(8) to craft creative remedies in response to the father's "deliberate, willful and blatant" non-compliance with numerous court orders pertaining to support and costs. Justice MacLeod-Beliveau struck the father's motion to change and precluded him from bringing any further motions to change until all his support arrears and cost orders were paid in full. Justice MacLeod-Beliveau also relied upon subrule 1(8) to prevent future motions to change brought by the father from proceeding unless the ongoing support orders were in good standing. Subrule 1(8) was also used to require the father to post security for costs in the sum of $25,000 if he brings any future motions to change. Lastly, Justice MacLeod-Beliveau ordered costs of the motion pursuant to subrule 1(8)(a).

The foregoing decisions illustrate that subrule 1(8) of the rules is a discretionary judicial tool for creating effective remedies to address noncompliance. The subrule can be invoked in order to ensure that cases are adjudicated justly, the integrity of the justice system is upheld, and to inform litigants that noncompliance has consequences.

***Michael Stangarone, a partner with MacDonald & Partners, and Ryan Kniznik, an associate lawyer with MacDonald & Partners, practice family law exclusively.***

# **Unrealistic:** Mandatory information programs and paralegal involvement urged

**Continued from page 12**

When litigants proceed without counsel, 83 per cent of respondents said that settlement before trial is less or much less likely when one party is self-represented, and 47 per cent said that settlement is less or much less likely when both parties are self-represented. This low rate of settlement may be attributable to unrepresented parties' assumptions about how their cases will turn out. Almost half of the judges and two-thirds of lawyers said that self-represented parties always or usually have unrealistically high expectations for the outcome of their cases.

Making matters worse, cases involving unrepresented litigants tend to take longer to resolve than cases in which all parties are represented. More than 90 per cent of respondents said that challenges always or usually arise because of self-represented litigants' unfamiliarity with the law of evidence, the legislation applicable to their case, the rules of court, and hearing and trial processes. Less than six per cent of respondents said that these problems arise only sometimes or rarely.

When cases involving self-represented litigants are resolved, their unrealistic expectations of outcome pair with results that are worse than what would have been achieved with counsel. However, two-thirds of respondents believe that judges treat self-represented parties "very fairly," and only one thought that judges treat these litigants unfairly. The perception is that self-represented litigants do worse than represented litigants on economic issues. They may do a slightly better job with parenting issues, but only six per cent of respondents said that self-represented litigants achieve better results on parenting arrangements, and only two per cent said they achieve better results on support issues.

Litigants without counsel are often caught in a downward spiral. They generally have unrealistically high expectations for the outcome of their cases, which reduces the likelihood that their cases will be resolved without trial. When they do proceed to trial, their lack of knowledge of the governing legislation, the rules of evidence, the rules of court and court processes frequently causes additional problems and doubtless increases the length of trials and the number of adjournments, and when their trials do complete, self-represented parties usually achieve worse results than they would have with counsel. Not surprisingly given these results, 84 per cent reported that the fact that one party is self-represented increases the cost of dispute resolution for a represented party.

Respondents were also asked their views on how to improve self-represented litigants' use of the court system. Almost half the judges and more than a third of the lawyers said that it would help to have plain-language guides to court processes, the rules of evidence and the legislation. More than a third of judges and almost half of the lawyers support requiring parties to attend a mandatory information program following the commencement of proceedings. About half of the judges and lawyers supported giving paralegals a limited role in family law disputes.

Interestingly, the measures that received the least support included actually simplifying court processes, the rules of evidence and legislation, or the appointment of counsel as *amicus curiae*. When all parties are unrepresented, about a quarter of judges and lawyers support the adoption of an inquisitorial approach, and 23 per cent of judges and 36 per cent of lawyers supported the use of a mediation-litigation hybrid process, in which judicial mediation is attempted and trial ensues if settlement is not achieved.

***Nicholas Bala is a professor of law at Queen's University, and John-Paul Boyd is the executive director of the Canadian Research Institute for Law and the Family.*** ***They gratefully acknowledge the collaboration of Dr. Rachel Birnbaum of Western University in this study.***

**Focus** FAMILY LAW

# Start by picking the right resolution method

**Lorne Wolfson**

Family lawyers have available a broad array of dispute resolution options, including collaborative negotiations, mediation, arbitration, mediation/arbitration, arbitration/mediation, or litigation. Determining the best option to recommend to one's client is often the most important decision that the family law lawyer must make. Some of the factors to consider are set out below.

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### Timeliness

Many family law clients complain of the slow progress of negotiations. Since there is no timetable or externally imposed deadlines, negotiations can drag on indefinitely. Often a party can exploit this to his advantage (for example, by delaying negotiations to establish a financial or custody/access status quo). Mediation is often an improvement, since the mediator can try to get the parties to consent to deadlines and can encourage compliance. While litigation offers a more formal structure that imposes deadlines and provides consequences for delay, that same formality is often slow and cumbersome, particularly where the courts are backlogged. Arbitration and med-arb are often the best compromises, in which the arbitrator can ensure that the case proceeds on a timely basis.

### Availability

Unlike the court system (where dates for motions, conferences and trials can be weeks if not months down the road), mediation, arbitration, and med-arb can provide hearing dates within four to six weeks and quick access (often within 24 hours) to the neutral to resolve urgent issues.

### Finality

Where a negotiated resolution is not possible, family law clients usually want a resolution that will provide finality. Appeals from court decisions can drag on for months. Most arbitration agreements provide for very limited rights of appeal. Courts have shown considerable deference to the decisions of family law arbitrators and have rarely interfered with their decisions.

> Most arbitration agreements provide for very limited rights of appeal. Courts have shown considerable deference to the decisions of family law arbitrators and have rarely interfered with their decisions.
>
> **Lorne Wolfson**
> Torkin Manes

### Cost effectiveness

Where both parties and their counsel are reasonable and the issues are not complex, a negotiated agreement should be the most cost-efficient solution. Where the involvement of a neutral is required, the cost-effectiveness of each dispute resolution option varies from case to case. While a successful mediation will usually be less costly than litigation, an unsuccessful mediation followed by litigation will likely be more costly than litigation alone. Similarly, a mediation/arbitration that settles in the mediation phase will be significantly less costly than a case that requires both a mediation and an arbitration.

### Selection of the neutral

Unlike litigation (where the parties have no say in the selection of their judge), in mediation and arbitration the parties have the opportunity to choose their neutral. By doing so, they can choose a person with expertise in the area of the dispute (for example, a mental health professional to determine custody/access issues, or a financial expert to deal with money issues). This usually results in a more efficient process in which the parties have greater confidence in the integrity of the process and the quality of the result.

### Privacy

For many family law clients, maintaining privacy outweighs all other considerations. Many seek to ensure that the details of their broken marriages, custody/access disputes, financial information, and business secrets are kept confidential. It is very difficult to obtain a court order sealing a court file. As a result, many parties favour mediation or arbitration in order to obtain a greater degree of confidentiality, although even in these forums there are limits to the privacy that can be guaranteed.

### Maintaining relationships

Unlike the parties to most other legal disputes, family law clients usually have to deal with each other for many years after the case is over. Adversarial options (litigation and arbitration) will usually destroy whatever opportunity for an ongoing relationship that might otherwise have remained. Negotiation and mediation often provide a forum for finding a common resolution and an opportunity to rebuild damaged relationships.

### The personalities

A family lawyer needs to assess what dispute resolution alternative best suits the parties and the lawyers in the particular case. The lawyer should consider each party's expectations, financial resources, need for an early resolution, desire to salvage the relationship, ability to withstand the pressure of the adversarial process, emotional maturity, ability to compromise, and any power imbalances. As well, the lawyer must consider each of the lawyers' personalities, dispute resolution preferences, ability to work co-operatively, ability to control her or his client, and willingness to consider dispute resolution alternatives and to give up control of the process. A related factor is the relationship between the lawyers, their history of resolving previous cases, the level of respect and trust between them, and the need for a third-party control of either or both counsel.

### Timing

The final factor is timing — whether the parties are ready to settle, have the disclosure they require to make an informed decision, have invested so much money and energy in the litigation process that they cannot see abandoning that course, or whether they have tried certain processes without success or are simply financially, physically, and emotionally exhausted.

*Lorne Wolfson is a Toronto family lawyer, mediator and arbitrator with Torkin Manes.*

# Focus

ABORIGINAL LAW

## Unwelcome disclosure

### Capacity funding, competition questions mar First Nations finance act



**Sean Jones**

Recently, the *First Nations Financial Transparency Act* (FNFTA) attracted media attention for requiring First Nations to post on the Internet their audited consolidated financial statements and all remuneration paid to Chiefs and councillors. The requirements will do little to improve the financial accountability of First Nations to their members or the federal government—the putative objective of the FNFTA. However, the FNFTA's public disclosure requirements may affect the negotiation of impact benefit agreements (IBAs) and capacity funding for consultation.

First Nations function as both governments and as commercial enterprises. As owners of business enterprises, First Nations may generate their own revenue, often in property development, resource extraction or support services for resource development. Through IBAs, First Nations businesses may receive direct payments for access to resources on their traditional territory and may receive favourable procurement opportunities. Chiefs and councillors already owe enforceable fiduciary duties to their communities in respect of those assets and revenues.

As governments, First Nations may receive monies collected from the use of on-reserve real property, treaty payments, on-reserve taxes and federal contribution agreements funding services like health care, education and roads. Except for treaty payments, reporting regimes exist for these revenue streams. A 2002 Auditor General's report found that each First Nation submits, on average, 168 reports per year to account for federal funding. A 2006 follow-up report concluded this reporting burden had not been streamlined. Under the funding agreements with the federal government, First Nations must submit, among other reports, audited consolidated financial statements and a schedule of all remuneration received by Chiefs and councillors (either in their capacity as an elected official or any other capacity, including as an employee of a First Nations business) to Aboriginal Affairs and Northern Development Canada (AANDC). They must also provide their members access to those documents. As recently as 2009, the Federal Court of Appeal, in *Sawbridge v. Canada*, confirmed AANDC may release those documents to a band member if the First Nation does not. AANDC can also withhold funding if reporting is not timely or adequate and impose other measures, such as third-party management, if the funding provided is not used according to stipulated conditions.

The FNFTA adds little to this existing regime: the audited consolidated financial statements and schedule of remuneration must now be posted on the Internet. AANDC can require the First Nation to develop a plan to comply with the FNFTA's requirements, withhold funding or terminate funding agreements if the documents are not posted. Any member of a First Nations, or "any person" including the minister, may apply for a court order compelling a First Nation to post those documents. The FNFTA does not streamline the burdensome number of reports that First Nations produce and the government must review each year, as the Auditor General recommended in 2002 and 2006. Nor does it appoint a First Nations Auditor General, as recommended by the 1996 Royal Commission on Aboriginal Peoples.

**Transparency, Page 17**

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**Focus** ABORIGINAL LAW

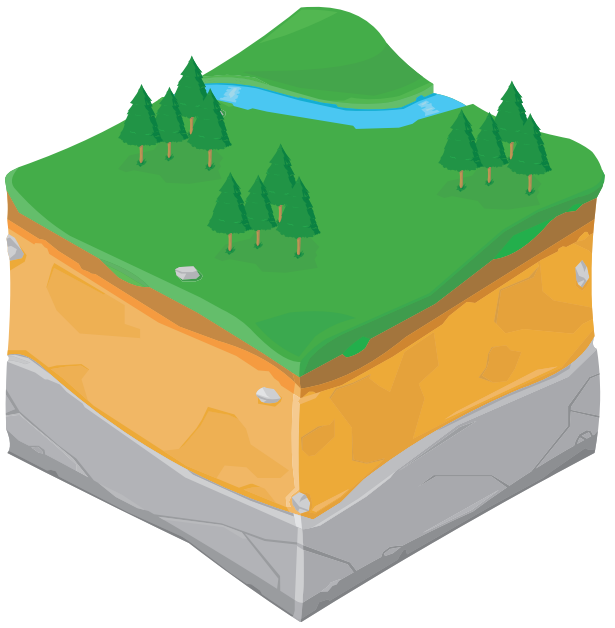
# Aboriginal title now based on territorial occupation

**Pierre-Christian Labeau**

Last June, the Supreme Court of Canada in the *Tsilhqot'in* case made a declaration of aboriginal title, a first in Canada. At the heart of the appeal in *Tsilhqot'in*, the court had to determine whether a semi-nomadic people could have title to their traditional lands.

The people of Tsilhqot'in Nation live in villages in central British Columbia, where they have managed lands for foraging roots and herbs, hunted and trapped, repelled invaders and set terms for the European traders who came on to their land. There are no adverse claims from other aboriginal groups. Was this sufficient to establish aboriginal title to approximately five per cent of what the Tsilhqot'in people regard as their traditional territory?

The declaration of aboriginal title in this case comes after the *Marshall* and *Bernard* decision (*R. v. Marshall; R. v. Bernard* [2005] S.C.J. No. 44), which many commentators had seen as significantly curtailing the possible application of the doctrine of aboriginal title. In *Marshall* and *Bernard*, the court dismissed Mi'kmaq claims of aboriginal title which were based on their having hunted and fished in the area for many generations before the arrival of the Europeans. As a result of this decision, it was believed aboriginal title would be much harder to prove, and may be found to exist only in relatively small areas. By stating that, "Typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right," and not an aboriginal title, some thought it was conceivable that subsequent court decisions may determine that title is limited to lands approximating the existing reserves.



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> **In Tsilhqot'in, the Supreme Court explained that a culturally sensitive approach is required in order to decide if occupation is sufficient.**
>
> **Pierre-Christian Labeau**
> Norton Rose Fulbright

On this issue Chief Justice Antonio Lamer, in *Delgamuukw v. British Columbia* [1997] S.C.J. No. 108, sent ambiguous messages regarding the possibility that nomadic or semi-nomadic groups could establish aboriginal title. He had reiterated his remarks held in the *Adams* ruling, saying it was not certain that these groups could claim a title when they "varied the location of their settlements with the season and changing circumstances," while including in the examples of occupations likely to be considered sufficient "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" and adding that the court will take into account the group's size, way of life, available resources, and the character of the lands.

To ground title, the court held in *Delgamuukw* that aboriginal occupation must possess three characteristics: it must be sufficient, continuous and exclusive. In *Tsilhqot'in*, the trial judge decided that occupation is established by showing regular use of sites or territory. The Court of Appeal opted for a narrower definition. Title will be recognized if the aboriginal group demonstrates that its ancestors intensively used a definite tract of land with reasonably defined boundaries. For semi-nomadic aboriginal groups like the Tsilhqot'in, the Supreme Court explained that the Court of Appeal's approach will result in small islands of title surrounded by larger territories where the group possesses only aboriginal rights such as hunting and trapping. By contrast, following the trial judge's approach, the group would enjoy title to all the territories that its ancestors regularly and exclusively used at the time of assertion of European sovereignty.

In *Tsilhqot'in*, the Supreme Court explained that a culturally sensitive approach is required in order to decide if occupation is sufficient. The analysis must be based on the perspectives of the aboriginal group in question — its laws, practices, size, technological abilities and the character of the land claimed — and the common law notion of possession as a basis for title.

The Supreme Court clearly rejected the proposal that title is confined to specific villages or farms. Regular use of territories for hunting, fishing, trapping and foraging is sufficient use to ground aboriginal title, provided that such use, in a particular case's facts, supports an intention on the part of the aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law. This means that the analysis must take into account the common law perspective and the aboriginal perspective.

Sufficiency of occupation is a context-specific inquiry, and the characteristics of the aboriginal group asserting title as well as the character of the land will have an impact on the intensity and frequency of the use.

The aboriginal group must show it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belongs to, was controlled by, or was under the exclusive stewardship of the claimant group.

The *Tsilhqot'in* case means a return to an equal role for aboriginal perspectives that includes aboriginal laws, instead of the exclusive focus on aboriginal practices that was a feature of *Marshall* and *Bernard*. Concerning aboriginal title, *Tsilhqot'in* clarifies that occupation is territorial and not site-specific.

***Pierre-Christian Labeau is a partner at the Québec office of Norton Rose Fulbright in Canada and chair of the aboriginal law team.***

# **Transparency:** Sensitive information available to third parties

**Continued from page 16**

Some First Nations have objected to the FNFTA due to lack of consultation and the absence of any reciprocal requirement for the AANDC to be transparent about its criteria for determining the funding First Nations receive for services. Most importantly, First Nations have objected to reporting on businesses they hold: although other governments report on government-owned entities, those entities are usually created to deliver government services and do not compete in the commercial mainstream, whereas First Nations' businesses often compete against mainstream commercial enterprises for contracts. Many First Nations believe they will face a competitive disadvantage if this information is disclosed. In a 1988 case, *Montana Band of Indians v. Canada*, the federal court agreed, at least partially. A journalist had requested the release of a First Nation's financial information. The court found the information was confidential and should not be released, even though the court also found its release would not result in a material financial loss or competitive prejudice.

Much has changed since 1988. Since the 2004 *Haida* decision, First Nations have been leveraging the Crown's obligation to consult on asserted Aboriginal rights to reach IBAs with industry. Given that First Nations are now using constitutionally-protected rights to their commercial advantage, the policy reasons for keeping the financial information of First Nations' businesses has changed. Regrettably, this important issue does not appear to have been debated prior to enacting the FNFTA. Undoubtedly, proponents negotiating IBAs with First Nations will use publicly available financial information to whatever advantage they can, but given the consolidated nature of the public information, it remains to be seen how much advantage will be gained.

The FNFTA's disclosure requirements may have the greatest effect on capacity funding. Although the courts have been clear that consultation is not adequate if First Nations lack the capacity to engage it meaningfully, the courts have not been definitive about who is responsible for providing capacity funding. First Nations often cite the lack of capacity funding as an impediment to meaningful consultation. Regulators and proponents routinely provide First Nations with capacity funding to help ensure that consultation will be meaningful. Proponents, regulators and the courts are all starved for better information about First Nations' capacity for consultation. They will likely use the newly disclosed information to test First Nations' requests for capacity funding. Despite the need for greater clarity on First Nations' financial capacity for consultation, this issue was not canvassed in the debate leading up to the government's enactment of the FNFTA.

Overall, the FNFTA is a feeble attempt to address the important issue of First Nations' financial accountability. It does little to improve First Nations' accountability to their members or the federal government. Instead, its main effect is to put information that many First Nations consider sensitive and confidential into hands of third parties with little thought to the implications of that disclosure.

***Sean Jones is an associate in the environmental, municipal, expropriation and regulatory group in the Vancouver office of Borden Ladner Gervais. His practice focuses on Aboriginal law and environmental law.***

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# Digest

## Aboriginal Law

**ABORIGINAL LANDS**
Types - Reserve lands - Title and ownership - Nature of interest - Certificates of possession - Transfer and disposition - Ministerial approval

Appeal by Miracle from an order enforcing the transfer of certain Certificates of Possession against four parcels of land allotted to Miracle, a Band member, and located on reserve lands to satisfy the Mohawk Band's damages and costs judgment against Miracle. Miracle purchased from Brant a building and land within the reserve that Brant, another band member, had never actually paid for or occupied lawfully. Ultimately, Miracle was enjoined from occupying the land and buildings and damages were awarded to the Mohawks of the Bay of Quinte First Nation ("MBQ") for years of unauthorized use. The MBQ obtained writs of seizure and sale against certain Certificates of Possession held by Miracle to secure its judgment. The parcels of land that were the subject of the Certificates were not the lands at issue in the trial. After some years of having no success in enforcing the judgment, the MBQ sought authorization to sell the Certificates of Possession. Miracle was ordered to complete any documents required to transfer the Certificates and submit them to the Indian land registrar. The sale of the Certificates was ordered to proceed subject to the approval of the Minister.

**HELD:** Appeal dismissed. The Superior Court had jurisdiction over the transfer of Certificates of Possession. As holder of the Certificates of Possession, Miracle had only a possessory interest in lands owned in fee simple by the Crown. The Certificates were items of personal or real property not considered reserve lands themselves, and as such, was subject to seizure, on the condition that the Crown consented to such seizure.

**Mohawks of the Bay of Quinte v. Brant, [2014] O.J. No. 3605, Ontario Court of Appeal, R.J. Sharpe, H.S. LaForme and M.H. Tulloch JJ.A., July 30, 2014. Digest No. 3419-001**

## Alternative Dispute Resolution

**BINDING ARBITRATION**
Commercial arbitration awards - Appeals and judicial review - Jurisdiction of the court to review

Appeal by Sattva Capital Corp. (Sattva) from two judgments of the British Columbia Court of Appeal, one setting aside a decision denying Creston Moly Corporation's (Creston) leave to appeal an arbitrator's decision and another overturning the arbitrator's decision. The issues in the case arose out of the obligation of Creston to pay a finder's fee to Sattva. The parties agreed that Sattva was entitled to a finder's fee of US$1.5 million and was entitled to be paid this fee in shares of Creston, cash or a combination thereof. They disagreed on which date should be used to price the Creston shares and therefore the number of shares to which Sattva was entitled. The parties entered into arbitration pursuant to the Arbitration Act (AA). The arbitrator found in favour of Sattva. Creston sought leave to appeal the arbitrator's decision pursuant to s. 31(2) of the AA. Leave was denied by the British Columbia Supreme Court. Creston successfully appealed this decision and was granted leave to appeal the arbitrator's decision by the British Columbia Court of Appeal. The British Columbia Supreme Court judge who heard the merits of the appeal upheld the arbitrator's award. The British Columbia Court of Appeal overturned this decision and found in favour of Creston.

**HELD:** Appeal allowed. Appeals from commercial arbitration decisions were narrowly circumscribed under the AA. In order for leave to be granted from a commercial arbitral award, a threshold requirement had to be met: leave had to be sought on a question of law. Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law. However, the historical approach should be abandoned. Contractual interpretation involved issues of mixed fact and law, as it was an exercise in which the principles of contractual interpretation were applied to the words of the written contract, considered in light of the factual matrix. Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract was a question of fact. The Court of Appeal erred in finding that the construction of the agreement constituted a question of law. The conclusion that Creston's application for leave to appeal raised no question of law was sufficient to dispose of the appeal. However, even had the Court of Appeal properly identified a question of law, leave to appeal should have been denied. The requirement that there be arguable merit that the arbitrator's decision was unreasonable was not met and the miscarriage of justice threshold was not satisfied. Further, even if the Court of Appeal had identified a question of law and the miscarriage of justice test had been met, it should have upheld the Superior Court's denial of leave to appeal in deference to that court's exercise of judicial discretion. In the context of commercial arbitration, where appeals were restricted to questions of law, the standard of review was reasonableness, unless the question was one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise, which was not the case here. Here, the arbitrator's reasoning met the reasonableness threshold of justifiability, transparency and intelligibility.

**Sattva Capital Corp. v. Creston Moly Corp., [2014] S.C.J. No. 53, Supreme Court of Canada, McLachlin C.J. and LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ., August 1, 2014. Digest No. 3419-002**

## Civil Litigation

**CIVIL PROCEDURE**
Parties - Class or representative actions - Certification - Common interests and issues - Representative plaintiff

Appeal by Good from a judge's decision refusing to certify her proceeding against the Crown and Toronto Police as a class action. The basis of the action was the detention of various groups of demonstrators in different locations in Toronto during the 2010 G20 summit. It was alleged these detentions were arbitrary and unlawful because they were based on a single command order and did not take into account the individual situations of each person detained to determine whether such individuals had committed an offence. Subsequent to the dismissal of the certification motion, the pleadings had been amended, representative plaintiffs other than Good had been dropped, and a second representative plaintiff, Taylor, had been added.

**HELD:** Appeal allowed. The claim was adequately pleaded. There was a single course of conduct alleged and the proposed subclasses of different demonstrators had the commonality of a single command order being made ordering their detention. Good provided sufficient evidence to support the proposition that demonstrators at the different locations were arbitrarily detained and denied access to counsel. These were common issues, along with the aggregate and punitive damages to which the plaintiffs were entitled. A class action was the preferable procedure to deal with the various claims, as it was unlikely individual plaintiffs would seek individual relief through the legal system, and because of the importance of the goal of behaviour modification. Good and Taylor were appropriate representative plaintiffs as demonstrators who had been detained.

**Good v. Toronto (City) Police Services Board, [2014] O.J. No. 3643, Ontario Superior Court of Justice, D.R. Aston, I.V.B. Nordheimer and M.T. Linhares de Sousa JJ., August 6, 2014. Digest No. 3419-003**

**CIVIL PROCEDURE**
Appeals - Moot issues - Powers of appellate court - Orders necessary to safeguard rights of parties

Application by Jane Doe to reopen an appeal. Crown prosecutors commenced a proposed class action against the Crown in Right of Alberta. They sought a declaration that publication of their names and salaries as part of a government disclosure initiative breached their employment agreement, the Charter and privacy legislation. The prosecutors were also concerned that the proposed publication raised personal safety issues. They sought interim and permanent injunctive relief. Jane Doe, on behalf of the prosecutors, obtained an interim injunction pending trial enjoining Alberta from publishing general personal information of any prosecutor. The Court of Appeal lifted the injunction in light of assurances received from Alberta that an alternative legal process was available to resolve the issues between the parties. Individual prosecutors had 30 days to seek a personal exemption from publication of their job and salary information, failing which publication would occur. Those who were denied an exemption were granted a right of judicial review. Jane Doe sought to reopen the Crown's appeal on the basis that she had already been denied an exemption at the time Alberta argued the appeal from the interim injunction.

**HELD:** Application dismissed. The motion for leave to re-hear the appeal was effectively moot. Jane Doe received a preliminary denial of a personal exemption. Disclosure of her salary information was held in abeyance pending the outcome of her judicial review proceedings. The legal issues which were the foundation of the parties' dispute were now safely in the hands of the Court of Queen's Bench inside the framework of a motion for judicial review. There was therefore no need to revive the appeal, even assuming the criteria for doing so were met.

**Doe v. Alberta, [2014] A.J. No. 787, Alberta Court of Appeal, J. Watson, B.K. O'Ferrall and T.W. Wakeling JJ.A., July 31, 2014. Digest No. 3419-004**

## Criminal Law

**APPEALS**
Grounds - Miscarriage of justice

Appeal by Al-Enzi from his first degree murder conviction. Al-Enzi was charged jointly with Kazem for the murder of Zalal. A third accused was sentenced as an accessory after the fact to the murder and gave evidence implicating Al-Enzi as the planner and shooter and Kazem as the driver of the car in which the murder took place. Al-Enzi implicated Kazem and claimed he was at the Exhibition with his wife, then at a nightclub, when the murder took place. Like the Crown, Kazem sought to convince the jury that the third accused was telling the truth. Al-Enzi's counsel was forced to withdraw during the course of the trial. He made it clear this was not Al-Enzi's fault, although the judge inferred Al-Enzi was directly or indirectly responsible. An extensive search throughout Ontario for a new lawyer for Al-Enzi was unsuccessful, as no experienced counsel was willing to continue the trial. Al-Enzi's application to sever his trial from Kazem's was unsuccessful. Amicus was appointed for Al-Enzi. Al-Enzi continued to assert his right to counsel, but the judge found this was trumped by the right of his co-accused and the Crown to have the trial continue before the same judge. Kazem was ultimately acquitted and Al-Enzi convicted.

**HELD:** Appeal allowed and new trial ordered. This was an exceptional case in which the interests of justice demanded that Al-Enzi be given a new trial so he could be defended throughout by his

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own counsel. Al-Enzi had not insisted that a particular lawyer be permitted to represent him at a severed or new trial. The judge based his decision not to order severance on the erroneous inference that Al-Enzi was unreasonably seeking to enforce his right to counsel of choice. There was no evidence to support the judge's position that Al-Enzi was to blame for his counsel's withdrawal. The judge also erred in relying on Al-Enzi's substantial criminal record in assuming he was familiar enough with the criminal justice system to handle his own defence. This was too complex a case and too serious a charge. Al-Enzi was facing off against experienced lawyers representing the Crown and Kazem. He was not clearly trying to frustrate the proceedings by orchestrating a severance. He made genuine attempts to find a new lawyer. Even with an expanded role, amicus was not an adequate substitute for counsel. The trial judge's ruling deprived Al-Enzi of the reality and appearance of a fair trial and produced a miscarriage of justice.

**R. v. Al-Enzi, [2014] O.J. No. 3608, Ontario Court of Appeal, J.I. Laskin, S.T. Goudge and D. Watt JJ.A., July 31, 2014. Digest No. 3419-005**

### CRIMINAL CODE OFFENCES

Impaired driving or driving over the legal limit - Breathalyzer or blood sample demand - Reasonable and probable grounds

Appeal by the Crown from a summary conviction appeal judgment acquitting the accused, Rezansoff, of failure to comply with a breath sample demand. The accused's vehicle was stopped after two 911 reports of a vehicle swerving on the highway and a near collision. A third witness described being forced into the ditch by the accused's driving. Police located the accused's vehicle and pulled him over. The officer observed slow and deliberate movements and glassy eyes, and detected an odour of alcohol from the accused's breath. A case of beer was between the front seats. The accused was arrested for impaired driving. Thereafter, he exhibited unsteady balance. The accused was charged with refusal after failing repeatedly to properly blow into the breathalyzer. At trial, the accused claimed he was unlawfully detained and arrested, and submitted that there were insufficient grounds for a breath sample demand. The accused sought exclusion of the evidence based on breaches of his ss. 8, 9 and 10(b) Charter rights. The trial judge acquitted the accused of impaired driving on the basis that there were insufficient grounds to stop the accused. The trial judge found that the officer's observations post-arrest were admissible pursuant to s. 24(2), and were sufficient to sustain a conviction for refusal. The summary conviction appeal court judge set aside the conviction on the basis that the breath sample demand was invalid due to the unlawfulness of the arrest. The Crown appealed.

**HELD:** Appeal allowed. The summary conviction appeal judge erred in law by temporally conflating the lawfulness of the arrest and the lawfulness of the breath sample demand. Neither the trial judge nor the summary conviction appeal judge directed their minds to the lawfulness of the demand as a component of a distinct offence from impaired driving. It was clear that all of the observations both prior to and after the arrest made by the arresting officer would fully support a demand for a breath sample. No Charter breach was established. The refusal conviction was restored.

**R. v. Rezansoff, [2014] S.J. No. 418, Saskatchewan Court of Appeal, J.G. Lane, M.J. Herauf and P.A. Whitmore JJ.A., June 23, 2014. Digest No. 3419-006**

## Employment Law

### CONTRACT OF EMPLOYMENT

Express terms - Duration - Fixed term contract - Renewals - Remuneration - Severance pay

Appeal by the defendants, Cardel Homes and Cardel Construction, from a judgment entitling the plaintiff, Thompson, to contractual severance pay. The parties entered into two fixed-term contracts. The 2008 agreement had a two-year term and provided for a 12-month severance payment in the event of non-renewal. The second agreement was for a one-year term and did not provide for a severance payment in the event of non-renewal. The employer had absolute discretion to terminate the second agreement at any time with four weeks' written notice, in which case the employee was entitled to a 12-month severance payment for early termination. One month before the second agreement's term expired, the defendants advised the plaintiff that his contract would not be renewed and that he was not required to work for the remainder of the term. The letter advised that the plaintiff would be paid until the end of the term and requested the return of certain workplace items. The plaintiff was sent home and his work email was terminated. At issue at trial was whether the defendants had terminated the plaintiff's employment, or merely given advance notice of non-renewal of the employment agreement. The trial judge found that the plaintiff was terminated without cause by way of constructive dismissal. The plaintiff was thus entitled to the contractual severance payment of 12 months' salary. The defendants appealed.

**HELD:** Appeal dismissed. The defendants' letter and actions, viewed objectively, constituted a termination. The plaintiff was not permitted to continue his employment or attend the office. There was an immediate and substantial change in the plaintiff's status and his employment-related powers. The defendants' letter went beyond notice of non-renewal by instructing immediate return of keys and computer items, and informing the plaintiff that his functions would immediately be assumed by the company's president. The plaintiff did not agree to an early termination or to a change in the terms of his employment. The trial judge's finding of a termination without cause did not disclose any error. The plaintiff was accordingly entitled to the severance payment contemplated by the parties' agreement.

**Thompson v. Cardel Homes Limited Partnership, [2014] A.J. No. 785, Alberta Court of Appeal, P.W.L. Martin, B.K. O'Ferrall and B.L. Veldhuis JJ.A., July 31, 2014. Digest No. 3419-007**

## Family Law

### CHILD PROTECTION

Protective agencies and institutions - Supervision or guardianship – Considerations - Best interests of child - Permanent appointment or Crown wardship

Appeal by the mother from an October 2013 order placing her three children in the permanent care and custody of the Minister without access. The children were 15, eight and two years old, respectively, at the time of the order. The two older children were first taken into care in 2006 following the father's violent assault on the mother. They were returned to the mother's supervised care within two months, on conditions prohibiting the father from having any contact and the mother from using alcohol or drugs. Supervision of the mother's custody ended. The mother and father reconciled and had the third child, in 2011. In early 2012, authorities learned the oldest child and the mother had been engaging in physical altercations, and that the father, while not apparently living in the home, was frequently at the home and fighting with the mother. Supervised custody was reinstated, again with prohibitions on the father having any contact with the family and the mother using alcohol, drugs or any form of physical discipline on the children. In the summer of 2012, the oldest son beat the mother severely as she held the youngest child in her arms and called for help. The children were placed in the temporary care and custody of the Minister, with supervised access to the parents. During the mother's supervised access, the mother and children were observed swearing at and using violence on each other. Although she claimed she had severed her relationship with the father for good, the mother helped to hide him when the authorities came to her home. Psychologists and therapists who had worked with the family indicated the mother had insight into the negative impact her relationship with the father was having on the children, but was unable to resist continuing her relationship with him. The psychologist acting as guardian ad litem for the younger two children indicated they had behavioural and emotional problems from their exposure to conflict and violence in the home that had improved since they had been in the Minister's care. In ordering permanent care and custody without access, the judge found that it was their best interests not to be exposed to any further family violence, which was inevitable if they were returned to the mother's care.

**HELD:** Appeal dismissed. The judge's finding that a permanent care and custody order without access was in the children's best interest was supported by cogent evidence and bore no palpable or overriding error. There was ample evidence establishing that the violent relationship between the mother and father would continue. The oldest child remained a risk to expose the younger children and mother to more violence. The mother was unable to control her behaviour. Less intrusive alternatives to permanent care and custody had already been implemented without success.

**S.A.D. v. Nova Scotia (Minister of Community Services), [2014] N.S.J. No. 419, Nova Scotia Court of Appeal, J.E. Fichaud, D.R. Beveridge and J.E. Scanlan JJ.A., August 1, 2014. Digest No. 3419-008**

### MARITAL PROPERTY

Equalization or division - Considerations - Needs of parties - Unequal division of property - Matrimonial home.

Appeal by the husband from an order dealing with child and spousal support and the apportionment of the family home. After living together for 13 years, the parties married in 2003, had two children, and separated in 2010. The husband worked in the field of mineral exploration during the marriage, while the wife took on a more traditional role caring for the children. The husband earned close to $1 million per year by the time of separation. He moved out at the wife's request and purchased a new residence. He paid $18,000 per month to the wife to cover spousal and child support, commencing in July 2011. This figure was based on an income of $660,000 as stated in a July 2011 financial statement. The parties' home was reapportioned 65 per cent in favour of the wife. The husband's income for support purposes was set at $1 million, resulting in an order requiring him to pay $24,124 for spousal support and $12,814 for child support each month.

**HELD:** Appeal dismissed. The husband failed to discharge the burden on him to prove that guideline level child support was inappropriate because his income was so high. The award of support was appropriate given the children's expenses as agreed upon by the parties, the lifestyle they enjoyed prior to separation and the values and aspirations the parties had for the children. The spousal support award was an appropriate exercise of the judge's discretion in light of the traditional role the wife played in the marriage, the special needs of one of the children, the unlikelihood of the wife being able to re-enter the workforce anytime soon, and the opportunity to build his career and earning potential the wife's efforts provided. The reapportionment of the family home, despite the substantial spousal support award, did not constitute double recovery in the circumstances of the case. The reapportionment was appropriate because the wife would not be able to work in the foreseeable future and because the husband's income was prone to fluctuation.

**J.E.H. v. P.L.H., [2014] B.C.J. No. 1996, British Columbia Court of Appeal, I.T. Donald, K.E. Neilson and D.C. Harris JJ.A, July 31, 2014. Digest No. 3419-009**

## Government Law

### ACCESS TO INFORMATION AND PRIVACY

Access to information - Inspection of public documents - Protection of privacy - Retention of information – Destruction

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Determination of the fate of documents produced during the independent assessment process by way of which former students of Indian Residential Schools could receive compensation from the government of Canada for injuries sustained while in attendance. Canada had agreed to pay certain compensation to all residential school attendees, but attendees also had the option of participating in an independent assessment to determine the extent to which their specific injuries should be compensated. The agreement also included provisions requiring Canada to create an historical record of the residential school system, accessible to the public for future study. The numerous parties involved with the implementation of the agreement sought the court's direction as to whether records produced as part of the individual assessment process should be destroyed, maintained and/or archived.

**HELD:** The Chief Adjudicator of the process was directed to draft an order providing for the retention of the documents for 15 years after which they would be destroyed. The information contained in documents produced in the individual assessment process was very sensitive and personal to claimants. Disclosure of names of victims and perpetrators of abuse, even years later, had the potential to harm the families of residential school attendees. The parties to the process understood the documents would be treated as highly confidential, subject to a limited prospect of disclosure during a retention period, after which they would be destroyed. A retention period was appropriate to permit claimants to decide whether they wanted their individual stories redacted and archived as part of the record of the residential school system.

**Fontaine v. Canada (Attorney General), [2014] O.J. No. 3638, Ontario Superior Court of Justice, P.M. Perell J., August 6, 2014. Digest No. 3419-010**

## Labour Arbitration

### PROCESS AND PROCEDURE

Arbitration - The hearing – Bifurcation

Appeal by the company, Agrium Vanscoy Potash Operations, from a judicial review remedy. The company owned and operated a potash mine. Its workers were represented by the union, United Steel Workers Local 7552. The union filed a grievance regarding the company's use of independent contractors. The arbitrator found that the company's practices breached the collective agreement. Despite the parties' agreement to address remedies in a separate hearing, the arbitrator ordered a remedy requiring the contracted workers to vacate the mine site. The arbitrator stated that she retained jurisdiction to address issues regarding other relief. The company applied for judicial review. The reviewing judge found that the arbitrator offended the audi alteram partem principle by ordering a remedy in the absence of submissions from the parties. The remedies portion of the arbitrator's decision was quashed and remitted for reconsideration. The company submitted that the reviewing judge should have quashed the arbitrator's decision in its entirety and referred the grievance to a new arbitrator to be dealt with afresh.

**HELD:** Appeal dismissed. The reviewing judge did not err in referring the remedies issue back to the arbitrator. It was open to the chambers judge to quash the portion of the arbitrator's decision related to remedies and leave the balance of the decision standing, as the reasons dealing with the issue of remedy were clearly excisable from the balance of the ruling. There was no authority to support the company's contention that the arbitrator lost jurisdiction of the whole of the grievance by breaching the audi alteram partem rule. The company did not establish a reasonable apprehension that the arbitrator would be biased in considering remedial matters. In addition, the reviewing judge did not err in citing Rule 1-3 without the parties having referred to the Rule in their submissions. No prejudice resulted, as the company had full opportunity to address whether it was appropriate to refer the remedies issue back to the arbitrator.

**Agrium Vanscoy Potash Operations v. United Steel Workers Local 7552, [2014] S.J. No. 417, Saskatchewan Court of Appeal, R.G. Richards C.J.S., P.A. Whitmore and J.A. Ryan-Froslie JJ.A., July 24, 2014. Digest No. 3419-011**

## Landlord & Tenant Law

### RESIDENTIAL TENANCIES

Landlord's obligations – Repair.

Appeal by a tenant from the dismissal of her action for damages as a result of a trip and fall which occurred on the landlord's premises owned by the defendant. The tenant caught her sandal in a gap between the metal piece attached to the metal landing of the staircase leading to her unit and the concrete walkway. The concrete in the area was also cracked. She tripped, fell down the steps and sustained personal injuries. The tenant commenced an action against the landlord alleging that the trip and fall accident was due to the landlord's negligence in the maintenance of the property. The landlord denied liability for the accident on the basis that it had in place an adequate inspection and maintenance system. Each unit was inspected annually and deficiencies which were reported by tenants were corrected throughout the year. The trial judge dismissed the tenant's action. She found that the cracked walkway was a persistent problem that was addressed each spring and that the tenant, who was aware of the gap, never reported it to the landlord. She further found that the landlord had a reasonable maintenance and inspection system in place. She held that the tenant had a positive duty to report this problem to the landlord as well as a positive duty to take care for her own safety but failed to do so. Finally, she held that the landlord could not be expected to rectify a problem which had not been specifically reported to it.

**HELD:** Appeal allowed. The trial judge erred in finding that the landlord was not liable because the tenant was aware of the gap. Whether or not the tenant was aware of the gap was a question that went to the issue of contributory negligence, not the liability of the landlord. Furthermore, the trial judge erred in transforming the tenant's contractual obligation to report needed repairs into an exemption clause which relieved the landlord of its obligation to provide reasonably safe common areas. The landlord had an obligation to keep the common areas of the premises in a reasonably safe condition and to ensure defects that posed a risk of harm were identified and remedied, and it failed to do so. Finally, the trial judge erred in finding that the landlord had adopted an adequate program for identifying and remedying defects in common areas. The annual inspections were carried out for the purpose of identifying and prioritizing the need for capital expenditures and not for identifying potential risks. The landlord should have adopted an inspection program that included an inspection of the common areas during the spring months. The fact that the tenants were obligated to report the need for repairs was not a substitute for a standard of care which was for the benefit of all entering the premises. Landlords should not be able to avoid liability by transferring their obligations to the tenant. Liability was apportioned 25 per cent to the tenant for failing to exercise due care.

**Hickey v. New Brunswick Housing Corp., [2014] N.B.J. No. 210, New Brunswick Court of Appeal, J.T. Robertson, B.R. Bell and B.V. Green JJ.A., July 31, 2014. Digest No. 3419-012**

## Pensions & Benefits Law

### PRIVATE PENSION PLANS

Pension benefits - Payment on marriage breakdown - Survivor benefits

Appeal by Colleen Tarr from a declaration that she held past and future pension survivorship benefits in trust for her former husband's estate. Colleen and Michael, both school teachers, married in 1964 and separated in 2002. Michael retired from teaching in 2002, executing a pension plan declaration irrevocably designating Colleen his 100 per cent joint life beneficiary. In 2007, the couple entered into a separation agreement providing that each would retain, free of any claim by the other, his or her pension and pension rights. They were divorced in 2007. Michael remarried in 2008 and died in 2010. Colleen received the pension benefits payable pursuant to Michael's teacher's pension. The executrix of Michael's estate, his widow, obtained a declaration that Colleen held these pension payments in trust for the estate. The judge found Colleen waived her entitlement to the survivorship benefits in the separation agreement.

**HELD:** Appeal allowed. The B.C. legislature intended that spousal interests in post-retirement survivor pension benefits be preserved, absent the consent of the beneficiary spouse. The separation agreement was not a clear and unequivocal waiver of Colleen's right. The agreement actually preserved her right to the pension benefits to which she became entitled as soon as pension payments to Michael commenced.

**Tarr Estate v. Tarr, [2014] B.C.J. No. 2025, British Columbia Court of Appeal, M.V. Newbury, P.A. Kirkpatrick and H. Groberman JJ.A., August 6, 2014. Digest No. 3419-013**

## Real Property Law

### PROCEEDINGS

Appeals and judicial review - Practice and procedure - Contempt - What constitutes – Punishment

Appeal by a condominium corporation and its directors from a finding of contempt and the sanction imposed. As a result of having to perform extensive garage repairs, the landscaping outside a condominium complex required restoration. The board of directors proposed a new landscaping design with different features than those in place before the repairs. Several owners opposed the design and wanted the area restored to its prior condition. The dispute led to litigation and a court order that the landscaping be restored to its original design. However, a formal order was never taken out. In defiance of the order, the directors authorized the installation of landscaping containing some elements of the previous design and some elements from the new design. The owners brought a contempt motion. The motion judge held that an order existed from the time the decision was

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pronounced, without the requirement of having been issued. He found that the endorsement was clear and unequivocal and the appellants had not sought clarification. He found that the appellants' failure to restore the landscaping was not inadvertent or accidental, but rather a conscious choice and therefore they breached the order willfully and deliberately. As a result of the violation of the court order, the condominium corporation and its directors were found in contempt of court. As a sanction, the motion judge ordered that the area be restored to its original design and that the directors personally bear the costs of restoration. The condominium corporation and the directors appealed the finding of contempt and from the penalty imposed. They argued that the motion judge erred by concluding that the terms of the order were sufficiently clear and unequivocal, that the contempt order was overbroad because it required them to undertake repairs that went beyond the scope of repairs required in the order and the terms of the contempt order were incapable of performance. The directors also argued that the judge erred in ordering them to pay the costs of restoration personally.

**HELD:** Appeal allowed in part. The endorsement was clear and unequivocal. Given the history of the dispute, the only reasonable interpretation of the endorsement was that the appellants were required to restore the landscaping to its state prior to the garage repairs. While the board's authority to manage the common elements in accordance with the Condominium Act was otherwise unfettered, the board had to comply with the endorsement. The contempt order was not overbroad. It did not require the appellants to undertake repairs beyond what the endorsement required. The appeal from the sanction was allowed. The portion of the sanction in which the motion judge ordered the directors to pay the costs of restoration was set aside and replaced with a fine of $7,500 to be paid by each director to the condominium corporation. While contempt was serious, the appellant's were not motivated by any personal gain or vengeance, but instead their belief that they knew what was best. The individual appellants were volunteers. The penalty imposed was so onerous that it would deter others from serving on condominium boards.

**Boily v. Carleton Condominium Corp. No. 145, [2014] O.J. No. 3625, Ontario Court of Appeal, G.J. Epstein, P.D. Lauwers and G.I. Pardu JJ.A., August 6, 2014. Digest No. 3419-014**

## Taxation

### PROVINCIAL AND TERRITORIAL TAXATION

Ontario - Income tax - Corporate income tax - Administration and enforcement - Tax appeals

Appeal by Inter-Leasing from a decision dismissing its appeal from provincial tax assessments. Inter-Leasing was a subsidiary established to assist its parent corporations reduce after-tax capital costs by acting as an investment holding company. Interest payments on refinancing transactions were determined by the Minister to be taxable as business income in Ontario. Inter-Leasing appealed the reassessments and argued that it passively earned interest income on the debt instruments it owned and was therefore not carrying on business in relation to the interest. The appeal was dismissed. The appeal judge held that Inter-Leasing's interest income was income from a business carried on in Canada and that the Minister's reassessment of corporate income was correct. He concluded that the factors in favour of concluding the interest payments were business income outweighed those suggesting it was not. He found that the factors which suggested the interest income was not business income included the terms of Inter-Leasing's memorandum of association, its lack of employees, that it undertook no regular administrative activity or oversight to earn the interest income and did not have to manage any risk, its single director, that the interest income was earned from only four debt instruments held throughout the taxation years in issue and that it received one yearly interest payment for each debt instrument. The appeal judge found that the factors supporting the conclusion the interest income was income from a business were the fact that Inter-Leasing was a corporation with a permanent establishment in Ontario, its director was an Ontario resident, its management and control was situated in Canada and it did not carry on business activity, maintain a bank account, enter into contracts or undertake any administrative activities outside Canada. Moreover, its sole purpose was to hold debts and earn income from property such as interest and the interest income was therefore within its corporate objectives. Inter-Leasing appealed the decision of the appeal judge claiming that he erred in finding that the interest income was business income. The province argued that even if the income was income from property, Inter-Leasing was liable to pay corporate income tax pursuant to the General Anti-Avoidance Rule ("GAAR") and that it was liable for the corporate minimum tax ("CMT") on the income from property.

**HELD:** Appeal allowed. Inter-Leasing's interest income was not income from business but rather income from property. Inter-Leasing's objects specifically prohibited it from carrying on a business in Canada, except through a limited partnership, and the level of activity associated with the once annual interest payment on each of the four specialty debt instruments did not make the interest income from business. The appeal judge erred in finding that Inter-Leasing was in the business of reducing its parent corporations' after-tax capital cost and the reasoning that since the specialty debt instruments were essential to, and employed in, achieving that goal, interest on that income was income from business. To characterize Inter-Leasing's efforts to structure its affairs to take advantage of the difference in treatment of corporate property income and corporate business income was to undercut the well-established jurisprudence that taxpayers could arrange their dealings and structures to reduce taxes. In addition, many of the factors cited by the appeal judge in support of his conclusion that the interest income was income from business were irrelevant to that conclusion. Inter-Leasing was not liable for corporate income tax pursuant to the GAAR or liable for paying the CMT on its interest income. Assuming the parent corporations' transactions created a benefit or were an avoidance transaction, they were not abusive. There was no evidence that the documents evidencing the transactions were a sham, nor was there any evidence of a failure to pay interest on the terms in the documents. The CMT was not applicable as the interest income was property, not business income and the property (the specialty debt instruments) were physically stored outside Canada. The location of the property outside of Canada was not abusive considering Inter-Leasing's minimal activity in Ontario and that they were located at its place of incorporation.

**Inter-Leasing Inc. v. Ontario (Minister of Revenue), [2014] O.J. No. 3671, Ontario Court of Appeal, K.M. Weiler, C.W. Hourigan and G.I. Pardu JJ.A., August 7, 2014. Digest No. 3419-015**

## Tort Law

### ABUSE OF LEGAL PROCEDURE OR PROCESS

Practice and procedure

Appeal by the plaintiff, Phillion, from the dismissal of his action against the Crown and Ottawa Police. In 1972, the plaintiff confessed to a 1967 murder. He retracted the confession shortly thereafter. The plaintiff was nonetheless convicted of murder and sentenced to life imprisonment. He maintained his innocence for the ensuing 31 years. The plaintiff sought to reopen his case following the Supreme Court of Canada decision in Stinchcombe. He received redacted disclosure of the Crown file. In 1998, a parole officer passed on previously undisclosed materials that included potentially exculpatory evidence. In a 1968 report authored by Detective McCombie, the Detective opined that the plaintiff could not have committed the murder based on confirmation of his alibi. The report failed to state the Detective's claim that he subsequently discredited the alibi. On reference to the Court of Appeal, the Court could not determine on the evidence whether the alibi had been discredited by police. The Court found that defence counsel was unaware of the McCombie report or any steps taken in relation to the alibi. Although there was no trial unfairness based on 1972 prosecutorial standards, the admission of the McCombie report as fresh evidence justified quashing the conviction. The Crown did not proceed with a new trial and the murder charge was withdrawn in 2010. In 2012, the plaintiff commenced a civil action against the Crown and police. The action was dismissed as an abuse of process and permanently stayed. The plaintiff appealed.

**HELD:** Appeal allowed. The motion judge erred in two respects in finding an abuse of process. The judge failed to analyze the nature and purpose of the Court of Appeal reference in comparison to the issues raised by the civil claim. In that context, the judge erred in concluding that the issue of whether the alibi had been discredited was a roadblock to the civil claim and in taking an overly broad view of the Court's findings. Secondly, the judge failed to consider the effect of the remedy of a new criminal trial, which would have opened all issues for decision by a jury, including whether the alibi had been discredited. The plaintiff's civil claim did not depend on setting aside any conclusion reached by the Court of Appeal on the reference. The reference's finding of no wrongdoing by the authorities was made for the purpose of determining whether the fresh evidence was admissible based on trial unfairness. No consideration was undertaken of whether any common law duty of care was breached. The order dismissing the plaintiff's action as an abuse of process was set aside. In addition, it would further bring the administration of justice into disrepute to grant a stay and deprive the plaintiff of any opportunity to seek financial redress for his conviction when he did not have the opportunity to present a full defence at his trial.

**Phillion v. Ontario (Attorney General), [2014] O.J. No. 3607, Ontario Court of Appeal, S.T. Goudge, K.N. Feldman and J.L. MacFarland JJ.A., July 31, 2014. Digest No. 3419-016**

### NEGLIGENCE

Liability of alcohol provider - Causation - Foreseeability and remoteness

Appeal by the plaintiff, Wandy, from the dismissal of her action against the defendant, River Valley Ventures (RVV). RVV operated a licensed bar. The plaintiff was socializing with friends when she was seriously injured by a chair thrown by another patron, Danyluk. The tavern was busy at the time of the incident. Its proprietors were bartending. Nobody was specifically assigned to monitor patrons' sobriety or conduct. Danyluk was a frequent patron of the tavern who often became intoxicated and loud. He was not known for violence. He had no recollection of the incident. The plaintiff successfully sued Danyluk for negligence. Her action against RVV was dismissed, as her injury was not attributable to any negligence on the part of RVV. The trial judge concluded that the plaintiff failed to establish a reasonably foreseeable risk of harm by virtue of RVV failing to address Danyluk becoming unruly and intoxicated. The plaintiff appealed.

**HELD:** Appeal dismissed. In finding that RVV did not breach the standard of care a commercial host owed to the plaintiff as a patron, the trial judge considered Danyluk's reputation as a heavy drinker who became aggressive but not violent when intoxicated. No palpable and overriding error was established. There was no prior misconduct or potential misconduct giving rise to a foreseeable risk of harm. No wilful blindness by RVV was established. Having found no breach of the applicable standard of care by River Valley, the trial judge was not required to address whether a causal link existed between the breach of a hypothetical standard of care and the injury suffered by the plaintiff.

**Wandy v. River Valley Ventures Inc., [2014] S.J. No. 419, Saskatchewan Court of Appeal, J. Klebuc, N.W. Caldwell and P.A. Whitmore JJ.A., July 29, 2014. Digest No. 3419-017**

# Business & Careers

# Cooling the flames of office conflict

## Disagreements are inevitable, and leaders need to take charge to address problems

GRANT CAMERON

In the courtroom, lawyers must be adept at dealing with conflict. They earn their living by playing the adversary, challenging witnesses and poking holes in the opposition's case.

Back at the office, though, it can be a different situation. When a conflict arises with another lawyer or co-worker, or with the employing law firm, some lawyers prefer to play Mr. Nice Guy. They want to be a peacemaker rather than somebody who's disagreeable.

However, legal recruiting and workplace productivity experts say failing to deal with internal workplace conflicts, can — if left unchecked — cause problems to grow into a toxic situation.

"Conflict is an inevitable part of people working together in any office," explains Steve Prentice, a partner in the Bristall Group in Toronto. "But avoiding conflict can just lead to problems. It's like having a pot on the stove with the heat on. It's just going to boil over."

Unresolved issues can fester, he says, possibly leading to a verbal or physically hostile confrontation in the workplace, or people quitting.

"It's like a burr under your saddle or a pebble in your shoe. It never gets better. If something irks you about somebody, it's going to continue to grow into something larger so, one day down the road, a simple thing could upset you and you reach the boiling point."

Workplace conflicts can arise from myriad situations. Lawyers might not see eye to eye with their counterparts or staff, or they might question or disagree with a firm's approach.

Prentice says workplace conflicts can involve seemingly trivial matters such as who gets the biggest office or the best chair, but can have deeper roots, such as compensation or the choice of office assistant.

The best way to resolve matters, whether it's an individual or a firm-wide issue, is to arrange a meeting and allow everybody an opportunity to vent their frustrations, he says. "Basically, it should be face-to-face communication and understanding more about what's going on."

It's also helpful, Prentice says, for those at the meeting to write down their frustrations on a whiteboard or pad for everyone to see.

"The activity of writing things down allows people to let go of what they're holding in their minds," he says. "The solutions can only start to appear once you've let go of the issues."

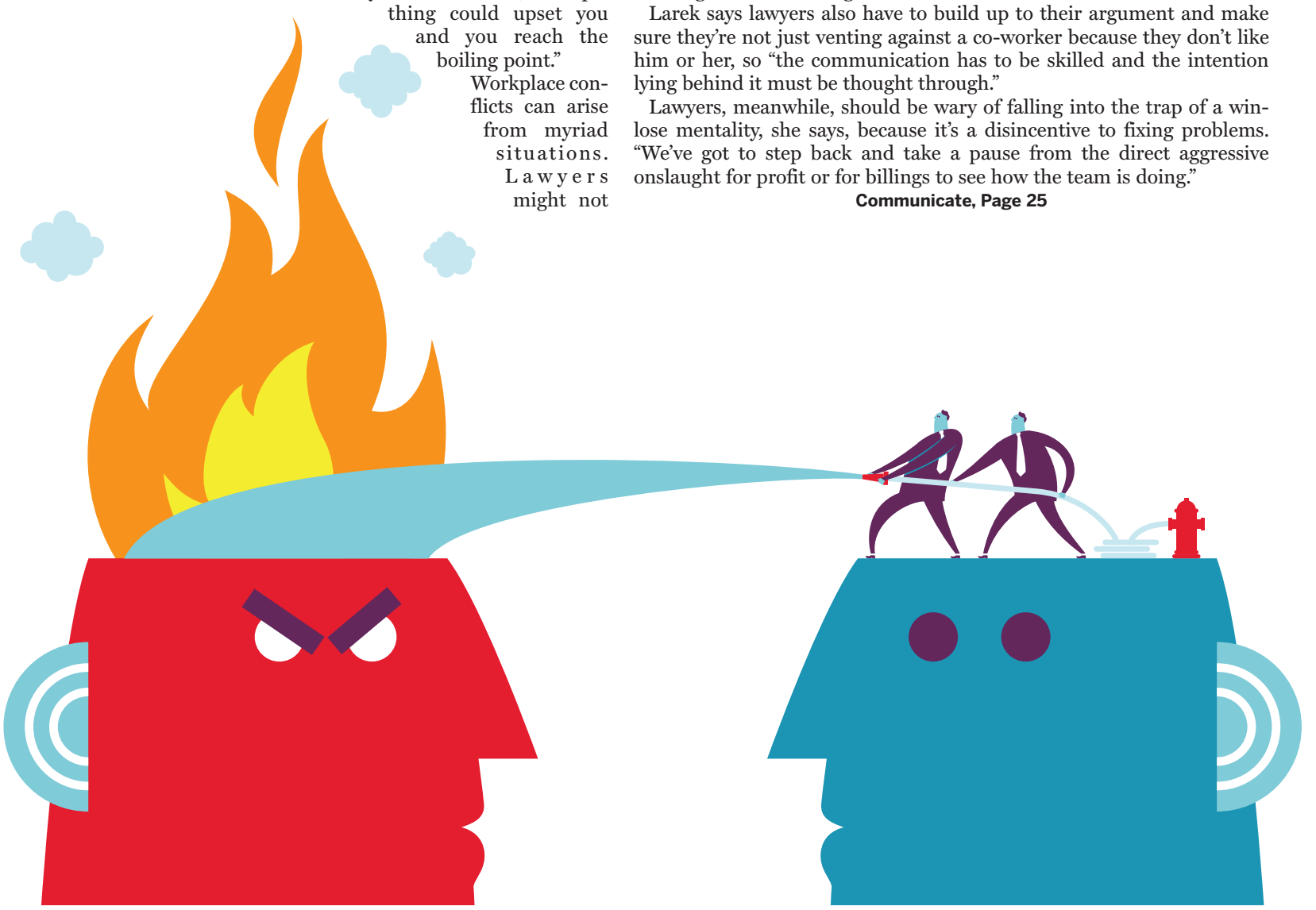
Anita Larek, president of Advocate Placement, which provides strategic advice to lawyers, says it's important for lawyers and partners to nip conflicts in the bud. She advocates laying the groundwork by building up rapport with co-workers before speaking up.

"There's nothing wrong with being confrontational but do it as a strategy…rather than just falling into a morass of conflict. It's not a good idea to demand things and say: 'You want this, I want that. Let's duke it out.' You've got to earn the right to make demands."

Larek says lawyers also have to build up to their argument and make sure they're not just venting against a co-worker because they don't like him or her, so "the communication has to be skilled and the intention lying behind it must be thought through."

Lawyers, meanwhile, should be wary of falling into the trap of a win-lose mentality, she says, because it's a disincentive to fixing problems. "We've got to step back and take a pause from the direct aggressive onslaught for profit or for billings to see how the team is doing."

**Communicate, Page 25**



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## Business & Careers

# Data disasters are waiting to happen

Having a recovery plan is indispensable for your system's inevitable crash

**Luigi Benetton**
Hi-Tech

Ben Sapiro well knows the meaning behind the metaphor "like closing the barn door after the horse escapes." When lawyers call him about disaster recovery, it's usually because something has already happened.

"Very often, questions come after a business continuity issue occurred," says the KPMG risk consulting senior manager.

This saddens Sapiro, but it doesn't surprise him: Many businesses are a corrupted hard drive or disabled router away from losing hours, even days, of billable time.

> "As soon as people assign monetary value to data, they treat it as though it's worth something.
>
> **Alex Moffat**
> Canadian Cloud Backup

Chuck Rothman and his colleagues at information governance and e-discovery services firm Wortzmans know the potential issues. When interviewed, the firm was reviewing disaster recovery setup. "The ability of our firm to function is based on access to our data," says Wortzmans' director of e-discovery services.

If Rothman's statement describes your firm, draft a disaster recovery plan to ensure you can mitigate the consequences.

When drafting the plan, Sapiro suggests firms map their systems. This map provides an understanding of critical business processes that rely on those systems. For instance, few law firms could function without e-mail, so they easily grasp the importance of their laptops, mail servers and Internet connections in keeping that mundane process available.

When drafting a disaster recovery plan, national account manager for Canadian Cloud Backup Alex Moffat suggests creating three scenarios: "Minor incident, major incident, and a full-fledged disaster and the response. Determine the time frame to recovery on each. Then write the disaster plan based on the three scenarios."

Once the plan is in place, practice it. "This is by far the most important part of the plan," Moffat says. "You will find areas where you have overlooked the importance of something you considered to be minor or non-critical."

Disaster recovery plans must include two highly similar measures. The recovery point objective (RPO) is the most time a firm will tolerate being without its data as a result of a business continuity disruption. The recovery time objective (RTO) is the amount of time a business can last without access to data before it suffers unacceptable consequences. Both measures help define the systems to use, required response times and other important points in the plan. Data backups, the most widely known component of disaster recovery plans, often do double duty as archives — something Rothman thinks is a bad idea.

"The whole idea behind retention is that you only keep files as long as you need them, and no longer," he explains. He recommends firms use information governance systems that automate the execution of their retention policies "so you don't keep every last e-mail, document and so forth" on a live system "which means you don't need to back them up."

Since backups are iterative copies of what's on a live system, "you create lots of duplicates," Rothman says. "Where it becomes an issue is if you're faced with litigation or regulatory production. You have tons of duplicates you need to sift through."

He steers clients toward hard disk drives as backup media, saying that the technology has been proven over its four decades of existence.

Magnetic tape may still be the least expensive way to store massive amounts of data, but users must maintain working tape drives (a technology travelling the same downward path as the fax machine) if they want to continue storing backups to tape.

Rothman won't use CDs as backups. "I have CDs that I burned 10 years ago, and I can't read them now," he says.

Online backup can be an attractive alternative to in-house systems. Three of the most common questions Moffat fields from lawyers about online backup concern whether data is stored in Canada, whether it travels outside of Canada en route to the data centre, and how encryption works.

Rothman explains his concerns over online backup by recounting a U.S. event. "The FBI had raided a cloud service provider because one of its clients was laundering money," he says. "They took hard drives out of the servers and made forensic copies.

"They seized data from all the clients, not just the one. One of the other subscribers to this cloud service provider sued the FBI to get their data back, and they lost.

"I don't know if the RCMP would have the same power here," Rothman adds, "but if the RCMP knocked on our door and imaged the hard drives on our server, the law firm upstairs from us doesn't have to worry about their data being taken as well. It's a matter of control."

Sapiro recommends accounting for "near misses" in the disaster recovery plan. For instance, lawyers may lose USB memory keys or have hard disks crash. A kind soul might return the key, and data recovery specialists might salvage a damaged hard drive. Such near misses happen, but don't take them lightly. Near misses "indicate situations from which you one day might not be able to recover," Sapiro warns.

Moffat suggests assigning dollar values to files and programs that will represent what it would cost if the firm lost access to them or had to recreate them. "As soon as people assign monetary value to data, they treat it as though it's worth something," he observes.

Just as importantly, he suggests testing the restoration of backed-up files to ensure that data is being backed up.

Sapiro agrees: "I've seen the documented restore procedure not be correct. I've seen backup media not be readable. By practicing, you learn what breaks and you put correct measures in place."

Periodic repeat practice sessions (experts recommend at least once a year) can alert lawyers to changes required in the plan caused by such issues as changes in hardware, software and information governance policies.

Firms that don't have the expertise to independently prepare for disaster recovery must consult professionals. "Spend the money," Moffat says. "Don't be penny-wise and pound-foolish."

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## Business & Careers

# **Communicate:** Passive approach will not help

**Continued from page 23**

Lawyers, she says, also have to be mindful that they're leaders and should strive to build collaborative teams.

"They are laying the foundations for an environment so the conversations have to be collaborative. When I make a pitch at a meeting I have to look at it like: 'Does this advance the team or am I just pushing my own next big project or big win?' "

In dealing with conflict, Larek says, lawyers must also ensure they respect their co-workers because "how can a lawyer be respected if he or she is yelling, or mean to their underlings?"

Warren Smith, managing partner at The Counsel Network in Vancouver, says it's dressed up many different ways but the "rub" that causes most conflicts at law firms is when there's a clash over what an individual lawyer might want and what's really good for the firm.

For example, he says, a lawyer or partner at a large national firm might want more autonomy over marketing and billing and push for a compensation system that rewards individuals, but the firm might not budge, preferring a system that benefits everyone in the firm. This could cause a lawyer to get annoyed at the firm or resent one of the partners.

"You may have partners that will say, 'No, we are a partnership, we have to work together, we have to shore up each other's weaknesses, and we can't just only look at individual performance because we're not a collection of individuals, we are a partnership.'"

The mark of a good managing partner or leadership team at a law firm, he says, is one that creates an environment that allows lawyers and partners to deal with such conflicts openly.

"The question is not so much as to whether conflict is good or bad. I think it's good. The question is more around: How does that conflict get resolved? I think that's where a lot of law firms get stuck."

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>
> **Warren Smith**
> The Counsel Network

The problem, says Smith, is that law firms often take a pre-dispositional and perhaps unintentionally passive approach to dealing with internal conflicts, "so, rather than actually getting them out in the open and having a frank conversation around a dispute or challenge between different practice groups in a firm, it can revert into a bit of a sniping match."

If a conflict arises, Smith says a lawyer, paralegal or law clerk should first seek to understand before they try to propose a solution. One way to do that is to speak with veterans at the firm to get some insight.

"Often times, it may be you don't like it but it's because you don't understand all the variables."

When dealing with a conflict, Smith suggests talking about the problem and not the person.

"Make sure that people understand what you're trying to do is address the issue and not an individual. As soon as you put it into the personal then it can get very heated. If you have that in mind when you start down a path you're more likely to get somewhere."



## ANNOUNCEMENTS

## Business & Careers

# Growth of data requires robust governance

CHRIS GROSSMAN

Technology has increased the volume of electronic data that flows through law practices. Lawyers and support staff often work using computers, laptops, tablets and smartphones, all of which generate and potentially expose a considerable amount of sensitive information. As a result, the failure to proficiently store, secure and retrieve this electronic data is an important risk to mitigate.

A failure to take appropriate steps to protect the electronic data in your office could result in a release of confidential information, a malpractice claim, a complaint to the law society, or the theft of someone's personal identity. Balancing the needs for information accessibility, client confidentiality and organizational privacy takes skill and planning.

E-mail, draft versions of documents, scanned documents, voicemail, metadata, and any other information saved and stored on servers, hard drives, or disks constitutes data that must be stored securely and kept confidential. The *Rules of Professional Conduct* and privacy laws such as the *Personal Information Protection and Electronic Documents Act* (PIPEDA) and the provincial legislation that supersedes it — in British Columbia, Alberta, Ontario, Quebec, New Brunswick, and Newfoundland and Labrador — apply to the collection and storage of this information.

In some cases, rules and legal requirements simply reflect lawyers' existing business practices. In other instances, the requirements can add further complexity to how data is managed.

If your storage solutions do not meet professional or legal requirements, you may need to find a different storage method. Law practices store records that must be kept for set periods of time, depending on the nature of the information and the needs of the client or firm. If you don't know that you are meeting professional, legal and your own firm's data standards, consider either revisiting your data governance policy, or creating one as soon as possible.

At Rand Secure Data, we performed a survey of more than 400 Canadian and U.S. organizations to understand their data governance current practices. The 2013 *Data Governance Survey* found that among participants, 44 per cent do not have a defined data governance policy. Of these, 78 per cent plan to produce one, and 82 per cent of respondents indicated that external regulations dictated parameters related to data storage.

In addition to regulatory pressures, the sheer growth in the volume of data necessitates intelligent information governance. All study participants forecast data growth over the next year. The median volume of storage was between 20 TB to 50 TB. Companies expect data growth of between 26 per cent and 50 per cent in 2014, with several participants indicating they expect more than a 200 per cent increase.

Although most organizations view data governance as important, 40 per cent indicated they had no budget allocated to technologies that would support governance policies. The average reported budget for data governance solutions was between $200,000 and $500,000.

Faced with legal requirements, professional responsibilities, privacy concerns, and rapidly growing data volumes, it is imperative that law practices have data governance policies and technologies in place to support them. If you are looking for an alternate to your existing backup, archiving and eDiscovery systems, you might consider creating data governance policies that define the use, storage, protection, and retrieval times for different categories of company information.

> A failure to take appropriate steps to protect the electronic data in your office could result in a release of confidential information, a malpractice claim, a complaint to the law society, or the theft of someone's personal identity.
>
> **Chris Grossman**
> Rand Worldwide

You can improve data governance and alleviate associated risks by following these four steps:

### Evaluate existing practices

The first step to improving data governance is to understand what processes you have in place today. Most law firms have backup and retention policies, but many have not created full-fledged governance policies including archival procedures and retrieval processes for eDiscovery requests. Re-evaluate them to make sure they truly meet your needs.

No system is perfect, but continuously working to improve governance increases the value a firm derives from its data and reduces the risk from poorly stored data as well.

### Create a team to make rules

The data governance — defining data categories, security rules and technology requirements — decisions you make will affect almost everyone you work with. As a result, partners, associates, IT managers and administrative managers should all be part of the decision-making process. Once your organization has developed a data governance policy, communicate it to all and educate people on how they can benefit from, and contribute to the policy.

### Requirements

It is essential that a data governance policy outline goals for fulfilling the legal requirements of managing data. Different types of data have different requirements; it is important to define these and implement solutions to meet them.

First, lawyers should always consider whether they need to collect and retain personal information at all — this is not only a requirement of PIPEDA, but also good practice that can minimize the chance of a data breach. Secondly, personal information should only be kept as long as necessary for the fulfilment of the purposes for which it was collected, used or disclosed.

Following the expiration of any limitation period applicable to such claims, lawyers should destroy or de-identify the information. In most circumstances, based on *The Limitations Act* of 2002, it is considered appropriate to destroy this data 15 years after the client file was closed.

### Solutions

Evaluate the technology solutions you have in place today. Do they support your new governance policies or are they simply backup systems that may not meet all of your needs? While you obviously need backup and disaster recovery systems, they are rarely sufficient to meet requirements for legal compliance or eDiscovery requests in a timely, cost-effective manner. How long, for example would it take you to pull together all the e-mails, transactions and documents if you are involved in a malpractice suit? The success of data governance rests with technologies that are efficient, reliable and capable of implementing your policies and legal requirements.

A data governance policy improves your ability to respond to legal duties, reduce risk, and increase data quality. By creating governance policies and selecting the right technologies to maintain and retain data, you will not only to comply with the Rules of Professional Conduct and privacy legislation, but also ensure the viability and integrity of your practice.

***As a senior vice-president, Chris Grossman manages the enterprise applications division of Rand Worldwide, including the Rand Secure Data division. Contact him at cgrossman@rand.com or visit www.randsecuredata.com.***

# News

# **Divided:** Experts split on course taken by judge

**Continued from page 1**

"It is my view that the appellant has wrongly accused me of being untruthful, dishonest and deceitful," Justice Boyle explained in recusing himself, on his own initiative *ex parte*, from deciding costs and confidentiality issues in the *McKesson* case.

He held that the appellant's factum filed with the Federal Court of Appeal last June would leave a reasonable, fair-minded and informed person "with a reasoned suspicion or apprehension of bias, actual or perceived."

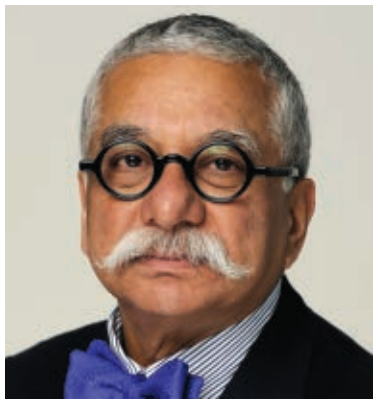
McKesson contends the judge decided unfairly, and acted unfairly during the 32-day trial, including unfairly displaying "palpable antipathy" to the company's witnesses and counsel because he found their evidence to be disingenuous.

The judge's reasons for recusal challenge a number of the appellant's assertions, including by quoting statements made during the trial by the judge and counsel, and parts of his transfer-pricing judgment.

"I believe the appellant was telling untruths about me that go beyond the appellate advocacy craft of colour, spin and innuendo," Justice Boyle said of the appeal factum prepared by Toronto's Al Meghji and Amanda Heale of Osler, and Blakes' Paul Schabas and Kaley Pulfer (who were also trial counsel).

"Canadians should rightly expect their trial judges to have broad shoulders and thick skins when a losing party appeals their decision," the judge said. "But I do not believe Canadians think that should extend to accusations of dishonesty by the judge, nor to untruths about the judge. Trial judges should not have to defend their honour and integrity from such inappropriate attacks. English is a very rich language; the appellant and its counsel could have forcefully advanced their chosen grounds for appeal without the use of unqualified extreme statements which attack the personal or professional integrity of the trial judge."

Justice Boyle's decision to revisit, and arguably augment his 105-page trial decision muddies the legal waters, commented University of Ottawa tax law professor Vern Krishna.



> I have never seen—and our system doesn't work on the basis of—a trial judge, in effect, writing a supplementary judgment defending his original judgment.
>
> **Vern Krishna**
> University of Ottawa law

"I have never seen—and our system doesn't work on the basis of—a trial judge, in effect, writing a supplementary judgment defending his original judgment."

He argued the ruling casts "a pall of unfairness" over the impending appeal.

However, Richard Devlin, a legal ethics professor with the Schulich School of Law at Dalhousie University in Halifax, said that the factum's "unusually aggressive" tone, and some of its wording, target the judge in a "close-to-*ad hominem* way."

"It seems to me that rarely would a factum ever go this far in trashing a judge," Devlin said. "In Canada I think there has always been a sense that we do not treat law as a blood sport. One's got to be a resolute advocate for one's client. One's got to put forward the best arguments possible, so it's not that one sort of pulls one's punches, in a sense, but...you can still make your point stick without having to quite go as far as in this case."

Devlin noted there is much less ethical guidance on what lawyers can say in factums versus in court or on the courthouse steps. He suggested *McKesson* "represents a useful opportunity to reflect upon the limits of the adversarial advocacy."

However, Krishna argued that, as a rule, trial judges who feel they or their decisions are being unjustly criticized "have to suck it up in the sense that there is an appellate procedure, and [the trial judge] is protected from on high by the Court of Appeal."

Krishna suggested Justice Boyle would better have explained his reasons for recusal by succinctly highlighting the contents of the factum he considered impugned his impartiality—without defending himself by plunging into the appeal's merits.

Devlin wasn't so sure that the judge went too far in his reasons.

"It is unprecedented, but I guess I'm not convinced that this is absolutely inappropriate," he said. "Are judges meant to 'suffer in silence' in these situations?...If a judge feels that their own personal integrity has been called into question, again that raises questions within the bar: 'Is this factum poisoning the well for this judge in other cases?'"

Krishna focused on the impact on the litigation. "This entire judgment of Boyle places [the appellant] in an extremely unfair and untenable position in that, if [it] is not allowed to file a supplementary factum [with the Federal Court of Appeal it] is basically precluded from rebutting Boyle's public allegations in his judgment," he said.

He argued the judgment is "more advocacy than it is judicial" and "almost speaks to the need for a new trial."

McKesson's appeal requests a new trial before a different judge, arguing Justice Boyle "discarded the case pleaded and argued by the parties and decided the appeal on grounds that were not raised in the pleadings or argued at trial, but made their first appearance in the trial judge's reasons well after the trial was over."

> It seems to me that rarely would a factum ever go this far in trashing a judge.
>
> **Richard Devlin**
> Dalhousie University Schulich School of Law

McKesson's counsel declined to say whether the company will file a motion seeking a new trial based on the judge's latest reasons.

"I am not prepared at this time, because the matter is before the Court of Appeal, to comment on what, if any, specific steps we plan to take," said Meghji, one of the appellate counsel.

He said he "respectfully disagrees" that the factum went beyond the bounds of appropriate appellate advocacy.

McKesson said in a statement that it stands by its factum "which firmly and properly advances compelling arguments grounded in the law and the facts" to overturn the trial decision.

McKesson complains the trial judgment "is highly critical of almost every aspect of McKesson's case" but "these complaints were never articulated at trial, such that McKesson had no opportunity to respond to them."

Justice Boyle pointedly states in his recusal reasons that counsel are "free to make whatever arguments they wish, including claiming or denying support in the record, the use of emphasis and spin, or even trying to argue a case it thinks it can win instead of the case it has."

However under "the guise of fearlessly advancing and representing the interests of McKesson Canada," he said the appellant crossed the line of what is appropriate by wrongly and intentionally challenging his "truthfulness, honesty and integrity."

Bolstering his assertion with quotes from the trial transcript, Justice Boyle said that "while the appellant may have every right to seek to challenge the evidentiary foundation of my conclusions and findings they have simply told clear untruths about me and what I did or did not say when they state that McKesson's tax motivation was not ever put to them during the trial and that they were therefore deprived of any opportunity to address it."

McKesson contends that Justice Boyle's negative view towards its whole case is illustrated by his "sharp conclusion" in his transfer-pricing decision that "never have I seen so much time and effort by an appellant to put forward such an untenable position so strongly and seriously." But the judge calls it "deliberately misleading" to "suggest in their factum that I wrote this about the taxpayer's whole case as opposed to [one of its expert's] opinion."

Last December, Justice Boyle upheld the CRA's reduction to 1.013 per cent the rate that McKesson Canada and its parent company, MIH, used to discount the face value of McKesson Canada's receivables when MIH purchased them in 2002. This increased McKesson Canada's tax payable in 2003 by boosting its income by $26.6 million. The judge did not accept that the parties' agreed-on discount rate of 2.206 per cent was within the range of what they would have agreed if they'd been dealing at arm's length.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