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THE LAWYERS WEEKLY

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Top court: Opportunity to serve trumps ultimate jury composition

Court splits 5-2 with majority taking restrictive view

CRISTIN SCHMITZ
OTTAWA

Lawyers say the Supreme Court's narrow view of the state's constitutional obligation to compile a representative jury roll could, at worst, constrain Ontario government efforts to improve the representation of First Nations on juries.

On May 21, the top court in *R. v. Kokopenace* [2015] S.C.J. No. 28 divided 5-2 to allow the appeal of the Ontario Crown against a ruling by the province's Court of Appeal. A majority of the Court of Appeal held in 2013 that the government's failure to compile a jury roll that adequately represented Aboriginal on-reserve residents in the northern Ontario district of Kenora undermined public confidence in the integrity of the justice system, and thus violated the *Charter* ss. 11(d) and 11(f) fair trial and jury trial rights of an Aboriginal man from the Grassy Narrows First Nation reserve who was convicted by a jury of manslaughter in 2008. The evidence indicated that Aboriginals living on reserves at that time made up as much as 32 per cent of the adult population in Kenora, but only four per cent of Kenora's jury roll.

Christa Big Canoe, seen above at the office of Aboriginal Legal Services of Toronto, said her group is 'quite disappointed' with the Supreme Court of Canada ruling in R. v. Kokopenace, which she believes gives Ontario a pass over failure to create representative juries. TIM FRASER FOR THE LAWYERS WEEKLY

The Supreme Court's judgment marks the first time it has decided on the important questions of *Charter*-protected rights to a representative jury, and the state's constitutional obligations in that regard.

All seven Supreme Court judges agreed that the underrepresentation of Aboriginal on-reserve residents in the jury system, and the estrangement of Aboriginal peoples from the justice system, are pressing and

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Appeal court raps jury over inconsistencies

KIM ARNOTT

It was illogical and inconsistent for a jury to convict a Toronto-area man for criminal negligence causing death while acquitting him on a charge of dangerous driving causing death for the same conduct, the Court of Appeal for Ontario has ruled.

With a unanimous ruling that the verdicts are "necessarily inconsistent," the court allowed Mohamad Al-Kassem's appeal and replaced his conviction with an acquittal in *R. v. Al-Kassem* [2015] O.J. No. 2330.

A conviction for criminal negligence causing death would require the Crown to prove a "marked and substantial departure" from the conduct of a reasonably prudent driver, noted Justice Kathryn Feldman, while the dangerous driving causing death charge only requires proof of a "marked departure."

"There is no logical basis in this case upon which the jury could have found that both elements were present for the count of criminal negligence, but that one of those elements, a marked departure, was not proven for dangerous driving," she wrote.

Entering an acquittal on the criminal negligence charge is the appropriate remedy in the case as

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News

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Greenspan: Risk is progress will grind slowly, or just stop

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serious problems. However, they split over whether an accused's *Charter* rights to a representative and impartial jury are the appropriate mechanisms for addressing these problems.

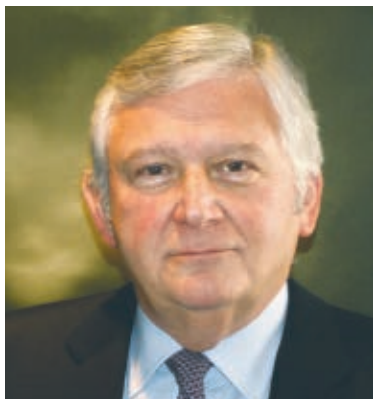
"This court is not a commission of inquiry and its role is not to dictate to the government how to resolve this issue," Justice Michael Moldaver wrote for the majority that included Justices Marshall Rothstein, Richard Wagner and Clément Gascon. "It must be remembered that the right to a representative jury is an entitlement held by the accused that promotes the fairness of his or her trial, in appearance and in reality. It is not a mechanism for repairing the damaged relationship between particular societal groups and our criminal justice system more generally — and it should not be tasked with that responsibility."

In a vigorous dissent, Justice Thomas Cromwell, backed by Chief Justice Beverley McLachlin, argued that "having played a substantial role in creating these problems the state should have some obligation to address them in the context of complying with an accused's constitutional right to a representative jury roll."

Christa Big Canoe, co-counsel with Jonathan Rudin for the intervener Aboriginal Legal Services of Toronto, said her group is "quite disappointed" with the majority ruling, and "completely agrees" with the dissent. She queried how it can be adjudged fair that 87 per cent of accused who go before juries in Kenora are from First Nations, yet these accused have no entitlement to a jury that represents their community by including on-reserve First Nations people.

The majority simply gave the government a pass on its evident failures in devising the jury roll and delivering the jury notices, she said.

Milne



Greenspan

"Part of what I read, when I read the majority decision, is that it's OK for Ontario to either be ignorant or incompetent, and that just can't be right," she said.

Cheryl Milne, co-counsel with Kim Stanton for the David Asper Centre for Constitutional Rights and the Women's Legal Education and Action Fund, said she sees an underlying approach in some of the court's majority and unanimous judgments authored by Justice Moldaver, "that says that as long as the government is well-intentioned and does something, that's good enough," even when the effects of the government's actions are "terrible." She cited as examples the Supreme Court's dismissal of defence appeals relating to inadequate Crown disclosure and jury vetting by Crowns and police (*R. v. Yumnu* [2012] S.C.J. No. 73) and the court's restrictive view of Crown liability for wrongful nondisclosure that results in miscarriages of justice (*Henry v. B.C. (Attorney General)* [2015] S.C.J. No. 24).

Milne also queried whether possible provincial initiatives to improve the representation of Aboriginals on jury rolls, such as sending out extra questionnaires or creating incentives for Aboriginals to join jury rolls, might be seen as overly aggressive and therefore not representative in light of the majority's ruling in *Kokopenace*.

Brendan Crawley, a spokesperson for Ontario's Ministry of the Attorney General, noted that although the court held that the government met its representativeness obligations, the majority "indicated that Ontario must also continue its efforts to address the under-representation of Aboriginal residents in the jury system."

"Ontario remains firmly committed to improving the representation of First Nations people on jury rolls," Crawley said by e-mail.

He said the province has implemented the recommendation of retired Supreme Court Justice Frank Iacobucci in his 2013 report on First Nations representation on Ontario juries to create a collaborative process between the government and First Nations to find practical solutions, and several have already been rolled out.

As recommended by Iacobucci, a forum was also held in Thunder Bay, Ont., last November which brought First Nations leadership and community organizations, government representatives and more than 100 Aboriginal youth to discuss First Nations issues in the justice system, Crawley said. He also pointed to a pilot summer internship program for Aboriginal law students that ran last year and will run again this year. As well, the Nishnawbe Aski Nation led a pilot project to seek on-reserve volunteers who could potentially serve as jurors at coroner's inquests in the judicial districts of Thunder Bay and Kenora, Crawley said.

Co-counsel for the intervener Advocates' Society, Brian Greenspan of Toronto's Greenspan, Humphrey, Lavine, said the majority decision is "disappointing" from his client's perspective.

"What we were proposing was a regime where you could have some better confidence in the steps that were taken to ensure the fundamental fairness of the jury array and the fundamental process by which juries were chosen, and we didn't think what we were proposing was revolutionary, but rather evolutionary," he said. "What we've been told in this judgment is that whatever progress will be made, will be made at the instance of the legislature as opposed to imposing it by either a constitutional or judicial requirement."

Greenspan said this creates the risk that progress will be slow or nonexistent.

The Supreme Court's majority set aside the appeal court's order of a new trial and restored Clifford Kokopenace's manslaughter conviction.

Justice Moldaver ruled that the jury in his case was representative, even though the jury roll included few Aboriginals, and that his *Charter* rights were not violated because the province met its obligation under ss. 11(d) and 11(f) to provide "a fair opportunity for a broad cross-section of society to participate in the jury process."

"In my view, representativeness focuses on the process used to compile the jury roll and not its ultimate composition," Justice Moldaver said. "Consequently, the state satisfies an accused's right to a representative jury by providing a fair opportunity for a broad cross-section of society to participate in the jury process."

He held that the province met this obligation by taking "reasonable steps to compile the jury roll using random selection from broad-based lists" and to deliver the jury notices to those who had been randomly selected.

However, the dissent pointed out that provincial officials who compiled the jury roll used sources substantially out of date, included people who should not have been included, and entirely excluded four First Nations reserves in Kenora District. Officials also had serious problems delivering jury notices to on-reserve residents.

The state should have taken additional steps to address those problems, Justice Cromwell said.

"An Aboriginal man on trial for murder was forced to select a jury from a roll which excluded a significant part of the community on the basis of race — his race. This in my view is an affront to the administration of justice and undermines public confidence in the fairness of the criminal process."

News

Foord: Crown's approach added 'noise' to case file

Continued from page 1

a new trial "would necessarily invite another inconsistent verdict," Justice Feldman added.

Al-Kassem was charged after a parking lot confrontation that resulted in him running over and killing a man with his vehicle. During his 2013 jury trial, he argued self-defence, accident, and that his driving did not depart substantially from that expected of a reasonable prudent driver under those circumstances.

It's rare for inconsistent verdict appeals to succeed because even "one scintilla of evidence" may be enough to justify the differing verdicts, said James Foord, a criminal lawyer with Foord Davies and president of the Defence Counsel Association of Ottawa.

However, the circumstances of this case and the fact that the one offence is "entirely included" in the other makes the jury's two verdicts "logically irreconcilable," he noted.

In her decision, Justice Feldman noted that the Crown risked creating possible jury confusion by charging Al-Kassem with separate offences, despite the fact that s. 662(5) of the *Criminal Code* makes dangerous driving causing death an expressly included offence when criminal negligence causing death by driving is not proven.

"It is difficult to see what advantage there could be to including both counts separately on an indictment in circumstances like these rather than relying on the operation of s. 662(5)," she wrote.

Including both charges resulted in a poorly-drafted indictment, said Foord.

"Tactically, there was no benefit to the Crown to proceed this way. It just added noise for no reason."

Toronto defence attorney Enzo Rondinelli says the Court of Appeal's decision sends a message to the prosecution that it should pick its battle before heading into the courtroom rather than charging "various shades of the same offence.

"Ultimately, this was a case of overcharging," he said. "Criminal charges shouldn't be treated like Russian dolls. You don't stack them together to make a small case into a big case.

"The Crown should really consider what they're going forward with very seriously because it obviously has an impact on how the trial is going to be run, because of the case that has to be presented and then explained to the jury."

Lakehead University assistant law professor Frances Chapman said the ruling not only admonishes the Crown to seriously consider the drafting of its indictments, but also provides clear direction to judges on the need to instruct juries "that a conviction for the more serious offence necessarily requires a conviction on the lesser offence."

Along with overturning the conviction for criminal negligence causing death, the Court of Appeal also set aside Al-Kassem's conviction for leaving the scene of an accident, directing a new trial on that count.

Foord

As well as finding Superior Court Justice Nancy Mossip's charge to the jury on that count was flawed, Justice Feldman also acknowledged the principle that inconsistent verdicts undermine the reliability of all the convictions, as espoused in *R. v. McShannock* [1980] O.J. No. 1289.

While the case doesn't make new law with regard to inconsistent verdicts, it may have an impact on how indictments are drafted, said Rondinelli, an adjunct professor at Osgoode Hall Law School and executive member of the Criminal Lawyers' Association.

"I think it hopefully moves the law a bit in terms of overcharging or going to the jury with varying shades of the same offence," he said.

News

Moves

- Mining lawyer **Jay Sujir** has joined the Vancouver office of B.C. law firm *Farris, Vaughan, Wills & Murphy* as a partner in the securities and mining practice groups. Also joining the firm are senior associates Verlee Webb and Lyndsay Schooley, both of whom practise corporate and securities law with an emphasis on the natural resource sector. All three lawyers were formerly at ASKD Law.
- **Jeff Durno** and **Sam Cole** have joined the Vancouver office of *Cassels Brock & Blackwell* as the firm expands its corporate and securities practice in Western Canada. Durno is a partner and Cole an associate in the firm's securities group. Both lawyers were formerly at ASKD Law.
- Former federal minister for foreign affairs **John Baird** has joined *Bennett Jones* as a senior advisor with a practice focusing on the areas of public policy and government affairs. Baird served as foreign affairs minister from May 2011 to February 2015.

Partnerships

- Norton Rose Fulbright and Atlantic Advisory Partners (AAP) have announced a partnership offering legal, business development and financial services advice to companies in Canada and the European Union regarding the Comprehensive Economic and Trade Agreement. Norton Rose Fulbright has five offices in Canada and 11 offices in eight EU countries. AAP is a private sector joint partnership between Toronto-based Acasta Capital Inc. and New York-based Spitzberg Partners LLC.

Convicted murderer found NCR on appeal

Rare ruling hinges on new evidence man was mentally ill

MICHAEL BENEDICT

Criminal appeals lawyer Delmar Doucette makes a practice of meeting all his clients — even if they reside in a Kingston prison, a 2.5-hour drive from his Toronto offices. In this case, Doucette's insistence on face-to-face contact set off a chain reaction that ended with the Court of Appeal for Ontario, in *R. v. Palmer* [2015] O.J. No. 2380, making a rare and "perhaps unprecedented" decision, not only accepting new evidence but also overturning a second-degree murder conviction and substituting a verdict of not criminally responsible (NCR).

Doucette was pursuing other grounds of appeal when he travelled to confer with Dwayne Palmer, who had stabbed to death a Brampton, Ont., couple, both strangers to him, in a shopping mall parking lot and then attempted to kill himself. After stabbing himself in the neck, Palmer was Tasered by a police officer and rushed to hospital.

"When I visited Mr. Palmer, he rested his head on his arms and would not speak," recalled Doucette, of DBSF Counsel. "A guard told me he had not spoken in three months. I've dealt with enough mentally ill clients in my 25 years of practice to recognize that this was someone who was severely mentally ill."

At trial, a defence psychiatrist testified that Palmer suffered from a psychotic illness, most likely schizophrenia, but that he could not conclude that the accused was NCR. Absent that defence, Palmer was convicted and sentenced to life imprisonment with no chance for parole for 20 years. He had served some two years when Doucette visited him.

Burstein

Cameron

After seeing his client, Doucette arranged for one of the province's leading psychiatrists, John Bradford, to assess Palmer. Based on Bradford's finding, the appeal court said that "an unprovoked attack against a complete stranger/strangers in a public place in broad daylight followed by a bizarre suicide attempt is strongly indicative of a severe mental illness at the time of the index offences. This is further indication that Mr. Palmer would not have been aware that what he was doing was wrong or even aware of the physical nature of his actions."

Bradford concluded that Palmer was "seriously mentally ill, suffering from schizophrenia, catatonic type" and must have been NCR at the time of the killings.

Based on his report, the defence and Crown psychiatrists from trial amended their views and agreed with Bradford's NCR finding. On appeal, the Crown did not challenge Bradford but argued that the fresh evidence did not meet the admissibility test.

The appeal court demurred. "The evidence was not available prior to trial; it bears on the appellant's not criminally responsible defence; it is credible, cogent and reliable evidence, and it could reasonably have affected the outcome of the trial," wrote Justices Kathryn Feldman, Janet Simmons and Sarah Pepall.

"Moreover, the evidence is strong, uncontradicted and consistent."

Doucette said the decision is "perhaps unprecedented" because it recognizes that an NCR finding can be made retrospectively.

"The original psychiatrist had a snapshot, but afterwards it was like looking at video," he said. "The disease continued to develop so that one could conclude that he was NCR at the time. And the court was prepared to look at post-conviction evidence to ensure justice was done."

Doucette added that the court's decision to consider retrospective evidence points to another significant aspect in NCR cases.

"For any convicted person close to the NCR line, it is crucially important to track post-trial development of the person's mental illness. Mental illness is often not static, and one might not be able to assess it properly until it takes an acute form later. And this case shows that it's never too late."

University of British Columbia law professor Nikos Harris called the case "exceptional" for several reasons.

"There is a strong presumption on appeal that one can't produce new evidence," said Harris. "There is also a strong presumption that one can't raise a new defence. But every rule is subject to an exception if faced with a wrongful conviction."

Harris added that the decision is also distinctive because the court of appeal substituted its own verdict, rather than taking the usual step of sending the case back for retrial.

Toronto criminal lawyer Paul Burstein said *Palmer* illustrates the difficulties of establishing an NCR defence, especially if one needs to rely on the testimony of the accused.

"Such people are usually the least able to prove their state of mind, because they are by definition mentally unstable," said Burstein, of Burstein Bryant. The case also shows the "critical importance of having experienced senior defence lawyers to defend those with mental illnesses," he added.

Osgoode Hall law professor Jamie Cameron is also a member of the Ontario Review Board, sitting on panels that assess the mental health of individuals such as Palmer.

"Upholding his conviction would not serve the interests of justice, because what he needs is psychiatric treatment," said Cameron. "This was an appropriate case for fresh evidence because Mr. Palmer belongs in a hospital, not a prison."

Meanwhile, Palmer is in Millhaven Institution, awaiting a review board hearing to determine what hospital should take him.

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News

Yukon woman denied legal aid, court rules

JOHN SCHOFIELD

The Yukon Court of Appeal has ruled that a Whitehorse woman facing retrial for a 2008 second-degree murder charge was effectively denied legal aid and a fair trial when the Yukon Legal Services Society refused to give her the legal-aid lawyer she wanted.

But in writing for the three-judge panel, British Columbia Court of Appeal Justice Elizabeth Bennett, who also sits on the Yukon Appeal Court, cautioned that the May 6 decision, in *R. v. Murphy* [2015] Y.J. No. 33, should not be seen as a blanket ruling requiring counsel of choice in all legal-aid cases.

"This is an unusual case requiring unusual measures to achieve a fair trial," said Justice Bennett, adding later that "the usual practice is to appoint counsel of choice if he or she meets all the necessary criteria. No explanation was ever given as to why that practice was not followed here."

Alicia Murphy, 36, was convicted of second-degree murder in November 2009 in the death of 27-year-old Evangeline Billy. Billy's beaten, drowned body was found in the Yukon River in downtown Whitehorse in June 2008.

Murphy, a First Nations woman, was sentenced to life in prison with no eligibility for parole for 14 years. The evidence against her was largely circumstantial, although two witnesses testified that Murphy had confessed to the murder to them. Testifying in her own defence, however, Murphy denied any connection to the murder. In June 2014, the Yukon Court of Appeal ordered a new trial, concluding that the Crown erred by asking police officers to testify at the original trial about the reliability of the witnesses.

Murphy applied for legal aid for the new trial, which is scheduled to begin June 8, and asked for Whitehorse lawyer Jennifer

Campbell

Cunningham, who had successfully represented her in the appeal.

Instead, the Yukon Legal Services Society (YLSS) appointed a B.C. lawyer and advised Murphy in July 2014 that she would hear from him. She did not. In a July 31 letter to YLSS, Murphy asked for a review of the decision and emphasized her long and trusting relationship with Cunningham. Based on information from a Crown lawyer, she also expressed concern that the appointed lawyer was preparing a plea bargain for her without her knowledge, and that she had no intention of pleading guilty.

Late last year, Murphy filed a so-called Rowbotham and Fisher application for legal-aid counsel of choice. In November, a trial judge stayed the proceedings of the murder charge until the Crown paid for Cunningham to represent Murphy, arguing that Murphy had no "genuine choice" of who would represent her. The Crown appealed.

"While I would uphold the order made by the trial judge, I would do it on a more narrow basis than 'genuine choice,'" Justice Bennett wrote.

While an accused has a right to counsel of choice, it is not an absolute right, she argued, pointing to Court of Appeal for Ontario decisions that stipulate that counsel of choice is limited to counsel who are competent to take the case, willing to accept the retainer offered (including a legal-aid certificate), available to represent the client within a reasonable period of time, and not suffering from any conflict of interest.

"Inherent in this decision is a recognition that, in some cases, a fair trial requires giving a person a lawyer they're comfortable with," said Toronto-based lawyer Philip Campbell, who represented Murphy in the appeal. "We argued that even if choice is limited, it should not be non-existent. Putting someone in the clutches of the system when she feels she has been denied the choice she wants to make is going to make her resentful and resistant to the system, and there's no reason to make that happen."

In deciding counsel of choice, lawyer Karen Hudson, executive director of Halifax-based Nova Scotia Legal Aid Commission, said her management team considers a number of factors, including the needs of the

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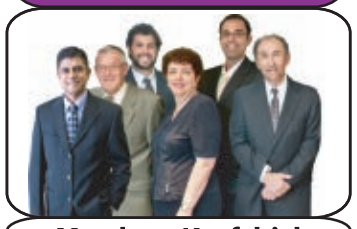

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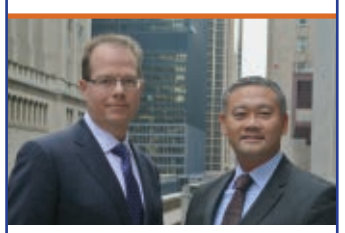

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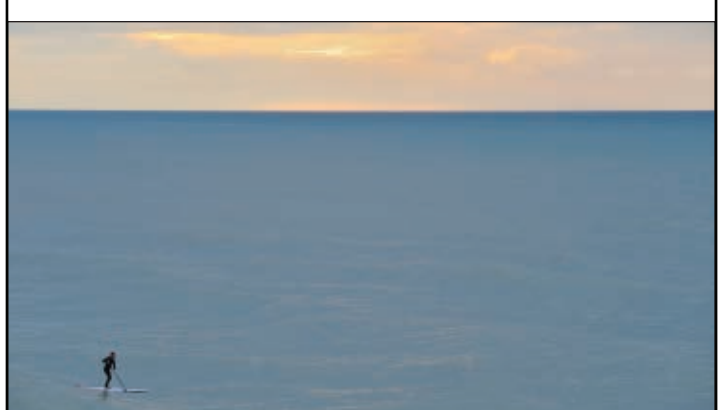

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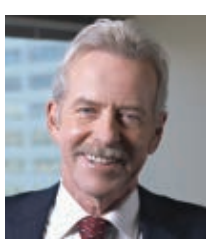
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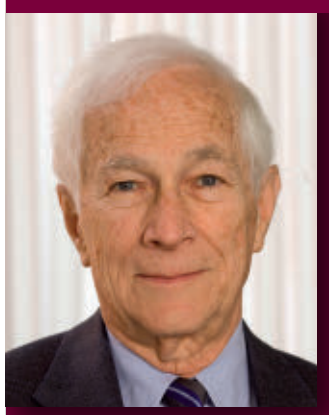

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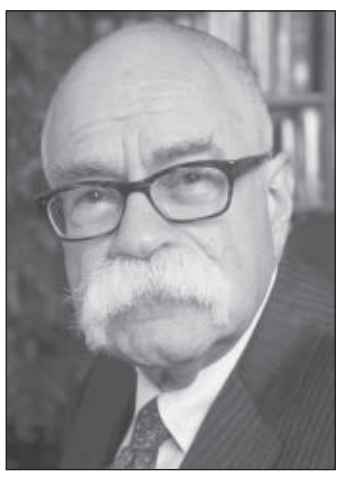

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News

Supreme Court amplifies 'private use'

CRISTIN SCHMITZ
OTTAWA

The Supreme Court has ruled that the "private use" defence to child pornography is not available if the depicted youths were sexually exploited in the making of the images.

Justice Andromache Karakatsanis's 9-0 ruling, in *R. v. Barabash* [2015] S.C.J. No. 29, amplifies the scope and application of the common law exception for privately held recordings of lawful sexual activity involving minors.

Due to errors in the Alberta courts below, the top court ordered new trials on child pornography charges for the appellants Donald Barabash and Shane Rollison. The accused were ages 60 and 41 respectively in 2008 when they recorded video and still images of what they maintain was consensual sexual activity involving two homeless, drug-addicted 14-year-old girls who stayed for some days at the older man's home, where they allegedly obtained drugs.

Relying on the private use exception, the men were found not guilty at trial, but a majority of the Alberta Court of Appeal set aside the acquittals.

The private use defence, created by *R. v. Sharpe* [2001] S.C.J. No. 3, legalizes a person's possession of child pornography created by, or depicting that person, only where the visual representations do not depict unlawful sexual activity, are held only for private use, and were created with the consent of those depicted.

The top court created the private use exception (along with the artistic merit exception) to the making and possession of child pornography in order to vindicate the *Charter*'s s. 2(b) guarantee of freedom of expression. The court aimed to insulate youths from criminal charges if they photographed or videotaped themselves in legal and consensual sexual activities with other youths. However, the rarely used defence

Matas

has since been relied on with mixed success by adults charged with child pornography.

In his May 22 judgment, Justice Karakatsanis instructs lower courts to undertake a "robust" and "holistic" approach to analyzing whether the relationship between those involved in making the pornography for private use is tainted by exploitation, dependency, or abuse of authority or a position of trust, contrary to s. 153 of the *Criminal Code* which prohibits sexual exploitation of 16-and 17-year-olds.

The court also stipulates that the exploitation analysis is to take place as part of the inquiry into whether the recorded sexual activity was lawful, and (contrary to the Alberta Crown's argument) not as a separate, overarching inquiry into whether exploitation or abuse of children occurred in the overall circumstances.

The Supreme Court also rejected an argument by the Crown urging the court to make the defence unavailable in the absence of "mutuality of benefit," i.e. if the accused cannot prove that the depicted minor derived a benefit from the pornographic material the creator of the material and the minor intended for their private use.

Justice Karakatsanis's judgment is noteworthy as well for its clear *obiter dicta* suggesting that youths who consent to the recording of their sexual activities via photos, video, etc. retain legal control over the resulting images and thus can demand their return and/or destruction.

Co-counsel for the interveners Beyond Borders and Canadian Centre for Child Protection Inc., Winnipeg's David Matas, told *The Lawyers Weekly* the court has somewhat enhanced the law's ability to protect minors from sexual abuse, although not as much as the advocacy groups would have liked.

"The rejection of 'mutuality of benefit' does not improve protection, but does not reduce it either, since the requirement of mutuality of benefit did not exist prior to" the Alberta Court of Appeal adopting it as a prerequisite to the private use defence in the *Barabash* case, Matas said.

In his view, the acquittal obtained in the *Barabash* case at trial illustrates a "nightmare scenario" where the private use exception was not used to vindicate teens' freedom of expression, as intended by the high court, but rather as a loophole to permit their abuse.

Co-counsel for the Alberta Crown at the Supreme Court, Jolaine Antonio of Alberta Justice in Calgary, said the private use defence "may become more common in this age of webcams and sexting."

She said the Supreme Court's ruling that the defence has only three criteria — legal sexual activity, consent to record, and private holding of the material — "is less protection than that afforded by some lower courts" which imposed additional prerequisites, such as an overall absence of exploitation and that the recording be made for the shared pleasure of all participants, instead of the child acting for the pleasure of the adult.

Antonio said for the Crown to knock out a private use defence the prosecution must disprove any one of the defence's three criteria, one of which is that the sexual activity itself must be legal.

"If the Crown can prove, beyond a reasonable doubt, that it is illegal, the defence fails," Antonio said. "Section 153 is one route to illegality, whether or not a charge of s. 153 [sexual exploitation] has been laid. Alternatively, the Crown may rely on *Criminal Code* sections providing that consent to sexual activity is vitiated by incapacity, revocation, threats, force, fraud, or the exercise or abuse of positions of trust, power or authority."

> "[The court] says basically: 'We already carved this out – there doesn't need to be further tinkering with it. It already encompasses some of the things we might be concerned about in terms of abuse and exploitation.'
>
> **Cara Zwibel**
> Canadian Civil Liberties Association

She added that "outside of s. 153, exploitation does not vitiate consent. Within s. 153, consent is irrelevant if it arises within a relationship of trust, authority or dependency, or within a relationship that is exploitative of the young person."

Antonio noted another option would be for the Crown to prove that the young person did not consent to the recording of the sexual activity. The Supreme Court declined to rule on whether an exploitative relationship would vitiate youth's consent to recording his or her sexual activity.

Cara Zwibel, a lawyer with the intervener Canadian Civil Liberties Association, said the decision reaffirms what *Sharpe* said about the personal use exception: "[It] says basically: 'We already carved this out — there doesn't need to be further tinkering with it. It already encompasses some of the things we might be concerned about in terms of abuse and exploitation.'"

Zwibel added that the court has also emphasized that assessing the legality of the recorded sexual activity "is a little more nuanced than just 'was it consensual?'"

At press time, counsel for the appellants could not be reached.

Police raided Barabash's Edmonton residence after one of the complainants posted online a photo of herself and her friend, one of whom was topless. Police seized video recordings and still photos of the minors engaged in explicit sexual activities with each other and with the younger man.

The accused were acquitted by the trial judge, who found both the sexual activity and its recording to be consensual and non-exploitative. (The age of consent, then 14, was raised afterward to 16.) However, a majority of the Alberta Court of Appeal convicted after holding that the sexual activity involved exploitation.

The Supreme Court held that there were legal errors made by both Alberta courts and the Crown, which wrongly conceded at trial that the sexual activity in question was lawful.

"Fundamentally the trial judge failed to consider the extent to which the appellants — two older men — may have exercised control over two vulnerable, deeply troubled and runaway girls," Justice Karakatsanis said.

See related story below

Novel prosecutions could emerge from top court's suggestion

CRISTIN SCHMITZ
OTTAWA

Novel child pornography prosecutions could emerge from the Supreme Court's suggestion in *R. v. Barabash* that youths who consent to the recording of their sexual activities for private use can later demand the return and/or destruction of the privately held images.

In order for the private use defence to child pornography to be available, *R. v. Sharpe* [2001] S.C.J. No. 3 requires, as one of three prerequisites, that the recording be kept strictly private by the person possessing it, and that the recording be intended exclusively for the private use of the creator and the depicted minor.

The intervener Attorney General of Ontario and the Canadian Civil Liberties Association both urged in the *Barabash* appeal that the privacy branch of the private use defence also implicitly requires that the minor retain *de facto* control over the material, so that he or she is able to destroy, or unilaterally direct the destruction of, the material in circumstances where he or she comes to regret his or her participation in its creation.

One example would be where a minor agreed to be recorded nude, or engaging in consensual sexual activity with his or her teenage boyfriend or girlfriend with the mutual understanding that the images are to be kept strictly private for the couple's personal use. The pair then breaks up and the minor doesn't want the other person to retain the images which had been protected by the private use exception when they were created.

According to *obiter dicta* in *Barabash*, if the person refuses the demand to return and/or destroy the sexual images, he or she loses the personal use exception and risks a successful prosecution for child pornography if the minor complains to police.

Writing for nine judges, Justice Andromache Karakatsanis observed "in my view, the bal-

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Focus

INFORMATION TECHNOLOGY

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Insult and injury

Ontario court extends defamation liability to online forum operators

Ren Bucholz

Political debate on the Internet is not for the faint of heart. Online discussion forums host conversations that can be robust, insightful, petty, and histrionic, sometimes at the same time. Opinions are met with blistering criticism, which leads to even more caustic responses.

Who wouldn't embrace the legal responsibility of refereeing such a ruckus?

That is one issue considered in the February trial decision in *Baglow v. Smith* [2015] O.J. No. 777, which deals with the liability of message board operators for defamatory content posted by users of their sites. The decision also considers the importance of context in determining whether a defamatory statement can be defended on the basis of fair comment.

John Baglow is a left-leaning political blogger who uses the online pen name "Dr. Dawg." He admitted to referring to another party as a "free dominatrix" and testified that he believes in being "uncivil to the uncivil." The trial judge, Justice Heidi Polowin, noted that Baglow has written on his blog that a Member of Parliament had "distinguished himself with petty acts of cruelty and an ill-concealed liking for torture," and was a "seasoned bigot."

Baglow was the plaintiff in this defamation case.

The defendants Connie and Mark Fournier operate a web forum called Free Dominion, which identifies itself as the "voice of principled conservatism." Connie Fournier has made derogatory remarks about Baglow.

The defendant Roger Smith is a conservative commentator who posts on a variety of Internet message boards. He and Baglow have a history of debating political topics across a number of Internet sites, including Baglow's website and Free Dominion.

In August 2010, after a running battle of rhetorical hand-grenades with Baglow, Smith visited Free Dominion and posted what the trial judge found "can only be termed a rant." He railed "against cultural elites, Bay and Bloor Street Torontonians, scientists who believe in global warming, Liberals, the Mark Steyn human rights case, the census, the CBC, and elitists in Ontario." Smith also described Dr. Dawg as "one of the Taliban's more vocal supporters."

Baglow wrote to the Fourniers and demanded they take down Smith's posting. They declined, and Baglow filed a defamation suit alleging that the Fourniers had republished the defamatory comments of Smith.

The main issues at trial were whether the Fourniers were liable as "republishers" of the defamatory statements of Smith, and what effect, if any, a court should give to the context in which a defamatory statement is made.

The Canadian Civil Liberties Association intervened on behalf of the Fourniers to argue that "operators and administrators of weblogs, online message boards and

Malice, Page 12

Focus INFORMATION TECHNOLOGY

Buyer beware when evaluating IT assets

Questioning vendor ownership key to a successful acquisition

Chris Bennett

One of the first steps in any IT acquisition is to determine the value of the target assets. Different types of value must be considered, such as the value of creating products or services for sale and licensing the asset to third parties to create products or services for sale, the value of providing a defence against infringement, the value of providing collateral for cross-licensing purposes, and the value for selling the asset to a third party.

Those figures will depend on a number of factors, including the extent to which the vendor owns the assets, the extent to which the vendor has protected the assets, and the extent to which the assets can be used without infringing any third party's rights. The main considerations are as follows:

Ownership

There are often deficiencies in the chains of title for IT assets, particularly when the assets have been created by third parties. For example, the vendor may have spent significant amounts of money for designers to create the assets. Alternatively, the vendor may be using an inventive new process or technology created by an employee who was not hired for the purpose of creating that process or technology. In each of these cases, the intellectual property rights in the assets are likely not owned by the vendor unless the vendor has specifically obtained a proper assignment of those rights in writing, signed by the owners of those rights. Furthermore, the creators of the assets may have "moral rights" in their work, which could prevent the vendor, purchaser and third parties from modifying the work, or from dealing with the work without referring to the creators by name.

JODI JACOBSON / ISTOCKPHOTO.COM

> "...[E]ven if the assets have been registered and maintained, the registrations could be worthless because they should never have been granted in the first place (for example, because the technology was not novel, or because the IP infringed a third party's rights).
>
> **Chris Bennett**
> DLA Piper (Canada)

Protection and enforcement

If the vendor does own the assets in question, the next consideration is the extent to which the vendor has protected the assets. Many types of IP (such as trademarks) are not fully protected unless they are registered. Some types of IP (such as patentable inventions) are not protected at all unless they are registered.

Even if the assets in question have been registered, they could still lose their protection if the registrations are not maintained properly. Also, for some types of intellectual property (such as trademarks), the registrations can be lost if the IP is not used the way it was registered, or if the owner of the registration did not take active steps to prevent third parties from infringing the IP.

Finally, even if the assets have been registered and maintained, the registrations could be worthless because they should never have been granted in the first place (for example, because the technology was not novel, or because the IP infringed a third party's rights).

Infringing third party rights

The vendor may have been using the assets for some time, and may have even registered them, but may still be infringing third party intellectual property rights. The infringement could be unintentional: it's possible to violate a patent even if you weren't aware that the patent existed.

In some cases, this can be remedied with a licence from the third party IP owner. However, it is important to note that even if the vendor already has a licence in place, the vendor may have being using the technology outside of the permissions granted by the licence. A common example is a software licence that limits the licensee to a certain number of computers or concurrent users, but the licensee is actually using the software in excess of those limits.

The solution from the purchaser's perspective is to conduct significant due diligence to determine the extent to which any of the above problems exist.

The vendor, however, should proactively conduct these investigations, well in advance of any proposed transaction. These investigations should identify all technology and IP owned and used by the vendor, including all technology owned by the vendor, and all technology owned by third parties. Once the assets have been identified, it then becomes possible to: (1) determine whether the company owns the assets, (2) protect the assets, and (3) take steps to avoid infringing third parties' rights.

The typical way this is accomplished is to meet the people who have a working knowledge of the vendor's technology, and compile a list of that technology.

The next step is to review all relevant documents including employment agreements, contractor agreements, technology polices, technology assignments, development and services agreements, licence agreements, terms of service agreements and other documents relating to the development, assignment, registration and enforcement of the vendor's technology and IP rights.

The next step is to conduct searches to determine what IP has been registered and where it has been registered. As part of this process, the searcher can look for IP owned by third parties that might cover technology or IP used by the vendor.

The final step is to compile the results of the investigation and begin to remedy the deficiencies that were identified.

Chris Bennett is head of the DLA Piper (Canada) intellectual property and technology law group.

Malice: Balancing free speech with guarding personal reputation

Continued from page 11

similar Internet platforms should not automatically be considered to have published, and therefore held legally responsible for defamatory content created by others."

Justice Polowin disagreed. She found that allowing moderators to escape liability would leave potential plaintiffs with no remedy, as "almost all of the individuals who post or comment on Free Dominion do so anonymously. To adopt the position of the defendants would leave potential plaintiffs with little ability to correct reputational damage" and would impair the balance between protecting free expression and protecting personal reputation.

Justice Polowin found that Smith's posting was defamatory, and that the Fourniers republished it. However, she also considered the context of online political debates in assessing whether the defendants had established the defence of fair comment.

The court took the unusual step of appointing its own expert under Rule 52.03. Greg Elmer, a professor at Ryerson University, opined that language on political message boards "can be harsher, more vulgar, spirited and personally directed on political blogs and message boards," and that "invective and hyperbole are common."

Justice Polowin accepted this position. She found that Smith and the Fourniers each met the test for fair comment in the context of an online political debate. Given the expectations of the parties, even Smith's "rant" was a statement of opinion that was justifiable in light of Baglow's previously published positions.

The court also found that Baglow failed to establish that any of the defendants were motivated primarily by malice. They reacted strongly to Baglow's provocations, but the trial judge essentially found that their words and conduct were not materially more malicious than the statement made by Baglow in relation to each of them.

The most significant element of this decision is its confirmation that website operators have clear liability for the comments of third parties, provided that the operator has actual knowledge of the comment and the ability to remove it. It remains to be seen how that principle will be applied in forums where the debate is less vigorous — or at least, less obviously defamatory — than the comments at issue here.

Ren Bucholz is a litigator at Lenczner Slaght whose diverse practice has a special focus on high tech, defamation, and intellectual property disputes.

Focus INFORMATION TECHNOLOGY

Protecting websites in the copycat age


Alan Macek
Vincent Man

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Websites are often the first interaction customers have with your business, and creating an attractive, informative site that ranks highly via search engines can be key to obtaining and keeping business.

Because of this competitors may be inspired to use aspects of your website, either properly or improperly, to improve their site. Several recent cases have tried to define what aspects of websites are protectable and which parts are not.

To have protectable copyright in your website, it is important to document the efforts used in creating each aspect of it, including the viewable content, the look and feel, and the hidden content (e.g., metatags). This documentation may be used as evidence to prove that there is originality (and thus copyright) in the various aspects of the website. Changes to the website should also be well-documented. If it is suspected that a competitor routinely copies content (whether visible or not) from your website, demonstrating that the competitor has copied over a period of time may help establish bad faith and allow you to claim punitive or exemplary damages.

In *Red Label Vacations Inc. (c.o.b. RedTag.ca) v. 411 Travel Buys Ltd. (c.o.b. 411TravelBuys.ca)* [2015] F.C.J. No. 220, one issue raised by the court was that the metatags that were allegedly copied did not rise to the level of originality needed to be copyrightable. To address this, consider using longer phrases or sentences in your metatags as opposed to a collection of key words. By using longer phrases and sentences, there is a higher likelihood that a court will find that there is copyrightable content in the metatags.

The court in *Red Label* also looked at whether there had been copying of the "look and feel" of the plaintiff's website. The court found that there was no evidence of copying with the exception of a screenshot, and found instead that the defendant had used a purchased template to develop the website. The court therefore concluded that there was no copyright infringement of the "look and feel."

While not applied specifically to the facts of the case, Justice Michael Manson in *Red Label* noted that the "look and feel" of a website may be protectable under trademark law provided that the party claiming rights can establish the test for "passing off." This is not a well-developed area of the law in Canada. One way of protecting the "look and feel" of not only websites but of all promotional material is to develop a consistent and unified brand which utilizes a common "look and feel" across all of a company's promotional materials, including their website. By using consistent fonts, trademarks, color schemes, and layouts across the various pages of a website, users more readily recognize and hopefully identify and associate a particular branding with your company and your products or services, and this will result in more readily protectable trademark rights.

If you suspect that a competitor has infringed IP rights in your website, immediately document their website by taking screen captures and downloading the HTML code used to generate the pages of the website. This should be done before sending any cease-and-desist letters to the competitor to avoid any he-said, she-said arguments as to what was available on their website, and when. Periodically monitor your competitor's website and document any changes that take place, even after a cease-and-desist letter has been sent. Because of the transient nature of web content, it is not easy to determine what changes have been made to a website and when those changes were made. Having a thorough record of this will make your case that much easier to prove if the dispute proceeds to litigation.

From the alternative perspective, there are several items to consider when a competitor alleges you or your company have copied some or all of their website and therefore may have infringed copyright.

A first step is to check for yourself the degree of similarity, if any, and talk to anyone involved in development of the site. Doing your homework will allow you to appropriately respond to the allegations being made. You may discover that there are good reasons for the alleged similarities, e.g., that both websites were derived from a common template purchased from a third party.

If an allegation has been made that there are portions of the site which have been copied, either inadvertently or accidentally, consider removing them immediately to minimize claims for damages and potentially resolving the allegations altogether. If changes are made in response to allegations from a competitor, be sure to keep a record to avoid allegations of destroying evidence.

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>
> **Alan Macek and Vincent Man**
> Dimock Stratton

For copyright, the portions copied may not be owned by the competitor — for example, the portions may be owned by a third party such as a website theme developer which may not give the competitor sufficient basis to make allegations in its own name. In *Century 21 Canada Ltd. Partnership v. Rogers Communications Inc.* [2011] B.C.J. No. 1679, the court denied Century 21's claim for copyright because it could not establish ownership in the photos that were alleged to have been copied in the defendant's website.

In addition, as discussed above, in *Red Label*, the court determined that the list of "metatags" in the website were not protected by copyright and therefore could not be infringed. They can also apply to allegations which are also not protected by copyright.

The increasing ease with which online content can be reproduced means that website owners must be constantly vigilant, both to ensure that competitors are not copying their websites but also to confirm that portions of a competitor's website do not end up appearing on their website either inadvertently or by accident.

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Lawddities

JPBCPA / ISTOCKPHOTO.COM

Bride who can't say no charged with fraud

Everyone loves a bride, but it really is possible to have too much of a good thing. New Yorker Liana Barrientos was accused of marrying 10 men in 11 years without ever getting a divorce, the New York Daily News reports. The 39-year old Barrientos, who is suspected of running an immigration scam, got into trouble when her recent marriage to a Bronx man named Salle Keita was investigated. A detective uncovered nine previous marriages, including half a dozen in one six-month period, and she was charged with filing a fraudulent marriage licence, a felony that could result in up to four years in prison. To make matters worse, Barrientos pleaded not guilty but failed to show up for a hearing at the Bronx Supreme Court, and a warrant was issued for her arrest. Even though she eventually turned herself in with a written apology, the judge threw her in jail to await trial. If Barrientos is eventually charged and convicted of immigration marriage fraud, she could face five more years in prison and a US$250,000 fine. – **STAFF**

Focus

CRIMINAL LAW

SILVERV / ISTOCKPHOTO.COM

False premise

How the veracity of confessions affects confirmatory evidence

Timothy Moore

When the voluntariness of a confession is challenged at trial, judges may be required to appraise the weight of confirmatory evidence whose probative value must be evaluated. The greater the concerns raised by the manner in which the confession was obtained, the more important it will be to find indicators of reliability in the attendant evidence. As the SCC noted in *R. v. Hart* [2014] S.C.J. No. 52, "confirmatory evidence…can provide a powerful guarantee of reliability."

The task is a difficult one for two reasons, and it is not restricted to undercover operations. First, extensive social science research has demonstrated how compelling and convincing confessions can be. Statements against interest are routinely perceived to be inherently reliable. Research has shown that confessions obtained from DNA-exonerated suspects often contained correct and graphic details about the crime that were not in the public domain. Because the confessors were innocent, this information could not have been gleaned from the crime scene. Notwithstanding their invalidity, many confessions included vivid sensory details, comments about motives, apologies and statements of remorse. In short, false confessions can appear highly credible even having been elicited by coercive means.

In a 2012 study, judges were asked to appraise culpability in cases where confessions were either present or absent and the corroborative evidence was either weak or strong. Some confessions were extracted with extremely high-pressure tactics (e.g., a 15- hour interrogation, or threats of the death penalty while the interrogators brandished a gun). Even with weak corroborative evidence, the conviction rate increased four-fold in the high-pressure condition, relative to the "no confession" control group. Surprisingly, perceptions of coercion and judgments of guilt were independent of one another. Ratings of voluntariness did not predict verdicts. More than one-third of the judges who read about the high-pressure confession (accompanied by weak evidence) perceived the confession as coercive but simultaneously judged the suspect to be guilty.

Obviously, judges themselves are not immune to the persuasive grip of a confession, which leads to the second difficulty associated with evaluating confirmatory evidence. He or she must assimilate multiple pieces of evidence together to decide whether the preceding confession is reliable enough to be admissible. Given what we know about confirmation biases, judgments about evidence are often influenced by the knowledge and expectations of the observer. Confessions in particular can affect the subsequent interpretation of evidence so that it is perceived to be congruent with the confession. The assumed corroboration may be more subjective and less confirmatory than it is portrayed to be. For example, research participants who read a case summary in which the defendant had confessed were more likely to erroneously conclude that handwriting samples from the defendant and perpetrator were a match. The prior confession produced not only an inaccurate judgment, but also influenced the perceived similarity between the two handwriting samples, suggesting that a belief in the defendant's guilt affected the actual perception of the handwriting stimuli. In another study, when eyewitnesses to a mock crime were told that a different lineup member than the one they had identified had confessed, most of them

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Focus CRIMINAL LAW

Twists and turns of the roadside refusal

Courts have set out requirements for defending the charge

Tushar Pain

EPANTHA / ISTOCKPHOTO.COM

The "roadside refusal" is probably the most common manifestation of the "refuse to provide breath sample" charge under the *Criminal Code*. This is not surprising given that there is a legal obligation to provide the breath sample and no right to speak with a lawyer first. Not appreciating that they must provide the breath sample and having no opportunity to get legal advice about the matter, many drivers end up refusing to provide the sample and find themselves facing a criminal charge, the consequences of which are the same as being convicted of "impaired driving" or "over 80."

While the police demand places a legal obligation upon your client, the police too must fulfil certain legal obligations before they can make the demand. Understanding those obligations is imperative to defending such a charge.

The offence of "refusing" is contained in section 254(5), which spells out the police officer's legal authority to demand and obtain the roadside sample. Within this provision, there are certain preconditions that must exist before the police officer will be in a legal position to make the demand.

Firstly, the officer must have reasonable grounds to suspect that the subject has alcohol in her body. The term "reasonable grounds to suspect" means that there must be both a subjective suspicion (i.e. that the officer actually suspects) and that the suspicion be objectively reasonable in all the circumstances. This requirement will typically be satisfied where the officer smells alcohol on the breath of the subject and/or where the subject admits to the recent consumption of alcohol.

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>
> **Tushar Pain**
> Criminal defence lawyer

The second requirement is that the officer reasonably suspects that the subject has, within the last three hours, operated or been in the care or control of a motor vehicle. Again, there is both a subjective and an objective component to this requirement. Note that under the previous incarnation of section 254(2), the Crown had to prove actual "operation" or "care or control" as a fact.

This requirement will usually not be in issue as most roadside scenarios originate from a police officer pulling over a driver, either as part of a RIDE program or for some suspected traffic violation. It can, however, become a litigable issue in, for example, a scenario where the police arrive at the scene of a traffic accident and the driver is no longer in the vehicle.

The third requirement is the immediacy requirement. The section implicitly requires immediacy with respect to the making of the breath demand and explicitly with respect to the provision of the breath sample by the driver. But for the immediacy requirements of this section, it "would not pass constitutional muster" for being in violation of sections 8, 9, and 10 of the *Canadian Charter of Rights and Freedoms* (*R. v. Woods* [2005] S.C.J. No. 42).

It is often on this front that many roadside refusal cases are litigated. The argument made is that if the demand did not meet both immediacy requirements, then it is not a demand pursuant to section 254(2). That being the case, it is therefore an illegal demand and one the accused did not have to comply with.

This argument can arise in various scenarios. The most common one is where an officer has pulled over a driver and formed a reasonable suspicion that the driver has alcohol in his body but does not have a roadside screening device on hand. In these cases one or both of the immediacy requirements may be vulnerable to attack. Officers in these scenarios often delay either making the demand until a device arrives or make the demand but are not in a position to take the sample.

In *Woods*, the court stated that the forthwith requirement under section 254(2) meant that the demand had to be prompt and that the response by the driver had to be immediate. However, it also indicated that, in some circumstances, "forthwith" may be given a more flexible interpretation. Not surprisingly, determining when the immediacy requirement has been met is not a cut and dried exercise.

In *R. v. Quansah* [2012] O.J. No. 779, the Court of Appeal for Ontario concluded that the immediacy requirement in section 254(2) required the court to consider five things: (1) The analysis must always be done contextually; (2) The immediacy requirement commences at the stage of reasonable suspicion; (3) The time of the forming of the suspicion to the making of the demand to the detainee's response must be no more than is reasonably necessary to enable the officer to discharge his or her duty as contemplated by section 254(2); (4) The immediacy requirement must take into account all the circumstances; (5) One of the circumstances to be considered is whether the officer could have facilitated contact between legal counsel and the driver. If so, the "forthwith" requirement has not been met.

When you find yourself defending a roadside refusal case, make sure you carefully examine the circumstances of demand as well as examining the circumstances of the refusal.

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Evaluation: Defence should identify all info sources available to accused

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subsequently changed their identifications. For those witnesses who had made no identification, half "selected" the so-called confessor, once his identity was revealed. Even fingerprint evidence is more open to interpretation than we might suppose. The same experts examining the same prints within different contexts sometimes reached different and contradictory conclusions. A match should be a match, or not, but it should not be context-dependent.

On the other side of the coin, it is not unusual for forensic facts that are incompatible with the confession to be overlooked or their reliability downplayed when the information is inconsistent with acceptance of the confession. In the Central Park Jogger case, five boys in their mid-teens ostensibly confessed to a brutal rape. Their reports contained abundant detail, but diverged significantly from each other and from the forensic facts.

The notion of confirmatory evidence depends on the assumption that the evidence on record will be assessed independently of the confession. If this assumption is incorrect then the perceived weight of that evidence may become inflated by the confession. What is the remedy? Depending on the evidence the Crown relies upon as confirmation, the defence would be well advised to identify all of the sources of information about the crime (e.g., media reports, Internet, rumours in the community, all previous interactions with the police, etc.) that would have been available to the accused. Such information, if present in the confession, should not provide a basis for any findings relating to confirmation. A confession that leads to the discovery of confirming evidence that was not heretofore known to the police is very different from one which simply supplies a lens through which already existing evidence is viewed.

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Digest

Administrative Law

JUDICIAL REVIEW AND STATUTORY APPEAL

Practice and procedure - Parties - Orders - Interim or interlocutory orders

Appeal by Rose from preliminary rulings in a judicial review proceeding. The appellant sought review of two decisions by the New Brunswick Human Rights Commission and a decision by the Conflict of Interest Commissioner. In 2012, she filed a complaint alleging discrimination based on marital status and perceived mental disability with respect to her unsuccessful applications for Government employment. The first decision of the Commission, made in April 2013, denied the appellant a request for an extension of time to include employment competitions held from 2006 through 2009 in the scope of her complaint. The second decision, made in June 2013, dismissed the remainder of the complaint on its merits. In addition, in April 2013, the appellant requested an investigation by the Conflict of Interest Commissioner. The Commissioner found no basis to sustain an investigation. The appellant filed her application for judicial review, naming several respondents and seeking 23 different orders. In a series of preliminary rulings, the judge refused to recuse herself on the basis of bias and refused the appellant's request to adjourn pending her complaint to the Canadian Judicial Council. The Commission and the Commissioner were removed as parties and the application was dismissed as against them. Rose appealed.

HELD: Appeal dismissed. The grounds for appeal were unwarranted, unsubstantiated and included outlandish allegations unsupported by the record. In refusing recusal, the motion judge cited and applied the correct jurisprudence and weighed the appropriate factors. There was no evidence to support the allegation of bias. The judge's procedural orders were exercises of discretion that did not disclose any reversible error or basis for appellate interference. There was no evidence that the Conflict of Interest Commissioner failed to comply with a duty of procedural fairness, acted in bad faith or was biased. The motion judge correctly found that their conduct was statutorily immune from review under the circumstances. The motion judge properly concluded that the Human Rights Commission did not have standing as a party to the proceeding.

Rose v. New Brunswick, [2015] N.B.J. No. 94, New Brunswick Court of Appeal, M.E.L. Larlee, B.R. Bell and K.A. Quigg JJ.A., April 23, 2015. Digest No. 3505-001

Constitutional Law

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Legal rights - On being charged with an offence - To make full answer and defence - Remedies for denial of rights - Damages

Appeal by Henry from a judgment of the British Columbia Court of Appeal that concluded he was not entitled to seek damages under the Canadian Charter of Rights and Freedoms (Charter) for non-malicious acts and omissions of Crown counsel. In 1983, Henry was convicted by a jury of sexual offences involving different complainants. He was declared a dangerous offender and sentenced to an indefinite period of incarceration. In 2010, the British Columbia Court of Appeal quashed all 10 convictions and substituted acquittals for each, finding serious errors in the conduct of the trial and concluding that the guilty verdicts were unreasonable in light of the evidence as a whole. Henry, who was imprisoned for almost 27 years, sought damages under s. 24(1) of the Charter for harm suffered as a consequence of his wrongful convictions and imprisonment. Henry alleged that the Crown had failed to make full disclosure of relevant information before and during his trial, and in subsequent proceedings. In his Notice of Civil Claim, he pleaded various causes of action: negligence, malicious prosecution, misfeasance in public office, abuse of process, and breach of his ss. 7 and 11(d) Charter rights. The sole question before the Court was the level of fault that Henry was required to establish to sustain a cause of action against the Attorney General of British Columbia (AGBC) in these circumstances. The AGBC argued that a claim for Charter damages grounded in alleged prosecutorial misconduct required proof of malice. The application judge rejected this submission. He observed that s. 24(1) afforded courts a broad discretion to craft appropriate remedies and found that there were competing policy considerations that were to be weighed in arriving at the appropriate threshold. He determined that a threshold lower than malice should apply. The British Columbia Court of Appeal unanimously allowed the AGBC's appeal, concluding that Henry was not entitled to seek Charter damages for the non-malicious acts and omissions of Crown counsel.

HELD: Appeal allowed. Section 24(1) of the Charter authorized courts of competent jurisdiction to award damages against the Crown for prosecutorial misconduct absent proof of malice. The malice standard was a high standard deliberately designed to capture only very serious conduct that undermined the integrity of the judicial process. By preserving this high bar for judicial intervention, the exercise of prosecutorial discretion could be properly protected. The AGBC advanced several arguments in favour of imposing malice as the liability threshold necessary to sustain a Charter damages award and submitted that the balancing of policy factors set out in the Nelles case, in which the Court established a qualified immunity shielding prosecutors from tort liability absent a showing of malice, was dispositive. The malice standard was firmly rooted in the tort of malicious prosecution, which targeted the decision to initiate or continue an improperly motivated prosecution. In contrast, the alleged wrongdoing at issue in this case was markedly different. Disclosure was a constitutional obligation which was required to be properly discharged by the Crown in accordance with an accused's right to make full answer and defence, as guaranteed under ss. 7 and 11(d) of the Charter. The liability threshold was tailored to the wrongful non-disclosure context. It lay in two key elements: the prosecutor's intent, and his or her actual or imputed knowledge. At trial, a claimant was required to convince the fact finder on a balance of probabilities that (1) the prosecutor intentionally withheld information; (2) the prosecutor knew or ought reasonably to have known that the information was material to the defence and that the failure to disclose would likely impinge on his or her ability to make full answer and defence; (3) withholding the information violated his or her Charter rights; and (4) he or she suffered harm as a result. In addition to establishing a Charter breach and the requisite intent and knowledge, a claimant needed to prove that, as a result of the wrongful non-disclosure, he or she suffered a legally cognizable harm. Proof of malice was not required to make out a cause of action for Charter damages against the provincial Crown in Henry's case. He could amend his pleadings to include a claim for Charter damages against the AGBC.

Henry v. British Columbia (Attorney General), [2015] S.C.J. No. 24, Supreme Court of Canada, McLachlin C.J. and LeBel, Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ., May 1, 2015. Digest No. 3505-002

Criminal Law

COMPELLING APPEARANCE, DETENTION AND RELEASE

Judicial interim release or bail - Grounds for denial - Detention necessary to maintain confidence in the administration of justice

Appeal by the Crown from a judgment of the Quebec Superior Court allowing St-Cloud's application for review of his detention order. St-Cloud was accused of aggravated assault after a video system recorded him and two others assaulting a bus driver. The three individuals struck the driver in the head many times, leaving him with serious long-term injuries. The Court of Québec judge who heard St-Cloud's application for release upon completion of the preliminary inquiry found that his detention was necessary to maintain confidence in the administration of justice, noting the victim's severe medical condition. St-Cloud applied to the Superior Court for a review of the detention order. The Superior Court concluded that the incident was repugnant, heinous and unjustifiable, but not unexplainable. The Court held that the first judge erred in denying release on the basis of the ground set out in s. 515(10)(c) of the Criminal Code. The Crown appealed that conclusion as well as the order granting St-Cloud's release.

HELD: Appeal allowed. The scope of s. 515(10)(c) had unduly been restricted by the courts in some cases. This ground for detention was not necessarily limited to exceptional circumstances, to the most heinous of crimes or to certain classes of crimes. The interpretation of s. 515(10)(c) had also been truncated by a misunderstanding of the meaning of the word "public" used in the provision's French version. The "public" were reasonable, well informed members of the community, but not legal experts with in depth knowledge of the criminal justice system. Since a decision whether to order the pre-trial release of an accused involved a delicate balancing of all the relevant circumstances, the power of a judge hearing an application under s. 520 or 521 of the Criminal Code to review such a decision was not open-ended. Exercising this power would be appropriate in only three situations: (1) where there was admissible new evidence; (2) where the impugned decision contained an error of law; or (3) where the decision was clearly inappropriate. In the last of these situations, a reviewing judge could not simply substitute his or her assessment of the evidence for that of the justice who rendered the impugned decision. It was only if the justice gave excessive weight to one relevant factor or insufficient weight to another that the reviewing judge could intervene. The Superior Court judge made several errors that justified reviewing his entire decision. The Crown's case appeared to be strong, since the incident was videotaped and there was eyewitness testimony. The offence was objectively very serious, being an aggravated assault for which the maximum sentence was 14 years, one of the most severe in the Criminal Code. St-Cloud was an active participant in the extremely brutal assault. The fact that the assault was committed against a bus driver, a civil servant who worked in the community to ensure the well-being of the public, made the offence even more heinous. Also relevant were the nature and severity of the injuries sustained by the driver, and in particular the long-term effects and the impact on his career and his personal life. In light of all relevant circumstances required to be weighed by s. 515(10)(c), St-Cloud's detention was necessary to maintain confidence in the administration of justice. The detention order was restored.

R. v. St-Cloud, [2015] S.C.J. No. 27, Supreme Court of Canada, McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis, Wagner and Gascon JJ., May 20, 2015. Digest No. 3505-003

Digest

CRIMINAL CODE OFFENCES

Offences against person and reputation - Homicide - Second degree murder

Appeal by the accused, Carter, from two convictions and the accompanying sentence for second degree murder. The victims, PK and VK, were last seen alive in the presence of the accused in his backyard. They died of significant blunt force trauma to their heads and chests. PK's girlfriend and another friend attended the accused's residence 45 minutes after PK arrived due to a troubling phone call from PK. They approached the backyard and heard arguing and a commotion involving PK, but could not see into the yard. PK's girlfriend testified she could see a human body on the garage floor through a hole in the fence and the accused apparently washing something. She testified they heard VK talking to the accused in worried fashion. The accused's neighbour testified that she called 911 after she heard the commotion and a man in distress. Another neighbour testified that he heard a man pleading to stop being hit. He testified that he witnessed the assault and yelled for the accused. The accused appeared looking physically spent and indicated that they did not need help and that the altercation was over. The victims were discovered approximately one hour away from the accused's home. The accused's vehicle and his garage were destroyed in a fire after the incident when the accused was on holiday. A witness saw a friend of the accused's leaving the scene of the fire. DNA and physical evidence linked PK to the accused's burned vehicle. An undercover officer recorded statements made by the accused to his friend while they were in custody on an unrelated matter. The accused was convicted by a judge sitting with a jury. He was sentenced to life imprisonment without eligibility for parole for 17 years. The accused appealed.

HELD: Appeal dismissed. The trial judge was incorrect in finding no air of reality to support a party liability route to a manslaughter verdict, as there was ample evidence of assaults in progress by one or more individuals without the accused's involvement. Nonetheless, the failure to leave party liability with the jury did not cause a substantial wrong or miscarriage of justice. The jury was left with the option of manslaughter if it found the accused lacked the requisite intent for murder. The jury was given a proper limiting instruction on the use of post-offence conduct evidence. No objection was taken by defence counsel to the adequacy of the manslaughter instruction or the lack of instruction on party liability, as on balance, instructing the jury on party liability could have conceivably provided an alternate route to a murder conviction. Despite unfortunate use of "speculative inference" wording and rhetorical questions, the jury charge, when fairly read as a whole, did not invite impermissible speculation. The verdict was not unreasonable given the body of circumstantial evidence supporting an inference the accused was an active participant in the assaults and had the requisite intent for murder. With respect to the sentence appeal, the period of parole ineligibility was well within the range of a reasonable sentence given the nature of the crimes. Sentence: Life imprisonment; 17-year parole ineligibility.

R. v. Carter, [2015] O.J. No. 2128, Ontario Court of Appeal, R.J. Sharpe, J.M. Simmons and M.L. Benotto JJ.A., April 27, 2015. Digest No. 3505-004

EVIDENCE

Witnesses - Compellability - Competency - Spouses

Appeal by Bao Nguyen and Binh Tu from convictions for first degree murder and by Tri Nguyen from a conviction for accessory after the fact to murder. Quang was shot and killed in a karaoke bar while Bao sang. The shooter was never identified or apprehended. Quang was a drug dealer who owed Bao money. Binh was present in the restaurant just prior to the shooting and in the vicinity thereafter. The Crown alleged Bao and Binh orchestrated the murder and Tri subsequently helped Binh escape to Vietnam. None of the accused testified or called a defence. The defence position was that the gunman was unknown to the accused and acted alone or with unknown parties. The Crown called the common-law spouses of Bao and Tri to testify, and led evidence of out-of-court statements made by Bao's common-law spouse shortly after the shooting in respect of phone calls with Quang leading up to meeting the victim. The appellants were convicted by a judge sitting with a jury. They appealed and sought a new trial. They submitted that the trial judge erred in failing to extend the spousal incompetency rule to common-law spouses, and that such failure was discriminatory and contrary to s. 15(1) of the Charter.

HELD: Appeal dismissed. The trial judge correctly ruled that the spousal incompetency rule should not be extended to common-law spouses. The spousal incompetency rule created a distinction based on marital status, denying common-law spouses protections afforded to formally married spouses, and thus imposed an arbitrary disadvantage on common-law spouses. The rule was discriminatory and violated common-law spouses' equality rights under s. 15(1) of the Charter. However, the limitation of the application of the spousal incompetency rule to married spouses was demonstrably justified under s. 1 of the Charter. Restricting the spousal incompetency rule to married spouses supported the objective of ensuring that a witness spouse was not deprived of the freedom of choice, individual autonomy and human dignity associated with testimonial competence, unless they chose to marry and accept the state-imposed responsibilities and protections associated with marital status. In addition, the impairment of the rights of common-law spouses was minimized by the availability of the choice to marry. The trial judge made no error in treating the common-law spouses of Bao and Tri as competent and compellable witnesses for the Crown. In addition, the trial judge did not err in admitting the out-of-court statements by Bao's wife after the shooting regarding her conversation with Bao about meeting Quang under the spontaneous declaration exception to the hearsay rule. There was ample evidence regarding the surrounding circumstances to support admission of the statements.

R. v. Nguyen, [2015] O.J. No. 2098, Ontario Court of Appeal, K.M. Weiler, E.E. Gillese and K.M. van Rensburg JJ.A., April 24, 2015. Digest No. 3505-005

Employment Law

DISCIPLINE AND TERMINATION OF EMPLOYMENT

Termination by employer, with cause - Culminating incident rule - Dishonesty and untrustworthiness

Appeal by the defendant, Canadian Imperial Bank of Commerce (CIBC), from a wrongful dismissal judgment in favour of the plaintiff, Ogden. The plaintiff, age 41, worked for the defendant for seven years. She started as a personal banker and was promoted to a financial advisor position. The plaintiff built a portfolio of high net-worth clients, primarily comprised of Chinese immigrants. Her performance was regarded as exemplary to an exceptional degree. The plaintiff was terminated for cause in March 2011. The defendant alleged the plaintiff breached the conflict of interest policy in its Code of Conduct when she accepted wire transfers from third parties in China into her personal accounts and directed transfer of the funds to a client. The client was in the midst of closing a $5.7 million house purchase and did not have sufficient accounts to accept the transfer. The plaintiff agreed to facilitate the transfer through her own accounts. The plaintiff testified that she had not perceived a conflict of interest. She testified that she made a judgment call in the middle of the night when faced with an urgent situation. The trial judge considered whether the wire transfer was a culminating incident justifying the plaintiff's termination. The plaintiff's prior disciplinary record included a 2008 final warning letter for deficiencies in loan documents and, in particular, unauthorized reduction of interest rates on personal lines of credit after funding, an incident in 2010 in which the plaintiff accepted clothing gifts from a client, and a 2010 warning letter related to processing a staff mortgage. The trial judge found that the defendant did not have cause for dismissal on a cumulative basis, as the prior incidents did not warrant discipline. The trial judge found that the applicable heads of damage were compensatory, special and aggravated damages, as the dismissal was communicated in a cavalier, high-handed and insensitive manner, and was designed to end the plaintiff's career and ensure the defendant retained the entirety of her client portfolio. The defendant appealed.

HELD: Appeal allowed. The trial judge misapprehended the defendant's legal argument and the evidence regarding the issue of cumulative cause. The defendant did not rely on cumulative cause for dismissal of the plaintiff, as it instead asserted that the earlier incidents were merely relevant context for the wire transfer incident as a stand-alone basis for termination based upon a breakdown in the employment relationship due to dishonesty. In addition, the trial judge misapprehended the evidence regarding the issue of whether the wire transfer breached the defendant's Code of Conduct thereby casting doubt upon the finding the plaintiff was wrongfully dismissed. The trial judge's findings of fact in dismissing the plaintiff's claim for punitive damages conflicted with those made in allowing recovery of aggravated damages, thereby casting doubt upon the finding of liability for aggravated damages. The trial judge's misapprehension of the evidence and legal arguments constituted palpable and overriding errors of fact and mixed fact and law. A new trial was ordered.

Ogden v. Canadian Imperial Bank of Commerce, [2015] B.C.J. No. 797, British Columbia Court of Appeal, K.E. Neilson, E.A. Bennett and N.J. Garson JJ.A., April 27, 2015. Digest No. 3505-006

Family Law

MAINTENANCE AND SUPPORT

Child support - Considerations - Dependent children - Attendance at educational institution - Child support guidelines

Appeal by the father from an order requiring him to pay child support for the youngest child born in 1992, who had attained the age of majority. The child commenced her post-secondary education in 2010 at age 17. As she was a member of a First Nations Community, her tuition, residence fees, and books were paid by the Band Administration, along with an allowance for travel to and from her home twice yearly. The appellant argued his child support obligation should have terminated when the child attained the age of 19 years, or, alternatively, should have been reduced to $40 weekly when she resided at home. The motion judge stated the mother continued to provide financially for the child, both at home and while she was at university. The motion judge found the child continued to be a child of the marriage due to the fact she was enrolled full time as a university student, and concluded the table amount of support after age 19 was neither inappropriate nor unsuitable considering the overall circumstances of this case.

HELD: Appeal dismissed. The motion judge made no error in concluding that the child was entitled to support after age 19 and in adjusting the child support amounts to reflect the increases in the appellant's income as well as the changes to the table amounts.

L.P.S. v. M.S.F., [2015] N.B.J. No. 93, New Brunswick Court of Appeal, K.A. Quigg, B.V. Green and B.L. Baird JJ.A., April 23, 2015. Digest No. 3505-007

Government Law

ELECTIONS

Regulation - Advertising - Third-party advertising

Appeal by the plaintiff from the dismissal of its Charter challenge to s. 239 of the Elections

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Act which required third party sponsors of election advertising during a campaign to register with the Chief Electoral Officer. The plaintiff challenged s. 239 of the Election Act as an unjustified incursion on its right to free expression under s. 2(b) of the Charter. It sought a declaration that, to the extent it applied to third party election advertising expenditures of less than $500, s. 239 unjustifiably infringed s. 2(b) of the Charter and was of no force or effect. The judge dismissed the claim and affirmed the validity of s. 239 without any monetary threshold. He found that the salutary effects of the impugned legislation outweighed the deleterious effects. He found that the most concerning aspect of the legislation was the restrictive effect on spontaneous political expression, but that that effect was minimal because registering required providing minimal personal information and undergoing minimal administrative inconvenience. He found that the salutary effect was that it increased the transparency, openness and accountability of the electoral process.

HELD: Appeal dismissed. The judge did not err in defining the purpose of s. 239 of the Election Act as increasing transparency, openness and public accountability in the electoral process. That conclusion was consistent with the evidence and the relevant case law. As previously found by the Supreme Court of Canada in Harper v. Canada, those objectives were pressing and substantial and rationally connected to the legislation. The legislation was justified because of the insubstantial burden placed on third parties and the importance of promoting egalitarianism in political discourse.

B.C. Freedom of Information and Privacy Assn. v. British Columbia (Attorney General), [2015] B.C.J. No. 774, British Columbia Court of Appeal, M.V. Newbury, M.E. Saunders and P.D. Lowry JJ.A., April 23, 2015. Digest No. 3505-008

Health Law

HEALTH INSURANCE, GOVERNMENT

Subrogated claims and direct cause of action

Appeal by the law firm from a decision regarding the interpretation of s. 39(6) of the Ontario Health Insurance Act Regulations which prescribed the portion of the costs of an insured person's personal injury action which the Plan must bear. Section 39(6) of the Regulation provided that the Plan must bear the same proportion of the taxable costs otherwise payable by the insured person as the recovery made on behalf of the Plan bore to the total recovery of the insured person in the action. Under the Ontario Health Insurance Act, any person who commenced an action to recover damages arising out of the wrongful act of a third party must include a claim on behalf of the Ontario Health Insurance Plan for the cost of any insured medical services provided to the insured person in respect of the injury or disability suffered. The application judge interpreted s. 39(6) of the Regulation to include the recovery made on behalf of the Plan in the total recovery of the insured person in the action. The appellant argued that the total recovery of the insured person did not include any amount recovered on behalf of the Plan and that one must first determine the proportion of an overall costs recovery attributable to the Plan and then add the Plan's share of the cost recovery to the recovery made on behalf of the Plan which formed the numerator of the formula. The application judge accepted the interpretation advanced by the appellant with respect to the treatment of costs recovered by judgment or settlement and concluded that the phrase "costs otherwise payable by the insured party" in s. 39(6) of the Regulation referred to the costs payable by the injured party but for the subrogation provision found in s. 30 of the Act and s. 39(6) of the Regulation.

HELD: Appeal dismissed. The application judge correctly interpreted s. 39(6) of the Regulation to include the recovery made on behalf of the Plan in the total recovery of the insured person in the action. Since the cause of action for the recovery of the costs of medical services incurred as a result of the injury remained that of the injured person, "the total recovery of the insured person in the action" would include the amounts recovered in respect of the subrogated claim advanced on behalf of the Plan for the cost of insured medical services. Where no recovery was made by the insured person, the "total damages of the insured person assessed by the court" would include "the assessed claim of the Plan." The approach of the application judge regarding the treatment of costs, where an insured person recovered costs as part of a judgment or settlement, was, however, not consistent with the language of s. 39(6) of the Regulation and unnecessarily complicated the calculation exercise. Such costs should be deducted from the total costs in order to determine "the taxable costs otherwise payable by the insured person" to their lawyer. Once the net costs due to the lawyer were ascertained, one could proceed to calculate the Plan's proportionate share of those net costs by using the formula found in s. 39(6) of the Regulation.

Erickson & Partners v. Ontario (Ministry of Health and Long-Term Care), [2015] O.J. No. 2130, Ontario Court of Appeal, K.N. Feldman, M.L. Benotto and D.M. Brown JJ.A., April 27, 2015. Digest No. 3505-009

Human Rights Law

ENFORCEMENT AND PROCEDURE

Commissions - Complaints - Time for - Appeals and judicial review

Appeal by Hicks from a judicial review decision affirming the dismissal of his human rights complaint against his former employer, the Canadian National Railway. The appellant was a railway mechanic dismissed in 2002 for violation of his employer's drug and alcohol policy. With the assistance of his union, the appellant sought reinstatement between 2002 and 2006 by undertaking addiction treatment. In 2005, a specialist considered him fit to return to work. In 2006, a doctor retained by the employer examined the appellant and gave a negative evaluation. In 2009, the union informed the appellant that no grievance would be filed and that it was ceasing its efforts toward reinstatement. In 2012, the appellant filed a human rights complaint alleging discrimination on the basis of disability. The 2006 medical evaluation was listed as the last of the acts forming the basis of the complaint. The Commission dismissed the complaint on the grounds that the last discriminatory act occurred more than one year before receipt of the complaint. On judicial review, the court found that the Commission failed to analyze whether the appellant's disabilities affected his capacity to file his complaint within time. The court ruled that the error was of no consequence given that no medical evidence was presented to the Commission. On appeal, the appellant adduced new evidence comprised of medical reports from 2009 through 2013.

HELD: Appeal allowed. The Federal Court correctly identified reasonableness as the standard of review. The Commission's decision was unreasonable for three reasons. First, the Commission failed to analyze the appellant's disability and its possible impact on the delay. There was evidence before the Commission regarding the appellant's treatment and therapy for mental illness, in addition to the fresh evidence, that could have supported a conclusion the appellant's failure to file was attributable to a medical disability. Second, the Commission failed to analyze the length of delay in the context of the appellant's explanation that he was required to exhaust his remedies under the collective agreement prior to filing a complaint. Finally, there was no evidence of prejudice to the employer caused by the delay. The Federal Court judgment was set aside and the issue of timeliness was referred to the Commission for reconsideration.

Hicks v. Canadian National Railway, [2015] F.C.J. No. 513, Federal Court of Appeal, Ryer, Near and Rennie JJ.A., April 27, 2015. Digest No. 3505-010

Intellectual Property Law

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Industrial designs - Infringement - Defences to infringement - Procedure - Appeal

Appeal by the defendants, Imperial Manufacturing Group (IMG) and Home Depot, from the dismissal of their motion for particulars. The plaintiff, Decor Grates, sued the defendants for infringement of certain industrial designs related to floor heating grates. The defendants sought particulars with respect to three categories. The first category included the store outlets and locations of where the plaintiff's products were sold, the scope and nature of its products, and the timeline of the sale of its products. The second category included particulars regarding the designs at issue, how and when each design was created and finalized, details of the creators, and details regarding any agreements or assignments with the creators. The third category included particulars of all floor registers sold by the plaintiff to the defendant Home Depot. The defendants submitted the particulars were relevant to its defences of whether the plaintiff was a proprietor for the purposes of the Industrial Design Act, and whether it had registered its designs in a timely fashion. The motion judge denied the request for particulars on the basis the defendants had embarked upon an impermissible fishing expedition in respect of matters that were not relevant to the plaintiff's claim, and/or were within the defendants' own knowledge. The defendants appealed.

HELD: Appeal dismissed. The defendants misapprehended the purpose of particulars. Their request for particulars related to matters relevant to the propriety of information sought on discovery rather than information they required in order to plead. No palpable and overriding error was made in concluding the defendants were engaged upon a fishing expedition. The supplementary finding that some of the particulars sought were within the knowledge of the defendant Home Depot was a fact-based finding that did not give rise to any error. No basis for appellate interference was established. The motion judge's costs award was affirmed.

Decor Grates Inc. v. Imperial Manufacturing Group Inc., [2015] F.C.J. No. 503, Federal Court of Appeal, Stratas, Webb and Scott JJ.A., April 20, 2015. Digest No. 3505-011

Legal Profession

JUDGES

Disqualification or removal - Bias, reasonable apprehension of

Appeal by the Yukon Francophone School Board (Board) from a judgment of the Yukon Court of Appeal setting aside the trial judge's decision and ordering a new trial on most issues. After a trial involving claims by the Board concerning minority language education rights, the trial judge found that the Yukon government had failed to comply with its obligations under section 23 of the Canadian Charter of Rights and Freedoms (Charter). Based on the trial judge's conduct, as well as his involvement in the francophone community, the Court of Appeal concluded that the threshold for finding a reasonable apprehension of bias had been met and ordered a new trial on all but three issues. At trial, the Board sued the Yukon government for what it claimed were deficiencies in the provision of minority language education. The trial judge concluded that the Yukon had failed to give the Board adequate management and control of French-language education in accordance with section 23 of the Charter and the Education Act, and that the Board had the authority to determine which students

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would be admitted to the French school, including those not expressly contemplated by section 23 of the Charter. He also ordered the Yukon to communicate with and provide services to the Board in French. The Court of Appeal concluded that the trial judge's conduct and his involvement as a governor of the Fondation franco-albertaine gave rise to a reasonable apprehension of bias. A new trial was therefore ordered on most issues. The Court of Appeal, however, did not send back all the legal issues, making determinations about two of them which were the subject of this appeal. First, it held that the trial judge erred in interpreting section 23 of the Charter to give the Board the unilateral right to set admission criteria so as to include students who were not covered by section 23. Second, it concluded that the trial judge erred in ordering all of the Yukon's communications with the Board to be in French.

HELD: Appeal largely dismissed. The appeal from the Court of Appeal's conclusion that there was a reasonable apprehension of bias requiring a new trial was dismissed, but the Languages Act claims were to be joined with the other issues remitted by the Court of Appeal for determination at the new trial. The trial judge's actions, taken together and viewed in their context, would lead a reasonable and informed person to see the trial judge's conduct as giving rise to a reasonable apprehension of bias. The Court of Appeal was rightly troubled by the trial judge's disparaging remarks directed at counsel for the Yukon on several occasions, which it found to be disrespectful. In addition, the trial judge's refusal to allow the Yukon to file a reply on costs was highly problematic in the overall context of the trial. The threshold for a finding of a reasonable apprehension of bias was met on the basis of these incidents. However, the trial judge's current service as a governor of the Fondation franco-albertaine did not substantially contribute to a reasonable apprehension of bias. The Court of Appeal's conclusion that the Board could not unilaterally decide whom to admit to its school was upheld. There was no doubt that a province or territory could delegate the function of setting admission criteria for children of non-rights holders to a school board. This delegation could include granting a minority language school board wide discretion to admit the children of non-rights holders. In this case, however, The Yukon did not delegate the function of setting admission criteria for children of non-rights holders to the Board. In the absence of any such delegation, there was no authority for the Board to unilaterally set admission criteria which were different from what was set out in the French Language Instruction Regulation. This would not preclude the Board from claiming that the Yukon had insufficiently ensured compliance with section 23, and there was nothing to prevent the Board from arguing that the Yukon's approach to admissions prevented the realization of section 23's purpose. It was unclear why the Court of Appeal decided that this case was not a suitable vehicle for the determination of rights under section 6 of the Languages Act. The Board's Languages Act claims raised significant factual issues that could lead to a finding that parts of the claims were justified.

Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General), [2015] S.C.J. No. 25, Supreme Court of Canada, McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis, Wagner and Gascon JJ., May 14, 2015. Digest No. 3505-012

Municipal Law

POWERS OF MUNICIPALITY

Local improvements - Types - Highways

Appeal by Viceversa Developments from a finding that certain roadways were dedicated to public use. In 2003, Viceversa purchased a railway bridge and two parcels of land, connected by the bridge, from the Canadian National Railway Company (CNR). CNR had ceased using the railway some years prior to the sale. Three roadways were located on the parcels of land, all used and maintained by the City of Winnipeg. When Viceversa took possession of the property in 2004, it took the position that Winnipeg was trespassing by using the roadways, invoking a 1936 agreement that a predecessor in title to CNR, Northern, had with Winnipeg. That agreement provided that Winnipeg was entitled to encroach on Northern's right of way and to construct slopes for a roadway approaching the bridge, but that no dedication to public use arose from the use of the slopes, and that Northern was entitled to resume its own use of the encroached-upon land at any time. Viceversa subsequently commenced the present action, claiming an injunction and general damages for trespass and nuisance. In dismissing Viceversa's action, the judge noted that the two parcels of land had been used by the public from as early as 1936. He implied from Winnipeg's expenditure of public funds in constructing and maintaining the roads and sidewalks that Winnipeg and CNR, or its predecessor Northern, intended to dedicate the land to the public use.

HELD: Appeal dismissed. The 1936 agreement was limited in its scope to the construction of slopes that were never actually constructed and did not exist at the time of the present action. The agreement provided no assistance in resolving whether CNR or Northern intended to dedicate the roads in issue to public use. The roads at issue were constructed pursuant to agreements between Winnipeg and either Northern or CNR. CNR made it clear in the documents relating to the sale of the bridge and land to Viceversa that the roadways on the property were dedicated to public use. Viceversa agreed to accept title subject to all registered and unregistered agreements and easements in favour of municipalities. The judge did not err in finding sufficient evidence of an intention on the part of Northern and CNR to dedicate the roads to public use.

Viceversa Developments Inc. v. Winnipeg(City), [2015] M.J. No. 113, Manitoba Court of Appeal, H.C. Beard, D.M. Cameron and W.J. Burnett JJ.A., April 20, 2015. Digest No. 3505-013

Securities Regulation

OFFENCES AND ENFORCEMENT

Materially-misleading or untrue statements - Contravention of securities law - Penalties - Commission orders in the public interest - Powers of Commission - Administrative penalties - Disgorgement

Application by McCabe for leave to appeal two decisions by the British Columbia Securities Commission. The applicant was a British Columbia resident who was the sole officer and director of Jake Landon Publishing, a company that published the Elite Stock Report, a stock tout sheet distributed by direct mail. The applicant made stock purchase recommendations under his own name. He was not a registered advisor under the Securities Act. In 2009 and 2010, the applicant invoiced companies in exchange for touting a mining company's shares in the Report. The Report contained misrepresentations regarding the company's prospects that resulted in increased trading volumes that inflated the company's stock prices. The Commission found that the applicant was liable for gross misrepresentations in the Report and ordered payment of a $1.5 million administrative penalty and $2.8 million representing disgorgement of ill-gotten gains paid to the applicant for the company's promotion. The applicant sought leave to appeal on five issues. The applicant submitted the Commission did not have jurisdiction to sanction him for conduct that did not occur within Canada. The applicant submitted that the Notice of Hearing was deficient in prosecuting him as an individual for the actions of a company. The applicant submitted that the Commission erred in making consequential findings regarding the touting of other companies. The applicant submitted that the Commission erred in ordering disgorgement, as no payment was made to him personally and any payment was not contingent upon making misrepresentations. The applicant submitted that the administrative penalty was excessive and insufficiently explained.

HELD: Application allowed to a limited extent. Leave was granted on the issue of whether the Commission had jurisdiction to sanction the applicant for misrepresentation given that his Report was distributed exclusively in the United States, and the company at issue was offshore. There was a substantial question and arguable ground for appeal regarding whether the test for jurisdiction was met. The extent of the Commission's jurisdiction was a question of general importance. The remaining proposed grounds failed to meet the criteria for leave to appeal. The alleged inadequacy in the Notice of Hearing was not procedurally unfair, as the applicant was aware of the intention to establish his personal responsibility for the misrepresentations in the Report. The impugned finding of liability was not founded on the evidence related to the touting of other companies, and thus no issue was raised in respect of that evidence regarding a serious point of law. The ground of appeal related to disgorgement was a challenge to a finding of fact that also did not raise a serious issue of law or question of general importance. No arguable ground was established with respect to the administrative sanction, which was appropriate in the context of the transaction at issue and was within the range of reasonable outcomes.

McCabe v. British Columbia (Securities Commission), [2015] B.C.J. No. 798, British Columbia Court of Appeal, P.M. Willcock J.A., April 27, 2015. Digest No. 3505-014

Business & Careers

Bringing calm to the court

Yoga, Buddhist principles bridge gap of traditional adversarial approach

GRANT CAMERON

The stereotypical view of Canada's legal system is that of two legal zealots engaged in verbal fisticuffs on the courtroom floor, obsessively and passionately defending the interests of their clients.

While the system is adversarial, it doesn't have to be that way, say academics who participated on a panel at a recent Law and the Curated Body Conference in Toronto organized by York University's Osgoode Hall Law School and the School of Arts, Media, Performance and Design.

Instead of deep partisanship, they say, lawyers can be just as effective in resolving matters by embracing yogic techniques and Buddhist principles.

"The assumption is that lawyers are doing their job best when they do their job vigorously and in a partisan way," says Deborah Cantrell, associate professor and director of clinical education at the University of Colorada Law School. "We have this idea that a lawyer gets to the truth by duking it out. They put forth their best case and do their best to show the weaknesses of the other side.

"However, my experience working with Buddhist lawyers and being a Buddhist lawyer myself is that the kind of partisan advocacy that we believe leads to the truth actually obscures all sorts of important information."

Cantrell, who has written extensively about the intersection of Buddhist principles and holds a master's degree in developmental psychology, says that by practising calmness or equanimity, compassion and non-attachment, lawyers can be more psychologically stable and exercise better judgment.

Practising equanimity, she says, allows lawyers to notice what's getting them stirred up and take action.

"If one gets yelled at that can often trigger an instinctual response to either fight back or flee. What equanimity does is allow some space to happen so that one acknowledges what's arising and doesn't move to that habitual action."

The pause creates a moment for thoughtfulness so an intentional choice can be made, she says. Compassion is also important because it enables lawyers to put themselves in another person's shoes and get a better understanding of where they're coming from. In combination, calmness and compassion can lead to better decisions regarding a legal situation.

By practising non-attachment, she says, lawyers will also refrain from making quick judgments and reflect on matters more carefully, recognizing their personal biases.

Cantrell's belief is that practising deep partisanship often leads to disruptive emotions such as anger, and discourages lawyers and their clients from exploring ways forward that respect each other's interests.

"Personally for me, I think this is a better approach," she says. "I think those competencies are critical."

While she proposes a Buddhist approach, Cantrell says lawyers can cultivate the same competencies via a variety of means, including yoga.

She says yoga is good for lawyers because it "makes you get situated in your body" and "you realize that some of what you may be experiencing in your head is because of something else going on."

Cantrell says a contemplative practice like yoga reminds her that her mind and body are one and the same.

"They aren't divorced. Emotions and thinking and walking and chewing are all actions and they don't get divided."

Jeannine Woodall, director of research and graduate studies operations at Osgoode Hall, says yogic techniques are a good way to keep fit and to manage stress and help to get centred, something that lawyers need because they are often under so much pressure on the job.

"The main thing is that yoga practice helps create some stability in the mind. It helps people just come to a place of centredness. It also helps physically by creating more flexibility and strength in the body."

Because yoga focuses on breathing, Woodall says it grounds the participant's attention to the present moment.

"When you are able to breathe more calmly and deeply it has an effect on your heart rate so the physiological reaction to stress is minimized."

The focus on breathing also helps participants to stop dwelling on the past, says Woodall, "and it really

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Business & Careers

The migration of profit from high to low tax countries

Vern Krishna
Tax Views

The abolition of unfair taxes was one of the foundational principles of Magna Carta, a document that King John assented to on June 15, 1215 at Runnymede, England. Taxation must be fair, and requires the consent of the people.

There is no more unfair aspect of fiscal law than retroactive taxation. Hence, it is ironic that on the 800th anniversary of the Great Charter, U.S. President Obama, a constitutional scholar, is proposing a retroactive tax of 14 per cent on the accumulated foreign profits of American multinational corporations (MNCs). Similarly, in 2004, Canada amended its general anti-avoidance rule to retroactively apply to its treaties back to 1988. The concern of governments is with the migration of profits from high-tax to low-tax countries.

It is useful to look at the root cause of the profit migration problem — disparate corporate tax rates — before moving to the formulation of complex, arbitrary, and artificial solutions. For example, the United States has a federal-state corporate tax rate of 40 per cent, the highest in the developed world. In contrast, Luxembourg taxes at 29.2 per cent; Canada at 26.5 per cent; United Kingdom at 20 per cent; Ireland at 12.5 per cent; and Bermuda at zero.

Apple negotiated with Ireland and legally structured its business to pay an effective tax rate of only 1.8 per cent on its non-United States sales. The company did not repatriate its foreign profits to the U.S. because of the punitive taxes it would have to pay if it brought back its profits to America. This allows Apple to use its foreign cash holdings, $178 billion at the end of 2014, to acquire foreign assets — such as Nokia's patents, for $600 million. The structure of MNCs is essentially driven by the disparity in international tax rates.

Similarly, Starbucks avoided paying U.K. corporate taxes for three years through a series of complex transfer pricing mechanisms among its intercorporate transactions. The company reported losses in the U.K. by paying a 4.7 per cent premium to its Netherlands division, where it roasts its coffee beans, and a 20 per cent premium to Switzerland, where it buys its beans. This allowed the company to accumulate a large horde of foreign earnings which were not subject to U.S. taxation until repatriation.

Capital flows to its lowest level of taxation in order to maximize return on equity (ROE). The obvious but unrealistic solution is for countries to adopt uniform corporate tax rates to counter the downward flow. That is not going to happen any time during this century. Thus, from its headquarters in a leafy suburb of Paris, revenue bureaucrats at the Organization for Economic Co-operation and Development's (OECD) are working away at ever more complex, costly, and cumbersome solutions to remediate profit shifting by MNCs.

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The OECD is spearheading a "base erosion and profit shifting" ("BEPS") project to curtail the revenue erosion of high-tax countries. However, as each country has its own economic interests to protect, they must first agree on what is "aggressive" tax avoidance, and how they should attack the problem through legislation.

The OECD has set an ambitious timetable (two years) to implement its plan. To achieve its goal, it must attract sufficient support from the big players — the United States, Britain, and Germany. In this context, we should recall that the European Union is not always as united as it name suggests. For example, in 1975 it issued its Proposed Directive on the Harmonization of Tax within the EU, saying: "The differences at present existing between national legislations in this field are a constraint on the free movement of capital, which is one of the fundamental objectives of the EEC Treaty; international dividend flows are currently impeded by a series of discriminations, double taxations and complicated administrative formalities, which contribute to the separation of capital markets. Certain taxation provisions may in addition give rise to abnormal movements of capital, provoked by taxation considerations and not by the traditional financial motives.

"It is also necessary to move towards taxation neutrality as regards conditions of competition: the need here is to reduce the present differences in the taxation of the profits of business enterprises. The adoption of a common system of company taxation would be a first step in this direction."

Forty years later, we are waiting for harmonization.

Unlike Canada, which has a parliamentary system, the U.S. has divided powers between its three branches of government. On Jan. 20, President Obama addressed Congress in his sixth State of the Union and set out his tax policy agenda to the new Republican-controlled 114th Congress. The very next day, the Republican chairmen of the House ways and means committee, and the Senate finance committee, responded with their own goals for tax reform, which are a long distance from the President's proposals. Any changes to America's tax treaties also require the advice and consent of the Senate's foreign relations committee. Given the divisive Congress, which will continue for at least two more years, it is unlikely that the U.S. will be ready to come on board for BEPS tax reform in the foreseeable future.

Without U.S. participation, BEPS will languish in the computers of tax bureaucrats. In the interim, we are likely to corporate migration, such as the Burger King move, to lower-tax countries. It would be wise if the leaders of democracies remember Magna Carta, and the consequences of unfair tax legislation. Corporate barons do not fight with swords, but vote with their feet.

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Business & Careers

Class action suit rules tightened in SCC pharma case

LUIS MILLAN

A Supreme Court of Canada ruling that dismissed a proposed securities class action against a Montreal pharmaceutical company will likely make it more difficult for investors to launch similar lawsuits in the future, lawyers say.

The high court held that plaintiffs must provide courts with "sufficient evidence" to show a "realistic chance" of success in order to proceed with a securities class action.

"The threshold should be more than a 'speed bump,' " said Justice Rosalie Abella in a 7-0 decision in *Theratechnologies inc. v. 121851 Canada inc.* [2015] S.C.J. No. 18. "What is required is sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant's favour."

Many provinces, including Quebec, Ontario, Alberta, and British Columbia, have in the past decade introduced amendments to provincial securities statutes that allow plaintiffs to sue reporting issuers for alleged secondary market misrepresentation, such as failing to report a material change. But in order to eliminate groundless so-called "strike suits," plaintiffs under most provinces' securities legislation must obtain leave or a judicial green light from the court before bringing such a claim. Courts have since been grappling with the screening mechanism or ground rules for securities class actions.

Theratechnologies, a pharmaceutical company listed on the Toronto Stock Exchange, became embroiled in a securities class action after it applied to the U.S. Food and Drug Administration for a new drug aimed at reducing excess abdominal fat among HIV patients. As part of its approval process, the FDA referred questions about the drug, including possible side effects, to an advisory board. The FDA published the questions on its website. When analysts published reports on this development, the company's shares dropped by more than 50 per cent. Two days later, the FDA advisory committee unanimously voted in favour of approving the new drug application, and Theratechnologies' share price soon recovered.

A class action was then brought under the *Quebec Securities Act* over the drop of the share price. The suit, launched on behalf of shareholders by a numbered holding company that held stock in Theratechnologies, claimed that the possible side effects of the medication, and the FDA's questions about its side effects, constituted a material change in the business, operations or capital of Theratechnologies, and that it had failed to disclose that change.

Lower courts in Quebec had given the go-ahead to the securities class action but the Supreme Court overruled them. In order for an action to be authorized, under s.225.4 of the act, it must be filed in good faith and there must be a reasonable possibility that it will be resolved in favour of the plaintiff. While the SCC agreed with the Quebec Court of Appeal that the "reasonable possibility" criterion sets out a higher standard than the general threshold for the authorization of a common law class action, the high court held the threshold had not been met in this case, and that the FDA's questions were not a material change in the company's business, but rather a routine aspect of the approval process. A case with a realistic chance of success requires the claimant to offer a plausible analysis of the applicable legislative provisions, and credible evidence in support of the claim, without mushrooming into a mini-trial, according to the SCC.

"The test is absolutely higher following the SCC ruling," said Garth Myers, class action counsel with Koskie Minsky in Toronto. "There are many outstanding cases in Ontario and across the country relating to misrepresentations in issuer public disclosure that are the subject of many class actions such as the Theratechnologies case. So courts across the country will be looking to this decision for guidance on the appropriate test to apply in similar circumstances."

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>
> **Garth Myers**
> Class action counsel
> with Koskie Minsky

Because the application of s.225.4 of the act is still novel, though, it remains to be seen how the lower courts will apply the SCC's interpretation of the "reasonable possibility" criterion, added Myers.

Since the SCC ruling raises the bar for plaintiffs in Quebec and in the rest of Canada to obtain authorization from the courts, it will likely be more difficult for investors to launch securities class action suits, according to Pierre Lefebvre, a Montreal lawyer with Fasken Martineau DuMoulin who successfully represented Theratechnologies.

"Without conducting a mini-trial, as the SCC put it, plaintiffs will have to demonstrate to the court that they have a reasonable chance of success which means that they will have to have present credible evidence to convince a judge," said Lefebvre. "They will have to work much harder to find credible evidence and to establish a good case. That will force plaintiffs to think twice before launching such an action."

But Dimitri Lascaris, a plaintiffs-side securities class action lawyer with Siskinds LLP who acted for a Quebec investors' rights group that intervened in the Theratechnologies case, is far from convinced the higher bar will lead to fewer securities class actions.

"It's all going to depend on how lower courts interpret it," said Lascaris. "But at the end of the day, if you have a case that on its face appears meritorious and you have credible evidence to support it, you are going to get leave. If you have a slim case, with no or marginal evidence to support the case, you are not going to get leave. That's just the reality. Cases are going to be decided by the facts and the evidence, and the nuances of the leave test are not going to have, I think, long-term implications."

Montreal lawyer Michel Savonitto, who acted for the numbered company, said the ruling is disappointing because it focused almost exclusively on the screening mechanism to prevent "unmeritorious litigation" to the detriment of the underlying objective behind the *Quebec Securities Act* and similar legislation in other provinces. Up until the amendments, Canadian investors in the secondary trading market like the stock market did not have access to a statutory cause of action when they suffered losses as a result of breaches of continuous disclosure requirements. In common law jurisdictions, investors had to rely on the tort of negligent misrepresentation, which required that investors prove they had relied on the misinformation or omission of information to their detriment. That was extremely difficult to prove, and essentially put "meaningful redress" out of reach for many who were harmed by dubious disclosure practices, noted Justice Rosalie Abella.

The SCC ruling turns back the clock to an era before the legislative amendments were introduced to make it easier for investors to launch securities class actions suits, asserted Savonitto.

"With the decision that was rendered, it seems to me that they have taken from one hand what they previously gave on the other because the way the test has been interpreted is so restrictive that it will be just as difficult to seek redress as was the case before (the legislative amendments)," said Savonitto. "Even though the SCC warns that it should not be a mini-trial, for all intents and purposes it will be almost like a trial because it will be necessary for plaintiffs to introduce credible evidence. Will this mean that plaintiffs will have to introduce expert evidence? That will be extremely onerous for small investors who are considering launching a class action suit."

Quebec investors with a securities misrepresentation claim will likely forgo launching class action suits under the act in light of the ruling, and opt instead to file a common law class action under article 1003 of the *Code of Civil Procedure* because obtaining authorization is much easier, said Lefebvre. That's a highly unlikely possibility in the rest of Canada. In Ontario, the courts have held that secondary market misrepresentation class actions "are simply not certifiable" because of the many individual issues involved in these cases, noted Myers.

Technique: Goal is to pay more attention to self-care

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allows you just to be very present and undistracted and focus. It allows you to develop concentration."

Woodall says yoga can give lawyers broader perspective on who they really are and what their values are, something that can help when they're feeling overwhelmed.

"Yoga creates an ability for one to feel quite centred and so, in an adversarial context, it's probably less likely that someone who's been practising regularly would, for example, take things personally because they have more of a sense of non-attachment."

Woodall, a certified Jivamukti yoga teacher and practitioner of Buddhist meditation, has led yoga and mindfulness meditation sessions at the Law Society of Upper Canada, law firms, Osgoode Hall and the international lawyers program at the University of Toronto's Faculty of Law.

She took up yoga because she had a sore back and was feeling stress from her first year of law school.

"When I started practising I felt the sky or ceiling had been lifted about 1,000 feet above my head," she recalls. "I had such a bigger perspective on my life. When you practice yoga, you relax and it gives you a different kind of attitude or perspective."

The conference featured academics and practitioners from various fields and from around the world speaking on modern-day issues affecting the human body.

Faisal Bhabha, an assistant professor at Osgoode Hall who helped design and organize the conference, says the school wanted to get lawyers thinking about self-care issues because it's often discovered that difficult life circumstances are to blame when lawyers end up in disciplinary hearings before law societies.

Increasingly, he says, lawyers are looking to practices like yoga and Buddhist principles in an effort to gain insight on the connection between mind and body and explore consciousness as a source of stress.

News

Civil liberties group mourns passing of champion

Human rights lawyer served as general counsel for four decades

GEOFF KIRBYSON

Canada has lost one of its greatest champions of civil rights. Alan Borovoy, the face of the Canadian Civil Liberties Association for decades, died in May at age 83.

"He was the superhero of civil liberties," said human rights advocate Bernie Farber, former CEO of the Canadian Jewish Congress. "His legacy is one of standing up and fighting for civil rights in a manner that no one else had ever done before. He took on issues that weren't the popular way to go. He liked being the lone warrior. At times, it became very difficult for him.

"It's a great life for Canada. A man who devoted his entire working life in the fight for civil rights should be deeply honoured."

Borovoy served as general counsel of the CCLA from May 1968 until June 2009. He presented regularly at public inquiries and parliamentary committees on hot-button topics such as mandatory drug testing in the workplace, wiretapping and police race relations. He was also outspoken on issues such as capital punishment, religion in public schools, the *War Measures Act*, campus speech codes and national security. Perhaps the biggest item on his docket over the years was the question of free speech versus hate speech.

Borovoy

In the mid-1980s when the CCLA decided to fight hate laws, Borovoy described himself as the "minority voice" on the committee. He was front and centre in the 1970s, too, a time when there was an outpouring of pro-Nazi sentiment, particularly in Ontario. The federal government decided to look at legislation that would safeguard free speech while protecting against hateful

"Alan was a purist. He believed in free speech," Farber said.

"He was very erudite. It was hard to beat him in a debate. He kicked my ass most of the time. Even if I got a word in edgewise, he was a master of debating issues of civil liberties and free speech."

Just because they were longtime friends didn't mean Farber and Borovoy had to agree on everything. Farber said they were at opposite ends of the spectrum when it came to the likes of notorious Holocaust denier Ernst Zundel. Borovoy believed that "hate speechers" should be allowed to say what they wanted to say, regardless of how repugnant their views might be.

"We debated this on countless occasions. He was steadfast in this and our community was steadfast on the other side. He felt terrible, he really felt he was hurting (Holocaust) survivors. He grew up during the war. He knew survivors and the pain they went through. He held fast to his ideas," he said.

Despite declining health, Borovoy still came to the office virtually every day, often going out of his way to talk to the junior members of the staff, said Sukanya Pillay, executive director of the CCLA.

"I thought that was lovely. He was an iconic figure in Canada but it never went to his head. He loved to see young lawyers defending civil liberties," she said.

There's no question the CCLA wouldn't be the organization it is today without him, she said.

"He was at the helm of it for more than 40 years. I think he made a huge contribution to the evolution and understanding of civil liberties in Canada. He had a huge impact on the issues he chose to address. I think he brought a new style of arguing, persuasion and logic to various complex questions. I think he showed courage because he was willing to take unpopular positions when he thought he was right," she said.

"He was a real maverick. He was like a shooting star. He was a great guy. He was completely committed, he was one of those few people who found in his work complete fulfilment and purpose," she said.

In what is likely a little-known fact, Farber said Borovoy was a Yiddishist. That is, a person who loves to speak Yiddish and does so for the love of the language.

"We used to get together with a bunch of other Yiddish speakers and go to a Chinese restaurant in downtown Toronto and just speak Yiddish," he said with a laugh.

Nobody will be filling Borovoy's shoes, or even attempting to.

"I don't think anyone is trying to replace him. We all know in many ways he was irreplaceable. He was the CCLA. The greatest compliment we can pay him is to make sure the CCLA has a long life," Pillay said.

Farber agreed, saying he doesn't know when the likes of Borovoy will be seen again.

"A person of Alan's civil rights inclination comes around maybe once in a lifetime, I don't see anybody picking up that mantle. Alan was the CCLA for many years. A person with that kind of profile and dedication to the cause, I don't think we're going to see another one like that, certainly not in my lifetime," he said.

Borovoy was also a successful author and a regular contributor of articles to some of Canada's biggest newspapers.

The CCLA is currently looking at a number of ways in which it can memorialize Borovoy, including an annual scholarship, Pillay said.

Hebert: 'Something is broken here'

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accused, the requested lawyer's unique competencies, and whether the choice is "a reasonable expenditure of finite funds."

"The federal government shares fiscal responsibility with the provinces for criminal legal aid services, yet the federal investment in terms of actual dollars has remained the same since 2003," she said in an e-mail.

Hudson added that many larger cases are handled by the commission's staff lawyers, including those in which the potential outcome if convicted is life imprisonment.

Edmonton lawyer Patricia Hebert, past chair of the Canadian Bar Association's legal aid liaison committee, told *The Lawyers Weekly* that tough-on-crime legislation brought in by Prime Minister Stephen Harper's Conservative government has contributed to an increase in complex cases, especially those involving potential incar-

Hebert

ceration. That trend, in turn, has fuelled an increase in Rowbotham applications for legal aid, without a resulting increase in funding from the federal government.

Last year, she noted, Legal Aid Alberta successfully lobbied the provincial government to provide more funding to help cover the rapidly rising number of court orders for state-funded counsel. That number surpassed 40 in Alberta last year, compared with an average of two or three annually in previous years, according to a Legal Aid Alberta news release.

The court costs incurred in processing Rowbotham and Fisher applications would be better spent directly on legal aid, said Hebert. "There's a growing discussion in access to justice circles that something is broken here," she added. "If people can't access meaningful justice, then our laws are just written on paper."

In an e-mail response, federal Department of Justice spokesman Ian McLeod said legal aid is a critical component of Canada's justice system.

"We continue to work with our provincial and territorial partners to identify innovations, best practices and efficiencies that will contribute to ensuring that legal aid continues to be accessible to Canadians and sustainable in the future," he added.

Obiter: Courts will follow lead

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ance struck between the right of free expression and preventing harm to children in *Sharpe* suggests that young persons who participate in a sexual recording caught by the private use exception retain the ability to ensure its return or destruction. This understanding of the exception would provide protection for young persons who may suffer anxiety or distress from the knowledge that another person possesses such material and could unlawfully share it. It would serve to address circumstances in which the risk of harm outweighs the expressive value of the recording, contrary to the principles articulated in *Sharpe*."

Justice Karakatsanis noted she was not making a final pronouncement about a right of access or destruction because the issues were not raised by the facts in *Barabash*.

However, clear and express *obiter dicta* by a unanimous Supreme Court is often followed by lower courts.

"It is too early to predict the effect that these comments will have, particularly in combination with recently proclaimed legislation prohibiting the non-consensual distribution of intimate images (*Criminal Code* s. 162.1) and empowering the police to delete intimate images from a computer system (*Criminal Code* s. 164.1)," observed Alberta appellate Crown Jolaine Antonio, who argued the *Barabash* appeal.

She noted that enabling a child to demand return or destruction "is a necessary first step."

However, "it may be difficult or impossible for a child to exercise that ability, either because of the nature of the relationship with the possessor of the recordings or because of the way the recordings have been handled," she said by e-mail.