THE LAWYERS WEEKLY

Vol. 35, No. 27 NOVEMBER 20, 2015 lawyersweekly.ca

Justice minister's blogs reveal her views on major legal issues

Sun appears to be setting on Harper's 'tough on crime' agenda

CRISTIN SCHMITZ
OTTAWA

Before she made history this month as Canada's first indigenous justice minister, Jody Wilson-Raybould set out her views on many issues now falling into her bailiwick.

The 44-year-old ex-Crown and University of British Columbia law graduate, who was sworn into the Liberal cabinet Nov. 4, is a senior Aboriginal leader with 15 years at the bar. Her writings disclose a thinker who engages — and goes back to first principles — with a variety of thorny legal and public policy issues. Her election period blogs, and public comments, reveal opinions on an array of legal matters she now confronts as the federal government's chief legal adviser, and a key member of Justin Trudeau's cabinet.

One area in which the legal community can anticipate "real change" (as per her party's election slogan) is criminal justice. After five years as a front-line provincial prosecutor in Vancouver's downtown eastside — and her first-hand observation of the contribution of the Indian residential schools regime to the high incarceration of Aboriginal Canadians — Wilson-Raybould is no fan of the former Conservative government's signature 'tough on crime' approach, as it was expressed through more jail time and mandatory minimum penalties.

Instead, she advocates for evidence-based criminal justice policy, including upholding judges' sentencing discretion, and looking at crime and punishment from multiple perspectives, including Aboriginal restorative justice.

New day, Page 2

Prime Minister Justin Trudeau and incoming Justice Minister Jody Wilson-Raybould share a moment during the swearing-in ceremony at Rideau Hall, Ottawa, on Nov. 4. Wilson-Raybould made history as the nation's first indigenous justice minister. ADRIAN WYLD / THE CANADIAN PRESS

Tall order for vet Goodale in revamping bill

CRISTIN SCHMITZ
OTTAWA

A national security law expert says new Public Safety Minister Ralph Goodale has the experience and cabinet clout to spearhead the complex job of overhauling Canada's anti-terror laws.

The Regina MP has held a string of cabinet posts in his 27 years as a member of Parliament, including finance, agriculture, natural resources and public works. On Nov. 4, the 66-year-old University of Saskatchewan law graduate became first in line to take over as acting prime minister if incumbent Justin Trudeau is incapacitated. He is the only MP to have served under both Trudeau prime ministers (Justin and Pierre), having been elected for the first time at age 25 in 1974 (he has been re-elected without interruption since 1993).

University of Ottawa law professor Craig Forcese says Goodale's latest cabinet portfolio bodes well for the Liberals' election promise to replace the "the problematic elements" of the Harper government's anti-terrorism legislation (C-51) with a new law — developed in consultation with experts and Canadians — that better balances collective security with individual freedoms.

Forcese, Page 5

INFO TECHNOLOGY

Trouble with data tracking

Employee monitoring can risk workplace problems

PAGE 14

BANKRUPTCY

Maximizing the Ponzi clawback

Trustees lack tools to recover lost assets

PAGE 18

BUSINESS & CAREERS

Keep resumé short, sweet

And update it even when not job hunting

PAGE 24

PUBLICATIONS MAIL AGREEMENT NO. 40065517

News

Contents

New day: Harper's shots at SCC deplored

Continued from page 1

"I think it's important to ensure that…we have a criminal justice system that is smart, and is looking more at rehabilitation, at prevention," the Vancouver-Granville MP told *The Lawyers Weekly* before she joined the cabinet.

The new government will take a different direction than its predecessor on criminal justice, she affirmed. "I think there is a lot that we can do."

Top of her to-do list is consulting with Canadians and crafting a constitutionally sound approach to assisted suicide while facing a tight deadline from the Supreme Court, which invalidated the law earlier this year.

Wilson-Raybould will also advise Public Safety Minister Ralph Goodale and the cabinet on the constitutional parameters for revamping Bill C-51, the predecessor government's anti-terrorism law, which security experts and many law groups contend is constitutionally suspect and counterproductive.

Wilson-Raybould has forcefully expressed her view that C-51 does not strike the right balance between public safety and Charter-protected freedoms. "Security must not run roughshod over the fundamental tenets of our democracy," she blogged.

With respect to Bill C-51, she emphasized "the critical need for accountability, review and oversight mechanisms, as well as narrowing the broad definitions (i.e. 'activity that undermines the security of Canada')." She also endorsed the stance of the Canadian Bar Association and others that "there is a need for fulsome debate about how far we are prepared to go as a country to limit individual freedoms in the name of national security. Any bill, and particularly a bill of this nature, should not be rushed. Policy should not be driven by fear…I know this bill does not have the balance right and leaves far too much to the interpretation of those with power or exercising discretion. Oversight is required."

Incoming federal Justice Minister Jody Wilson-Raybould criticized the Stephen Harper government's 'attacks' on 'the integrity of the Supreme Court of Canada and Chief Justice Beverley McLachlin, (above) which is an assault on one of the most important and fundamental institutions of our constitutional democracy'. THE LAWYERS WEEKLY FILE PHOTO

Wilson-Raybould also blogged that she was "deeply troubled" by some of the predecessor government's rhetoric and reforms in the areas of immigration and refugees. "As a nation of immigrants, it is frightening when any government draws arbitrary lines between classes of people to further political objectives, as the Conservative government has done in recent years," she wrote.

"Although terms like 'old stock Canadian' may seem laughable for their absurdity, we must check our laughter so as not to underestimate the insidious danger of such terms and policies rooted in xenophobia, ignorance and personal quests for power," she wrote after former prime minister Stephen Harper said in a debate last September that "existing and old stock Canadians" approved of his government cuts to the health care of failed refugee claimants. "Mr. Harper has sought to divide Canada by creating the illusion of the 'other'— an approach recycled by politicians throughout world history, who have chosen to rely on politics of fear as a distraction from a dearth of meaningful policy or a weak or failing economy."

In particular Wilson-Raybould deplored Bill C-24's "two-tier citizenship" (which the Liberals have vowed to repeal) that enables Ottawa to revoke a dual citizen's citizenship (including those born in Canada) if they have been convicted of certain crimes. "Basically all that is necessary to rob a citizen, and by implication their descendants, of their home and their country, is the decision of a politician made under a bureaucratic process," she wrote. "These draconian powers do not strike the necessary balance between the protection of our security and the protection of our fundamental freedoms.

"Equally disturbing," she continued, was the denial of Zunera Ishaq's religious freedom to wear a niqab while swearing the citizenship oath, and that "when the courts of this country repeatedly direct the Conservative government that such policies are counter to the fundamental laws of Canada, Mr. Harper continues to finance doomed legal battles with taxpayer money in order to deny Ms. Ishaq the right to vote in the upcoming election and to use her plight as his own personal political fodder."

Wilson-Raybould is a member of B.C.'s We Wai Kai Nation who spent six years as regional chief of the Assembly of First Nations before federal politics. "Good decisions, policy and laws are born out of dialogue, inclusivity and informed debate," she wrote.

She advocated consideration of "advancing our maturing democracy through embracing appropriate measures of electoral reform, including proportional representation and mandatory voting. Democratic reform and renewal of our institutions may not be sexy, but it is incredibly important."

Wilson-Raybould criticized the Harper government's "attacks" on government watchdogs and "the integrity of the Supreme Court of Canada and Chief Justice Beverley McLachlin, which is an assault on one of the most important and fundamental institutions of our constitutional democracy: the independence of the courts."

On reconciliation between Aboriginals and Canada, the new justice minister has said the Liberals must "move forward with vigour" on their sweeping commitment to implement all 94 recommendations of the Truth and Reconciliation Commission (see story "First Nations Liberal MP wants quick action,' *The Lawyers Weekly*, Nov. 6, 2015, p.4)

She argues that legal and political mechanisms must be implemented now to facilitate Aboriginal self-governance. There must also be "an overarching cross-government reconciliation framework that would guide all departments and ministries, and be supported at the highest levels of the prime minister's office," to put into operation "what has been directed by the courts and set out in the *UN Declaration on the Rights of Indigenous Peoples*," she wrote.

Wilson-Raybould will advise the cabinet on how to implement the Liberals' pledge to create a "new fair process that will restore robust oversight and thorough environmental assessments." She argues that in order to implement an effective strategy for developing natural resources, including oil and gas, "we need to have a more robust conversation about what we mean by sustainable resource development for the future. We need to invest in science and research. And we need to have openness, transparency and clear rules surrounding environmental assessment and the approval for major projects. Moreover, unlike the past, Aboriginal governments are going to have a greater say, and it is unlikely major projects will proceed unless Aboriginal interests are taken into account."

In balancing the responsibility to protect the environment, with the need to grow the economy, "a strong economy is a means to an end and not an end in itself," Wilson-Raybould wrote. "It must lead to a better quality of life for all Canadians. Economic policy must be tied to social policy that speaks to the type of country we want to live in. We cannot ignore how our economy impacts the physical and social environment."

News

‘Cult’ of ISIS knows how to use social media

CRISTIN SCHMITZ
OTTAWA

Canada, and other members of the international coalition against ISIS, must step up their legal and other non-military attacks on the savage “cult” whose chief weapon is fear, advises an expert on the Middle East.

Twitter and other social media remain the tool of choice for the Islamic State of Iraq and Greater Syria (ISIS) to recruit fighters, mobilize adherents and terrorize populations, yet such platforms refuse to suppress the vast array of ISIS traffic, says University of Waterloo, Ont. political scientist Bessma Momani.

“We’re having a real hard time in the fight against ISIS, getting these private companies to buy into the idea that you’ve got to shut them down,” she told lawyers attending the annual conference Nov. 5 of the Canadian Council on International Law. “They’re not willing to shut them down because of freedom of speech, which is understandable.”

However the Islamic State’s relatively unfettered ability to recruit, and spread its message, globally over social media, has serious consequences, including sparking attacks in the West by self-radicalized individuals who will never set foot in Syria or Iraq, she said. “How do we deal with that?”

Momani noted that, in response to pressure at one point, Twitter eliminated about 40,000 ISIS accounts. Within a month, the number of accounts jumped back up to 30,000. Now “they have 70,000 Twitter accounts,” she said. “So it’s really a whack-a mole-strategy.”

Unfortunately, “there is so much more effort put on fighting them militarily than looking at them on the social media model,” Momani said. “We do not have enough money, or we’re not diverting money…into our hackers. Where is our social media, [our] online electronic army-equivalent doing the job of fighting ISIS? We’re just not doing that.”

The senior fellow at the Centre for International Governance Innovation, a Waterloo, Ont.-based non-partisan think tank, noted Islamic State comprises an estimated 50,000 people, while much of the territory it holds is unpopulated desert. “It is actually not a big problem in the big scheme of things,” she said. “It’s neither a state nor is it Islamic. It just makes things up as it goes.” The group’s “playbook” is *Management of Savagery*, which teaches how to govern through fear, she said.

Yet by disseminating videos of beheadings, and committing other well-publicized horrific acts, it has been able to dominate large numbers of people. In the city of Mosul, Iraq “there are 5,000 fighters controlling two million people,” Momani said.

In addition to considering how to combat ISIS messaging, lawyers have a role in grappling with how to cut off the group’s financing. Along with its oil revenues, ISIS funds itself through kidnapping and ransoms, she said.

“We’re not immune to criticism here because, other than the Americans, who have a really, I think, firm law about not paying terrorists, much of the international community…are paying,” she observed. And although members of the international coalition have committed not to transfer money to ISIS, many private actors, often companies, pay to get their people back. Churches are also paying monthly ransoms to keep imprisoned Arab Christians alive. “Something needs to be done with that,” Momani said.

Canada and other western nations also have to come to grips with how to reintegrate their nationals who return from abroad, she noted. Many are “gullible” youths lured online to join ISIS, only to be disillusioned quickly when the group’s rhetoric does not match reality on the ground.

“If you really want to get at the gist of what ISIS is, it’s a cult,” Momani explained. “ISIS has a really passionate, and very attractive, way of pursuing recruitment that really tries to get in the minds of these recruits.”

She suggested putting such impressionable returnees in prison is not likely the answer “because that’s where they become actually radicalized.”

News

Moves

- **Peter Lukasiewicz** will be chair and chief executive officer of *Gowlings* as of Jan. 1, 2016. He will succeed Scott Jolliffe. Lukasiewicz will also serve as a representative on the global board of Gowling WLG, the new international legal practice created by the combination of Gowlings and Wragge Lawrence Graham & Co. He is currently the firm's external managing partner and has served on Gowlings' executive committee as one of the firm's two managing partners. Previously, he was managing partner of the firm's Toronto office for 15 years. Lukasiewicz practises as a senior commercial litigator.
- Former federal minister of industry **James Moore** is joining *Dentons* as a senior business advisor. Based in Vancouver he will be providing strategic advice to clients across Canada and around the world. During his time as minister of industry he also served as regional minister for B.C. and provided strategic advice from a B.C. perspective. He was the youngest federal cabinet minister in B.C. history.
- *Miller Thomson* announced that **Pierre Soulard**, **Lisa Spiegel**, and **Kim Ozubko** have joined the firm's Toronto office as partners. Soulard joins the firm's capital markets and securities and mergers and acquisition groups. His experience includes guidance on public offerings, private placements, take-over bids, mergers and acquisitions. Spiegel joins the firm's health industry practice group. Her experience includes 10 years of prosecuting at the College of Physicians and Surgeons of Ontario as senior counsel. Ozubko joins the firm's tax and private client services groups. She has practised pensions and benefits law at several international law firms.

Crossing line prompts judicial critique

KIM ARNOTT

The Ontario Court of Appeal has reminded lawyers that while they are given wide latitude to make impassioned closing jury addresses on behalf of clients, statements impugning the character of the opposing party or its counsel exceed the limits of zealous advocacy.

In considering a closing address made during a jury trial in a personal injury case, the court found comments about "mischaracterizing," as well as "slanting" and "cherry-picking" evidence to be improper.

"[The statements] raised the risk the jury would focus on the character of York Fire [& Casualty Insurance Company]'s counsel and his client instead of what the jury should focus on: the evidence," wrote Justice John Laskin on behalf of the unanimous panel, in *Gilbert v. Smith*, 2015 ONCA 712.

Despite that, the court dismissed an appeal by the insurance company, finding that Superior Court Justice Ian Leach was "entirely reasonable" in refusing to grant a mistrial in the case.

"The improper comments of Gilbert's counsel were few and were not so serious or so prejudicial that they could not be addressed by an appropriate correcting instruction to the jury," noted Justice Laskin.

Along with objecting to statements that its counsel was "mischaracterizing" and attempting to "slant the evidence," the insurance company complained about the following comment on its own integrity: "I can only suggest to you that York Insurance is not on the search for the truth. Rather, it wants to divert your attention away from the truth, put up some smoke screens, and confuse the real issue by using tactics of selectively cherry picking the evidence to convince you to award as little money as possible."

> Where do you draw the line between, 'Hey, that witness's testimony cannot be believed,' and the label that you're attacking the integrity of the party? One sounds like it's offside, the other sounds like zealous advocacy. That's the real problem.
>
> **Robert Bell**
> Lerners

> The focus needs to be squarely on your client, and you just accentuate the positives about the case, attempt to minimize the deficiencies, and put your best case forward on behalf of your client.
>
> **Jason Katz**
> Singer Kwinter

While agreeing the statements were inappropriate, the Court of Appeal found the trial judge offered a clear and unambiguous correcting instruction directing the jury to disregard the improper comments and focus only on the evidence in the case.

Remarking on the motivation or sincerity of opposing parties is typically not helpful, and can be dangerous, says Michael Watson, a Toronto litigator who has taught advanced civil procedure at Osgoode Hall Law School for 30 years.

"Cherry-picking the evidence — it's a pejorative term, but that's exactly what counsel in our partisan litigation process are required to do. They emphasize the evidence that is good for them and then either ignore or downplay or explain away the evidence that is harmful to their client's case," he said.

"And how far will that really get you, to say that the other lawyer ignored this evidence? What really matters is: 'There is this other evidence, and don't forget it.' "

"The central message here is, 'Take a deep breath and make logically compelling arguments that do not attack the other party or lawyer, because that runs the distinct risk of being characterized by the court as inviting the decision-maker — the trier of fact — to base a decision on something other than what the decision-maker is required by law to base it on, and that's the facts and the application of the law to the facts."

While comments on the character of your opposition aren't helpful to a judge or jury, it is entirely legitimate to argue against the credibility of an opponent's case, says Robert Bell, a Toronto-based litigator and partner with Lerners.

"Where do you draw the line between, 'Hey, that witness's testimony cannot be believed,' and the label that you're attacking the integrity of the party? One sounds like it's offside, the other sounds like zealous advocacy. That's the real problem."

He says it can be avoided by ensuring credibility challenges are based on the foundation of evidence developed during the trial, rather than broad comments on character.

Bell added that the decision provides a good opportunity for discussion around these issues, in light of the increasing number of jury trials occurring in personal injury cases.

Jury trials demand particular rigor from lawyers because an unwise choice of words may lead to a call for a mistrial, jury removal or correcting instructions. "With a jury, every 'mistake' made by counsel gets magnified and puts pressure on the trial judge," he said.

Jason Katz, a personal injury lawyer with Singer Kwinter, noted that careful expressions of concern about the behaviour of an opposing party may sometimes be warranted, but don't belong in closing arguments.

"The focus needs to be squarely on your client, and you just accentuate the positives about the case, attempt to minimize the deficiencies, and put your best case forward on behalf of your client."

THE LAWYERS WEEKLY

Publisher
Ann McDonagh

Editor In Chief
Rob Kelly

Senior Editor
Matthew Grace, LL.B.

Focus Editor
Richard Skinulis

Ottawa Bureau Chief
Cristin Schmitz

Production Co-ordinator
Pauline Poulin

Art / Production Designers
Sara Hollander
Samantha Jackson

Correspondents
Kim Arnott, Toronto
Luigi Benetton, Toronto
Thomas Claridge, Toronto
Christopher Guly, Ottawa
Geoff Kirbyson, Winnipeg
Luis Millan, Montreal
Donalee Moulton, Halifax

LexisNexis
CCAB BPA WORLDWIDE BUSINESS

HOW TO REACH US
Tel: (905) 479-2665 Fax: (905) 479-3758
Toll-free: 1-800-668-6481
Email: comments@lawyersweekly.ca

Main Office
111 Gordon Baker Road
Suite 900, Toronto, ON M2H 3R1

Ottawa Bureau
c/o Parliamentary Press Gallery
Rm 350-N, Centre Block
Parliament Hill, Ottawa, ON K1A 0A6
Tel: (613) 820-2794 Fax: (613) 995-5795

Website
www.lawyersweekly.ca

Member, Ontario Press Council
2 Carlton Street, Suite 1706, Toronto, ON
(416) 340-1981; Fax: (416) 340-8724

GST/HST/QST No.: R121051767

ADVERTISING

Advertising Sales
Jim Grice (905) 415-5807
Ritu Harjai (905) 415-5804
Anne Yu (905) 415-5881

Advertising Traffic Co-ordinator
Jackie D'Souza (905) 415-5801

Circulation Controller
Scott Welsh (905) 479-2665, ext. 324

Print Subscription Rates
1 year (48 issues): $315, plus tax
2 years (96 issues): $535, plus tax
1 year U.S./international: $435
1 year student: $70, plus tax
Individual copies: $12, plus tax

Digital Subscription rates
1 year (48 issues): $285, plus tax
2 years (96 issues): $485, plus tax
1 year U.S./international: $385
1 year student: $60, plus tax

Postal Information: Please forward all postal returns to: Circulation Controller, The Lawyers Weekly, 111 Gordon Baker Road, Suite 900, Toronto, ON M2H 3R1. Return postage guaranteed. ISSN 0830-0151. Publications Mail Sales Agreement Number: 40065517.

News

Forcese: Smart people with no agendas needed

Continued from page 1

"You need a public safety minister, first of all, at whom the buck will stop, but who also has sufficient gravitas, and political and administrative experience, that they can actually take charge of that department, and so Ralph Goodale fits those criteria in the sense that he's held very senior portfolios in the past, and…he's basically the most experienced cabinet minister, so that is heartening," said Forcese.

He and University of Toronto law professor Kent Roach argue in their new book on Bill C-51, *False Security—The Radicalization of Anti-terrorism*, that to Canada's detriment, no one official is in charge of overseeing and co-ordinating anti-terrorism measures. Forcese noted the sprawling Department of Public Safety and Emergency Preparedness comprises several complex agencies dealing with anti-terrorism, such as CSIS, the RCMP and the Communications Security Establishment, while other government agencies outside the department's purview also have responsibility for fighting terrorism. "Everyone's in charge," he said.

The big question now is how far the new Liberal government will go in reforming the overlapping tangle of national security laws. "We have some hint of that in their platform, and aspects in the platform are good—it's just that they themselves are not alone sufficient," Forcese observed. "The problem with C-51 isn't that the security ills that C-51 was trying to cure are wrong. It's just that the execution was so poor in C-51 that it not only will not cure those security ills, it will have… counterproductive implications for rights and everything else."

Forcese and Roach argue that Canada's national security laws desperately need a holistic review and profound rethink, rather than only piecemeal reforms.

The Liberals' election platform did not expressly go that far. It committed to *ad hoc* changes, but does not address, for example, the complexities of information-sharing by government entities.

Forcese

"What we said in our book is: 'You need to press pause on that and you need to go back to basics and you have to rebuild this—not just tinker with the language,' " Forcese advised.

"And that means going right into the text of some of the existing laws, rather than layering wallpaper over a cracked wall—that's what C-51 does for information-sharing."

Forcese suggested the minister could immediately issue an administrative directive to CSIS not to seek new disruption warrants under C-51 that authorize Charter breaches. "But then, on a fairly urgent basis…I think we need an overarching architectural rethink" of the national security regime, he said.

Alternatively the government could adopt "a graduated process," beginning with amendments that eliminate the constitutional problems, as well as adding due process protections for those put on no-fly lists and for those whose passports are revoked (C-59). A second round of amendments could deal with more complex issues, such as information-sharing.

Forcese said the executive might be held more accountable after the Liberals implement their pledge to create an all-party committee to monitor and oversee the operations of every government department and agency with national security responsibilities. "But I think the most important virtue of a specialized committee with access to secret information is you'll suddenly enhance competency in national security—which has been more or less non-existent in our Parliament," he said.

Above all, he urged, before tabling a bill the new government should consult widely on anti-terrorism reforms. It should then strike a committee of legislators engaged by the subject matter. "Put together some really smart, capable people who are going to look at this through the optic of what's good for the country and not what's good for party."

Forcese recommended that the government send any proposed legislation for committee study before, rather than after, second reading debate. This will ensure that the bill's parameters are not set in stone. "Process matters. It's not a guarantee of good outcomes but it's a prerequisite to that."

Expert Witness Directory

ACCESSIBLE INVESTIGATIVE, FORENSIC ACCOUNTING & BUSINESS VALUATIONS

KROFCHICK VALUATIONS

Personal Injury
Investigative Accounting
Family Law
Business Valuations
Actuarial Services
Expert Underwriting
Damage Quantification

Matthew Krofchick
CPA, CMA, CBV, CMC, CFF
matthew@kval.ca

1-877-250-6682
www.kval.ca

DAMAGES QUANTIFICATION, BUSINESS VALUATION & EXPERT TESTIMONY

Business valuations
Personal injury damages
Business & economic losses

A *Canadian Lawyer* magazine
2015 Readers' Choice Awards Winner

Our outstanding record includes provision of expert witness testimony on over 150 occassions for plaintiffs, defendants and insurers.

Ian Wollach
iwollach@collinsbarrow.com

Carolyn Seaquist
cseaquist@collinsbarrow.com

T: 416.480.0160

Collins Barrow
Clarity Defined.
collinsbarrow.com

DAMAGES QUANTIFICATION, BUSINESS VALUATION & FORENSIC ACCOUNTING

Three words when looking for the right expert in damages quantification, business valuation & forensic accounting:

Expertise.
Independence.
Objectivity.

Three words when looking for the right firm:

cohen hamilton steger
Expertise. Independence. Objectivity.

Farley Cohen MBA, FCPA, FCA, CA•IFA, CIRP, FCBV, ASA
Ross Hamilton CPA, CA•IFA
Peter Steger CPA, CA•IFA, CBV, CFE
Paula Frederick CPA, CA, CBV
Prem Lobo CPA, CA, CBV, CFE, CPA (Illinois)
Greg McEvoy CPA, CA•IFA, CBV, CFE

cohenhamiltonsteger.com
Toronto • 416 304 1595
Ottawa • 343 291 1095

FORENSIC ACCOUNTING

Our expertise goes well beyond the numbers

Find out more at
> mdd.com

MDD
FORENSIC ACCOUNTANTS

DENTAL EXPERTS

Expert Dental Opinions

TMJ/TMD

POST MVA
TMJ/TMD

Iatrogenic Dentistry
Orthodontics
Periodontics

A unique dual specialist (Orthodontist/Periodontist) with extensive legal opinion and court experience available for engagement

Curriculum Vitae available upon request

Please contact
Dr. Brian Rinehart, BSc, DDS, FRCD(C), PC
drrinehartlegal@gmail.com

BUSINESS VALUATION & LITIGATION CONSULTING

Stern Cohen
ACCOUNTANTS

Want a report that holds up?

Stern Cohen Valuations Inc.
Business valuation
Damage quantification
Forensic accounting
Transfer pricing

Peter Weinstein
CPA, CA•IFA, CBV, MBA
416.967.5100
pweinstein@sterncohen.com

FORENSIC INVESTIGATORS

Need professionals who can see the forest for the trees?

- **Litigation Support**
- **Forensic & Investigative Accounting**
- **Fraud Investigations**
- **Fraud Prevention & Detection**

Look for a **Certified Forensic Investigator of Canada "CFI"** who has demonstrated competency through examination, experience and education – and continually maintains their proficiency.

For more information contact the *Association of Certified Forensic Investigators of Canada*
Alan M. Langley, Executive Director
(416) 226-3018 or
(877) 552-5585

ACFI
ASSOCIATION OF CERTIFIED FORENSIC INVESTIGATORS OF CANADA
www.acfi.ca

LIFE & HEALTH INSURANCE LITIGATION

Barry J. Plener CONSULTING

EXPERT UNDERWRITING OPINIONS ON LIFE, DISABILITY, CRITICAL ILLNESS INSURANCE CLAIMS AND LIFE EXPECTANCY

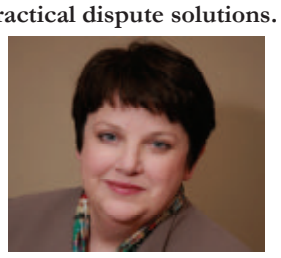
- Former Chief Underwriter
- Over 25 years of Underwriting Experience
- Available to both Plaintiffs & Defendants

Contact:
Barry J. Plener, BA
Tel: 416-402-0008
www.barryplener.com

LITIGATION AND FORENSIC ACCOUNTING

Benefit From Experience.

Built on over 20 years of experience providing creditable, objective, and independent expert evidence and practical dispute solutions.



Nancy Rogers
CPA, CA, IFA, CBV, CIP
416-471-9155
www.nrogersinc.com

- Damage quantification
- Business valuations
- Disputes consulting
- Insurance claims
- Forensic accounting

NRogers & Associates Inc.

AGENT: DUTY OF CARE

Jim Bullock

42 years as a Life Insurance broker

16 years experience as an Expert Witness

Services available to Plaintiff or Defendant

Expert Opinion Re Agent Duty of Care:

Denied claims
Failure to disclose
Misrepresentation
Unsuitable products
Know Your Client
Negligent Administration of Application

Jim Bullock
Caledon, Ontario
416-518-2075
Jim@peelinstitute.com

Expert Witness Directory

FORENSIC ACCOUNTING, DAMAGES QUANTIFICATION & BUSINESS VALUATION

LBC INTERNATIONAL

Forensic Accountants

Expert witnesses with over 30 years of experience

Ivor Gottschalk
CPA, CA, IFA, CBV

416.596.1000

WWW.LBCINTL.COM

NURSING AND MEDICAL EXPERTS

CONNECT MEDICAL LEGAL EXPERTS

HEALTHCARE AND LAW WORKING. TOGETHER

1500 EXPERT OPINIONS FOR OVER 400 LAWYERS

CONNECT MEDICAL LEGAL EXPERTS

855-278-9273
http://www.connectmlx.com
Experts@ConnectMLX.com

ACCOUNTANTS — FINANCIAL ADVISORY

Exceptional service for exceptional circumstances.

From analysis and interpretation of financial data to expert testimony, BDO's multidisciplinary Financial Advisory Services team serves a wide range of clients facing a range of complex financial issues.

People who know, know BDO.℠

Fraud investigation
Economic loss quantification
Insurance loss determination
Business valuation
Expert testimony

Gregory C. Hocking
CPA, CA·IFA, Partner
416 775 7800
ghocking@bdo.ca
www.bdo.ca

BDO

FORENSIC ACCOUNTING & INVESTIGATION

We can help.

Grant Thornton LLP is a national audit, tax and business advisory firm, and we offer comprehensive expert witness and support services to firms like yours. Whatever challenges your case presents, we can help—every step of the way.

Jennifer Fiddian-Green, Forensics and Dispute Resolution
T +1 416 360 4957 | E Jennifer.Fiddian-Green@ca.gt.com

Brad Rolph, Tax Structures and Transfer Pricing
T +1 416 360 5012 | E Brad.Rolph@ca.gt.com

Grant Thornton
An instinct for growth™

www.GrantThornton.ca
Audit • Tax • Advisory

BUSINESS VALUATION & DAMAGE QUANTIFICATION

VSP VALUATION SUPPORT PARTNERS LTD.

Delivering clear, concise and defensible expert business valuation and loss quantification reports.

Expertise in the following areas:

- Commercial disputes/ transactions
- Shareholder disputes/ buyouts
- Matrimonial disputes/ collaborative separations
- Tax and estate planning

Jason Kwiatkowski,
CPA, CA, CBV, ASA, CEPA
jason@vspltd.ca

Jeff Ambrose, CPA, CA
jeff@vspltd.ca

Support, Confidence, Credibility
905-305-VSPL (8775)
www.vspltd.ca

DAMAGES QUANTIFICATION, BUSINESS VALUATION & FORENSIC ACCOUNTING

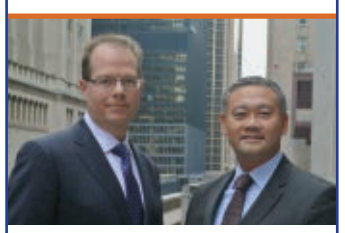
Ferguson Mak LLP

STRATEGIC CLARITY ➢ EXACTING RESULTS

- **INDEPENDENT**
- **EXPERIENCED**
- **OBJECTIVE**

Specializing in:

- damages quantification
- litigation support
- accountant & auditor negligence
- shareholder disputes
- fraud investigation



Bob Ferguson, CPA, CA•IFA
416.955.0016
bob.ferguson@fergusonmak.com

Alan Mak, CPA, CA, CBV, CPA/CFF (Illinois), FCPA (Hong Kong), CGMA, CFE
416.955.0048
alan.mak@fergusonmak.com

F M LLP fergusonmak.com
p: 416.955.7878

FORENSIC ACCOUNTING, DIGITAL FORENSICS & DAMAGE QUANTIFICATION

Count On Us

Experience the difference when you retain one of our experts in forensic accounting, corporate investigations, computer forensics, loss quantification and business valuation.

FROESE FORENSIC partners ltd.
> The Financial Investigators

froeseforensic.com

BUSINESS VALUATION & LITIGATION ACCOUNTING

SF VALUATIONS
Valuation & Litigation Support

NUMBERS THAT STAND

For further information or a detailed quote, contact:

Joshua Epstein
CPA, CA, CFF
Associate
SF Valuations Inc.
Tel: (416) 646-8068
Email: jepstein@sfgroup.ca

Marnie Silver
MBA, CPA, CA, CBV, CFF
Principal
SF Valuations Inc.
Tel: (416) 646-8085
Email: msilver@sfgroup.ca

4950 Yonge Street, 4th Floor, Toronto, ON M2N 6K1 (416) 250-1212 www.sfgroup.ca

Alternative Dispute Resolution Directory

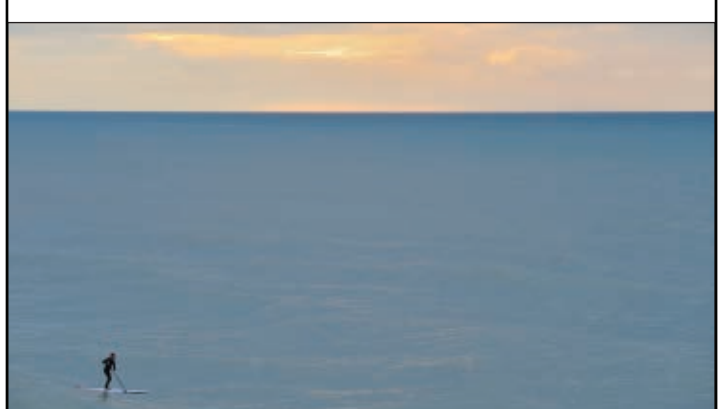
ROBBY BERNSTEIN
MEDIATOR and ARBITRATOR

IF YOU CAN LITIGATE IT, I CAN MEDIATE IT

"You are a fine mediator and a very bright guy.We need more like you."

"I have never had a mediator who has worked as hard at getting the parties to reach a settlement."

"You know exactly what to say and when to say it and are excellent at judging people."



STEERING YOU TO CALMER WATERS

Robby Bernstein
BCom LLB BCL (Oxon) FCIArb
Barrister and Solicitor
Mediator and Arbitrator
416.595.2491
rbernstein@bernsteinlaw.ca

www.bernsteinlaw.ca

BENNETT mediations

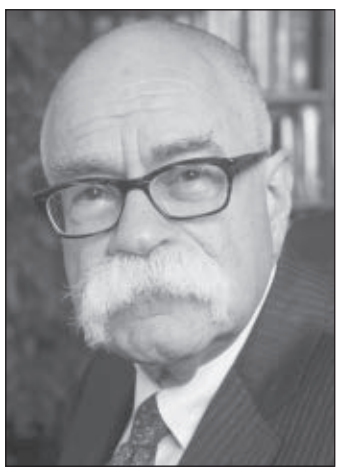
Objective ▪ Tenacious ▪ Cost Efficient ▪ Knowledgeable

At Bennett Mediations, the resolution of your dispute is our goal.

With over 20 years of experience in civil litigation and dispute resolution, Elizabeth Bennett-Martin understands fair compromise. Elizabeth brings a tireless and impartial approach to achieve the best settlement possible for all parties.

Commercial & Civil Litigation ▪ Personal Injury ▪ Motor Vehicle Accidents ▪ Insurance ▪ Contracts

Bennett Mediations
27 Old Kingston Road
Toronto, ON M1E 3J6
T: (416) 361-3319
F: (416) 361-1530
E: info@bennettmediations.com
www.bennettmediations.com



PHILIP ANISMAN
B.A., LL.B., LL.M., J.S.D.

MEDIATION AND ARBITRATION

- Shareholder and Partnership Disputes
- Dealer and Adviser/Client Disputes
- Shareholder Oppression
- Corporate Governance
- Investment and Securities law
- Securities Regulatory Matters

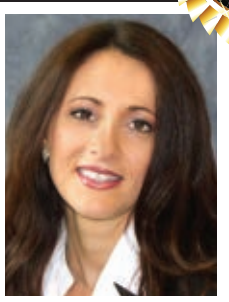
Philip Anisman
Barrister & Solicitor
1704-80 Richmond Street West
Toronto, Ontario M5H 2A4
Telephone: 416-363-4200
Facsimile: 416-363-6200
Email: anismanphil@on.aibn.com

YORKSTREET
DISPUTE RESOLUTION GROUP INC
MEDIATION • ARBITRATION • APPRAISAL

NAMED TOP 10 ADR FIRM IN CANADA'S LAWYER MAGAZINE

We can help You find the Fairway


Douglas Cutbush
F.C.I.P., F.C.I.ARB., C.ARB

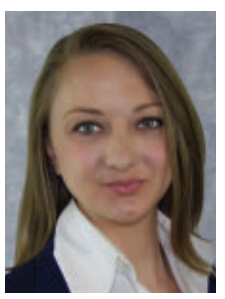

Helen Walt
B.Comm., LL.B., LL.M.


Margaret K. Rees
C. Med.


Derek Sarluis
CIP


Cindy Winer
B.A., A.L.H.C.


David L. Smith
C.A.


Alicia Kuin
B.A., M.A., LL.M., Q.Med.


Jeffrey Musson
B.A., B.Comm. LL.M.

We can offer you immediate dates for Mediations & Appraisals.

Please call our ADR Coordinator or book online: **(416) 866-2400**

130 Adelaide Street West, Suite 701, Toronto, Ontario, M5H 2K4
Fax: (416) 866-2403 | Email: adradmin@yorkstreet.ca | Web: www.yorkstreet.ca

---

JULIAN POLIKA
Q.C., J.D., F.C.I.Arb.
Mediator, Arbitrator, Referee, Neutral

EXPERIENCE:

- 16 years as a case management master with 8 years specializing in construction lien references
- 30 years as a litigator at all levels of court
- Heard thousands of motions in civil & construction lien actions
- Conducted over 400 construction lien references, involving over 2,000 claims for lien, through to settlement or trial

FEES BASED UPON THE PRINCIPLE OF PROPORTIONALITY

Contact:
(416) 617-4802
jpolika@polikamedarb.com
www.polikamedarb.com

CHOOSE FROM CANADA'S TOP MEDIATORS AND ARBITRATORS

Andrew M. Diamond
B.A., LL.B., M.B.A.

is an Arbitrator and Mediator in insolvency law, commercial disputes, employment law, personal injury and human rights cases. Andrew is a former Superior Court Registrar in Bankruptcy and member of the Human Rights Tribunal of Ontario. Andrew provides cost effective dispute resolution.

adrchambers.com
416.362.8555

ADR CHAMBERS

Alternative Dispute Resolution Directory

Commercial Leasing

Real Estate

Franchising

Condominium

Construction

Wolfgang Kaufmann
wolfgang@dv-law.com
416-597-3952

Mediation & Arbitration

Daoust Vukovich LLP

Click here for Wolfgang's biography or Visit our website www.dv-law.com

---

JAMES E. DOYLE
Mediator

T: 416-598-2140
F: 416-598-5466
jdoyle@wmdlaw.net

Providing mediation and other dispute resolution services for over 10 years

Over 35 years litigation experience involving a broad spectrum of civil disputes

Personal Injury, Insurance, Commercial, Employment, Estates, Sports, Sexual Abuse

Walsh McLuskie Doyle
Suite 2200, 181 University Ave.,
Toronto, ON M5H 3M7

COE ADR MANAGEMENT

MEDIATORS AND ARBITRATORS
NEUTRALS WITH YEARS OF NEGOTIATION AND TRIAL SKILLS


Earl A. Cherniak, Q.C., FCIArb

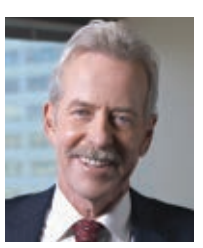

Bert Raphael, Q.C., LSM


The Hon. Donald J. Taliano

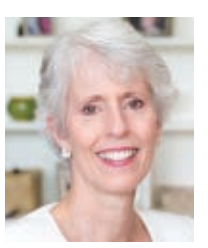

The Hon. Peter G. Jarvis, Q.C.


The Hon. James M. Spence, Q.C., LL.D


Brian H. Wheatley, Q.C.


Stuart Forbes, Q.C.


Stan Raphael, Q.C.


Leslie J. Smith


Howard B. Kohn


Robert A. Beccarea


Harvey M. Haber, Q.C. LSM

COE ADR MANAGEMENT

Appointments
Marjorie Coe
Tel: 416 363 2977
mcoe@rogers.com
Cell: 416 805 8555

617-7 King Street East
Toronto, Ontario M5C 3C5
Toll Free: 1 844 547 2977
Fax: 416 703 4597
www.coeadrmanagement.com

JM DISPUTE RESOLUTION

A proven record of consistently EXCELLENT settlement results

Joyce Miller, Barrister & Solicitor, Mediator and Arbitrator since 1995

MEDIATING
Personal Injury Claims and Statutory Accident Benefits

ARBITRATING
Priority and Loss Transfer Disputes

CONTACT JOYCE AT
joycemiller@jmdisputeresolution.com
and at 416-780-1762 or visit
www.jmdisputeresolution.com

Visit Joyce's website at www.jmdisputeresolution.com to SCHEDULE your mediation and arbitration

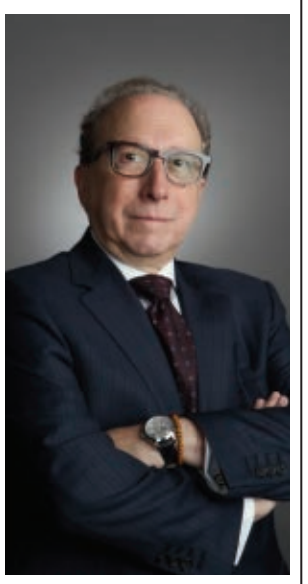
---

MCD
Mason Caplan Dizgun LLP

" Settlements don't just happen."

Achieving settlements at mediation requires an effective strategy and a dedicated team. **Leslie Dizgun** and **Gary Caplan**, accomplished mediators, partner with counsel and their clients to find the best solutions.

- Mediation
- Arbitration
- Motions Arbitration
- Case Management



Respect for the Process · Respect for the Parties · Respect for Counsel
www. mcdlawgroup.ca

Mason Caplan Dizgun LLP
350 Bay Street, Suite 500, Toronto, Ontario, M5H 2S6
Tel: 416-596-7690 | Fax: 647-725-7698 | www.mcdlawgroup.ca

Alternative Dispute Resolution Directory

THINK WIN-WIN

Cheryl Goldhart

A **certified family law specialist** and an **accredited family law mediator and arbitrator**, Cheryl Goldhart has 30 years of experience practicing family law. She is skilled in creatively and thoughtfully assisting parties achieve resolution in family law matters, including complex, high conflict, and high net worth cases.

To retain **Cheryl Goldhart** as a family law lawyer or as a family law mediator and/or arbitrator visit her website.

www.goldhartlaw.com
416 967 6111 x 31

GOLDHART & ASSOCIATES
FAMILY LAW • MEDIATION • ARBITRATION

CHOOSE FROM CANADA'S TOP MEDIATORS AND ARBITRATORS

The Honourable David M. Steinberg

is an expert in all areas of family law. He is a retired judge of the Superior Court, an editor of the Ontario Family Law Practice, and the founding editor of the Reports of Family Law. He was recipient of the Award of Excellence from the Family Law Subsection of the OBA in 2012 and received the Distinguished Service Award from the Association of Family Conciliation Courts in 1999.

adrchambers.com
1.800.856.5154

ADR CHAMBERS

Be it resolved

THOMAS G. HEINTZMAN O.C., Q.C., FCIArb

With over 40 years of experience in complex commercial disputes across Canada, Tom Heintzman gets to the heart of the arbitration and mediation: quickly, clearly and fairly.

Resolving Corporate Commercial, Financial, Investment, Insurance and Construction Disputes

HEINTZMANADR

416.848.0203 | HEINTZMANADR.COM

IGOR ELLYN ADR

Get to the Point Resolutions.

Igor Ellyn, QC, FCIArb.
Chartered Arbitrator
and Mediator

MEDIATION
ARBITRATION
NEUTRAL EVALUTION
OPINIONS

BUSINESS AND CORPORATE DISPUTES

Efficient. Effective.
Experienced. E-Savvy.

T: 416 365 3750
E: igor@ellynadr.com
www.ellynADR.com

181 University Avenue #2200
Toronto, Ontario M5H 3M7

operated by
Igor Ellyn Professional Corporation

SULLIVAN MEDIATIONS

905.522.7068

- Specializing in: injury, insurance, tort, accident benefits Mediations
- Trusted by Plaintiff and Defence Bar and their clients
- Former Regional Bencher and Hamilton Law Association President
- Certified Law Society Specialist
- **Available across Ontario**

www.sullivanmediations.com

RUDOLPH

Mediation & Arbitration Services Inc.

J. Jay Rudolph

Wishes to thank you as he celebrates 20 years

as a Mediator

40 Sheppard Ave. W,
Suite 700
Toronto, ON M2N 6K9
(t) 416-222-8787
(f) 416-222-5532

jay@jjayrudolph.com

Are you a mediator, arbitrator or ADR expert?

Appearing weekly in

Ontario Reports
and
The Lawyers Weekly

Over 240,000 issues distributed each month

For more information, or to reserve your advertising space, please contact:

Jim Grice	Ritu Harjai
jim.grice@lexisnexis.ca	ritu.harjai@lexisnexis.ca
905-415-5807	905-415-5804
1-800-668-6481, Ext. 807	1-800-668-6481, Ext. 804

News

B.C. court sides with accounting firm E&Y

GEOFF KIRBYSON

The B.C. Court of Appeal has sided with a major accounting firm despite one of its professionals providing "erroneous" advice that led to a client getting a tax bill of more than $500,000 US.

Justice Mary Newbury dismissed an appeal by Anita Felty, who sued Ernst & Young for negligence for the tax advice she received in her divorce settlement with former husband Tim Delesalle.

Her lawyer, Fiona Robin, had signed an agreement with Ernst & Young that contained a limitation of liability clause, restricting damages for negligence or other reasons to the total fees paid to the defendant.

The trial judge found Felty was bound by the clause, which limited her damages to slightly more than $15,000 (Canadian).

The critical issue was the tax treatment of 10 shares that Felty held in a Delesalle family holding company, called "DHL," and the fact that she was a U.S. citizen who had moved to Canada following her marriage. (They separated in 2002).

The shareholders agreement spelled out an option for DHL to acquire all company shares from anybody who wasn't a member of the family at fair market value. In her divorce, Felty fell into that category.

During the summer of 2004, Delesalle's side proposed a "global settlement" of $4 million, which was designed to take care of the shares issue as well any future spousal support.

Robin, a partner in Vancouver-based family law firm, Schuman Daltrop Basran and Robin, wanted professional advice concerning the value of various assets so she entered into a retainer agreement with Ernst & Young Corporate Finance Inc. and dealt with a tax attorney in its California office.

He informed her that Felty did not have to be concerned about paying any U.S. tax on the transfer of her 10 shares to her ex-husband. He pointed to section 1041 of the U.S. Internal Revenue Code of 1986 which stipulated "no gain or loss is to be recognized on the transfer of property from an individual to or in trust for a spouse or former spouse if the transfer is incident to a divorce."

Based on the tax attorney's advice, Robin determined Felty didn't need to make a minority share claim in order to discount the value of her shares for sale to Delesalle for the purpose of reducing her U.S. taxes.

Unfortunately, the attorney overlooked a "special rule" that said section 1041 "did not apply if the spouse of the transferor was a 'non-resident alien,' which Delesalle was.

In her decision, Newbury said Felty was bound as a disclosed principal to the entire agreement. She found the trial judge erred by failing to consider whether the limitation clause should be unenforceable on public policy grounds, but said the giving of erroneous advice in this case was not so "reprehensible" that it would be contrary to the public interest to enforce the clause.

"As desirable as it might be to hold the accounting profession to a high standard of care, I am not persuaded that an error in the giving of erroneous tax advice in the circumstances of this case rises to the level of conduct that is so reprehensible that it would be contrary to the public interest to allow [the defendant] to avoid liability," Newbury wrote in her decision.

"If the legislature took a different view, it could, of course, enact a provision in the Chartered Professional Accountants Act similar to that contained in the Legal Profession Act. Thus far, it has chosen to prohibit the use of limitation clauses only by lawyers and law firms."

Catherine Brown, a professor of law at the University of Calgary, says the Felty case should serve as a cautionary tale.

"[Felty] should have gotten legal advice from a lawyer. You'd never see a lawyer providing legal advice and putting a limitation of liability clause on it.

"It's illegal, you can't limit liability under the Legal Professions Act. Obviously, accountants can," she says.

"The case law is pretty clear. When the courts have overturned a limitation of liability clause in the past, the conduct has been pretty egregious," she says.

Brown notes the judge pointed to a manufacturer of baby food, which poisoned its products, as an example of when a limitation of liability clause might be overturned.

"The accountant made a mistake but it wasn't behaviour that was so reprehensible that you would be overriding the limitation clause," Brown says.

David Asper, a businessman and lawyer who will be teaching law at Arizona State University this winter, agrees with Newbury because the decision provides

Brown, Page 27

Old remedy may chart new route for detainees

KIM ARNOTT

One of the law's oldest remedies — habeas corpus — may offer a new route to freedom for individuals detained on immigration matters.

The Court of Appeal for Ontario has ruled that immigration detainees seeking to challenge the legality of continuing lengthy detentions of uncertain duration have the right to make habeas corpus applications to the Superior Court of Justice.

The decision in *Chaudhary v. Canada (Minister of Public Safety and Emergency Preparedness)* [2015] O.J. No. 5438 is being welcomed in the immigration law community.

"I think what we have in *Chaudhary* is an affirmation of the constitutional right to habeas corpus that non-citizens can rely on, and I think that's a very good thing," said Sharry Aiken, associate law professor at Queen's University.

Swaisland

"It's a very welcome decision in the immigration bar," added Jacqueline Swaisland, a lawyer with Waldman & Associates, part-time professor at the University of Ottawa and author of several texts on Canadian immigration and refugee law.

"It basically will give us a faster and more effective way to get people who have been subjected to prolonged immigration detention out."

The appeal was brought on behalf of four individuals held in detention while awaiting deportation for periods ranging from roughly two years to more than eight years. While their stories vary, the lengthy detentions are primarily related to difficulties in obtaining travel or identification documents required to deport them.

At the time of the appeal, all four were detained because they were viewed as flight risks. Their continued detention has been confirmed in reviews conducted every 30 days by the Immigration and Refugee Board.

Under the *Immigration and Refugee Protection Act* (IRPA), the detainees may seek leave for judicial review of the monthly decisions in Federal Court.

That led Ontario Superior Court Justice Kenneth Campbell to decline to exercise the court's habeas corpus jurisdiction on applications from the detainees this spring, on the basis of the so-called "Peiroo exception."

Swaisland, Page 27

News

Tobacco companies to make $1 billion deposit

LUIS MILLAN

NIKOLA NASTASIC / ISTOCKPHOTO.COM

Tobacco companies suffered a second legal setback in less than a month after the Quebec Court of Appeal ordered two cigarette makers to set aside nearly $1 billion in security, the largest such sum in the province's history, to ensure that money is available to pay victims who won a landmark $15.5 billion class action lawsuit earlier this year.

In a ruling that clarifies the exceptional circumstances under which such security can be ordered, the appeal court ordered Imperial Tobacco Canada Ltd. to pay $758 million in seven quarterly instalments and Rothmans, Benson & Hedges Inc. $226 million in six quarterly instalments, beginning in December. If the tobacco manufacturers are successful in having the $15.5 billion judgement overturned on appeal, the security will be returned to them. If not, it will be available for distribution to victims who launched the class action suit. (A motion for security was not sought against JTI-MacDonald Corp. because one of the lawyers became ill).

"It's a very significant ruling because it ensures that should the victims win on appeal there will be funds immediately available for the victims," noted Rob Cunningham, a lawyer and senior policy analyst for the Canadian Cancer Society in Ottawa. "It also sends a very important message to tobacco companies, and that is, that they can't get away with anything that they want. They just can't be depleting their massive bank accounts to deprive victims of compensation."

> It's a very significant ruling because it ensures that should the victims win on appeal there will be funds immediately available for the victims.
>
> **Rob Cunningham**
> Canadian Cancer Society

In late September, approximately three months after a precedent-setting ruling that ordered three leading Canadian tobacco companies to pay $15.5 billion in moral and punitive damages to Quebec smokers, the Quebec appeal court found that while the province's healthcare recovery legislation does deprive tobacco companies some traditional means of defence, it does not affect their right to a trial.

Last May, Quebec Superior Court Justice Brian Riordan found that Canadian tobacco companies committed four separate faults under Quebec law and ordered them to pay what is believed to be the biggest class action settlement ever in Canada. The ruling, which marked the first time tobacco companies have gone to trial in a civil suit in this country, also ordered the companies to make an initial aggregate deposit of $1.13 billion in the 60 days following regardless of an appeal because "it is high time that the companies started to pay for their sins" and "high time" for the plaintiffs to receive some relief from the "gargantuan" financial burden of bringing the tobacco companies to justice, said Justice Riordan in *Létourneau c. JTI-MacDonald Corp.* 2015 QCCS 2382.

But in July, the Quebec appeal court cancelled the provisional order for the $1.13 billion initial deposit because it would cause serious financial prejudice to the tobacco companies, could have harmed their ability to appeal, and it would have been all but impossible to recoup the money from class members if the companies succeeded on appeal. "The potential necessity of seeking reimbursement of $10,000 from each of the 100,000 class members is by any objective standard a prejudice that cannot be ignored," said the appeal court in a unanimous decision in *Imperial Tobacco Canada Ltd. c. Conseil Québécois sur le tabac et la santé* 2015 QCCA 1224. But the appeal court also gave a rather obvious hint that there are other ways that victims could obtain at least partial payment. "This is not to say however that such facts and arguments could not give rise to other recourses or orders," added the appeal court.

The Montreal lawyers representing the victims paid heed. They argued that a $5 billion security was necessary because the manufacturers would — in the face of defeat — file for bankruptcy. In the meantime, the companies were trying to make themselves "judgment proof" by diverting all their profits to their parent companies, argued Philippe Trudel, one of the Montreal class action lawyers.

Quebec appeal court Justice Mark Schrager partially complied. He noted that the granting of security is an exceptional remedy, and is a matter of discretion. Under article 497 of the *Code of Civil Procedure*, an appeal regularly suspends the execution of a judgment. However, an appeal court judge may for a "special reason" order the appellant to furnish security to guarantee in whole or in part the payment of the costs of appeal and the amount of the penalty if the ruling is upheld. The correct criterion for the exercise of the discretion is whether in the absence of security, the execution of the judgment would be in jeopardy, noted Justice Schrager.

While insolvency may constitute a special reason as would fraudulent behaviour, neither is the criterion per se, added Justice Schrager. And contrary to what the tobacco companies asserted, it is not necessary for "clear and precise facts" underlying the security to have crystallized since the judgment of first instance. "While the existence prior to judgment of the facts invoked may have been noted in certain decisions of my colleagues, no judgment has asserted the existence of such a hard and fast rule," said Justice Schrager.

"When a security is granted one has to look at all of the facts of the case, including those that took place before the judgment of first instance," said former Quebec appeal court justice André Rochon, now counsel with Prévost Fortin D'Aoust Attorneys in Montreal. "It's not true that to order a security only the facts that took place between the judgment of first instance and pre-appeal must be analyzed. One has to look at all the facts — and this is the first time that a decision has clarified that."

After looking at all the facts, Justice Schrager concluded that both tobacco companies structured their business affairs in a manner that "drastically, if not completely," reduces their exposure to "satisfy any substantial condemnation that might be made against them in this litigation." Imperial Tobacco earned $535 million from operations in 2014 and paid $334 million in dividends to its parent, British American Tobacco Corp. Rothmans adopted the same strategy. From 2008 to 2013, its average annual earnings were approximately $450 million, and it paid $300 million annually on average to its parent Phillip Morris International, Neither of the firms, even after the landmark class action ruling, set aside funds to pay the penalty.

Those facts gave the appeal court the "special reason" needed to order the security, particularly since under Quebec law a judgment pending appeal benefits from a presumption of validity, said Rochon.

"I do not question appellants' right to appeal but neither can I stand idly by while appellants pursue an appeal which will benefit them if they win but which will not operate to their detriment if they lose," said Justice Schrager. "Continuing the practice of distributing earnings out-of-jurisdiction at this point is at best disingenuous and at worst, bad faith."

According to Trudel, the appeal court sent a strong message to companies contemplating dispatching their profits to their parent firms in order to be "judgment proof" when they lose a decision. "When a ruling is issued, and it is a ruling presumed to be valid, companies cannot act like they have in the past," said Trudel. "They cannot send their profits to their parent companies located in a foreign country. This precedent-setting finding, I believe, will have an impact on other similar cases."

We want to hear from you!
Send us your verdict:
comments@lawyersweekly.ca

News

Ruling expands First Nations' pursuit of claims

LUIS MILLAN

First Nations can bring tort claims founded on Aboriginal rights and title before those rights are formally recognized by a court declaration or government agreement, after the Supreme Court of Canada refused to end lawsuits brought by Aboriginal communities against natural resource companies.

The SCC's decision to dismiss the applications for leave to appeal paves the way for a $900 million class action filed by two Quebec Innu First Nations against Iron Ore Co. of Canada (IOC) and a separate suit by two north-central British Columbia First Nations against Rio Tinto Alcan Inc. over its diversion of water from the Nechako River since the 1950s.

AWSEEBARAN / ISTOCKPHOTO.COM

"The interaction between common law torts and Aboriginal law has not really been explored in Canada," said Greg McDade, lawyer of the Saik'uz and Stellat'en First Nations of British Columbia. "The decision by the SCC to deny leave allows us to go to trial, and confirms that common law tort may have a role to play, so that's important. It's a basic principle of law that where there are rights, there must be remedies. If Aboriginal rights and title truly are existing rights, there must be existing remedies for their breach. That's at the heart of the case."

The SCC's decision marks yet another evolution in Aboriginal law, said David Schulze, a Montreal lawyer specializing in Aboriginal law. With few exceptions, the classic cases of the 1980s and into the 1990s involved fishing and hunting offences under criminal law. Then a series of civil cases launched against the government over claims to Aboriginal rights and title eventually led to the SCC precedent-setting decision in *Haida* that found that the Crown has a duty to consult with Aboriginal peoples and accommodate their interests. The duty to consult, grounded in the honour of the Crown, does not extend to third parties even though the Crown may delegate procedural aspects of consultation to industry, noted Schulze. But with the latest SCC decision, private parties face legal uncertainty, he added.

"These cases create another level of risk for industry that is going make industry more eager to come to agreements with First Nations," said Schulze, of Montreal-based Dionne Schulze. "The duty to consult already did, because whether or not they were actually bound by the duty they knew their permits were on the line and they knew that one of the best ways to make sure that the duty to consult didn't arise was to make sure that, before they got their government permits, that the First Nations were satisfied. This now goes further."

The SCC's decision may potentially provide significant leverage to Canada's First Nations in asserting their Aboriginal rights and title against existing and new industrial projects they perceive to infringe on those rights, said Alison Gray, a lawyer practising energy and public law with Bennett Jones in Calgary. That in turn may embolden First Nations to launch more claims seeking relief from private parties.

"The decision really sort of says, 'look, private companies you are no longer going be able to hide behind the government," said Gray. "There may be some actions that you undertook that you may be personally liable for now.' So they may be subject more to direct litigation by First Nations."

The Innu First Nations of Uashat Mak Mani-Utenam (Uashaunnuat) and Matimekush-Lac John (MLJ), whose traditional territory covers much of northeastern Quebec and Labrador, filed a motion in 2013 to obtain an injunction against IOC's mining operations in Quebec and Labrador, as well as damages for harm caused to them by IOC estimated at $900 million. IOC's majority shareholder is Rio Tinto.

The Nechako Nations sued Alcan in 2011, claiming private and public nuisance and breach of riparian rights (water rights) as a result of Alcan's operation of the Kenney Dam on the Nechako River, which was built in the early 1950s to provide water for power generation for Alcan's aluminum smelter in Kitimat. The Nechako Nations claim that the dam is damaging the ecosystem of the Nechako River and its fisheries.

In both cases, the mining firms brought applications to dismiss the claims, alleging that no reasonable cause of action exists until Aboriginal rights and title is proven. In both cases, the companies also relied in part on the defence of statutory authority, asserting that the act causing the nuisance was authorized by statute and inevitably resulted from that authorization. The British Columbia and Quebec appeal courts dismissed the arguments in both cases.

> The interaction between common law torts and Aboriginal law has not really been explored in Canada.
>
> **Greg McDade**
> Lawyer

The B.C. appeal court confirmed that if a statute authorizes someone to do something in a particular place, and nuisance is the inevitable result of doing what's authorized, then the authorized person cannot be sued for the nuisance. But the appeal court added that "the statutory authority did not prescribe" how the Kenney Dam was to be constructed, and it is not known whether it could have been constructed in a manner that could have avoided the alleged nuisance.

"There are matters that need to be explored through the discovery process and at trial in order to determine whether the alleged nuisance is the inevitable result of what was authorized by the statutory authority," said B.C. appeal court Justice David Tysoe in a unanimous decision in *Saik'uz First Nation v. Rio Tinto Alcan Inc.* [2015] B.C.J. No. 694.

The B.C. appeal court also held that tort claims based on harm to asserted Aboriginal rights and title should not be struck out as disclosing no reasonable cause of action. Aboriginal people should not be treated "disadvantageously" compared to any other litigant asserting claims for nuisance and breach of riparian rights.

"Setting a separate standard for Aboriginal people before they can sue other parties in order to enforce their rights is not only lacking in principle but could also be argued to be inconsistent with the principle of equality under the *Charter of Rights and Freedoms*," said Justice Tysoe.

In a similar vein, the Quebec Superior Court held in a ruling upheld by the provincial appeal court that the identification of Aboriginal rights between the Crown and First Nations should not preclude a First Nations from having access to their day in court if it has a chance of success.

"While it may not have been totally clear than any First Nation like any citizen can go against anybody they want in court proceedings because the whole purpose of special recognition of constitutional rights was based on an effort to reconcile Aboriginal societies with the greater Canadian society, the Supreme Court provided a clear confirmation that First Nations can sue anybody if they think their rights have been violated," said James O'Reilly, a Montreal Aboriginal law expert who defended the Quebec Innus.

But while both McDade and O'Reilly said they believe that the rulings provide First Nations with a "new tool to use" to seek relief from private parties, they don't feel it will open the floodgates to new actions.

"You still have to go to trial and prove your rights and title, and that's a significant burden so it's not every First Nation that is going to jump to this solution right off the bat," said McDade. Most First Nations cannot afford such extremely expensive litigation, pointed out Schulze, who believes that business will likely assess the risk and cut deals.

"Business wants to do business," said Schulze. "It's really quite possible that what will happen is that you'll see more deals that address past damages and not just the future consequences of a project."

The rulings may also spur business to add the Crown as a party in these claims, Gray suggested. Private parties are not likely going to be able to defend any claims of Aboriginal title or lack of consultation "so necessarily you would need the government," said Gray. She added it would be in the best interests of First Nations to have the Crown involved to make sure that any decisions on Aboriginal title will be binding in the future and will stand, and "not be read as a kind of decision made in this narrow context of this private action."

The rulings also open the possibility of business chasing governments for damages. If First Nations are successful suing private parties, the private parties in turn could then argue that "we thought we were acting legally but it turns out we weren't and that's your fault and you should compensate us for that," said Gray. "Aboriginal law is now starting to open into a new private law area."

Focus

INFORMATION TECHNOLOGY

The trouble with data tracking

A wave of new employee monitoring software opens up a range of legal issues

Matthew Pearn

Canadian employers looking to track workplace satisfaction and productivity are taking inspiration from foreign companies that use personal data trackers and data analysis to improve employee performance.

However, employers looking to gain the benefit from such programs should prepare for workers raising challenges related to this new practice.

In Japan, Hitachi already runs an employee performance program called "Human Big Data." Offices are equipped with stationary sensors that track the movement of employees who are required to wear data trackers throughout their work day.

Last winter, a similar idea migrated to accounting firm Deloitte's St. John's office, recently redesigned to an "open concept" setting. To see if the investment increased employee productivity, Deloitte asked employees to wear ID badges with embedded microphones and accelerometers. The badges tracked how often employees were engaged in conversations or moved around the office. Deloitte received as much as four gigabytes of data a day from each employee's movements and activity inside of the office.

Deloitte made the project optional, guaranteed its participants anonymity, and agreed by contract that employee data remained the worker's personal property. Data was collected to see how often employees engaged co-workers in conversation, to track an employee's "body language," and to track how frequently an employee was up from his or her desk.

Employees in turn received daily updates on their behaviour. These reports advised workers on whether they were speaking enough at meetings or demonstrating "leadership."

Not unlike digital fitness trackers aimed at motivating better health, the reports apparently motivated Deloitte employees to change their behaviour and then improve their tracked performance. The Deloitte program ultimately indicated that employees preferred the new office layout so much that they were less likely to get up from their desks to take breaks.

For an employer looking to assess the overall success of a workplace redesign, Deloitte's practice of collecting anonymous, aggregated employee data may work. Tracking how often employees start conversations with colleagues may show whether a new "open concept" office facilitates the free exchange of ideas.

Other creative uses of this technology are no doubt on the horizon, and not all of them may be as easily justified.

California-based social media company Buffer already encourages its employees to wear data trackers outside of the office and then share data with their employer. The project is aimed at improving employee health and productivity, but other uses for the data remain open to employers.

For example, aggregated employee health information may help employers when purchasing group health coverage. Being able to demonstrate the success of workplace fitness programs by showing that workers are up and moving about during their day or at home could be used as part of negotiating a premium for such coverage.

It is not beyond imagining that employers could extrapolate information on an employee's overall health using this data, and make advancement decisions based on expected career longevity.

For now, the goal behind many of these programs appears to be to determine which employees are the happiest, most productive workers. By assessing the behaviours of these "top-tier" workers, employers can use this information to develop best practices and to provide under-performing workers with coaching to help them to improve.

While no Canadian employer has yet advised that it is using these data tracking programs to identify top-tier workers for advancement, this seems a likely extension of this kind of program. Despite having similar job performance and success, it is possible

Productivity, Page 15

COMOMOLAS / ISTOCKPHOTO.COM

Focus INFORMATION TECHNOLOGY

End of Safe Harbour leaves Canadian laws in doubt

Mark Hayes
Adam Jacobs

SHIRONOSOV / ISTOCKPHOTO.COM

Max Schrems is no stranger to filing privacy complaints. Starting in late 2011, Schrems filed 23 complaints against Facebook Ireland Ltd. regarding the company's data practices. Although the Irish data protection commissioner (DPC) did not rule on the first 22 of those complaints, the 23rd is stirring the pot for multinational organizations that transfer personal information (PI) outside of the EU.

Schrems' 23rd complaint contended that Facebook Ireland should be prohibited from transferring PI to Facebook Inc. in the United States, since the U.S. did not ensure that PI held within its borders was adequately protected against state surveillance activities. In particular, Schrems was concerned with the Prism program, which involves the disclosure of data by various organizations including Facebook to the National Security Agency.

The Irish DPC rejected Schrems' complaint as frivolous and vexatious since the adequacy of data protection in the U.S. had already been determined by the European Commission's Safe Harbour privacy principles.

Safe Harbour was created pursuant to commission decision 2000/520 in response to the EU's requirements on PI and international data transfers. It set out certain privacy principles which, if implemented by a U.S. organization, would ensure an adequate level of protection for PI transfers to the U.S. from the EU, and compliant organizations in the EU could transfer PI to the U.S. without running afoul any EU data-transfer laws.

Schrems appealed to the High Court of Ireland. The High Court stayed the proceeding since, in its view, the major issues to be decided were the interpretation of EU law and whether a DPC is bound by a previous finding of adequacy (such as Safe Harbour). These issues, said the High Court, should be determined by the Court of Justice of the European Union (CJEU).

On Oct. 6, the CJEU released *Schrems v. Data Protection Commissioner*, and invalidated Safe Harbour. In the CJEU's opinion, while the DPC was not bound by a previous adequacy finding, only the CJEU had the jurisdiction to declare the invalidity of an EU act such as the Safe Harbour regime created by decision 2000/520.

As the CJEU saw it, there were a number of issues with Safe Harbour, including the primacy of U.S. national security, public interest or law enforcement requirements over the Safe Harbour principles. While accepting that "adequate" protection does not mean "identical," the CJEU held that the protection offered by Safe Harbour must be protection that is "essentially equivalent" to that guaranteed within the EU by virtue of their privacy laws read in light of the *EU Charter*. Further, a lack of judicial redress in the U.S. for European citizens was another major flaw found by the CJEU.

While invalidating Safe Harbour, the CJEU noted in a somewhat passing tone that the level of protection ensured by countries outside the EU is liable to change and that "it is incumbent upon the Commissioner" to periodically check whether an adequacy decision is still factually and legally justified. Further, if the evidence gives rise to doubt in that regard, a check is "required."

Although there are many unknowns regarding the implications of the CJEU's decision, the dicta regarding periodical checks by the commission suggests that the EU may at some point revisit its previous adequacy findings relating to countries outside the EU, including Canada.

In December 2001, the European Commission recognized the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) as providing adequate protection for certain data transfers from the EU to Canada. However, in light of the CJEU's dicta, it is possible this adequacy finding will be revisited. This is especially so given that the EU Article 29 data protection working party released an opinion in June 2014 which, although not an adequacy decision, raised potential concerns with the adequacy of protection offered by the provincial privacy legislation in Quebec (*An Act respecting the Protection of Personal Information in the Private Sector*).

For example, the EU working party expressed concern regarding Quebec's absence of a clear definition of "sensitive information," an omission which also applies to PIPEDA. The working group also referred to the existence of ambiguity regarding the territorial scope of the Quebec Act in relation to PIPEDA for international and inter-provincial transfers of PI. Without a clear resolution on these and other concerns, it is possible the Quebec Act would be found not to provide an adequate level of protection and that PIPEDA's adequacy finding may be revisited.

Given the above, parties transferring PI across international borders, especially intra-organizational transfers from the EU to another jurisdiction, should enter into standard contracts ensuring adequate levels of protection during the transfer and storage of PI, as well as considering implementing binding corporate rules.

This strategy may significantly reduce the risk that your organization will be the target of Schrems' 24th complaint.

Mark Hayes is the founding partner and Adam Jacobs a partner at Hayes eLaw, a boutique IP, technology and privacy firm in Toronto.

Productivity: Digital record could become evidence in future dismissal claims

Continued from page 14

that employees who do not demonstrate tracked behaviours may be passed over for advancement under this new system. Employers must be prepared to justify these kinds of decisions.

There is risk in creating any digital record. Data collected from devices like those used in the Deloitte example may become evidence in future employee claims for wrongful dismissal, for workplace prejudice under human rights legislation, or for incidental breaches of their privacy.

Before using data to track employee productivity, employers would be wise to develop human resources policies in anticipation of challenges raised by workers, as well as to make workers aware of how data will be used. At this early stage, employers may even want to "decouple" data so that it cannot be linked with an individual employee.

Incidental breaches of privacy abound. Employers who wish to learn more about their workforce by way of data trackers should prepare for this. Following after *Jones v. Tsige*, the emerging tort of "intrusion upon seclusion" has been the basis of a number of certified class actions in Canada. One of the easiest ways to protect against any worker's claim that their personal data was leaked by an employer would be to do as Deloitte has done, and ensure that data tracking is anonymous.

Another consideration is whether the employer's use of data unfairly prejudices certain employees. Provincial human rights legislation protects employees against workplace discrimination on the basis of physical or mental disability. It may be possible to unintentionally prejudice the career advancement of workers that are less able to carry out certain tracked tasks associated with top-tier workers. As discussed above, health and fitness data could be used as a basis for blocking career advancement as well. Employers should proceed with caution.

> "For an employer looking to assess the overall success of a workplace redesign, Deloitte's practice of collecting anonymous, aggregated employee data may work.
>
> **Matthew Pearn**
> Foster & Company

Data associated with an individual employee may become disclosed in the course of wrongful dismissal claims. Human resources policies related to the collection and use of employee data could be disclosed during litigation. The claimant may wish to know which other workers could access this data, and whether it became a consideration in that employee's dismissal or failure to advance. Employers should prepare for such questions and have principled answers to justify their decisions on how to use data.

While employers may reap considerable rewards from tracking employee data, be prepared to justify why data was collected in the first place and how data was used.

Matthew Pearn (matthew.pearn@fosterandcompany.com) is an associate lawyer with Foster & Company in Fredericton, N.B., practising in the areas of personal injury and insurance defence.

We want to hear from you!
Send us your verdict:
comments@lawyersweekly.ca

Focus INFORMATION TECHNOLOGY

Local right to privacy v. foreign jurisdiction

Thea Hoogstraten

Privacy law in Canada is particularly "local." Provinces provide their own interpretation of privacy jurisprudence: Ontario has a common law privacy tort, while British Columbia, Manitoba, Saskatchewan and Newfoundland and Labrador have distinctive statutory privacy torts. Approaches to privacy torts and remedies available to claimants vary widely, according to jurisdiction.

The *Douez v. Facebook* decisions ([2014] B.C.J. No. 1051, and [2015] B.C.J. No. 1270) find the B.C. courts engaging in the struggle between the enforcement of forum selection clauses favoured by international business and B.C.'s rather singular statutory right to privacy.

The proposed representative plaintiff, Douez, alleged that Facebook took the names and photos of Facebook users without their consent for advertising purposes and featured them in paid advertisements called "Sponsored Stories." Douez alleged that this was a breach of s. 3(2) of the *Privacy Act*, R.S.B.C. 1996 c.373, which creates a tort for the unauthorized use of a person's name or image.

Facebook brought a preliminary application to stay the class action proceedings, and argued that the B.C. court should decline to exercise jurisdiction. Under its terms of use, Facebook says, its users agreed to a choice of jurisdiction in California. Douez asked the court to find that the forum selection clause does not supersede B.C.'s *Privacy Act*, arguing that s.4 of the act grants exclusive jurisdiction to the B.C. Supreme Court.

Supreme Court Justice Susan Griffin agreed that the B.C. Supreme Court had exclusive jurisdiction to hear the *Privacy Act* claim, declined to stay the proceeding, and certified the class action. She considered the historical basis of privacy torts, and the "cultural differences in the way various jurisdictions think of a right to privacy." Justice Griffin focused on the importance of the particular protections conferred on the privacy interests of B.C. residents by the province's statutory torts, in an age where the prevalence of social media has the potential to erode those interests to an unprecedented degree.

The trial decision favours the protection and enforcement of "local" perceptions of and rights to privacy, overriding Facebook's attempt to select a particular (Californian) view of privacy for its international users through its forum selection clause. Facebook appealed.

JACKYLEUNG / ISTOCKPHOTO.COM

The B.C. Court of Appeal took a different path of reasoning to determine that Facebook's forum selection clause should be enforced and the proceeding stayed. It focused instead on the principle of territoriality and the idea that the B.C. legislature has no ability to affect the law of foreign jurisdictions, so that the language of the B.C. *Privacy Act* could not oust the jurisdiction of the California court.

The Court of Appeal decision can be contrasted with the result in *Equustek Solutions Inc. v. Jack* [2015] B.C.J. No. 1193, released just a week earlier. There, the Court of Appeal was asked to order an injunction that would affect Google's content worldwide, prohibiting Google from delivering search results to the defendants' websites that were found to infringe the plaintiffs' trademark rights. Google appealed, arguing that the injunction was beyond the jurisdiction of the court and that it had an impermissible extraterritorial reach. Specifically, Google raised "the specter of it being subjected to restrictive orders from courts in all parts of the world, each concerned with its own domestic law."

The court agreed with the chambers judge that "it is the world-wide nature of Google's business and not any defect in the law that gives rise to that possibility," and that courts must exercise considerable restraint in granting remedies that have international ramifications. In order to determine the limits of such restraint, the Court of Appeal once again looked to historical concepts, finding freedom of expression to be a value at the core of a nation's self-determination. (Privacy is arguably the converse value.)

The court held that accordingly, where there is a realistic possibility that an order with extraterritorial effect may offend another state's core values, the order should not be made. The panel found, however, that there was "no realistic assertion" that the injunction sought would offend another nation's sensibilities.

> "The court agreed with the chambers judge that… courts must exercise considerable restraint in granting remedies that have international ramifications.
>
> **Thea Hoogstraten**
> Alexander Holburn Beaudin + Lang

Interestingly, in the Facebook appeal, the court held that if the plaintiff had established that the California courts would not have territorial competence to hear the plaintiff's claim, that could constitute "strong cause" for the B.C. courts not to enforce the forum selection clause and deprive the plaintiff of her claim.

It remains to be seen whether, on the proper evidentiary basis, or perhaps on a different analysis of the complex conflict of laws principles that dominate the Facebook and Google cases, B.C. courts may still assume exclusive jurisdiction over *Privacy Act* claims, and give recognition to the distinct legislated view of privacy in B.C. against foreign defendants. (Both *Douez* and *Equustek* may be headed to the Supreme Court of Canada, as leave to appeal has been filed.)

In this age of social media, Canadian courts will continue to contend with the tensions between respecting foreign jurisdictions and enforcing local legal protections against international media giants.

Thea Hoogstraten is a civil litigator working in Vancouver at Alexander Holburn Beaudin + Lang. Her practice has a focus on municipal law, media law and defamation and administrative law.

Lawddities

OCUSFOCUS / ISTOCKPHOTO.COM

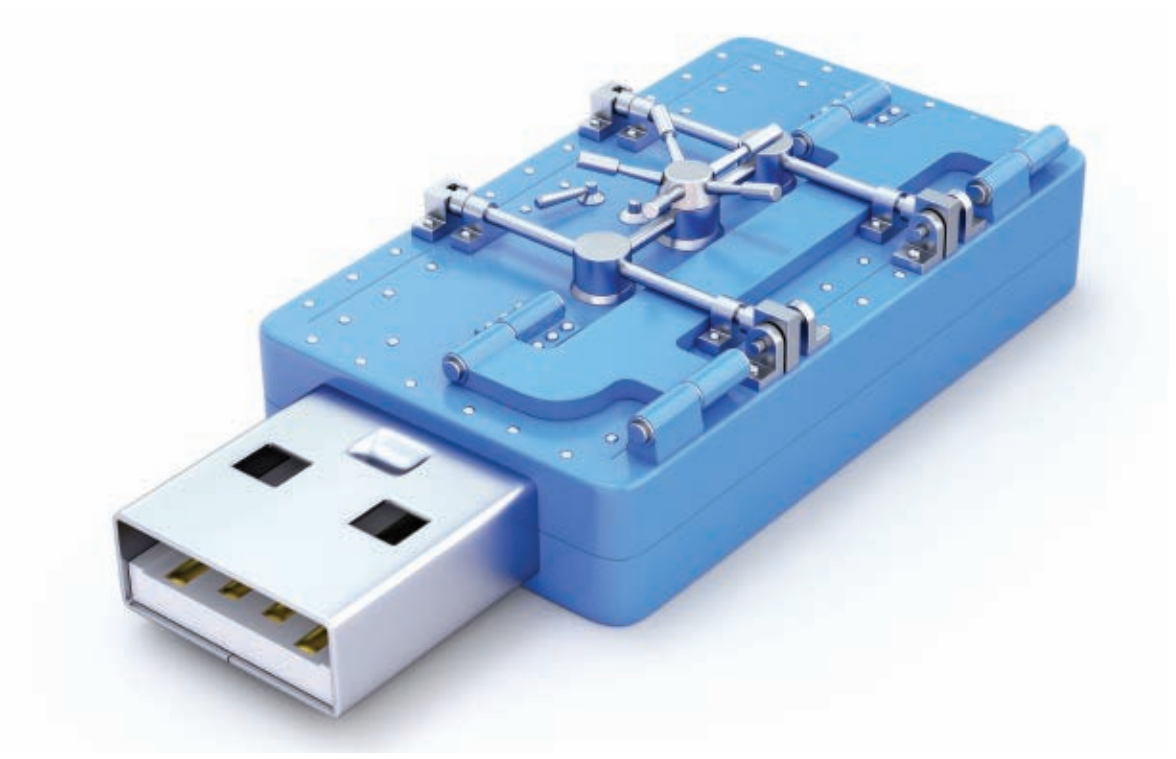
Subway agrees to put foot in mouth

Apparently size really does matter, at least with fast food. As a result of a class action lawsuit, sandwich chain Subway announced it will ensure its "footlong" product really is, reports MSN.COM. The trouble started in 2013 when an Australian man posted a picture to Facebook showing a Subway sandwich with a ruler showing it was only 11 inches. Then, chain customer Nguyen Buren filed a lawsuit in Chicago, alleging a pattern of fraudulent, deceptive and otherwise improper advertising. "This is no different than if you bought a dozen eggs and they gave you eleven," said his attorney, Tom Zimmerman. While denying the claims, Subway announced a proposed settlement in which it would make changes to training that had "allowed for a small tolerance in the size of a 'footlong' sandwich." It will also require franchisees to have measurement tools in stores to insure loaves are a true 12-inches. Plaintiffs won't get a monetary reward, although Subway agreed to pay attorney fees. The settlement must be approved in federal court. -**STAFF**

Focus INFORMATION TECHNOLOGY

Info breaches a danger zone for public companies


Lawrence Ritchie
Raphael Eghan



MIPAN / ISTOCKPHOTO.COM

The proper handling, management and protection of confidential customer information continues to be a major risk management issue facing companies, their executives, employees, and the boards that oversee them.

In August, the Securities and Exchange Commission commenced a civil complaint against over 30 individuals and firms from around the world alleged to have participated in a sophisticated hacking scheme. The accused allegedly stole 150,000 confidential press releases of publicly-traded companies from several newswire services' computer systems. At the time the press releases were stolen, they had not yet been released to the public. At least one of the hacked newswire services is based in Toronto. Criminal charges, including various fraud and conspiracy charges have been brought by U.S. federal prosecutors in New York and New Jersey against several of the individuals alleged to have been involved with the scheme. The confidential press releases, allegedly stolen by Ukrainian hackers, were shared with traders in the United States and Europe who traded on the non-public information and in turn made profits of over $100 million over a five-year period.

Here in Canada, an Ontario Security Commission investigation resulted in charges being commenced under the *Criminal Code* and quasi-criminal charges being commenced under the *Securities Act* related to the misuse of confidential patient information from the Rouge Valley Health System and the Scarborough Hospital. Charges have been brought against nurse Esther Cruz and clerk Shaida Bandali, who were formerly employed by the hospitals, as well as representatives of investment firms Nellie Acar (Global RESP Corporation), Poly Edry (Knowledge First Financial Inc.) and Subramaniam Sulur (C.S.T. Consultants Inc). Criminal charges have been commenced against Acar and Cruz, while Bandali, Edry and Sulur have been charged under the *Securities Act*. The OSC alleges that over a multi-year period the former hospital employees took lists of names from confidential maternity ward records and sold them to the representatives of the investment firms. The investment firms then allegedly used the confidential information to identify potential targets to approach and to whom to sell their RESP products.

Digital security is a topic on the mind of securities regulators on both sides of the border. Earlier this year the SEC released cyber-security guidelines aimed at combatting the increasingly varied and complex issues faced by securities funds and advisers. The guidance focused on identifying risks and developing appropriate controls and breach response systems. Specifically, among other things, funds and advisers were encouraged to conduct periodic assessments of internal and external cybersecurity threats and vulnerabilities to their IT systems, and to periodically review matters such as the nature, sensitivity and location of information that is collected, processed and stored. The SEC also encouraged funds and advisers to develop strategies to prevent, detect and respond to cyber-security threats — for example, incident response plans, ensuring data backup and retrieval systems are in place, making use of data encryption, and controlling access to data through use credentials, authentication and authorization methods. Similarly, in its 2015-2017 strategic outlook, the OSC identified cyber risk as an area it will continue to monitor as a result of the persistent and increasingly sophisticated threats that the securities markets are facing. The OSC noted the need for securities regulators to adapt their approaches to respond to modern technology's impact on securities trading and all other aspects of the markets. The commission also commented on the use of social media by market participants and investors and the need for the OSC to adjust how it looks at compliance in response. In 2013, the Canadian Securities Administrators (CSA) also published a comment, CSA staff notice 11-326, "Cyber Security," which notes the risks posed by increasingly persistent and sophisticated cyber-attacks to the capital markets and its participants, including public companies and other regulated market participants, and recognizes that investors and potential investors are interested in how issuers are mitigating them.

> The OSC noted the need for securities regulators to adapt their approaches to respond to modern technology's impact on securities trading and all other aspects of the markets.
>
> **Lawrence Ritchie and Raphael Eghan**
> Osler, Hoskin & Harcourt

Outside of the securities regulation context, companies unable to protect confidential customer information may face increased liability risks from civil suits, including class proceedings. Notable Canadian examples include *Evans v. Bank of Nova Scotia*, where last year the plaintiffs were successful in certifying a class action in Ontario against the bank and one of its employees, Richard Wilson, who provided confidential information about the bank's customers to third parties to be used for fraudulent purposes. More recently, earlier this year the Court of Appeal for Ontario allowed a privacy class action based on the tort of inclusion upon seclusion to proceed against the Peterborough Regional Health Centre (PRHC) and several of its former employees, where it was alleged that patient records were wrongfully accessed and disclosed by the accused former PRHC employees.

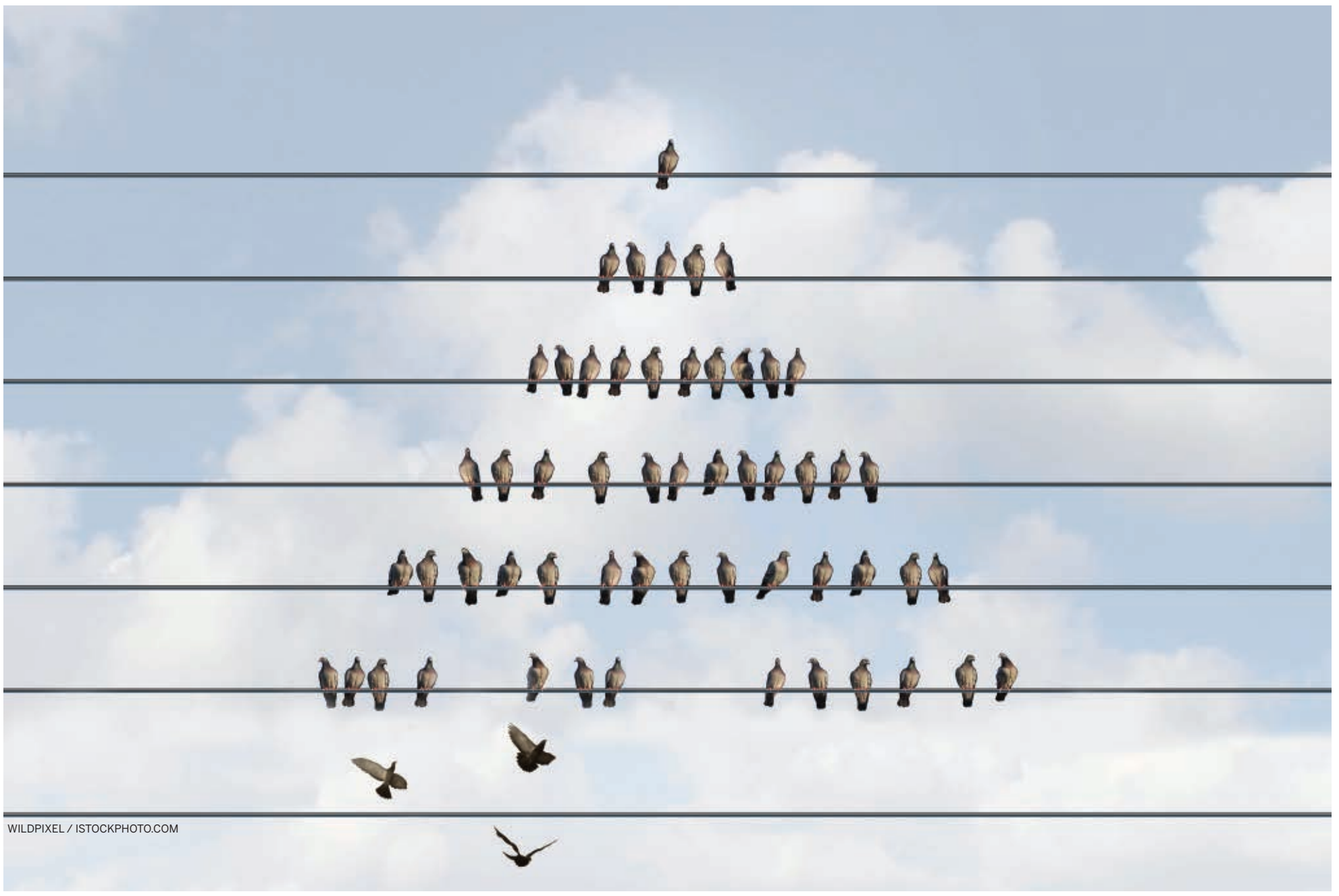
The examples above and commentary from securities regulatory bodies demonstrates the need for organizations to work toward the implementation of appropriate safeguards to protect confidential information. Organizations should also proactively work with their compliance officers, privacy officers and legal advisors to develop appropriate response plans to address breaches and the possible regulatory and civil proceedings that may follow.

Lawrence Ritchie is a partner with Osler, Hoskin & Harcourt who chairs the firm's cross-disciplinary risk management and crisis response national practice. Raphael Eghan is an associate whose practice encompasses a broad range of civil litigation.

We want to hear from you!
Send us your verdict:
comments@lawyersweekly.ca

Focus

BANKRUPTCY & INSOLVENCY



WILDPIXEL / ISTOCKPHOTO.COM

Maximizing Ponzi payback

There is little Canadian jurisprudence to help bankruptcy trustees with asset recovery

Katie Mak

A "Ponzi scheme," made famous by Charles Ponzi and his fraudulent postage speculation in the 1920s, is little more than an arrangement in which a fraudster pays returns to investors from monies obtained from later investors rather than from any real "profits" of an underlying business venture. Eventually these purported profits dry up, the Ponzi scheme is exposed, and more often than not the perpetrator and its business entities find themselves in bankruptcy or receivership proceedings.

Unravelling a Ponzi scheme once it has come to an end is a complicated affair that gives rise to a myriad of legal issues and considerations as bankruptcy trustees or receivers attempt to recover assets for the benefit of the victims of the scheme. The best means of maximizing asset recovery in a Ponzi scheme is for the trustee or receiver to try to "claw back" as much money as possible from "net winners" (those investors that have profited from the scheme) for the benefit of "net losers" (those investors that received less than their original investment).

Although clawback proceedings have received significant judicial consideration in the United States, there is surprisingly little Canadian jurisprudence on this topic. In Canada, trustees and receivers have utilized provincial fraudulent preference legislation for the return of funds given by the Ponzi debtor to net winners. Although preference legislation varies from province to province, in general four elements must be established to void a transaction: (1) a transfer of property must have been made; (2) by an insolvent person or a person who is on the eve of insolvency; (3) to a creditor; (4) with the intent of giving that creditor a preference. *Titan Investments Ltd. Partnership (Re)* [2005] A.J. No. 1041 is the most comprehensive Canadian case to date concerning clawback proceedings. In *Titan*, the court found that the receiver appointed over a Ponzi debtor's estate had met the requisite elements of the Alberta *Fraudulent Preferences Act* to set aside transactions made to net winners. With regard to the insolvency requirement, the court adopted the American principle that Ponzi schemes are inherently insolvent from their inception. In addition, the court considered and found that investors fell within the statutory definition of "creditor" and that the fraudster intended to prefer those investors that he paid out. Accordingly, the net winners were ordered to return all distributions received from the Ponzi scheme.

Trustees in bankruptcy can also consider utilizing the legislative framework of sections 95 and 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, to challenge transactions that are preferences or transfers at undervalue that diminish the money available for distribution to creditors of the estate. Although these sections have not been applied in Canadian Ponzi cases, similar sections of the U.S. *Bankruptcy Code*,

Fraud, Page 19

Focus BANKRUPTCY & INSOLVENCY

Court clarifies pension, secured creditor priority

Michael Rotsztain
Sanja Sopic

LPSTUDIO / ISTOCKPHOTO.COM

The Court of Appeal for Ontario's Aug. 7 decision in *Grant Forest Products Inc. v. GE Canada Leasing Services Co.* [2015] O.J. No. 4147 provides guidance on the relative priorities between security interests granted pre-insolvency and the deemed trust arising on the winding up of pension plans under the province's *Pension Benefits Act*.

Insolvency practitioners have been especially alive to pension plan priorities since the Supreme Court of Canada's decision in *Sun Indalex Finance, LLC v. United Steelworkers* [2013] S.C.J. No. 6, when the court concluded that the Act deemed trust created upon the wind-up of a pension plan includes the amount owing for both unpaid current service contributions and any deficiency on the wind-up, and has priority over the security interests of pre-filing secured creditors, but is subordinate to a court-ordered debtor-in-possession charge.

In the recent case, Grant Forest Products Inc. (GFPI) and its subsidiaries were manufacturers of strand board with facilities located in Ontario, Alberta and the United States. In March 2009, a creditor applied for a bankruptcy order against GFPI under the *Bankruptcy and Insolvency Act*. In response, GFPI and related companies applied for and obtained protection under the *Companies' Creditors Arrangement Act* (CCAA). The bankruptcy application was stayed while the CCAA proceeding continued as a liquidation and GFPI's assets were sold. A priority dispute arose when the asset sale did not generate sufficient funds to satisfy the claims asserted by second lien lenders and two of the debtor companies' pension plans. During the CCAA proceedings, an order was made that the pension plans be wound up. The monitor held back certain funds from distribution to creditors to satisfy an anticipated deficit in the wind-up of the plans.

Ontario's Superintendent of Financial Services argued that the winding up of the plans created a deemed trust based on the interaction of sections 57(3) and (4) of the PBA and section 30(7) of the *Personal Property Security Act* (PPSA). The PBA provisions deem an employer to hold an amount of money equal to employer contributions to the date of the wind-up in trust, for the plan's beneficiaries. The PPSA gives a deemed trust arising under the PBA priority over security interests in the debtor's accounts or inventory.

> Lenders concerned about the scope of the pension claim priority in the wake of Indalex can now rest assured that such claims do not take priority to claims of secured creditors where the wind-up of the pension plans is commenced after the start of insolvency proceedings.
>
> **Michael Rotsztain and Sanja Sopic**
> Goldman Sloan Nash & Haber

In June 2012, GFPI sought a declaration that it was not required to make further contributions to the pension plans. Subsequently, a second lien lender brought a motion to terminate the CCAA proceedings and petition GFPI into bankruptcy.

Justice Colin Campbell of the Ontario Superior Court of Justice [Commercial List] ordered that GFPI and the remaining applicants be adjudged bankrupt, relieved the company from making any further payments to the pension plans and declared that deemed trust pension claims do not take priority over claims of secured creditors where the wind-up of the pension plans commences after the commencement of insolvency proceedings. In reaching this conclusion, Justice Campbell reasoned that *Indalex* had limited the PBA deemed-trust priority to cases where the wind-up of the pension plans began before the commencement of insolvency proceedings. Notably, Justice Campbell confirmed that it is not improper to institute bankruptcy proceedings for the purpose of reversing priorities.

The Court of Appeal concluded that Justice Campbell did not err in exercising his discretion to adjudge GFPI bankrupt, as GFPI's assets had long been sold in the liquidating CCAA proceeding. The court further reasoned that once the bankruptcy order was made, section 67(2) of the BIA applied to reverse the deemed trust created by the PBA, and the doctrine of federal paramountcy rendered the deemed trust inoperative. The court distinguished the case from the facts in *Indalex* in two ways. First, the court emphasized that one of the pension plans at issue in *Indalex* had commenced being wound up prior to the commencement of CCAA proceedings. The court also noted that there was no bankruptcy in *Indalex* and the priorities instituted by the BIA had no application.

Lenders concerned about the scope of the pension claim priority in the wake of *Indalex* can now rest assured that such claims do not take priority to claims of secured creditors where the wind-up of the pension plans is commenced after the start of insolvency proceedings. Insolvency practitioners will also take note of the Court of Appeal's comments that it is not inappropriate to continue CCAA proceedings under the BIA, even where the purpose of doing so is to reverse priorities.

Michael Rotsztain and Sanja Sopic are members of Goldman Sloan Nash & Haber's insolvency and restructuring group.

Fraud: Receivers should cooperate with parties in parallel proceedings

Continued from page 18

11 U.S.C. have been utilized successfully in clawback proceedings in the United States.

Trustees and receivers can also consider bringing a claim in unjust enrichment against net winners. In *Den Haag Capital, LLC v. Correia* [2010] O.J. No. 4316, the court set aside the impugned transactions as fraudulent preferences pursuant to the Ontario *Assignment and Preferences Act*, but noted in obiter that an unjust enrichment claim could succeed (although the court did not set out an analysis on each element of the claim).

While litigation is underway, bankruptcy trustees and receivers should consider utilizing prejudgment remedies such as certificates of pending litigation and injunctions to preserve assets pending the final outcome of the litigation.

At the end of a Ponzi proceeding, the trustee or receiver will be tasked with distributing the assets recovered. The claims allowance and distribution process gives rise to various issues, such as how to value the amount of a net loser's loss, trust claims, taxes paid on fictitious return and the appropriate distribution scheme to use at the end.

A bankruptcy trustee or receiver's asset-recovery efforts may also be impacted by parallel proceedings such as criminal proceedings, securities commission hearings, class action suits and independent civil actions. In such situations, it is important for the trustee or receiver to work co-operatively with the parties in these parallel proceedings to maximize value to creditors. For example, a trustee may consider working with class action counsel to run a single claims process to avoid duplication of effort and wasted resources.

> Unravelling a Ponzi scheme once it has come to an end is a complicated affair that gives rise to a myriad of legal issues and considerations as bankruptcy trustees or receivers attempt to recover assets for the benefit of the victims of the scheme.
>
> **Katie Mak**
> Clark Wilson

Ponzi schemes unfortunately continue to flourish, and ultimately the goal of utilizing insolvency proceedings to administer a Ponzi estate is to compensate victims of the fraud. As the law in Canada continues to develop in this area, professionals involved with unravelling these schemes should consider use of clawback proceedings to maximize asset recovery to net losers.

Katie Mak is a lawyer at Clark Wilson in the firm's insolvency & restructuring and financial services groups.

Digest

Civil Litigation

CIVIL PROCEDURE
Dismissal of action - Delay or failure to prosecute - Excuse for - Order of - Application to set aside - Prejudice to defendant

Appeal by the plaintiffs from an order refusing to set aside an administrative dismissal of their personal injury action. One plaintiff was seriously injured in a 2002 motor vehicle accident. The other driver was uninsured. He was allegedly impaired when the accident occurred and died in the impact. In 2004, an action was commenced for damages to compensate for personal injuries and for damages under the Family Law Act. In 2005 and 2006, the action was dismissed as against two insurers and the plaintiffs were granted leave to add the owner of the primary plaintiff's vehicle and its insurer as defendants. Counsel did not take the required steps to amend the pleading. In fact, counsel took no steps to advance the action and it was dismissed by a registrar's order in 2007. Between 2007 and 2009, the plaintiffs' counsel assured them that their action was continuing and assured the defendants he would take necessary steps to further the proceeding. No steps were taken and the plaintiffs retained new counsel. The second lawyer spent 2009 and 2010 focusing on a solicitor's negligence action against initial counsel. In 2013, the second lawyer served a notice of change of counsel and a notice of motion to set aside the dismissal order. In 2014, a third lawyer for the plaintiffs filed the same notices and another solicitor's negligence action was brought against the second lawyer. In 2015, the motion was heard and dismissed due to the delay in bringing the motion. The plaintiffs appealed.

HELD: Appeal dismissed. The motion judge was aware that the conduct and inaction of counsel rather than the plaintiffs themselves led to the administrative dismissal and the failure to move to set aside the dismissal promptly. The judge was aware that the plaintiffs were assured their action would continue upon becoming aware of the administrative dismissal in 2007. The fact that the plaintiffs always intended to pursue their claim was insufficient, as the rights of the defendants were also a factor in determining whether setting aside the dismissal was fair and just. Similarly, the absence of guaranteed recovery against former counsel was not determinative. The motion judge did not err in assessing the prejudice to the defendants. Significant evidence regarding liability was no longer available. The ability to assess and evaluate the primary plaintiff's claim was impaired by the failure to answer undertakings. Actual prejudice relevant to the ability to defend the action was established. There was no error in refusing to set aside the administrative dismissal.

Chrisjohn v. Riley, [2015] O.J. No. 5555, Ontario Court of Appeal, E.E. Gillese, K.M. van Rensburg and B. Miller JJ.A., October 26, 2015. Digest No. 3527-001

CIVIL PROCEDURE
Judgments and orders - Summary judgments - Availability - Procedure

Appeal by the defendants, Pilot, Colosimo, Hatton and Warkentin, from a summary judgment granted in favour of the plaintiff, Canaccord Genuity. The plaintiff was an investment dealer who terminated the contracts of the defendants, four sales agents, when it closed its Thunder Bay corporate office in 2012. Each defendant had received a loan from the plaintiff that became due and payable upon termination of their contracts. The plaintiff commenced an action for repayment. The defendants claimed that the plaintiff made a misrepresentation by omission by failing to inform them that it was closing the Thunder Bay office when they entered their agreements the year prior. They claimed equitable set-off based on the plaintiff's continued receipt of revenue from clients following their termination and counterclaimed for damages. The plaintiff obtained summary judgment requiring repayment of the Colosimo loan by Colosimo and his guarantor, Pilot. The defendants appealed.

HELD: Appeal allowed. The motion judge erred in granting summary judgment. Overall, the motion judge was not in a position to reach a fair and just determination on the merits of Colosimo's defence without considering the evidence of the other defendants. The motion judge erred in fact in finding the terms of repayment of Colosimo's loan differed from the other defendants' loans and consequently took an overly narrow approach. The possibility of inconsistent verdicts with respect to the same agreement and two of the same defences was real, and the concern for substantive justice was significant. The motion judge failed to consider the impact of her decision on the other defendants. Given the necessity of trying the same defences advanced by the other defendants as well as Colosimo's counterclaim, granting summary judgment would not have resulted in any significant reduction in trial time. The judgment was set aside with a direction that the claims and counterclaims proceed to trial.

Canaccord Genuity Corp. v. Pilot, [2015] O.J. No. 5595, Ontario Court of Appeal, K.M. Weiler, K.M. van Rensburg and L.B. Roberts JJ.A., October 27, 2015. Digest No. 3527-002

Constitutional Law

CONSTITUTIONAL PROCEEDINGS
Practice and procedure - Pleadings

Appeal by the plaintiffs and cross-appeal by the defendants from a judgment striking the appellants' statement of claim. The appellants were comprised of consumers, distributors and producers of natural health products. They commenced an action challenging the constitutional authority of Parliament to enact a scheme for the regulation of the production and sale of natural health products, including vitamins, and dietary and nutritional food supplements. Alternatively, the appellants challenged the statutory authority that authorized the regulations, and pled various Charter violations and tortious conduct by government officials in the administration and enforcement of the scheme, supporting a claim for damages. They sought declarations of invalidity and a stay of the enforcement of the legislation and regulations. A Federal Court order struck the statement of claim. The plaintiffs appealed and the defendants cross-appealed to the extent that it was an error not to strike the claim in its entirety.

HELD: Appeal and cross-appeal dismissed. The cross-appeal was unnecessary, as the ruling of the Federal Court judge clearly intended to strike the whole of the statement of claim with leave to file a fresh as amended claim eliminating the defects. The judge accepted the plaintiffs could seek declarations of invalidity on constitutional and administrative law grounds with claims for damages and restitution. The judge appropriately struck the whole of the claim for failure to meet the requirement of pleading material facts. No material facts were pled to support the claims of Charter violations by the individual appellants. The corporate plaintiffs were unable to maintain a s. 7 Charter claim under the prevailing circumstances. The tort claims were supported by bald assertions rather than material facts. The notion that the appellants could proceed to trial on the basis of the unobjectionable portions of the pleading was rejected, as the Court required a sense of the law's reach in order to define the contours of legislative and constitutional competence to assess whether the legislation was ultra vires. With respect to the claims arising from enforcement, the judge erred in characterizing the claims as a collateral attack, but correctly identified them as an abuse of process.

Mancuso v. Canada (Minister of National Health and Welfare), [2015] F.C.J. No. 1245, Federal Court of Appeal, Stratas, Rennie and Gleason JJ.A., October 27, 2015. Digest No. 3527-003

Contracts

INTERPRETATION
General principles - Context - Express terms

Appeal by the plaintiff from a decision of a motions judge finding that the appellant's offer accepted by the respondent included costs. The parties were engaged in litigation over an account for services. The appellant's 2013 offer provided for payment of $50,000 in full and complete satisfaction of the appellant's claim. In September 2014, just days before the scheduled two-day trial, the respondent accepted the offer but interpreted the offer as inclusive of costs. The motion judge found that the offer was unambiguous. She held that the words full and complete satisfaction meant that the offer was inclusive of costs, and that although the respondent waited several months before accepting the offer on the eve of trial, Rule 49.07(5)(b) did not apply.

HELD: Appeal allowed. The offer, as accepted by the respondent, did not provide for the disposition of costs, and the appellant was entitled to costs assessed to the date on which the respondent's acceptance of the offer was served. The motion judge made a reversible error by taking a literal approach to the offer and acceptance and failing to consider the factual matrix when interpreting the concluded agreement. The motion judge erred in focusing only on the words "in full and complete satisfaction" and ignoring other words used in the offer. The meaning of the words "in full and complete satisfaction" in the offer were not unambiguous and it was not clear that those words provided for the disposition of costs. The motion judge also failed to consider the Rule 49 context, including the purpose of that rule, the timing of the offer and its acceptance in the litigation, and the fact that the parties were lawyers, and represented by counsel, such that they well knew and appreciated the context in which they concluded their agreement. Interpreting the offer in the relevant context, it did not provide for the disposition of the appellant's costs.

Puri Consulting Ltd. v. Kim Orr Barristers PC, [2015] O.J. No. 5649, Ontario Court of Appeal, E.E. Gillese, K.M. van Rensburg and B. Miller JJ.A., October 29, 2015. Digest No. 3527-004

Creditors & Debtors Law

PROCEEDINGS
Practice and procedure - Pleadings

Appeal by the defendant, the Guarantee Company of North America, from dismissal of its application to strike the action by the plaintiff, HOOPP Realty. In 1999, the defendant entered into a standard form written guarantee in the form of a performance bond for a contractor's obligation in respect of construction of a warehouse for the plaintiff. A dispute arose over the completion of the warehouse and was settled through a 2004 bond agreement that preserved the plaintiff's rights of recovery. In 2002, the plaintiff commenced an action against the contractor for damages under the construction agreement. The plaintiff issued a separate statement of claim against the defendant seeking to recover fees under the performance guarantee. The contractor obtained an order striking the action for failure to seek mandatory arbitration under the construction contract. The defendant sought to strike the plaintiff's claim against it for failure to disclose a reasonable cause of action on the basis that the plaintiff's claim against the contractor was now void or unenforceable. The chambers judge refused the relief sought. The defendant appealed.

HELD: Appeal dismissed. The chambers judge erred in ruling that the action could not be struck because allegations in a portion of the statement of claim, read in isolation from the balance of that pleading, were sufficient to reveal a cause of action. The chambers judge was required to consider the content of the entire pleading. However, the judge's alternate conclusion was correct and reasonable in finding that the terms of the 2004 performance bond arguably created obligations which survived

Digest

the discharge of indebtedness owed by the contractor. Under Rule 3.68(3), the chambers judge was entitled to consider earlier reported decisions addressing aspects of the same claim, including the result of companion litigation which produced a complete defence to the action in question on the application to strike. Here, an application to strike was not the proper vehicle for engaging in definitive interpretation of complex contractual provisions, and whether they survived the loss of the plaintiff's right to claim recovery from the principal debtor.

HOOPP Realty Inc. v. The Guarantee Co. of North America, [2015] A.J. No. 1182, Alberta Court of Appeal, J.D.B. McDonald, M.B. Bielby, T.W. Wakeling JJ.A., November 3, 2015. Digest No. 3527-005

Criminal Law

CRIMINAL CODE OFFENCES

Offences against the administration of law and justice - Misleading justice - Obstruction of justice - Breach of undertaking or recognizance

Appeal by the accused, Roulette, from convictions and the resulting sentences for attempted obstruction of justice and failure to comply with a detention order. The offences arose from a failed romantic relationship. The accused was arrested following a domestic incident and detained following refusal of bail. The detention order directed the accused to refrain from communicating with the complainant. Several weeks later, the complainant received three messages from the accused via Facebook. The messages were sent through an account belonging to a friend of the accused, but the message author self-identified as the accused. The messages contained personal information about the accused and complainant and requested the complainant not to testify against the accused. It was posited that the accused dictated the messages to her friend by telephone from the detention centre. The trial judge rejected an impersonation defence as speculative and convicted the accused based on the circumstantial evidence. The accused received concurrent one-year prison terms followed by one year of probation. The accused appealed.

HELD: Appeal dismissed. Although the reasons for judgment were terse, they were adequate in the context of the entire record. The content of the electronic messages was sufficiently unique that the only rational inference was that the accused was the true author of the messages. The impersonation defence of the accused was not grounded in the evidence and amounted to conjecture. The sentencing judge did not err in principle and properly took into consideration the pertinent sentencing factors, including the relevant Gladue factors such as the accused's alcohol-related neurodevelopmental disorder. A one-year sentence for what amounted to witness tampering, while toward the high end of the range, was not demonstrably unfit given the accused's complete disregard of the judge's direction not to communicate with the complainant. Sentence: One year's imprisonment; one year's probation.

R. v. Roulette, [2015] M.J. No. 264, Manitoba Court of Appeal, A.D. MacInnes, W.J. Burnett and C.J. Mainella JJ.A., October 20, 2015. Digest No. 3527-006

EVIDENCE

Methods of proof - Circumstantial evidence - Inferences

Appeal by the accused, Bou-Daher, from a conviction for arson. The accused was the manager of a bar that was owned by his son and his nephew. The accused and two other persons were present at the bar. The accused had been working in his office on the second floor. Shortly after he left the bar and armed the security system, a fire broke out on the second floor. The fire started in two separate locations and a liquid accelerant was used to ignite the flames. The bar's video surveillance cameras were disabled earlier that afternoon. The accused was convicted of arson, but acquitted of arson for a fraudulent purpose. The trial judge drew an inference from the circumstantial evidence that no unidentified intruder could have accessed the second floor when the fires were set. The conviction was based on the conclusion that the accused had the exclusive opportunity to set the fire, as neither of the other two individuals had access to the second floor. The accused appealed.

HELD: Appeal dismissed. The accused's defence of another perpetrator was problematic. The individual would have had to disable the security system in the afternoon, hide upstairs for 10 hours with an accelerant without being detected by the bar's staff, and emerge and start two fires after the accused left his office, but prior to the accused arming the security system. No evidence supported the hypothetical scenario of an unidentified intruder. The hypothesis was neither reasonable nor rational. The trial judge did not err in finding that the sole rational conclusion from the evidence was that the accused set the fire. The verdict was not unreasonable.

R. v. Bou-Daher, [2015] N.S.J. No. 449, Nova Scotia Court of Appeal, M. MacDonald C.J.N.S., J.W.S. Saunders and J.E. Fichaud JJ.A., October 27, 2015. Digest No. 3527-007

EVIDENCE

Witnesses - Compelling attendance by subpoena - Subpoena duces tecum

Appeal by five defendants from an order quashing subpoenas duces tecum issued to certain police witnesses. The appellants were charged with drug offences as part of a multi-police force drug and criminal organization investigation. The subpoenas compelled the police witnesses to appear at a preliminary inquiry and bring copies of any policy directives and protocols related to the documenting and tracking of confidential informants and police agents between 2011 and 2012. The Crown had previously refused disclosure on the basis the materials sought were irrelevant and protected by informer privilege. The police witnesses and the Crown sought prerogative relief. In quashing the subpoenas, the motion judge ruled that in issuing the subpoenas, the preliminary inquiry judge in effect granted a production order for documents which he knew the Crown had refused to disclose in the first instance and which were arguably in the possession of third parties. The preliminary inquiry judge exceeded his jurisdiction in doing so. The defendants were entitled to bring a Stinchcombe application and an O'Connor application before the trial judge for production of the materials at issue. The defendants appealed. Their appeal was moot, as the related proceedings had concluded with guilty pleas and sentencing.

HELD: Appeal dismissed. It was appropriate to determine the merits of the appeal despite its mootness due to the importance of the procedural issue of whether an accused could invoke the authority of a preliminary inquiry judge to issue a subpoena duces tecum, accepting that the judge had no authority to make a disclosure order under a Stinchcombe application or O'Connor application. The motion judge did not violate the audi alteram partem principle by quashing the subpoenas on a ground not advanced in argument. Seeking an extraordinary remedy invoked the supervisory jurisdiction of the superior court to assess the preliminary inquiry justice's jurisdiction. The issue of jurisdiction was linked to the contention that an O'Connor application was the sole means of accessing what the police considered to be third party records. Although the motion judge erred in finding issuance of the subpoenas was functionally equivalent to a disclosure order, the error was immaterial. The appellants clearly used the subpoenas for indirect disclosure purposes in circumvention of the established Stinchcombe and O'Connor regimes. The jurisdiction to grant the remedy of production lay with the trial judge.

Ontario (Provincial Police) v. Thunder Bay (City) Police Service, [2015] O.J. No. 5594, Ontario Court of Appeal, D. Watt, P.D. Lauwers and C.W. Hourigan JJ.A., October 28, 2015. Digest No. 3527-008

SENTENCING

Procedure - Appeals - Extension of time to appeal

Motion by the accused, Spencer, for an extension of time to file a notice of appeal. The accused moved to Canada from St. Vincent in 1993 after she was adopted by a Canadian citizen. She had no further connections with St. Vincent. In 2014, the accused's boyfriend murdered another individual in a rooming house. The accused was present at the time of the killing and was arrested two days later. She pled guilty to being an accessory after the fact to murder. A joint submission recommended a two-year custodial sentence. The sentencing judge was not advised of the accused's immigration status. The accused did not file a notice of appeal within 25 days of the sentence. Following her conviction, the accused was ordered deported. Under the Immigration and Refugee Protection Act, a foreign national sentenced to more than six months' incarceration was unable to appeal a deportation order. The accused moved for an extension of time to appeal on the basis she would not have agreed to the joint sentence recommendation had she been aware of the prospect of deportation. The Crown opposed an extension on the basis the proposed appeal lacked merit.

HELD: Motion dismissed. The objective of the accused's appeal was to avoid deportation. In order to appeal her deportation order, the accused required the Court of Appeal to reduce her sentence from two years to six months. Although the accused's involvement in the murder fell at the lower end of the spectrum, a reduction in the sentence imposed would reduce the sentence far below the applicable range of fit sentences for accessory to murder. There was no possibility a reduction of that magnitude would be granted on appeal. An extension was thus refused. Sentence: Two years' imprisonment.

R. v. Spencer, [2015] N.S.J. No. 470, Nova Scotia Court of Appeal, J.E. Fichaud J.A., November 3, 2015. Digest No. 3527-009

Family Law

CHILD PROTECTION

Supervision or guardianship - Permanent appointment or Crown wardship - Termination of parental rights - Appeals

Appeal by the father from a decision by the Superior Court of Justice ("SCJ") affirming a trial judgment making his child a Crown ward for the purpose of adoption without parental access. The child, age four, had been the subject of child protection proceedings since the time of her birth. She had been in the continuous care and custody of the Children's Aid Society of Toronto since she was just under five months old and had resided with her proposed adoptive parent during that time. The child's mother had impersonated a nurse. The father fronted the employment agency that hired the mother out to work as an unqualified nurse. The child was born while the mother was incarcerated for her fraudulent activity. The father cared for the child until he too was incarcerated for his role in the fraud. The Society believed that the mother's unstable mental health posed a risk to the child despite the father's otherwise appropriate care for the child. The father breached conditions regarding the mother's access to the child. A trial judge ordered Crown wardship without access. The SCJ affirmed the decision. The father appealed and brought a motion for leave to adduce fresh evidence he claimed compelled a new conclusion. The father sought a custody order in his favour, or an order of Crown wardship with access.

HELD: Appeal dismissed. The trial judge made no palpable and overriding errors in determining the facts. The fresh evidence did not affect the disposition of the appeal. The evidence consisted of affidavits from the parents, two individuals with fraud convictions who demonstrated an ongoing pattern of deception and non-compliance with court orders. The concerns regarding the father's relationship with the mother remained extant. It was not established the father had the necessary support to raise the child. Further disruption of the child's relationship with her foster mother was undesirable. It continued to be in the child's best interests to remain a Crown ward with no access, and to be adopted by her foster mother.

Children's Aid Society of Toronto v. P.M., [2015] O.J. No. 5415, Ontario Court of Appeal, A. Hoy A.C.J.O., K.M. Weiler and G.I. Pardu JJ.A., October 19, 2015. Digest No. 3527-010

Digest

Health Law

HEALTH CARE PROFESSIONALS

Liability (malpractice) - Battery - Absence of valid consent - Informed consent - Negligence - Causation - Failure to diagnose - Standard of care - Doctors

Appeal by the plaintiffs from dismissal of their medical malpractice action against the defendant physician, Raman. In 2004, the primary plaintiff, Kirby, was a surgeon. For several days, he did not sleep well or feel well. His wife found him on the bathroom floor in severe pain. He contacted the hospital at which he worked and arranged to meet the defendant in the emergency department. The two physicians met and the defendant conducted a physical examination. They agreed that the plaintiff likely had a peptic ulcer and the plaintiff agreed to an endoscopy. The plaintiff requested sedation and the defendant performed the endoscopy. Thereafter, he was admitted to hospital. The following day, a CT scan was taken of the plaintiff's stomach and head and he was discharged. That evening, the plaintiff had two serious seizures. He underwent two surgeries to treat a burst blood vessel in his brain caused by an arterial dissection in his neck. Following further surgery, the plaintiff was unable to resume practice as a surgeon. In 2013, the plaintiff was able to retrain as a pathologist, but continued to suffer impairment of motor functions and speech. The plaintiff sued the defendant for damages for battery, negligence, breach of contract and breach of fiduciary duty. The plaintiff alleged that he did not consent to the endoscopy, and that regardless of consent, the defendant negligently performed the endoscopy, causing the plaintiff's injuries. The trial judge dismissed the action. The plaintiffs appealed.

HELD: Appeal dismissed. There was no basis for setting aside the trial judge's finding of informed consent to the endoscopy. It followed that the claim based on battery failed. No palpable and overriding error was made in finding that the endoscopy was administered competently. No breach of the standard of care was established with respect to the performance of the endoscopy or the failure to conduct post-procedure testing that would have diagnosed the arterial dissection. It followed that the claims based on negligence and breach of contract failed. The claim based on breach of fiduciary duty was unfounded. Although it was not necessary to decide the issue, the trial judge did not err in principle or misconceive the evidence related to causation or err in his application of the principle of proof on the balance of probabilities. Given the findings on liability, it was unnecessary to consider the issues related to the scope of compensable harm or damages.

Kirby v. Raman, [2015] N.J. No. 350, Newfoundland and Labrador Supreme Court - Court of Appeal, B.G. Welsh, M. Rowe and C.W. White JJ.A., October 26, 2015. Digest No. 3527-011

HOSPITALS AND HEALTH CARE FACILITIES

Administration - Hospital boards and trustees - Liability of board members - Statutory protections against direct liability - Practice and procedure - Pleadings

Appeal by the defendants from dismissal of their application to strike the plaintiffs' statement of claim. The primary plaintiff was a cardiologist who claimed the defendants unlawfully restricted his laboratory privileges and falsely asserted patient safety concerns, causing a loss of income and damage to his reputation. He sued the individual defendants for conspiracy and inducing breach of contract and sued the defendant hospital for breach of contract. The defendants applied to strike the whole of the claim, citing s. 51 of the Evidence Act and s. 46 of the Hospital Act. The chambers judge recognized that the statutory protections possibly provided a complete defence to the claim. However, it was uncertain at the current point of the litigation whether the plaintiff might establish a viable cause of action based on admissible evidence, or otherwise find a creative circumvention of the statutory defences. The judge concluded it was not plain and obvious the claims must fail. The defendants appealed. On appeal, the defendants shifted their focus from the statutory protections to the common law principle of witness immunity.

HELD: Appeal dismissed. The chambers judge did not err in dismissing the application. The circumstances required for witness immunity had yet to coalesce into a protected occasion. At present, there were no extant proceedings before the type of quasi-judicial decision-making body that had the authority to restrict or otherwise affect the plaintiff's practice in the manner alleged in his pleading. The pleading made no mention of proceedings before a peer review or medical advisory committee, or the hospital board or appeal board. Rather, his complaint was tied to the conduct of the individual defendants, alleging they acted without formal authority to exclude him from access to work in a laboratory important to his practice. While it was possible that future administrative proceedings might give rise to the immunity claimed, it was not plain and obvious at present that the plaintiffs' claims were not viable.

Hamburger v. Fung, [2015] B.C.J. No. 2315, British Columbia Court of Appeal, M.V. Newbury, D.C. Harris and R. Goepel JJ.A., October 27, 2015. Digest No. 3527-012

Immigration Law

REMOVAL AND DEPORTATION

Removal from Canada - Pre-removal risk assessment

Application by Abdillahi for judicial review of a negative pre-removal risk assessment ("PRRA") decision. The applicant, age 26, was a citizen of Somalia. He entered Canada as a permanent resident ten years earlier with his mother. Shortly after his arrival, the applicant exhibited chronic alcoholism that led to criminal conduct. He amassed 22 convictions in Canada, with further charges pending. The applicant was found inadmissible on the grounds of serious criminality and was subject to removal. An appeal of the removal order on humanitarian and compassionate grounds was unsuccessful. In addition, the applicant sustained a traumatic brain injury in 2013 when he was hit by a bus. He exhibited ongoing deficits in memory, language and insight. The applicant had limited family connections in Somalia, with no knowledge of where extended family resided. His visible tattoos identified him as westernized rather than Muslim. The applicant submitted he would be at risk in Somalia without the social and protective support of a clan. The PRRA officer concluded that the applicant would not be at risk if returned to Somalia due to the existence of an internal flight alternative in Mogadishu that would significantly diminish the risk posed by Al-Shabaab. The applicant sought judicial review.

HELD: Application allowed. The officer's analysis of Mogadishu as an internal flight alternative was unreasonable and unacceptable. The officer relied on selected passages from the documentary evidence, and thus ignored and failed to address significant evidence and jurisprudence to the contrary. The applicant had no known family, friends, or clan connections within Mogadishu. He was a cognitively-disabled recidivist offender alcoholic with minimal work experience, access to resources, or social supports. He fell squarely within the category of persons identified in the documentary evidence that were unlikely to be able to reside in Mogadishu without experiencing undue hardship. The volume of evidence contradicting the officer's conclusion, and his failure to address it, rendered the decision unreasonable. The application was remitted for determination by a different officer.

Abdillahi v. Canada (Minister of Citizenship and Immigration), [2015] F.C.J. No. 1241, Federal Court, Zinn J., October 23, 2015. Digest No. 3527-013

Insurance Law

THE INSURANCE CONTRACT

Interpretation - Coverage provisions and exclusion clauses - Reasonable expectation doctrine

Appeal by the insurer from a decision that it was required to defend the respondent in three separate actions. The respondent was insured by the appellant under commercial liability insurance policies. St. Amand, Sheridan and Smith sued the respondent for malicious prosecution, false arrest, and defamation arising out of the respondent's conduct. St. Amand alleged the respondent failed to return race horses to him despite an order of the Animal Care Review Board to do so. The respondent then accused St. Amand of conduct that led to criminal charges which were subsequently stayed as an abuse of process. Sheridan, a veterinarian with the Toronto Humane Society, sued after the respondent executed a search warrant that led to charges being laid against Sheridan and the loss of his employment. The charges were stayed because the search warrant and its execution were so flawed that material seized during the search could not be adduced into evidence. Smith, a prominent investigator with the Toronto Humane Society, was arrested by the respondent and escorted out of his office in handcuffs in the presence of the media. All charges against him were withdrawn, as there was no reasonable prospect of a conviction. The appellant conceded that claims for malicious prosecution, false arrest, false imprisonment, and slander were encompassed by the insurance policies. However, it relied on exclusion clauses in the policies for personal injury sustained as a result of wilful violation of a penal statute and a knowing violation of the rights of another, and on the application of the fortuity principle, to deny coverage. The application judge determined that the exclusion clauses and the fortuity principle did not apply to exclude coverage.

HELD: Appeal dismissed. The application judge did not err in finding in the St. Amand action that the purpose of the Ontario Society for the Prevention of Cruelty to Animals Act was not penal, so that the exception in the policy for conduct that violated a penal statute did not apply in the St. Amand action. The application judge was also correct in finding that the fortuity principle did not apply, as the policy expressly covered offences such as malicious prosecution. Given the context was one in which the appellant agreed to provide insurance for an investigative body which could lay charges without supervision from Crown prosecutors, it would be reasonable to expect coverage for the allegations in the St. Amand claim. The fortuity principle should not be applied so as to preclude coverage that the insurer agreed to provide. In addressing the claims of false arrest and malicious prosecution in the Sheridan action, the application judge correctly concluded that exceeding the scope of a search warrant was not an offence or violation of the Criminal Code. As such, the exclusion provision was not triggered. As for the application judge's treatment of the fortuity principle, the reasons for rejecting this argument with respect to the St. Amand claim were equally applicable to that of Sheridan. Given the commercial context in which the insurance contract was formed, the application judge correctly found in the Smith action that strict application of the exclusion respecting violations of the right of another would serve to defeat the main object of the contract. It was not evident from the pleadings that there was any allegation of a violation of rights respecting any of the claims in issue. The fortuity principle and the language of the policy in issue in the Smith action did not operate to exclude coverage for Smith's claim.

Ontario Society for the Prevention of Cruelty to Animals v. Sovereign General Insurance Co., [2015] O.J. No. 5492, Ontario Court of Appeal, G.J. Epstein, S.E. Pepall and M.L. Benotto JJ.A., October 22, 2015. Digest No. 3527-014

Landlord & Tenant Law

PROCEEDINGS

Appeals and judicial review

Appeal by Sidhu from a Court of Queen's Bench ruling affirming a writ of execution on an order for possession. The appellant operated a Subway franchise in a shopping centre beginning in 2003. He entered a franchise agreement and a sublease for the premises, paying rent directly to the mall operator. In 2013, the appellant fell into arrears on the rent. In June 2014, Subway obtained an order for vacant possession setting rent arrears at $18,152 and ordering taxation of costs on a solicitor and client basis. In July 2014, the appellant paid the arrears in full. Approximately one week later, Subway obtained an ex parte writ

Digest

of execution based on the order for vacant possession. A new franchisee reopened the premises and continued to operate in the same location. The appellant appealed the Master's order. The Court of Queen's Bench found that the statutory stay of eviction proceedings was not available under the circumstances, and that the time for which the rent was in arrears precluded relief from forfeiture. The appellant appealed to the Court of Appeal.

HELD: Appeal dismissed. Under his tenancy, the appellant's right to use the premises was limited only to operate a Subway sandwich shop pursuant to the franchise agreement. The franchise agreement was terminated long before Subway commenced the eviction proceedings. The termination of the franchise agreement and the third party rights created post-eviction rendered the appeal moot. The correctness of the motion judge's interpretation of the stay provision would have no practical effect on the parties' rights. This was not an exceptional case that justified determination of the merits.

Subway Franchise Restaurants of Canada Ltd. v. Sidhu, [2015] M.J. No. 265, Manitoba Court of Appeal, M.M. Monnin, D.M. Cameron and C.J. Mainella JJ.A., October 19, 2015. Digest No. 3527-015

Natural Resources Law

PUBLIC UTILITIES

Operation of utility - Toll methodology - Rates - Regulatory tribunals - Licensing and rate-making - Judicial review - Standard of review

Application by Enbridge Gas New Brunswick Limited Partnership ("Enbridge") for judicial review of a decision of the New Brunswick Energy and Utilities Board prohibiting it from recovering any revenue shortfall incurred by it as a result of the imposition of a rate rider in 2014. Enbridge was a public utility operating as a distributor of natural gas. When Enbridge began operating in New Brunswick, it was expected to operate at a loss while its customer base was being developed. During this development period, Enbridge was entitled to establish a deferral account, and to record the difference between the revenue received and the revenue requirement approved by the Board. When it was determined that the development period was over, Enbridge would not be permitted to add to the deferral account and it was to be amortized over the remaining term of the agreement with the province. In 2013, Enbridge applied to change distribution rates for a series of customer classes. For the relevant class, the Small General Service class, the Board denied Enbridge's request to recover the revenue shortfall it maintained was caused by the imposition of a rate rider by the Board earlier in the year. Enbridge sought judicial review of the Board's decision on the basis that the Board erred in law in denying Enbridge the opportunity to recover its full revenue requirement, rendering the decision incorrect or unreasonable, and that the Board breached its duty of fairness by failing to provide adequate reasons for its decision.

HELD: Application dismissed. Recovery of the shortfall occasioned by the imposition of the rate rider was not guaranteed. When the Board ordered the implementation of the rate rider, it did so based on the evidence before it, after determining that reducing the Small General Service rate was appropriate and that it was in the public interest, in keeping with the existing tariff and required by Regulation. The rate rider impacted upon the rates fixed by the Board in 2012. It was not an interim rate measure. The Board was clear that the rate being charged to the Small General Service class of customers could no longer be reasonably justified and an adjustment was therefore required. The Board was governed by its statutory obligation to impose rates that were just and reasonable, which it did. While the Board did not provide extensive reasons for its decision on the specific issue of recovery of the shortfall in revenue requirement associated with the imposition of the rate rider, having regard to the full context, the reasons were sufficient.

Enbridge Gas New Brunswick Inc. v. New Brunswick Energy and Utilities Board, [2015] N.B.J. No. 243, New Brunswick Court of Appeal, J.E. Drapeau C.J.N.B., K.A. Quigg, B.V. Green JJ.A., October 22, 2015. Digest No. 3527-016

Securities Regulation

OFFENCES AND ENFORCEMENT

Offences - Penalties - Commission orders in the public interest - Powers of Commission - Resignation as director or officer

Appeal by Chandran from the sanctions imposed under the Securities Act. The Securities Commission found the appellant guilty of fraud in the capital market. The Commission found that the appellant was the guiding mind of Platinum Equities, which raised more than $58,000,000 from investors relating to different real estate projects. All but one of the projects failed and the investors lost their money. The Commission found that the appellant and the companies he controlled perpetuated a fraud, misled investors and engaged in illegal trades and distributions. The Commission imposed numerous sanctions, including requiring the appellant to resign all positions he held as an officer or director of any issuer, registrant or investment fund manager for a period of 25 years or until the $1 million administrative penalty had been paid, cease trading in securities, refrain from being a director or officer of any issuer, registrant or investment fund manager, refrain from advising in securities or exchange contract and refrain from acting in a management or consultative capacity in connection with activities in the securities market. The appellant wanted the sanctions imposed against him relaxed so that he could remain an officer and director of all related entities of Platinum in order to deal with litigation involving the investors. He also wished to remain a trustee for a company owned by a family trust, to continue as the sole director of his family companies, to act as asset manager of the assets owned by the trust and to consult for the benefit of the trust.

HELD: Appeal dismissed. None of the aspects of the sanctions imposed on the appellant were unreasonable. The sanctions fell within the range of acceptable and rational solutions, were not demonstrably unfit, were not based on some error of principle and were not otherwise unreasonable. The Commission properly considered the seriousness of the appellant's conduct, which included fraud, misrepresentation, illegal trades and illegal distributions, and found that the appellant's conduct warranted significant sanctions. The Commission considered mitigating factors such as the appellant's cooperation and his apology, that he did not set out to harm investors, had no prior sanctions and that he lacked experience in the capital market.

Alberta (Securities Commission) v. Chandran, [2015] A.J. No. 1171, Alberta Court of Appeal, P.W.L. Martin, B.K. O'Ferrall and F.L. Schutz JJ.A., October 30, 2015. Digest No. 3527-017

Transportation Law

MOTOR VEHICLES AND HIGHWAY TRAFFIC

Liability - Provincial or regulatory offences

Appeal by the Crown from the acquittal of the defendant, Ikede for distracted driving contrary to s. 100D(1) of the Motor Vehicle Act. Police pulled over and ticketed the defendant after observing him driving with a cell phone in his hand. The defendant testified that he used a feature on his iPhone to ask for directions, and then placed it on the centre console. He submitted that he was not using the phone in the traditional sense of communicating by voice or text. He testified that he did not look at the screen, as he merely spoke into the voice-activated navigation system. The strict liability offence required proof of use of a cell phone while driving, and did not require proof of distraction. The trial judge found that "use" of a hand-held cell phone, interpreted in the context of driver distraction, did not encompass the defendant's conduct. The defendant was acquitted. The Crown appealed.

HELD: Appeal dismissed. The phrase "to use a hand-held cellular telephone" was not defined by the Act. Interpretations varied from use of a smartphone to accessing other applications, to having a conversation. In this instance, the scope of the prohibition in the context of distracted driving did not encompass all interactions with hand-held devices that had cellular telephone functionality. The verb, "use", only made sense in the context of the object of the sentence, "telephone". A telephone was widely understood as a communication device. The wording used suggested a legislative intent of prohibiting driving while distracted by a conversation on a telephone in the driver's hand. The defendant did not use his phone to carry on communication with another person. When the defendant, without looking at the screen of the device, engaged a voice-activated navigational system related directly to the safe operation of the vehicle, through a hand-held electronic communication device, he was not "using" a cellular telephone within the scope of the offence. The trial judge's nuanced interpretation was reasonable and the acquittal was thus affirmed.

R. v. Ikede, [2015] N.S.J. No. 459, Nova Scotia Supreme Court, J.S. Campbell J., October 23, 2015. Digest No. 3527-018

Business & Careers

DANE_MARK / ISTOCKPHOTO.COM

The modern resumé: short but substantive

Keep your CV handy and up to date

DONALEE MOULTON

Today's well-prepared lawyers have a notebook at the ready, a fully charged smartphone in their pocket — and an up-to-date resumé close at hand.

Resumés are no longer documents dusted off and updated only when a lawyer decides to look for work. They are an integral part of retaining clients, attracting new ones and being able to answer quickly when opportunity knocks.

"You need a resumé completed and ready to go as part of your marketing material," says Warren Bongard, co-founder and president of ZSA Legal Recruitment.

In the competitive business and legal market, a current resumé is as essential as an LL.B. Many companies and government departments issue requests for proposals for legal services that require a resumé for every team member. Head hunters are also reaching out to potential job candidates, and external counsel are frequently approached about in-house jobs. They don't want to wait while a lawyer updates their curriculum vitae.

Like most modern tools of the legal trade, the contemporary CV does not resemble its forerunners. First of all, it's much shorter.

"A successful lawyer's resumé would be one page and it would highlight accomplishments," says Bongard.

The one- or two-page resumé may not be as long as previous iterations, but it must be relevant and informative.

"It needs to read well, be short and concise, but it still needs to be substantive," says Gene Roberts, division director with Robert Half Canada. "You need to be as informative, you just have less space."

A lawyer's formal resumé will exist on paper and online. The latter poses unique challenges. Keywords, those most likely searched for when employers and potential clients are in the market for legal services, need to be identified and highlighted. Warren Smith, managing partner with The Counsel Network, recommends lawyers consider the roles they are most interested in, then determine the search terms they would use to find these roles online as well as the skills typically referenced in relevant job descriptions.

"Consider including those words prominently and frequently in your materials to help your profile stand out to prospective employers and recruiters," Smith says.

Savvy lawyers will not only keep their resumés up to date, but also their social media profiles. Many employers proactively assess candidates through their online profile — LinkedIn most commonly — but also through searches.

"As a result, it is important for everyone to take steps to ensure their online profile accurately reflects their work accomplishments," Smith says. "Your resumé may be as much about your online or public profile as it is the document you submit for consideration to a particular opportunity."

While much has changed with respect to writing a job-winning resumé, the foundational elements remain constant. A CV is about convincing pro-

Stand out, Page 25

Business & Careers

Stand out: Highlight activities to humanize yourself

Continued from page 24

spective employers and clients that you are the best person for the job, or at the very least, a promising interview candidate. Decisions to interview or to proceed with a request for quote are made quickly, so resumés must be able to be scanned easily. A chronological approach often still works best: highlight where you are today and work back from there. Decisions are made in a few seconds.

"You have to clearly lay out your career map," Bongard says.

The chronology must be more than a mere timeline. For senior lawyers and those with substantive work experience, specific dates are not even necessary. What is critical is showing readers how successful you have been in your career to date. It's not about a list; it's about accomplishments.

"Employers want to know what you've worked on and what you've achieved," says Roberts. "You always tailor your resumé for the specific job."

It's helpful to humanize yourself. Including information about hobbies, volunteer work and community contributions can set you apart from contributors.

"You don't want people to think you're a legal robot," says Roberts. "Show what you are passionate about."

According to The Counsel Network, a number of things don't belong in a CV, including personal information such as race, nationality or ethnic origin; salary expectations (unless requested); and non-legal experience that is more than 10 years old. Likewise, photos of yourself are not necessary.

In addition to content, lawyers need to show they took time with their resumé. Typos and grammatical mistakes call into question your competency and your carefulness. Bongard gets resumés from prospective candidates who assure him they are detail-oriented and they spell "detail" incorrectly.

"It means they didn't give this enough attention and they're not detail-oriented," he says.

Errors are more likely to occur when lawyers are rushed. Routinely updating your resumé online and otherwise avoids this.

"Taking time between deals or trials to get your online materials working for you…can be the most effective way to ensure your CV is giving you the greatest opportunity for career advancement," says Smith.

Common CV blunders

Monster Worldwide, a global online job site, says it is deceptively easy to make mistakes on a resumé but exceptionally difficult to repair the damage. Here are the company's 10 most common resumé-writing pitfalls.

1. Typos and grammatical errors
2. Lack of specifics
3. Attempting one size fits all
4. Highlighting duties instead of accomplishments
5. Going too long or cutting things too short
6. A vague objective statement that sounds like puffery
7. No action verbs
8. Leaving off important information
9. Visually too busy
10. Incorrect contact information

We want to hear from you!
Send us your verdict:
comments@lawyersweekly.ca

Business & Careers

Parsing the regulation of professional corporations

Vern Krishna
Tax Views

MEDIAPHOTOS / ISTOCKPHOTO.COM

Special corporate and tax rules apply to professionals carrying on business. The rules are technical, but have attractive aspects if properly used. There are substantial tax savings available and, for some professionals, opportunities for income-splitting.

The corporate rules vary by province and territory. The tax rules are federal and apply across the board.

Roscoe Pound defined a professional as a person "pursuing a learned art as a common calling in the spirit of public service — no less a public service because it may incidentally be a means of livelihood." Daniel Duman calls the English bar "the classic English profession as measured by nearly all the criteria usually associated with professionalism: autonomy from external interference, monopoly over practice, the possession of esoteric knowledge and skills, corporate unity and a position of dominance over a clientele dependent upon professional advice."

For tax purposes, the definition of a "professional" is much broader than any of the traditional professions (lawyers, doctors, accountants, engineers, architects, etc.), and includes almost any occupation other than individuals who engage in a personal services business as an "incorporated employee."

Thus, with the limited exception for incorporated employees, almost any individual can form a professional corporation for tax purposes. There are, however, also stringent regulatory rules in each of the provinces.

Fundamental business concepts

The fundamental business structure of a professional corporation (PC) is that the corporate entity provides its services through an employee, who may also be its principal shareholder. The principal business imperative of a professional service corporation is that the entity must provide the services to, and contract with, the client or third party, even though it is the professional who personally delivers the service. Thus, the professional is the agent of the corporation. The corporation cannot be the agent of the professional.

A professional corporation should conduct itself as in the case of any other business corporation. This means that it is the PC that should:

- Enter into all contracts, including employment contracts;
- Enter into leases and contracts to acquire services;
- Operate its bank accounts;
- Promote itself in advertising; and
- Prepare financial statements.

In essence, the PC must deliver the services.

Enabling statutes

Professionals can incorporate in all Canadian common law provinces under their respective corporate statutes. In Ontario, for example, the *Business Corporations Act* is the governing statute for PCs.

Section 3.1 OBCA provides that: "Where the practice of a profession is governed by an act, a professional corporation may practise the profession if,

(a) that act expressly permits the practice of the profession by a corporation and subject to the provisions of that act; or

(b) the profession is governed by an act named in Schedule 1 of the *Regulated Health Professions Act, 1991*, one of the following acts or a prescribed act:

1. *Certified General Accountants Act, 2010*.
2. *Chartered Accountants Act, 2010*.
3. *Law Society Act*.
4. *Social Work and Social Service Work Act, 1998*.
5. *Veterinarians Act*. 2000, c. 42."

After some initial resistance, all of the common law provinces now allow lawyers to practise their profession through PCs.

With the exception of physicians and dentists, where special rules apply, the OBCA effectively precludes most other professions from splitting their professional income with family members who are not also members of the same profession. Thus, the rule prevents most lawyers from taking advantage of one of the principal tax benefits of private corporations.

> "For tax purposes, the definition of a 'professional' is much broader than any of the traditional professions (lawyers, doctors, accountants, engineers, architects, etc.), and includes almost any occupation other than individuals who engage in a personal services business as an 'incorporated employee.'
>
> **Vern Krishna**
> TaxChambers LLP

Void voting agreements

Voting agreements that vest powers or proxies in non-members of the profession are void if they remove powers from the shareholder, as are unanimous shareholders agreements if all of the shareholders are not members of the PC.

Continued existence of corporation

The OBCA, for example, provides for the continued existence of a PC despite:

(a) the death of a shareholder;

(b) the divorce of a shareholder;

(c) the bankruptcy or insolvency of the corporation;

(d) the suspension of the corporation's certificate of authorization or other authorizing document; or

(e) the occurrence of such other event or the existence of such other circumstance as may be prescribed.

Unlimited liability

A professional practising his or her profession through a PC cannot limit his or her liability. Thus, the liability of a professional is not affected by the fact that the member is practising his or her profession through a PC. The member is jointly and severally liable with his PC for all professional liability claims in respect of errors and omissions made during the tenure of his shareholding in the corporation.

Limited liability partnerships

The liability of a shareholder of a PC that is a partner in a partnership is not affected by the existence of the PC structure. Thus, where a PC is a partner in a partnership, or limited liability partnership, the shareholders of the PC continue to have the same liability in respect of the partnership, or limited liability partnership, as they would have if they were directly the partners.

Regulatory restrictions

A PC cannot carry on any business other than the practice of the profession of its shareholders. All of the shareholders of the PC must be members of the same profession: lawyers in the case of law firms, accountants in the case of accounting firms, etc. There can be no multi-disciplinary practices in a PC. A PC may, however, carry on any ancillary activities and can invest its surplus funds, including any cash saved from its deferred tax. Professional regulators also stipulate various requirements and procedures to follow for PCs.

For example, the Law Society of Upper Canada provides as follows: "The corporation may not carry on a business other than the practice of law, but this paragraph shall not be construed to prevent the corporation from carrying on activities related to or ancillary to the practice of law, including the investment of surplus funds earned by the corporation."

Accounting for PCs

A PC carrying on a business is generally taxable on its income on an accrual basis. However, lawyers (but not paralegals), accountants, dentists, medical doctors, veterinarians and chiropractors can elect to exclude any work in progress from their income at the end of the year. This benefit also extends to their PCs.

Conclusion

The corporate and tax rules allow a professionals carrying on business substantial savings through tax deferral, and for medical professionals opportunities for income-splitting. Professional corporations must comply with provincial corporate rules, the rules of professional conduct, and, of course the federal tax statute.

Vern Krishna, CM, QC, FCPA, University of Ottawa Law School. Of Counsel, TaxChambers LLP (Toronto). Email: vern.krishna@TaxChambers.ca (www.vernkrishna.com).

We want to hear from you!
Send us your verdict:
comments@lawyersweekly.ca

News

Delusional doesn't mean diminished intent

MICHAEL BENEDICT

A recent B.C. Court of Appeal judgment upholding the second-degree murder conviction of a delusional man who brutally stabbed his wife demonstrates the difficulties of establishing a defence of diminished intent, according to legal observers.

"The law has not caught up with psychiatry — the threshold for showing an absence of mens rea is too high," says Vancouver lawyer Roxane Vachon, who argued the unsuccessful appeal.

The case, *R. v. O.V.* 2015 [BCCA 449], subject to a publication ban because of the victim's and accused's children, involves a 2009 killing in Burnaby, B.C.

At the time, O.V. approached the home of his estranged wife who had banned him from the house two months earlier. O.V. asked to return, but his wife refused. However, she allowed him to use the bathroom.

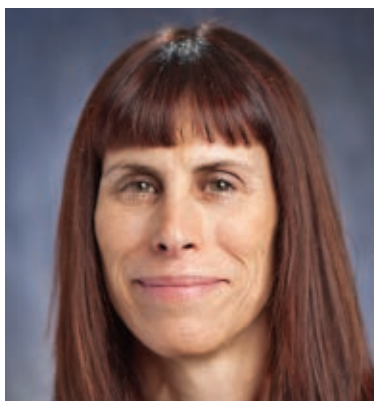
After he was finished, O.V., who had earlier been convicted of assaulting his wife, went to the kitchen, picked up a knife and stabbed her 15 times in the back and chest while she was seated on a couch watching television with their three children. He then fled but was arrested at a nearby gas station.

While evidence at trial indicated that O.V. understood why he was being arrested and had asked for a lawyer, the man said he recalled nothing of the killing.

As well, O.V. had acted strangely that day. Before the killing, he called 911 for an ambulance that took him to hospital. But he walked out before being assessed. Then he went to a RCMP detachment and said he was being followed.

O.V., who had been previously hospitalized for two months under the province's *Mental Health Act*, did not testify at his trial. While his psychiatrist testified that O.V. suffered from delusions, he was unable to say that the delusions prevented him from forming the intent to kill his wife.

The trial judge agreed O.V. was delusional and suffering from a disease of the mind, but added,



Silver

according to the B.C. appeal court, "there was insufficient medical or circumstantial evidence to show he did not appreciate the nature and quality of his actions or to show he was incapable of knowing his actions were wrong."

On appeal, Vachon argued, among other things, that the trial judge should have considered all of O.V.'s behaviour that day in determining his state of mind. "I was hoping the appeal court would step back, look at the totality of the evidence and say the trial judge should have found a reasonable doubt about my client's ability to form the necessary intent," she says. "This man has been sick for a long time. He acted bizarrely throughout the day. But the law won't let you be a silent crazy person."

The appeal court flatly rejected Vachon's arguments. "The [trial] judge carefully considered the cumulative effect of all the evidence and the submissions of counsel," Justice Anne MacKenzie wrote on behalf of the court.

Vachon, a lawyer at Gaffar Cooper Vachon, also argued that the trial judge, having established that O.V. was delusional, was wrong in applying the common sense inference that the stabbing itself was evidence of the specific intent for murder. But the appeal court on Oct. 29 instead found that, "The extent of the injuries and the degree of force used to inflict them, resulting in piercing vital internal organs and penetrating bone, was clearly evidence relevant to the appellant's intention."

Concluded MacKenzie: "It was open to her [the trial judge]...to infer that the appellant intended the natural and probable consequences of his acts...The fact another judge might have evaluated the evidence differently does not give this court licence to interfere."

Calgary criminal sole practitioner Lisa Silver, also a University of Calgary Law School adjunct professor, agrees the evidence was compelling. "It's not unusual that under the law someone can be mentally ill and still form the necessary intent," Silver says. "When there are 15 stab wounds, the inference is pretty strong."

Toronto criminal appeal lawyer Jonathan Dawe of Dawe Dineen noted the B.C. high court had no basis to overturn the trial judge because neither the accused nor his doctor presented evidence about his state of mind when he killed his wife.

"It shows the basic problem of someone being mentally ill whose illness probably contributed to the killing, but [who] does not have a legal defence," he added.

Swaisland: 'Faster and more effective access' for some people

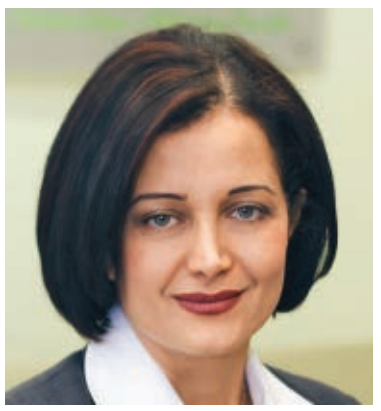
Continued from page 11

That exception, drawn from *Peiroo v. Canada (Minister of Employment and Immigration)* [1989] O.J. No. 805 (leave to appeal refused, [1989] S.C.C.A. No. 322), establishes that habeas corpus is precluded in immigration matters where "a complete, comprehensive and expert statutory scheme provides for a review that is at least as broad as and no less advantageous than *habeas corpus*."

On appeal, Justice Paul Rouleau noted that the Peiroo exception was intended to avoid "a collateral attack" on immigration decisions in cases where an alternate review process existed. However, he found it didn't amount to "a blanket exclusion of *habeas corpus* in immigration-related matters" where the issue of the legality of detention was raised.

After considering factors including the onus, review process and the question the court must answer, as well as access, timeliness and court expertise, he also concluded that "where, as in the current appeals, the issue is the legality of a continuing lengthy detention of uncertain duration, the review process created by the IRPA is not as broad and is less advantageous than *habeas corpus*."

According to Immigration and Refugee Board statistics, Justice Rouleau noted that after 18 months of detention "release becomes less likely at each successive review."



> At the heart of this are Charter rights, even though they arise in an immigration law context.
>
> **Arghavan Gerami**
> Immigration and refugee lawyer

"At the heart of this are *Charter* rights, even though they arise in an immigration law context," said Ottawa immigration and refugee lawyer Arghavan Gerami.

She said the judicial review process offers significant practical and procedural roadblocks to obtaining an effective remedy for detainees locked up with no clear prospect of either release or deportation.

The 30-day window between monthly reviews makes it challenging to obtain even necessary transcripts, let alone a judicial review of a decision before it is made moot by a newer determination, she noted.

She added that the Federal Court reviews decisions using a standard of reasonableness rather than correctness, is deferential to the authority of the non-lawyer board members making the findings, and couches its decisions on indeterminate detention in discretionary language.

"There's no finding that it is unconstitutional and therefore compelling in a way that habeas corpus would be," Gerami said. "When you have constitutional issues, it's either right or wrong. It's not a little bit reasonable to detain someone indefinitely."

Aiken agreed that the immigration review process, which places the onus on the applicant to bring clear and convincing evidence that would lead to a departure from previous findings, is not well suited for managing individuals facing lengthy and indeterminate detention.

"The immigration system, as data demonstrates, does these people a disservice because they're required to demonstrate that they have new info, and if they don't have new info, we essentially reinforce a decision that's already made, regardless of the fact that it may not have been the right decision," said Aiken. "You can see how grave injustices can be done and compounded, with effectively no remedy for the individual concerned."

Swaisland said habeas corpus proceedings will likely be considerably more demanding of the immigration system in considering the merits of ongoing detention.

"I think in the provincial courts what we're going to have is a far more searching review," she said. "It's a great win because it really should provide faster and more effective access to justice for people who fall within this narrow exception that the court has carved out."

The Court of Appeal decision follows an increasing amount of attention being paid to the plight of those in long-term immigration detention. Earlier this year, a report by the University of Toronto Law School's international human rights program looked at the issue as it related to individuals with mental illnesses, while a subsequent report by the United Nations' human rights committee expressed concern about lengthy detentions in Canada.

The Ontario decision has also created "a buzz" among immigration and refugee lawyers across the country, with interest expressed in bringing habeas corpus applications in other provinces, said Swaisland.

Brown: Care standard was met by lawyer in this case

Continued from page 11

certainty for the public.

"If the public interest demands that the law be different, then the legislature can intervene as it has done in other areas," he says.

Asper believes the B.C. Court of Appeal wasn't interested in "riding the unruly horse" of what is or isn't contrary to public policy.

Asper says it's hardly unusual for accountants to provide tax advice but he believes there is a difference between accounting and legal advice even though it overlaps.

"The reality is that whether it's a lawyer or an accountant, sometimes mistakes happen," he says.

Brown says Felty could consider suing her own lawyer for negligence but her chances would have been better if advice had been sought from a fly-by-night firm.

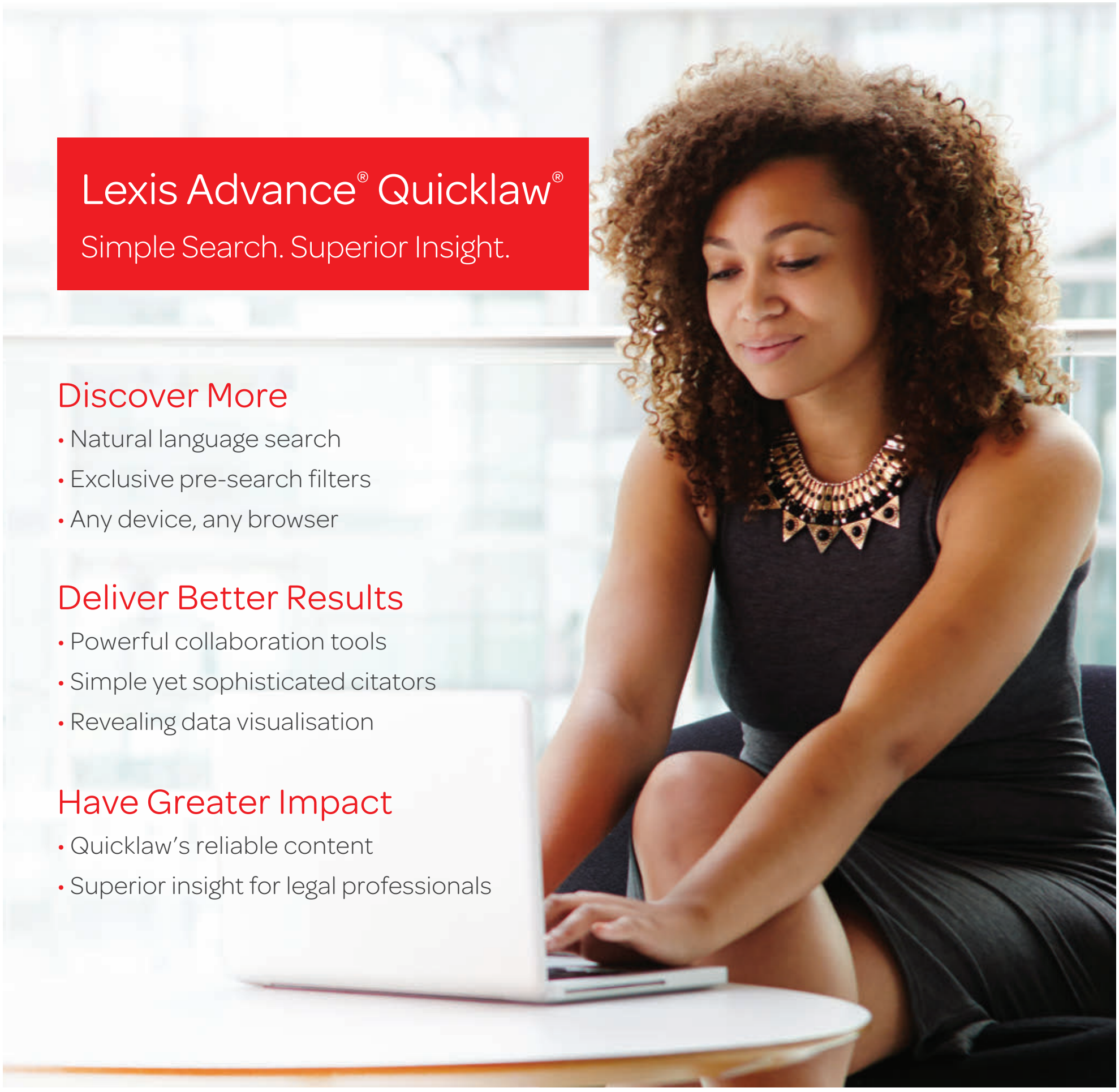
"There's nothing negligent in using one of the top five accounting firms in the country," she says.

"I think in this case, Ms. Robin met the standard of care to Ms. Felty by consulting with Ernst and Young."

We want to hear from you!
Send us your verdict:
comments@lawyersweekly.ca

Lexis Advance® Quicklaw®

Simple Search. Superior Insight.



Discover More

- Natural language search
- Exclusive pre-search filters
- Any device, any browser

Deliver Better Results

- Powerful collaboration tools
- Simple yet sophisticated citators
- Revealing data visualisation

Have Greater Impact

- Quicklaw's reliable content
- Superior insight for legal professionals

Get free access for the rest of 2015 with a 1-year subscription for Lexis Advance Quicklaw!*

1-877-920-2587

www.lexisnexis.ca/insight

LexisNexis®

*Offer valid until December 31, 2015. New LexisNexis customers must purchase a one (1) year subscription, or longer, Lexis Advance Quicklaw in order to receive free access to the product for the remainder of the 2015 calendar year. Cannot be combined with any other offers and is subject to change without notice. All orders are subject to the Lexis Advance Quicklaw terms and conditions. Other restrictions may apply. LexisAdvanceQuicklaw-BigAd-TLW-11/15