



# In Brief

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In Brief: General comments on legal developments of concern to business and individuals

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## In This Issue

LAW NOTES canvasses a host of interesting and current topics including law suits that have no chance of success (summary judgment); insider trading exemptions; stipulated price contracts (CCDC 2); misrepresentation of risk (insurance); the business cost of new environmental requirements (municipal) and third-party orders (federal); “material change” (in the securities context); and firing (as cautionary notes for the employer).

The Table of Contents will provide more details about full-length articles on trade, competition policy, patents (significant differences from American law), our trade-mark law, and the ramifications to manufacturers and importers of new consumer protection legislation.

And you may wish to weigh in on whether we should be sorry about the “apology” being legislated; the pros and cons of putting the squeeze on knock-off goods; the idea behind videotaping medical examinations; whether there is reason to be concerned about re-jigging the “reasonableness *simpliciter*” rule; and whether the decisions of boards and tribunals will now enjoy less or more finality. There is an article on how unresolved issues of Aboriginal rights create problems, and another on “cumulative cause” and “mitigation” as workplace issues.

*Brief Life Bites* may provide a smile, and in the hard copy, your *Letters and Comments*, and a little bit about us.

## Significant Differences Between Canadian and American Patent Law



Donald H. MacOdrum

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Most patent lawyers, familiar with the American patent prosecution system and substantive patent law, assume that, as its largest trading partner and closest neighbour, Canada has essentially the same patent laws as those of the U.S. In fact, Canada’s system diverges quite significantly from the American system. In

this article, a few of the significant differences will be briefly canvassed. A much more complete overview of contrasts in the two systems has been prepared and is available from any of the co-authors.

## First-to-File

From the drafting, filing and prosecution perspective, the single biggest difference between Canadian and American patent law is that, like the rest of the world (but not the U.S.), Canada uses a first-to-file system. This means that establishing the earliest possible claim date (as it is referred to under Canadian patent law) is paramount. The “claim date” for each claim is the date an application is filed in Canada or the priority date, if such priority is properly asserted and is applicable to the subject matter of the claim. If any amendment of a specification takes place between the filing of a priority application and the filing of the corresponding Canadian application, the safest practice is to file the Canadian application as soon as possible so as to obtain the earliest possible claim date, in the event the asserted priority for a particular claim fails.

Canada has a one-year grace period with respect to disclosure directly or indirectly by the applicant, but this can be dangerous, particularly for U.S. applicants, because the grace period is for one year prior to the Canadian filing date. So, for example, an American applicant who has disclosed an invention five months before filing an American application and who files a Canadian application 10 months after the American application, claiming priority from the American application, will find the Canadian application anticipated by the original disclosure which was more than 12 months before the Canadian filing date. Canada is an absolute novelty jurisdiction in respect of disclosures that do not originate from the applicant.

There are other differences that affect how claims and specifications should be drafted, and are generally not well-known to practitioners outside Canada. While it is typical for foreign patent attorneys to simply file a copy of an application as filed in the U.S. or Europe with the Canadian Patent Office, by doing so, practitioners are not taking advantage of the peculiarities of Canadian patent law and are obtaining less for their clients than is properly available.

## Applicants

In Canada, unlike the U.S., both natural and juridical persons may apply for patents. It is a requirement that the applicant make a declaration as to entitlement if it is other than the inventor. Such declaration may claim entitlement on any of a number of grounds, including employer-employee relationship, express assignment, agreement, court order, and so on. The declaration may be executed by the applicant or its patent agent.

## Requirements of Patentability

To be patentable in Canada, the invention must relate to allowable subject matter and, like the U.S., must be new, inventive and useful. But unlike the U.S., where “anything under the sun that is made by man” is patentable, allowable subject matter is somewhat narrower in Canada. For example, higher life forms are not patentable, while lower life forms are. Scientific principles and abstract theorems are not patentable and neither are patents that relate to professional skill and judgment. The extent to which pure business methods are patentable is presently unclear.

## Canadian Claims Strategy

A substantial difference to bear in mind, when filing a Canadian patent application, is that there is no limit to the total number of claims or the number of independent claims that may be included in an application, and there are no restrictions on the use of multiple dependent claims or multiple, multiple dependent claims. Also, there are no surcharges for any of those. The only surcharge that exists is for filing an application that exceeds 100 pages in length.

Each claim in multiple dependent claims is treated as a separate claim. Thus, if one were to convert a typical set of one independent claim and four dependent claims (five claims total) to multiple, multiple dependent claims, one would essentially have 16 separate claims. This effect increases exponentially as the number of original claims increases. Since there is no surcharge for additional claims, there is no obstacle to including any claim that may have been deleted from the original U.S. for cost-savings purposes. So, a Canadian application should maximize both the number of claims and the number of multiple dependent claims.

*The single biggest difference between Canadian and American patent law is that, like the rest of the world (but not the U.S.), Canada uses a first-to-file system.*

## Types of Claims Permitted in Canada

The Canadian Patent Office accepts multiple types of claims for an invention in the same application. A patent may claim a product, a process for manufacturing the product and a use of the product, all within the same patent. Thus, it may be that the claims of several related foreign applications, all based on the same specification, can be combined into a single Canadian application, saving on filing, examination, maintenance and issue fees.

However, while divided claims have become common in certain types of applications in the U.S., particularly computer and communications systems, they are not permitted in Canada. All of the steps in a method, process or system claim must be performed by the same actor. For example, in a claim to a client-server system, all of the steps claimed must be performed either client-side or server-side. It is not permissible to combine both client-side and

server-side steps in the same claim. It may, however, be possible to claim them in the same patent as two separate sets of claims.

### Restrictions in the Specification

There are certain common inclusions in American specifications that should be removed prior to filing in Canada. For example, American specifications often incorporate, by reference, other material, particularly earlier patents. This is not permitted in Canadian specifications and should be deleted or rewritten in order to avoid an automatic rejection from an Examiner on that basis. The drawings should also be formalized, preferably before filing but, at the latest, before requesting examination, as formal drawings are a requirement for allowance, rather than issue, and a rejection will result if the application relies on informal drawings.

### Language

It is not necessary to convert American or British English to Canadian English. Canadian, British or American spellings of words are acceptable and either metric or imperial measurements are permitted.

And of course, in Canada, applications may be filed in either English or French. However, all parts of the application must be in the same language and there is no requirement to translate an English application into French or vice-versa.

### Some Final Remarks

In this abridged and edited version, we have touched upon some of the differences between Canadian and American Patent law. While there are also similarities, the differences justify involving a Canadian patent lawyer or agent to conduct a review of an American application before it is filed as a corresponding Canadian application. Such advice is likely to result in broader claims, fewer rejections and faster approvals during prosecution, and more efficient litigation, thereby saving the applicant time, aggravation and expense.

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Ed.: *This is an edited and abridged version of a much lengthier article that is available, without cost or obligation, by contacting any of the co-authors.*

## New Consumer Protection Legislation



Cyndee  
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In April of this year, Bill C-52, “respecting the safety of consumer products,” was tabled in the House of Commons by the Minister of Health. This proposed legislation protects consumers by addressing or preventing dangers to human health or safety that are posed by consumer products in Canada (whether manufactured domestically or imported into Canada).

Canadian manufacturers, importers of consumer products into Canada, retailers in Canada and/or advertisers that communicate to consumers in Canada must, however, fully appreciate the limitations that are being legislated and their new obligations. The potential for severe penalties is intended to ensure that persons dealing with Canadian consumers take the health and safety of Canadian consumers seriously. The negative effects of a public accusation of harming consumers can destroy the reputation of a manufacturer, importer and/or retailer. This proposed legislation increases the risk of manufacturers, importers, retailers, sellers and advertisers that fail to:

- adopt a compliance mentality;
- conduct proper due diligence;

- implement risk management policies and procedures; and
- maintain proper books, records and reporting procedures.

### Scope

The proposed legislation applies to most manufacturers, importers, advertisers and sellers of consumer goods. The proposed legislation is very broad and applies to all consumer products with the exception of certain products covered by other statutory regimes such as explosives, firearms, vehicles, vessels, aeronautic products, food and drugs and controlled substances.

### Prohibitions

The proposed legislation has a number of prohibitions including the manufacturing, importing, advertising and/or selling of a consumer product that is a danger to human health or safety, and it prohibits all persons (other than manufacturers and/or importers) from advertising or selling a consumer product that they know, or ought to know is a danger to human health or safety.

In addition to other prohibitions under Canadian law regarding misleading advertising and consumer protection, the proposed

legislation prohibits all persons from packaging or labeling a consumer product in a manner that is false, misleading or deceptive, or that is likely to create an erroneous impression regarding whether it is a danger to human health or safety. The proposed legislation also prohibits all persons from packaging or labeling a consumer product in a manner that is false, misleading or deceptive relating to its certification or compliance with a safety standard or regulation. Further, no person shall advertise or sell a consumer product that it knows or ought to know is advertised, packaged or labeled contrary to such prohibitions.

## Obligations

The proposed legislation imposes a number of new obligations on manufacturers, importers, advertisers and sellers of consumer products. For example, it empowers the Minister of Health to order any person who manufactures or imports a consumer product for commercial purposes to conduct tests or studies on the product in order to obtain information that the Minister considers necessary to verify compliance with the Act or regulations. Failure to conduct such tests and provide such information would be an offence under the Act.

As further example, every person who manufactures, imports, advertises, sells or tests a consumer product for commercial purposes must prepare and maintain a number of records to enable tracking of the product in the event of a problem.

The proposed legislation imposes an additional documentation requirement on importers of consumer products as they must provide the prescribed documents to the Minister at the time of importation.

## Penalties

The penalties imposed under the proposed legislation can be extremely severe. The punishment for the commission of an offence is determined at the Court's discretion. If the prosecutors proceed by way of indictment, the fine may be up to \$5 million. In addition, individuals may be imprisoned for up to two years.

Persons who are prosecuted for contravening the Act may present a due diligence defence. As a result, it is very important for all manufacturers and importers to engage in compliance practices and implement internal processes and procedures to ensure compliance with the Act and regulations.

However, if a person engages in willful or reckless conduct and is prosecuted for contravening the Act or regulations, the due diligence defence is not available, and if convicted, could be fined an amount established at the discretion of the court. In other words,

there is no statutory cap to the fine. And if the prosecutors proceed by way of indictment, an individual may also be imprisoned for up to five years.

Furthermore, directors, officers, agents and employees may also be pursued. For example, if a corporation, partnership, trust or other business entity commits an offence under the Act (or regulations), any of the directors, officers, agents or mandataries who direct, authorize, assent to, acquiesce in or participates in the commission of the offence will be considered to be a party to the offence and will be liable upon conviction for the punishment provided for by the Act.

In addition, the proposed legislation and the regulations that will follow establish an administrative penalty system for contraventions similar to the existing administrative monetary penalty system for customs, import and export controls, antidumping/countervailing duty and other border measures. The Canadian Cabinet may enact regulations fixing penalties and/or ranges of penalties for each form of infraction under the Act and/or regulations. The maximum administrative penalty will be \$5,000 for not-for-profit organizations and other non-commercial activities and \$25,000 for all other organizations and activities.

*Any of the directors, officers, agents or mandataries who direct, authorize, assent to, acquiesce in or participates in the commission of the offence will be considered to be a party to the offence.*

## Manufacturers and Importers Can/Should Prepare

Given the fact that administrative penalties may add up to significant monetary amounts, it is very important that all manufacturers and importers engage in compliance practices and implement internal processes and procedures to ensure compliance with the Act and to hold the protection of consumers as paramount in importance. It is not wise to wait for problems to arise.

The assistance of legal counsel should be sought to advise as to the law that will apply; provide timely updates when the regulations are published; conduct a compliance audit; prepare a compliance report; develop internal compliance programs, policies and procedures; develop document retention and reporting procedures; structure internal reporting to an internal or external compliance officer; develop lines of communication for concerned employees/whistle-blowers; and develop training manuals that teach directors, officers, employees, agents, mandataries and others about their obligations.

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Ed.: *The unabridged version of this article appeared in the International Trade Alert issued on April 9, 2008. To subscribe to the International Trade publication, please visit the Publications Request page of our website. Anyone wishing to make submissions to the Canadian Government concerning the effects of the proposed legislation may contact our Government Relations team.*

## The Knock-off Trade: The Rising Cost of Counterfeiting



Matthew  
Thurlow

The knock-off trade has just got a bit more risky.

The recent decision of the Federal Court in *Louis Vuitton Malletier S.A. et al. v. Lin Pi-Chu Yang et al.* awarded extensive damages against counterfeiters that had exhibited a pattern of such behaviour. That decision reinforces the position taken by the same court in *Microsoft Corporation v. Cerelli et al.*

The plaintiff, Louis Vuitton, is the well-known maker of fashion accessories. Since at least 2001, the defendants, Lin Pi-Chu Yang and Tim Yang Wei-Kai (both also known under aliases) controlled and operated a retail store named K2 Fashions, located in Richmond, British Columbia.

Louis Vuitton had been pursuing the defendants since 2001 in relation to alleged trade-mark and copyright infringement through the sale of counterfeit Louis Vuitton goods at K2 Fashions. Two previous judgments had been entered against the defendants, although the awards made in those cases have not been paid. Subsequent to those judgments, Louis Vuitton orchestrated the seizure of numerous counterfeit copies from the defendants and repeatedly advised the defendants to cease their infringing activities. Those attempts by the plaintiffs to curb the infringing activities of the defendants had been largely unsuccessful.

The plaintiffs commenced this current action in July of 2007 alleging trade-mark infringement and copyright infringement by K2 Fashions' sale of counterfeit Louis Vuitton goods. The defendants failed to defend the action and Louis Vuitton brought a motion for default judgment. The Court granted default judgment, easily finding that both trade-mark and copyright infringement had occurred.

Louis Vuitton elected an award of statutory damages in relation to infringement of its copyrighted works. Such damages range between \$500 and \$20,000 per infringed work. There were two infringed works in this case. Looking to the analysis performed in the *Microsoft* case, the Court found that the full \$40,000 was appropriate, given that the defendants had acted in bad faith and had persistently engaged in infringing activities despite being advised numerous times to stop such activities. Justice Snider also found a high award to be "necessary to deter future infringement and, secondarily, to deter open disrespect for Canada's copyright protection laws."

Apart from the number of infringed works, a "nominal" award of \$6,000 per instance of infringement is often given to each plaintiff in actions for trade-mark infringement – i.e., as an approximation of damages, where neither damages nor profit can be accurately quantified (as is commonly the situation when defendants do not defend or participate in the action). In this case, the Court found such a "nominal" award to be appropriate and made an adjustment to \$7,250 per infringing instance to account for inflation – and awarded a further \$87,000 to the plaintiffs (i.e., six instances each at \$7,250 per plaintiff).

Using the test set out by the Supreme Court of Canada in *Whiten v. Pilot Insurance Co.*, additional punitive and exemplary damages of \$100,000 were awarded with a notation that such an award would be consistent with that given in the *Microsoft* case. Indeed, in this case, the Court found such an award was justified

in view of the egregious conduct of the defendants and the disproportionately low award of damages for trade-mark infringement when compared to the profits that were probably made (and which profits could not be determined due to the non-participation of the defendants in the action).

The plaintiffs were also awarded \$36,699 in costs, bringing the total award of damages and costs to \$263,699.

The similarity of scale for the statutory and punitive damage awards in this case in comparison with those in *Microsoft* serves to reinforce the message that holders of intellectual property rights are now in a strong position to seek extensive damages against counterfeiters. This decision is also a further warning to counterfeiters of the high risk of taking a flippant attitude to court proceedings and other attempts to curtail their infringing activities.

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*The similarity of scale for the statutory and punitive damage awards in this case serves to reinforce the message that holders of intellectual property rights are now in a strong position to seek extensive damages against counterfeiters.*

## Legislating the Role of Apologies in Litigation



Joseph  
D'Angelo



Benjamin  
Bathgate

The Ontario provincial government may soon be getting into the business of regulating apologies.

It started with a recommendation by the Uniform Law Conference of Canada to the Ontario Bar Association to urge the Ontario government to enact apology legislation. At the time of writing, a private member's bill, "Bill 59 – An Act Respecting Apologies," had received second reading and had been sent to the Standing Committee on Social Policy. The proposed legislation would effectively stipulate that an apology:

- cannot be admissible in court for the purpose of proving liability or as an admission of liability;
- cannot be used as confirmation of a cause of action to extend a limitation period; and
- cannot be regarded as an admission of liability for the purpose of voiding an insurance policy.

Similar legislation already exists in British Columbia, Manitoba and Saskatchewan. The objective of such legislation is to encourage early and cost-effective resolution of disputes and/or prevent the commencement of lawsuits where apologies are offered. This article examines the traditional role of apologies in the legal context and questions whether the intended legislation will accomplish its objectives.

In the absence of apology legislation, an apology would be considered a key admission in the course of a legal dispute. In particular instances, apologies can take on a significant role. For example, in defamation cases the plaintiff will inevitably request an apology from the defendant who committed the defamation to redeem his or her reputation. And, assuming the plaintiff is successful at the end of the day, the plaintiff could win increased damages if the defendant refuses to apologize.

Apologies are also relevant in the civil litigation context where, for example, there has been a finding of contempt of court and the offending party wishes to purge the contempt, and in the criminal context during sentencing.

If the recommended apology legislation is enacted in its proposed form, apologies could potentially play a very significant role in a variety of commercial disputes. Even though commercial disputes typi-

cally involve a dispute over money (or some form of property or business interest, which ultimately boils down to a monetary loss), invariably these disputes arise from a decision made or an action taken by a person. The person may have acted through or on behalf of a corporation, or may have acted as an individual, but that person's decision or action ultimately caused monetary loss to another person. Typically in such cases, there is also some feeling of injustice or damaged pride by the innocent "victim" which, from a litigator's perspective, often translates into the all-too-common desire by a client to litigate "out of principle" even when the economics do not justify it.

In many of these disputes, an apology could help facilitate a settlement more quickly and for less money because, while a monetary payment would compensate for pecuniary loss, it would not compensate for the intangible losses described above. There is data from 1994, for example, which shows that, in the case of medical

malpractice suits, a significant percentage of patients said that they might not have filed suits had they been given an explanation and apology.

The danger, however, in enacting the proposed apology legislation is that it would eliminate the court's discretion to make a finding of liability in any way based on a clear admission of fault by the defendant. As it is presently worded, the draft *Uniform Apology Act* defines "apology" very broadly, such that it means "an expression

of sympathy or regret...or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate." In some cases, the strongest (or only) evidence that a plaintiff may have to prove its case are admissions of fault spoken or written by the defendant. This proposed legislation would, therefore, tie the court's hands and disallow any consideration of such an admission of fault in determining liability.

This danger could be addressed by limiting the scope of the legislation to apply only to apologies or admission of fault that are given *after* the commencement of litigation. In other words, any such statements made by a defendant prior to the commencement of litigation could still be used as evidence of fault, whereas any such statements made after the lawsuit is commenced could not. Such a change to the proposed legislation would, theoretically, still satisfy the objective of encouraging early, non-litigious dispute resolution, but at the same time avoid the danger of disallowing important

*The objective of such legislation is to encourage early and cost-effective resolution of disputes and/or prevent the commencement of lawsuits where apologies are offered.*

admissions of fault made at material times during the dispute.

Another concern is that apologies can become trivialized and meaningless if the defendant knows that they will not be admissible and the mere act of apologizing could either prevent a lawsuit from being commenced or reduce the amount of potential damages for which the defendant is liable.

The answer to this concern is that human nature being what it is, if the defendant truly believes he has done nothing wrong, he is unlikely to apologize; and conversely, if the plaintiff believes the apology is insincere, he is unlikely to accept it.

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Ed.: *This article appeared in Commercial Litigation Brief Spring 2008. To subscribe to this publication, please visit the Publications Request page of our website. At the time this article was being prepared for inclusion in this publication, as noted, the private member's Bill had received second reading and had been sent to committee, but it was difficult to predict when or if it would become law.*

## Mitigation: What One Hand Giveth, The Other Taketh



**Matthew  
L. Dewar**

Employers can take comfort from a recent decision of the Ontario Superior Court of Justice on the issue of mitigation. Typically, employers face an uphill battle in proving that an employee has not reasonably mitigated his or her damages. The more exacting judges have demanded that an employer prove not only that the employee has not reasonably sought alternate employment, but also that there were specific positions that the employee had a reasonable chance of accepting. In *Plotogea v. Heartland Appliances Inc.*, Mr. Justice R.D. Reilly took a different approach.

Plotogea had been employed as a senior design engineer by Heartland for 11 years. After a series of incidents of misconduct and inadequate job performance, he was terminated for just cause. In defence to Plotogea's action for wrongful dismissal, the employer relied on the doctrine of cumulative cause; that is, while the individual incidents did not amount to just cause, the cumulative effect did meet that test.

The court did not accept that argument. It found that the incidents and circumstances relied on by Heartland did not amount to cumulative cause. In fact, Plotogea's service to the company had been exemplary other than for isolated incidents. His failure to perform had to be viewed in the context of 11 years of otherwise commendable service. The employer's action in terminating the employee was disproportionate to his misconduct. In light of his length of employment, the appropriate notice period, ruled the court, would be nine months.

The legal obligation rests on the employer to demonstrate, on a preponderance of evidence, that the employee has failed to make

reasonable efforts to obtain alternate employment. The court noted, however, that it could scrutinize the plaintiff's evidence of his job search in assessing whether the efforts were reasonable.

Plotogea had presented a list of some 125 companies that he claimed were involved in his job search. He stated that he had attended at the business premises of most of the companies, the names of which he obtained from the Canada Employment Centre. He could not, however, produce any proper log showing the dates of such attendance or the names of the contact persons at any of these companies. He claimed that at none of the businesses was he provided with an application form to complete. Finally, he stated that he was

unable to find any advertised position for an equivalent job of design engineer. He sought no professional advice for his job search.

Condemning the plaintiff's efforts as woefully inadequate, the court determined that his attempts to look for work were desultory at best. It assessed his resume as amateurish, non-revealing and not likely to attract the attention of any prospective employer. Indeed, the CV was found to have deterred any employers from interviewing him.

Additionally, an expert witness was produced by the employer on outplacement and career counseling, and she supported the court's evaluation that the CV was inadequate and that there were a variety of other resources that the plaintiff could have accessed to assist him in his job search. He had not done so. Based on all of this information, the court concluded that Plotogea had not taken reasonable steps to secure alternate employment.

The court proceeded to discount the plaintiff's notice period entitlement from nine months to two months. It concluded that

*The employer relied on the doctrine of cumulative cause; that is, while the individual incidents did not amount to just cause, the cumulative effect did meet that test.*

any employee is entitled to a period of two months as a cushion to recover from the impact of a job loss and to then diligently search for alternative employment.

The lessons for employers are evident. If an employee is terminated, offer outplacement services to assist him or her to find alternate employment. Should the employee choose not to make use of such a service, that can be used as evidence of a failure to mitigate. As well, if employers are sued for wrongful dismissal, they

should keep track of the job market to confirm the availability of other jobs and send such postings to the employee. They should not hesitate to call upon experts in the job placement field to assess the quality of an employee's mitigation that can effectively diminish the damages an employer must otherwise pay.

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## The Standard of Review: Simplifying Reasonableness



**Tom Hakemi**

The Supreme Court of Canada recently undertook a major reassessment of the approach courts should employ in reviewing the decisions of administrative tribunals. The Supreme Court's decision will have an impact on a wide variety of administrative tribunals, including securities commissions and labour relations boards.

The Supreme Court had previously held that the appropriate standard of review was to be found on a spectrum. At one end, deference to the decision below was lowest, and the reviewing court would reverse the decision below if it found that it was incorrect. This was known as the "correctness" standard of review. At the other end of the spectrum, where the level of deference was highest, the appeal court would not reverse the decision below unless it found the decision to be "patently unreasonable." Between the correctness standard of review and the patently unreasonable standard lay the standard of "reasonableness *simpliciter*," where deference was moderated.

In *Dunsmuir v. New Brunswick*, the Supreme Court departed from this earlier jurisprudence and acknowledged that, "[T]he system of judicial review in Canada has proven difficult to implement." After considering "both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation," the Court concluded that, "There ought to be only two standards of review: correctness and reasonableness." The Court reasoned that:

The operation of three standards of review has not been without practical and theoretical difficulties, neither has it been free of criticism. One major problem lies in distinguishing between the patent unreasonableness standard and the reasonableness *simpliciter* standard. The difficulty in distinguishing between those standards contributes to the problem of choosing the right

standard of review. An even greater problem lies in the application of the patent unreasonableness standard, which at times seems to require parties to accept an unreasonable decision.

In light of these difficulties, the Court chose to effectively collapse the two standards – "reasonableness *simpliciter*" and "patently unreasonable" – into a single standard referred to as "reasonableness." The Court then explained the analytical approach required when applying each of those standards:

When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

In contrast:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

The Court also explained what deference means in the context of judicial review:

Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts

*Deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law.*

must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers... [T]he concept of deference as respect requires of the courts not submission, but a respectful attention to the reasons offered or which could be afforded in support of a decision...

In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

The Court then explained the method for selecting the appropriate standard of review in particular cases. It held that:

[Q]uestions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

The Court noted that guidance in determining the appropriate standard of review can be found in existing caselaw, and outlined the following factors for courts to consider in determining the standard of review:

- A privative clause: This is a statutory direction from Parliament or a legislature indicating the need for deference.
- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
- The nature of the question of law. A question of law that is of central importance to the legal system and outside the specialized area of expertise of the administrative decision maker will always attract a correctness standard. On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

*Dunsmuir* provides some much-needed reconsideration of the approach to determining the appropriate standard of review of decisions of administrative tribunals. Whether the duality of correctness and reasonableness proves more workable than the spectrum that existed before remains to be seen. One thing is certain, *Dunsmuir* will be a landmark in the evolution of Canadian jurisprudence on the standard of review applicable to administrative tribunals.

**Tom Hakemi** is a member of the Bar of New York State and is now a member of the Bar of British Columbia. Contact him at 604-691-6852 or [thakemi@mls.com](mailto:thakemi@mls.com).

## Aboriginal Rights: Unresolved Issues Create Problems for Business



Keith Clark

Unresolved issues concerning Aboriginal rights and title are creating problems for the business community across Canada. Businesses operate best in environments where legal rights and rules are known and respected.

In British Columbia, where most of the land base is not subject to a treaty, it was hoped that the *Tsilhqot'in v. British Columbia* case would bring more certainty to the issue of where, and under what circumstances, Aboriginal title might be found.

Unfortunately this case, decided late in 2007 by Mr. Justice Vickers of the Supreme Court of British Columbia, may have only added to the confusion.

Although the *Tsilhqot'in* case was a massive undertaking, it was not the longest Aboriginal title case in B.C. At 339 days of evidence and argument, it fell short of the 374 days taken up by the trial in *Delgamuukw*. But the *Tsilhqot'in* case was almost certainly the most expensive Aboriginal case to be heard in Canada. It is estimated that the cost of the litigation that was funded by the

Canadian taxpayers was \$30 million.

However, where the *Tsilhqot'in* case really stands out is in the amount of *obiter dicta* in the reasons for judgment. *Obiter dicta* is defined as “an incidental and collateral opinion that is uttered by a judge, but is not binding.” The vast majority of the 473 pages of the judgment in the *Tsilhqot'in* case are expressly intended to set out only the opinion of the trial judge, but to have no binding or legal effect.

In the *Tsilhqot'in* case, an Indian band with less than 400 members sought a declaration of Aboriginal rights and title over an area of B.C. forming part of what is known as the Chilcotin – a remote area of the province between Williams Lake and Bella Coola about 200 kilometres north of Vancouver that has no paved roads or even electrical power. It is one of the few areas of the world where wild horses still run free.

The court dismissed the claim for a declaration of Aboriginal title to the claimed area. However, that was only for a technical reason, relating to the “all or nothing” way the claim was pleaded. The judge determined that he could not find Aboriginal title to

the entire area, but went on in *obiter dicta* spanning several hundred pages about what he would have found had the case been presented slightly differently.

What the judge said he would have found if the pleadings had allowed it was that about half of the claimed area was Aboriginal title land, and provincial legislation purporting to regulate that land would be of no effect. It is reasonable to conclude that if his *obiter dicta* were to be accepted as the law, then the forestry and mining rights held by businesses over about half of the province of B.C. could be invalid, and rights to private land throughout the province, that are also based on provincial legislation, would be thrown into question.

In what would appear to be considerable understatement, the judge observed, “I am aware of the serious implications this conclusion will have on British Columbia.”

The judge ended his reasons by stating that he hoped that the parties would not appeal his judgment, and instead would use his reasons as a basis to negotiate a settlement that would lead to reconciliation. The almost immediate reaction of the Aboriginal community to the judgment was to issue a declaration in which they demanded complete recognition of their claimed rights and title as a precondition to any further treaty negotiations.

It is difficult to see how a non-binding opinion of a judge that puts fundamental issues of jurisdiction over land into question, without any solutions, could lead to a reconciliation of Aboriginal issues throughout the country. It would be fair to say that the decision has not so far furthered the reconciliation process, but has

rather added to the already huge uncertainty concerning the nature and extent of Aboriginal rights and title in British Columbia.

The issues in this case are not only of great importance to the approximately 300 people living in the claims area, but also to the more than 4 million people living in British Columbia, and the almost 35 million people living in Canada.

At this point, all of the parties have filed notices of appeal, but are engaged in settlement discussions as suggested by the judge.

It is not clear how one appeals an opinion as opposed to a judgment, but assuming the parties get over that hurdle, it is hard not to think that the interests of all of the people in Canada would be best served if the settlement discussions are not successful and this case is appealed to the Supreme Court of Canada, which is the body that actually makes the laws on what Aboriginal rights and title mean in this country.

With the greatest of respect to the Honourable Mr. Justice Vickers, we already have many opinions as to what Aboriginal rights and title might be. In order to achieve certainty in this highly charged area what we – Aboriginal and non-Aboriginal alike – need are legal precedents telling us what the law actually is.

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Ed.: *This article appeared in Commercial Litigation Brief Spring 2008. To subscribe to this publication, please visit the Publications Request page of our website.*

## Beating Canada to China's Door: Competition Policy Review

Ed.: *This article is an edited segment of a presentation made earlier this year by Sergio Marchi on behalf of the Canada China Business Council (“CCBC”) to the Competition Policy Review Panel in Ottawa. The submission followed consultation with a cross-section of CCBC members, among which are many of Canada's leading corporations. Mr. Marchi is the current president of the CCBC, which is now in its 30<sup>th</sup> year.*



**Sergio Marchi**

Canada is, and will remain for the foreseeable future, an export-dependent economy. While the NAFTA relationship accounts for almost 80 per cent of Canada's exports today, we cannot overlook tomorrow's economic superpowers.

History teaches us that, as trade winds blow, they sometimes alter course. We cannot rest in the comfort of today's safe harbours. We must constantly be navigating more challenging seas if we are to hand prosperity to succeeding generations.

For Canada today, that means deepening and strengthening our trade and investment connections to one of the economic giants of the future – China.

### The Canada-China Relationship

Trade relations between Canada and China are at a critical juncture. While China is already Canada's second-largest trade partner after the U.S., China accounts for only about five per cent of Canada's world trade.

Canadian businesses are sometimes content to remain within the known confines of the Canada-U.S. trade connection. While there is comfort in the familiarity of that market, it is also prudent to look beyond.

Fallout has been dramatic from the relatively rapid rise in the comparative value of our dollar measured against the U.S. dollar. Of greater significance is the fact that the infrastructure supporting Canada's trade with the U.S., whether logistical or political, is

nearing capacity and, indeed, Canada's trade volumes with the U.S. are in decline.

Without doubt, the next most opportune target is China. With this belief firmly in mind, CCBC strongly supports government action to enhance Canada-China trade.

To encourage the most positive outcome in the Panel's deliberations, we present the following responses to one of the questions posed for this consultation: "How do Canada's policies impacting direct investment, both inward and outward, affect Canada's competitiveness as a destination for Foreign Direct Investment ('FDI') and as a platform for global growth?"

## Canada in the Global Economy

Keeping Canada open for international investment is central to growing our economy, especially in light of the ever-increasing global economic linkages.

Canada's national trade policies, reflected in the regulatory framework, can – indeed, should – play a substantive role in enhancing Canada's global trade. The *Investment Canada Act* ("ICA") should be a catalyst for growth in Canada-China trade.

For Canada – a country whose percentage of exports to gross domestic product ("GDP") is very high and which has a driving ambition to make its economy more competitive globally – maintaining an open investment regime is vital. It is important to recognize that our economy's development to date has benefited tremendously by such an approach.

In fact, as the Department of Foreign Affairs and International Trade ("DFAIT") notes in *Seizing Global Advantage*, two-way trade and investment in Canada is equivalent to more than 70 per cent of Canada's national economy.

So, with regard to both inbound and outbound investment, the federal government must, in close collaboration with provinces and cities – which are increasingly competing globally for labour and investment – have a strategic plan that clearly outlines our priority sectors.

## Canada and China

It does not overstate the case to say that increased Canadian trade with China is essential to Canada's future prosperity. As the World Economic Forum acknowledges: "It has become an established fact [that] the rising economies of Asia are poised to equal those of the West, revolutionizing the traditional economic order. Building relationships and understanding between the 'old' and the 'new' economies and business leaders is essential for the future prosperity of both."

More explicitly, connecting the two sides of the Canadian and

Chinese trade equation, DFAIT noted in *CanadExport* in March 2007: "As a market for Canadian exports, China is like no other. It is the fourth-largest economy in the world and has a gross domestic product growing at unparalleled rates."

## Canada-Chinese FDI

Foreign Direct Investment is a two-way street. There is traditionally greater outbound FDI in Canada than inbound. Both are growing. However, there is a significant and worrisome codicil.

China – the fourth largest economy in the world and Canada's second-largest trading partner, with an economy growing by double-digits annually – did not make the top 10 for FDI either in outbound or inbound investment. DFAIT figures show Canadians invested \$1.5 billion in China in 2006, compared to more than \$223 billion in the U.S. China invested \$1.3 billion in Canada in 2007.

Canada must do better, both as a source for FDI in China and as a target for Chinese FDI. Government must do everything in its power to enhance Canada-China trade. Government does have opportunity in practical terms. The Asia-Pacific Gateway and Corridor Initiative stands as a superb example of government acting as a trade catalyst.

If this country does not substantively increase its efforts to profit by investment in China's meteoric growth and to attract more of the billions of dollars in Chinese investment that is looking for a home, we will fail future generations of Canadians.

## Inbound FDI from China

Since 2002, China's government – driven by the need for secure sources of raw materials to feed "the world's factory" and fuelled by massive U.S. dollar-denominated foreign reserves – has encouraged that country's largest corporations, including State-Owned Enterprises, to seek growth abroad. Known as China's "Going Out" strategy, Chinese corporations are seeking to invest offshore. Chinese investors will increasingly target resource companies around the world.

It is also worth noting that China has a need to find a safe harbour for its huge foreign exchange surpluses. China's government has created a \$200 billion (U.S.) state investment agency, the China Investment Corp., that is actively seeking FDI opportunities. That agency demonstrated, with purchases such as its US\$3 billion investment in the U.S.-based Blackstone Group in 2007, that China is no longer content to sit on its foreign reserves.

These events represent very substantive opportunities for Canada. Canada's stable services sector and our resource companies could – and should – be prime targets for Chinese FDI.

*While China is already Canada's second-largest trade partner after the U.S., China accounts for only about five per cent of Canada's world trade.*

Countries around the world will compete to become the destination for such investments. Canada cannot afford to give up this opportunity. On our own territory, we should have confidence that our laws and regulations will be respected. It is the lowest risk, highest return equation for Canadians. It's vital that we don't lose it.

**Hon. Sergio Marchi** is Senior Business Advisor to the International Trade Group in Toronto. Contact him directly at 416-307-4178 or [smarchi@langmichener.ca](mailto:smarchi@langmichener.ca).

Ed.: *Other segments of this presentation were carried by divisions of Canwest Publishing Inc. that noted that Sergio Marchi was a former federal minister of international trade, a former ambassador of Canada to the World Trade Organization ("WTO") and to the Office of the United Nations in Geneva and that he served as Chairman of the WTO General Council.*

## Videotaping Medical Examinations – The Whys and Wherefores



Ruba El-Sayegh

The issue of videotaping a medical examination often arises where the physical or mental state of a party in a legal proceeding is in question. And not surprisingly, the issue is often relevant in personal injury or disability cases where one of the injuries suffered by the injured party is a cognitive or neurological impairment.

### Doctor-Patient Relationship

Although a doctor-patient relationship is generally based on fiduciary principles of trust, confidence and confidentiality, a medical examination conducted for the purpose of refuting a plaintiff's allegations is not quite the same. Often, the injured party feels violated, and is skeptical about the impartiality of the doctor who is conducting the examination.

### Injured Party's Position

"Bias" is an oft-cited reason by the plaintiff to push for the recording of a medical examination; however, other reasons include cognitive difficulties such as memory loss or difficulties concentrating, understanding or recollecting the questions, or the involvement of a child under disability. The subjectivity involved in a psychological assessment is what creates anxiety for most, if not all plaintiffs.

### Doctor's Position

While the issue may seem uncontroversial, generally many doctors are uncomfortable with having their examinations recorded for fear that the presence of a recording device will alter the credibility and sincerity of the examination because the examinee may *act* for the camera. Alternatively, videotaping can call into question the doctor's methodology, observations and diagnosis because an unsophisticated jury may wrongly interpret certain statements or actions made by the examinee to suggest a disability, when in reality the examinee is not *clinically* disabled.

### Ontario Rules of Civil Procedure

The Courts have often faced the issue of whether it is appropriate

to record a medical examination. While the Ontario Rules do not specifically limit or prescribe the right to record a medical examination, the Rules grant the Court the jurisdiction to determine if another person can be present at the examination. Case law, such as *Simon v. Paslawski*, has defined the scope of Rule 33.05 to include videotapes and audio recordings, since any one who watches or listens to the tape afterwards is effectively present at the examination.

### Bellamy v. Johnson Case

To this day, the leading authority on recording medical examinations is the 1992 Ontario Court of Appeal decision of *Bellamy v. Johnson*. The Court of Appeal outlined a three-part test to determine whether it is appropriate to allow for a recording. The first of the following considerations predominates:

1. The opposing party's ability to learn the case it has to meet by obtaining an effective medical evaluation.
2. Fairness and effectiveness of trial.
3. Likelihood of achieving a reasonable pre-trial settlement.

The decision in *Bellamy* stands for the proposition that a plaintiff is not automatically entitled to determine how a medical examination is to be conducted. However, if a doctor refuses to allow the recording, on a motion the court may exercise its inherent jurisdiction, and establish the terms and conditions surrounding the medical examination, which can include permitting the plaintiff to record the examination. This depends on the circumstances of each case, and the burden of proof rests with the person requesting the recording.

### Recent Decision – Dempsey v. Wax

A number of cases post-*Bellamy* were decided either for or against recording medical examinations. The only consistency amongst these decisions was the application of the *Bellamy* principles.

*Dempsey v. Wax* is the most recent Ontario decision on this issue, which seems to have made it more acceptable to record medical examinations. In applying *Bellamy*, Justice Quigley held, "the

recording should enhance, rather than detract, an examiner's ability to confidently express his/her observations, conclusions, diagnosis and prognosis." He further stated, "a full and reliable record of statements...would facilitate the fact-finding process...providing context and avoiding potential ambiguity..." Besides mere preference, Justice Quigley found that the defendant presented no evidence to suggest that recording the neuropsychological assessment would affect the integrity of the examination. Interestingly, the Court awarded costs against the defendant, which could be signaling to counsel the Court's overall position on the issue.

### Procedure When a Defence Medical Is Recorded

According to *Willits v. Johnston*, to ensure the accuracy of videotaping, the following conditions should apply:

1. Camera should be set up in an unobtrusive manner.
2. Videotape shall not be edited.

3. Videographer should not be present in the examination room.
4. Tape should be of sufficient time capacity to eliminate interruptions.
5. Tape is to display the time in seconds on a continuous basis.

### Final Thoughts

It is best to determine in advance whether the doctor will object to a recording. If at a standstill, one solution would be to suggest having the plaintiff's medical legal examination recorded as well.

Further, in applying the *Bellamy* case, it is insufficient for a party to cite the doctor's *preference* or *bias* as the reason to either contest or endorse the recording of a defence medical.

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## LAW NOTES

New Environmental Requirements; Costs of Producing Data; Material Change; Insider Trading Exemption, Misrepresentation; No Chance of Success; Stipulated Price Contract; and Firing.



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*This section offers a brief note or comment on an area or point of law (or information source) that may be of interest.*

### 1 Business and Developers Brace for New Municipal Environmental Requirements

At time of writing, the City of Toronto was considering a new bylaw to introduce an Environmental Reporting and Disclosure Program that would require certain businesses to report, on an annual basis, the use or release of certain prescribed chemicals to the City. The information reported to the City would be made publicly available.

Businesses with facilities that use or release any of 25 listed chemicals in amounts above specified thresholds would be affected by the proposed program.

The 25 substances listed in the consultation document are sub-

stances that the City has identified as being of concern to human health. These substances include: carbon tetrachloride, lead, nickel, polycyclic aromatic hydrocarbons, tetrachloroethylene, trichloroethylene, vinyl chloride and volatile organic compounds.

Under the proposed program, companies would be required to conduct annual reviews of their operations to determine whether the business used or released any of the 25 listed chemicals into the environment. The reporting requirement would be triggered if the company's use or release of the listed chemical exceeded the substance reporting threshold set by the City.

Certain types of businesses and sources of chemicals would be exempted from the program. Sector exemptions include residential homes, small medical facilities and accommodation and food services. Source exemptions include chemicals that exist as part of a manufactured item and are not released by using that item, chemicals that exist in the distribution, storage or retail sale of fuels and road dust.

More details about the proposed bylaw and program are needed to fully understand the implications for businesses in Toronto. For example, the consultation document does not specify whether and how the City intends to integrate the new bylaw with existing federal, provincial and municipal reporting requirements. This new program could have the effect of unduly increasing the reporting obligations of businesses, simply because of the inability of the various levels of government to coordinate and to share data already generated from existing programs.

Needless to say, if successfully implemented in a municipality like Toronto, similar bylaws in other major Canadian cities would likely follow.

*Ed.: This is an abridged version of an article that appeared in the Real Estate Alert issued on January 25, 2008. To subscribe to the Real Estate publication, please visit the Publications Request page of our website.*

—**Annie M. Thuan**, Lang Michener LLP (Toronto)

## 2 The Business Cost of Third-Party Production Orders

Amendments to the *Criminal Code* in 2004 introduced a new investigative tool for law enforcement agencies: a production order that would compel third parties to produce documents or data for use in criminal investigations. Two production orders required Telus to produce call-data records. Telus applied for exemptions from the orders on the grounds that the burden of compliance would be unreasonable without compensation due to the cost of retrieving the archived data.

The Supreme Court of Canada did not agree. For a unanimous Court, in *Tele-Mobile Co. v. Ontario*, Justice Abella wrote in part:

...In the absence of a specific provision permitting the recovery of costs in the production order scheme, therefore, and in light of the legislative history, the *ex parte* procedural mechanisms set out in the legislation, and the principle that compensation is not ordinarily recoverable in criminal matters (*Foster*, at para. 56), I agree with Vaillancourt J. that s. 487.012(4) and (5) cannot be interpreted so broadly as to permit a judge to order compensation for compliance with production orders.

I accept Telus' concern that because of the nature of its business, it will necessarily be the object of repeated production orders but, as an American court observed in connection with banks, another entity from whom requests for information are routinely sought, such requests are neither unanticipated nor aberrational....

The object of an unreasonable production order is not without remedy. It lies in an application for an exemption.... [But] in essence, the financial consequences must be so burdensome that it would be unreasonable in the circumstances to expect compliance. This, I readily acknowledge, is a somewhat tautological explanation, but I see no purpose in offering alternative definitions for a term so well known and understood as

having a fact-specific compass. What is reasonable will be informed by a variety of factors, including the breadth of the order being sought, the size and economic viability of the object of the order, and the extent of the order's financial impact on the party from whom production is sought. Where the party is a repeated target of production orders, the cumulative impact of multiple orders may also be relevant.

*Ed.: The above is edited from a segment that appeared in Lang Michener's S.C.C. L@wLetter (Issue 19, 2008) prepared by Eugene Meehan, Q.C. In this appeal, Jeffrey Beedell in our Supreme Court of Canada Practice Group acted as Ottawa Agent for counsel representing the intervener, Canadian Bankers Association.*

## 3 Securities Commission Clarifies Material Change Reporting Obligations

In a highly anticipated decision, the Ontario Securities Commission ("OSC") provided new guidance to the business community as to when a public issuer is required to disclose its intention to complete a merger and acquisition transaction.

Although the OSC decision does not purport to provide a bright line test, it does provide considerable comfort to public issuers that sale or acquisition transactions will not be a material change requiring disclosure until all parties are firmly committed. In almost all commercial cases, we expect that the "firm commitment" time will be when definitive agreements are signed.

The decision is also helpful in confirming the generally accepted practice of not disclosing non-binding letters of intent. However, the OSC decision suggests the issuer is likely to have a disclosure obligation when, in what we expect would be a highly unusual circumstance, the letter of intent contains all of the key terms of the transaction and such terms are binding. Additionally, the fact pattern in this case serves as a caution to drafters of resolutions that appear to approve transactions before the terms have been fully negotiated or finally settled.

The OSC staff's statement of allegations and the Settlement Agreements led many to believe that, if the OSC decision followed the reasoning behind the Settlement Agreements, public issuers would be required to disclose non-binding letters of intent, or even merger or acquisition negotiations, at an early stage. However, issuers can now breathe a sigh of relief as the OSC decision departed from the staff's recommendation and, instead, confirmed the current practice in the context of merger or acquisition transactions.

—**Khorshid Hakemi**, Lang Michener LLP (Vancouver)

—**Leo Raffin**, Lang Michener LLP (Vancouver)

*Ed.: This NOTE only touches upon a few of the matters canvassed by the authors in an article that appeared in Securities Brief Spring 2008. To subscribe to this publication, please visit the Publications Request page of our website.*

## 4 Insider Trading Exemption: Automatic Securities Trading

Ed.: *Below is merely an introduction to this insider trading exemption and an article written by Stephen J. White that appeared in Securities Brief Spring 2008. To subscribe to this publication, please visit the Publications Request page of our website.*

Under Ontario law, insiders are prohibited from purchasing or selling securities of an issuer with knowledge of a material fact or material change with respect to the issuer that has not been generally disclosed (“material undisclosed information”). However, the purchase or sale by insiders of securities of issuers with material undisclosed information may be exempt from this prohibition where the purchase or sale is effected pursuant to “automatic securities dispositions plans” or “automatic securities purchase plans” (that we are collectively referring to as “automatic securities trading plans” or “ASTPs”). (The Ontario Securities Commission (“OSC”) Staff Notice 55-701 – *Automatic Securities Disposition Plans and Automatic Securities Purchase Plans* (the “Staff Notice”) sets out the view of the staff of the OSC in this regard.)

An ASTP is generally an arrangement whereby an insider will instruct his or her broker to purchase or sell securities on the insider’s behalf in accordance with a pre-determined set of instructions. The ASTP will usually contemplate that the broker will continue to purchase or sell securities on behalf of the insider regardless as to whether a “blackout” period established by the issuer is in effect or whether the insider is in possession of material undisclosed information at the time of the purchase or sale.

Ontario law provides that an insider will be exempt from the prohibition against purchasing or selling with knowledge of material undisclosed information where the purchase or sale is made by the insider through an “automatic dividend reinvestment plan, share purchase plan or other similar automatic plan” which the insider entered into before he or she acquired the material undisclosed information.

The Staff Notice provides that an ASTP will be considered “automatic” when the insider no longer has the ability to make decisions relating to the trading of the securities held under the ASTP, and when a number of conditions are met, including these two:

1. At the time of entry into the plan, the insider is not in possession of any material undisclosed information in relation to the issuer.
2. At the time of entry into the plan, in the case of plans that have not been established by the issuer, the insider provides the broker with a certificate from the issuer confirming that the issuer is aware of the plan and certifying that, to the best of its knowledge, the insider is not in possession of material undisclosed information about the issuer.

—Stephen J. White, Lang Michener LLP (Toronto)

## 5 Insurance: Misrepresentation of Risk

In the Supreme Court of Canada, adopting the conclusions of the Quebec Court of Appeal that, since the insured had committed a fraud against Lloyds, there was no chance of success, leave to appeal was dismissed. The Applicant, Shama Textiles Inc., owned by two brothers, was issued an insurance policy for its property. A fire broke out and water damage was caused to machinery and spare parts. Notice of loss was given and adjustors appointed. After an investigation, Lloyds refused to pay on the grounds that Shama had misrepresented the risk (thus nullifying the policy), and that it had grossly exaggerated its claim. Shama then commenced a law suit claiming \$3,090,032 representing its direct physical loss, \$1,150,000 for loss of goodwill, business interruption and loss of profits, and \$3,000,000 representing punitive and exemplary damages.

The trial judge found that the testimony of the two brothers was not credible and that they had exaggerated the claim. He decided that Shama was not entitled to payment, as the claim had been made with the intention of defrauding Lloyds, which nullified the policy from the start. He also found that in any event, Lloyds had discharged its burden of proving that Shama had misrepresented the risk when applying for insurance. Finally, he dismissed the claim for punitive and exemplary damages for lack of credible evidence. In the Supreme Court of Canada: *Shama Textiles Inc. v. Certain Underwriters at Lloyds*.

Ed.: *A lengthier abridged version and the full text of this decision appeared in Issue 11 (2008) of Lang Michener’s S.C.C. L@wLetter, prepared by Eugene Meehan, Q.C.*

## 6 Law Suits that Have No Chance of Success

Ed.: *In a recently decided case, (Canada (Attorney General) v. Lameman (Alta.)), the Supreme Court of Canada, in the context of examining a summary judgment, provides a lucid summary about how claims or defences that have no chance of success should be treated. The Court wrote:*

This appeal is from an application for summary judgment. The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. [Trial judges hearing] unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is no genuine issue of material fact requiring trial... The defendant must prove this; it cannot rely on mere allegations or the pleadings... If the defendant does

prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal.... Each side must put its best foot forward with respect to the existence or non-existence of material issues to be tried.... The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts....

[In this case] we are of the view that, assuming that the claims disclosed triable issues and that standing could be established, the claims are barred by operation of the *Limitation of Actions Act*. There is no genuine issue for trial. Were the action allowed to proceed to trial, it would surely fail on this ground. Accordingly, we agree with the chambers judge that it must be struck out, except for the claim for an accounting of the proceeds of sale, which is a continuing claim and not caught by the *Limitation of Actions Act*.

## 7 Stipulated Price Contract: The New CCDC 2

Ed.: *The Canadian Construction Documents Committee ("CCDC") has now released the long awaited CCDC 2 – 2008 Stipulated Price Contract. The CCDC was formed in 1974 and is a national joint committee responsible for the development, production and review of standard Canadian construction contracts, forms and guides.*

The CCDC 2 Stipulated Price Contract is one of the most utilized contracts in construction. Some of the significant changes are set out below:

- Interest on overdue accounts are now at the bank's prime rate plus 2% for the first 60 days and 4% over the prime rate after 60 days.
- Notice may now be given by fax and e-mail.
- Many of the definitions have been updated, clarified and simply corrected to deal with the new realities of the construction industry.
- The responsibilities of who pays for tests to be conducted on the project has been revised.
- Specific shop drawings must be listed in the construction documents.
- The owner can only request to speed up the time to complete the contract as specified in the contract documents by way of a change order.
- If there is to be a change order, the additional costs that are to be included by the contract are specified in significant detail in the new standard contract. The percentage of mark up for profit and overhead is to be added to those costs.
- The provisions regarding delay are set out with new clarity in the new contract and quick notice must be given by one party to the other along with particulars as to cost.
- The owner has an obligation to show the location of utilities in contract documents.

- Provisions dealing with toxic and hazardous substances have been set out in a new form to make it consistent with new developments in occupational health and safety.
- The new contract attempts to clarify responsibility for obtaining government approvals, permits, licences, inspections and certificates.
- The insurance requirements have increased the minimum liability coverage to \$5,000,000 and a new CCDC 41 has been introduced to set out additional types of insurance that need to be provided under these types of contract.
- There are now significant changes to the indemnification, waiver of claims and warranty claims setting out specific time limitations for which claims can be made or whether they are waived.

At a quick glance, the CCDC 2 2008 Stipulated Price Contract appears similar to the CCDC 2 1994 Stipulated Price Contract, but there are significant and substantial changes that require the careful review by all parties to the contract to make sure that the new terms and conditions of the contract accord with the requirements of the project.

—**Ron Petersen**, Lang Michener LLP (Ottawa)

## 8 Employers Must Employ Caution When Firing

Jacqui Stuart's employer, Navigata Communications, decided there was no longer room for part-time work and fired her after 24 years of service, even though she was a top sales executive. Prior to that, the company asked Stuart to consider a severance package but it deliberately led her to believe she had a choice and could return to work. The court awarded her 18 months of damages in the amount of \$216,666 plus legal costs. The final severance was increased by the fact that this all occurred while she was dealing with her son's serious, unexpected illness. The lessons for employers are clear:

- A decision to terminate an employee's employment should be communicated in a timely fashion.
- The termination decision should be presented candidly and honestly to avoid additional damages.
- Don't take advantage of an employee's particular vulnerability.
- Negotiations for severance pay must be reasonable in light of the employee's position and tenure.
- If the employee is going through a particularly difficult time, be prepared to pay a little more.

—**Howard Levitt**, Lang Michener LLP (Toronto)

Ed.: *This short, edited segment was taken from an article that appeared in Howard's weekly column on the first page of the Working section of the National Post.*

## Brief Life Bites

### Translation; Flintstone Law; Snowboarding.

Editor: *This segment offers colleagues and readers an opportunity to briefly comment or read about a life experience, an accomplishment, an acknowledgement, a powerful image, an incredible experience or a simple “slice of life.” I would be most pleased to consider publishing one of yours or one that pertains to a friend, family member or colleague. (I am always open to suggestion.)*

#### 1 Lost in the Translation

Ed.: *In Issue 11 (2008) of Lang Michener’s S.C.C. L@wLetter, prepared by Eugene Meehan, Q.C., Eugene, Melanie Bueckert and Marla Miller, light heartedly explored the latest translation utility on the web. Marla put Section 1 of the Charter of Rights and Freedoms to the test – English to French and back to English and here are the results:*

The English:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

To French:

La charte canadienne des droites et des Libertés garantit les droites et les libertés présentées à elle sujet seulement à de telles limites raisonnables prescrites par loi comme peut-être de façon concluante justifié dans une société libre et démocratique.

And back to English:

The Canadian charter of the right-hand sides and Freedoms, guarantees the lines and the freedoms presented at it prone only to such reasonable limits prescribed by law as can in a conclusive way be justified in a free and democratic company.

This reminded Marla of a joke told to her by her father, probably in the 1960s, well before we could even imagine computers the way they are today:

A company was excitedly introducing their new machine that could translate English into other languages. As part of the demonstration, they asked someone from the audience to suggest something to be translated. “Out of sight, out of mind.” was the suggestion. They put it into the machine and asked the machine to translate it into Chinese. Out came the translation in Chinese. Then someone asked how they would know that it was an accurate translation, given that no one there read Chinese. “Easy,” was the answer, “We’ll just put the Chinese writing back into the machine and it should translate back to English.” Indeed the machine did translate it back to English. The proud inventors of the machine were a little put back, however, when they realized that the re-translation read: “Invisible idiot.”

#### 2 (In)sanity Trumps Law: The Flintstones’ Car

Just in case you missed this precedent-setting case, a word or two about it: For the youthful among our readers (and assuming they missed the reruns), first just a note about the television animation series, *The Flintstones*, popular during the 1960s and likely intended for adult viewing. Some describe that series as depicting the misadventures of a “modern” stone-age family and its friends. The Flintstones had a “car” that moved as a result of the efforts of its occupant(s). Fast forward now to the 21<sup>st</sup> Century and 2008, when Toronto police charged the driver of a car (Buick Regal) for operating an unsafe vehicle on Queen Street West. No engine, no transmission and candles for headlights, the driver of that “car” appeared before a Justice of the Peace who, among much laughter in the Court room, threw out the charges.



### 3 Snowboard Sponsorship

Ed.: Here is an edited portion of a news release issued under the following heading earlier this year by the Canadian Snowboard Federation (“CSF”) in Vancouver, B.C.: “Major Canadian Law Firm Supports Canadian Athletes: Lang Michener LLP, a leading Canadian law firm, has entered into a three year sponsorship of the Canadian National Snowboard Team.”

This is a very important and very exciting development for our sport,” said Tom McIlffaterick, Chief Executive Officer of the CSF. “We’re delighted to be partnering with such a leading Canadian organization as we support our athletes in their pursuit of international excellence.”

The announcement came at the conclusion of the Canadian Team’s most successful season in international competition.

Lang Michener LLP takes the role of a sponsor of the Canadian National Snowboard Team, as well as a sponsor of major Canadian Snowboarding events including the 2009 FIS Snowboard World Cup at Cypress Mountain. **Steve Mathiesen**, partner, said: “Our firm is committed to values of high performance – values that the athletes demonstrate every day.”

The Canadian Snowboard Federation, established in 1991 as the governing body for the sport of competitive snowboarding in Canada, manages programs throughout the country, with the goal of fostering the development of Canadian athletes, coaches, and officials from the entry level through to the Olympic Games.

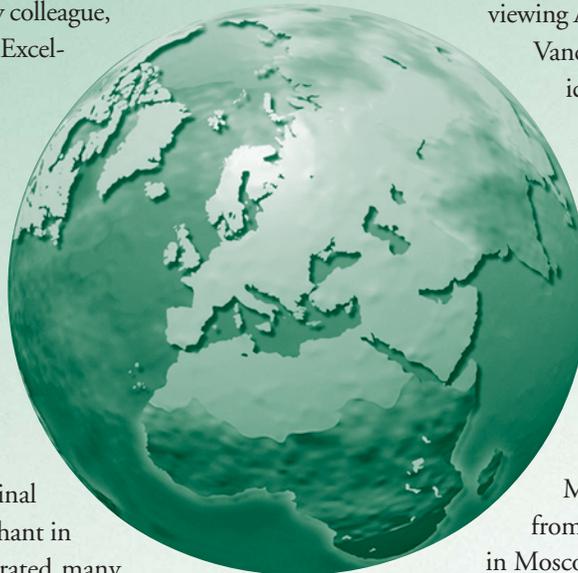
## Letters & Comments

### Some cherished comments about *In Brief*

**1** From a Director of a private company that deals with the Federal Government, to my colleague, **Keith Cameron**, about *In Brief*: “Excellent newsletter – very well written.”

**2** From Queen’s Counsel to one of my Partners, **Eugene Meehan**, the comment that, among similar publications, *In Brief* is “the very best he has ever seen” and that it is uniquely “practical, accessible and personable.”

**3** Appearing in the last issue of *In Brief*, the article entitled “Aboriginal Land Claims: A Primer on the Elephant in the Room” by **Annie Thuan** generated many requests for the unabridged version and considerable favourable comment like: “allowed me to understand the terms and details,” “very helpful,” “great article,” “terrific article.” Also, permission was requested and granted to reprint Annie’s article



in a CCH newsletter, and *Canadian Lawyer* is interviewing Annie and **Graham Matthews** (at our Vancouver office) with reference to an article they are preparing on Aboriginal land claims.

**4** **Sunny Pal**’s article on a “New Governance Standard for the World’s Natural Resources Industry” generated some significant international attention as a “subject of great current interest,” and received commendations including those from readers in Madrid, Spain and Bombay, India, and from a consultant in the mining industry in Moscow, this comment:

As a G8 country, it will be interesting to see how Russia implements the EITI principles. This is a fascinating country and one where the metals and mining industry is front and centre, given its rich resource base.

## Lang Michener, In Brief...

### Announcements

#### Lang Michener Welcomes New Partners

We are pleased to announce that **David Debenham** (commercial litigation and construction law) and **Martin Masse** (international trade and commercial law) in our Ottawa office, and **George Waggott** (employment and labour) in our Toronto office, have been admitted to the partnership. Each individual has demonstrated a strong commitment to excellence, leadership and client service. Congratulations!



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#### Lang Michener Welcomes Five New Hires

We are pleased to welcome **Darrell Podowski**, partner and Chair of the Vancouver Mining Group, **Sean O'Neill**, associate counsel, Securities Group and **Rod Kirkham**, partner, Securities Group to Lang Michener's Vancouver office. In addition, **Sumitha Pudupakkam** has joined the firm as an associate in the Employment & Labour Law Group and **Alex Ilchenko** has joined the firm as counsel in the Banking & Restructuring Group in the Toronto office.



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### News

#### Lang Michener Lawyers Recognized in *The International Who's Who of Business Lawyers 2008*

Congratulations to **Sheryl Seigel** (insolvency & restructuring), **Barry Finlayson** (mining), **Bill Sheridan** (mining), **Donald MacOdrum** (patents) and **Michael Flavell** (trade & customs) for being recognized by their peers in *The International Who's Who of Business Lawyers 2008* edition. The Who's Who Legal website features over 9,000 of the world's leading private practice lawyers from over 100 national jurisdictions.

#### Lang Michener Recommended in the *PLC Which Lawyer? Yearbook 2008*

Lang Michener is pleased to announce that seven partners have been recommended in the *PLC Which Lawyer? Yearbook 2008*. We are proud to congratulate **David Young** (life sciences), **Donald MacOdrum** (intellectual property, life sciences, patent litigation), **Donald Plumley** (intellectual property and patent litigation), **James Musgrove** (competition/antitrust), **Patrick Phelan** (corporate M&A), **Peter Reardon** (restructuring & insolvency) and **Sheryl Seigel** (restructuring & insolvency) for their distinction.

### Events

#### The Canadian Institute's 2<sup>nd</sup> Annual Law Clerk Summit – Advanced Issues in Corporate Law Presented by The Canadian Institute

July 8–9, 2008  
Toronto, ON

**Howard Simkevitz**, Associate, Corporate & Insurance Group will provide an overview of the latest developments in the law and marry that theory with practical, hands-on information that is directly relevant to the responsibilities of a legal clerk.

#### 8<sup>th</sup> Tax Planning for Real Estate Transactions Course Presented by The Federated Press

October 7–8, 2008  
Toronto, ON

**Cyndee Todgham Cherniak**, Counsel, International Trade Group, will be speaking at this conference which is focusing on topics including: real estate investments, alternatives from a tax perspective, the REIT exception to the new tax on income trusts, tax-deferred transfers of real estate, property purchase tax implications, tax issues in donations and eco-gifting of land, real estate transaction GST and provincial tax issues, mergers and acquisitions of real estate investment trusts, tax issues for non-resident investors in Canadian real estate and international real estate acquisitions.

## The 10<sup>th</sup> Annual Investigative and Forensic Accounting Conference

Presented by CA•IFA

October 20–21, 2008

Niagara Falls, ON

**David Debenham**, Partner, Commercial Litigation Group, will be speaking at this premier conference which is celebrating its 10<sup>th</sup> Anniversary, for CA•IFAs working in the field of investigative and forensic accounting. The conference includes expert speakers sharing information on the latest trends and developments in Litigation and Fraud Investigation. Conference sessions range from primers on fraud investigation and litigation to advanced workshops on cross-border issues, damages and disputes.

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Lang Michener publishes newsletters on current developments in specific areas of the law such as Competition & Marketing, Employment & Labour, Insurance, Intellectual Property, International Trade, Mergers & Acquisitions, Privacy, Real Estate, Securities and Supreme Court of Canada News.

*InBrief* offers general comments on legal developments of concern to business and individuals. The articles in *InBrief* are not intended to provide legal opinions and readers should, therefore, seek professional legal advice on the particular issues which concern them. We would be pleased to elaborate on any article and discuss how it might apply to specific matters or cases.

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