Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=d408bac1-4e53-4be9-9f31-2408bfa8a17f

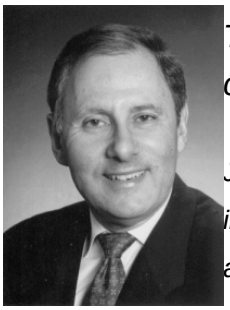
This article is not legal advice. Information only.
If you require legal advice about a commercial appeal or any of the matters mentioned on our website, please consult Igor Ellyn, QC, at iellyn@ellynlaw.com or 416-365-3750.

Article Library | DATE POSTED: 2007-10-12

Winning business appeals and the concept of 'commercial reasonableness'

SOURCE: ELLYN LAW LLP

AUTHOR: IGOR ELLYN



The court will not adopt an interpretation that is "clearly" commercially absurd.[1]

Judges look for consistency between their existing beliefs and any new information presented to them. The less they have to travel to agree with you and the smoother the journey to get there, the more likely you are to persuade them.[2]

Advocates learn early in their careers that Canadian judges are not some strange breed of beings hidden in the ivory towers of their Courthouses. They are experienced jurists, most of them former advocates themselves, imbued with a common sense understanding of the workings and order of our complex society. This quality exhibits itself in commercial appeals and is critical for appellate counsel to appreciate.

At the root of appeals from judgments in commercial cases is the burning question, “Does the result make sense from a business perspective?” or put in more legally-eloquent language, “Does this result meet the test of commercial reasonableness?”

This paper will demonstrate that in commercial appeals, the Court of Appeal generally operates on the principle of “commercial reasonableness.” If the relief sought is not commercially reasonable, then you are unlikely to achieve a successful result for your client. We hope to show that appellate courts in Ontario approach appeals involving commercial disputes by asking whether the trial judge’s decision was commercially reasonable. We will first try to define this term in an effort to understand where the courts are coming from in making their decisions.

Defining“commercial reasonableness”

Commercial reasonableness may be defined as the reasonable expectation of a business

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=d408bac1-4e53-4be9-9f31-2408bfa8a17f

person in the circumstances, or how a reasonable person might expect a business person to conduct him/herself in a fair marketplace. Certain catchphrases that come to mind include “the law of the marketplace”, “limitation of liability”, “consumer protection”.

The test for commercial reasonableness is an objective test and does not include a subjective measure of the party’s “good faith”. If a subjective consideration of a party’s good faith were to be made, this would allow the party to act in an unreasonable manner so long as it did so in good faith. This consideration would undermine the “reasonableness” aspect of the test. Further, it is possible for a party to exercise poor business judgment in good faith, rather than the standard, widely accepted business practice.[3]

The test for commercial reasonableness may be determined by asking the following: “What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?”[4]

How have courts defined “commercial reasonableness”? In *Greyvest Leasing Inc. v. Merkur*[5], the Court laid out specific circumstances which help determine the commercial reasonableness of a transaction. These circumstances include method of sale, advertising, timing, location and related expenses and to do everything reasonably possible to obtain the best price. Dilks J. put it in these words:[6]

> Commercial reasonableness depends upon the circumstances of the sale, including a consideration of variables such as the method of sale, the subject matter of the sale, advertising or other methods of exposure to the public, the time and place of the sale, and related expenses. A receiver is under a particular duty to make a sufficient effort to get the best possible price for the assets. See *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.). This duty is not to obtain the best possible price but to do everything reasonably possible with a view to getting the best possible price.

In *Doran v. Hare*[7], the Court determined that the vendor took all commercially reasonable steps to determine the fair market price for a boat by consulting with experts in the field. The vendor took a commercially reasonable approach by attaining a fair price in light of a drop in the boat market at the time. In *Copp v. Medi-Dent Service*[8], the Court found that the sale at issue was not commercially reasonable because it was not publicly advertised and therefore the collateral was not properly appraised prior to it being sold.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=d408bac1-4e53-4be9-9f31-2408bfa8a17f

"Commercially Reasonable" Appellate Decisions

> ***Author's Note:*** *Since the publication of this article, the concept of commercial reasonableness has also been addressed by the Ontario Court of Appeal in Red Seal Tours Inc. v. Occidental Hotels Management B.V.,2007 ONCA 620, in respect of the forum selection clause of a commercial agreement. Writing for the Court, Sharpe J.A. stated: "It is well established that the law strongly favours the enforcement of choice of forum clauses and that special deference is owed to forum selection clauses found in international agreements involving sophisticated parties," he wrote. He noted that the Supreme Court of Canada in Z.I. Popey Industrie v. ECU-Line N.V., 2003 SCC 27, held that "parties should be held to their bargain … in all but exceptional circumstances."*

Examples where Appeal Dismissed

Below are several examples of Ontario Court of Appeal decisions which demonstrate the Court's approach to a trial judgment which it considered to be commercially reasonable. There are many such decisions, and the ones we have selected are merely illustrative but not exhaustive of the subject.

In the recent decision of *Valemont Group Ltd. v. Philmor Goldplate Homes Inc.*,[9] the appeal turned on a motion judge's interpretation of an earlier order arising from the resolution of a joint venture dispute. The question was whether one joint venturer, the general partner of the project, had a right to buy the other party's interest. The Court of Appeal said this (note the last sentence which we have emphasized):[10]

> We add that the motion judge did not interpret paragraph 9 of the order of Ground J. in a vacuum. He was aware that the relationship between the parties had irretrievably broken down. He was also aware that Philmor was in control of all aspects of the project. He fashioned an order that fully protected the fair value of Valemont's interest in the property while at the same time, gave Philmor control of the project so it could complete the development and market the units. *His order made sound commercial sense.*

In *Helix Biopharma Corp. v. Lifecodes Corp.*[11],the Court of Appeal dismissed the appeal in a single-paragraph decision that focused on commercial reasonableness. The Court found, that since the trial judge's interpretation of the asset purchase agreement at issue produced a commercially reasonable result, the decision was upheld and the appeal was dismissed.

In *Mississauga Teachers' Retirement Village Ltd. Partnership v. L.M.C. (1993) Ltd.*[12], the

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=d408bac1-4e53-4be9-9f31-2408bfa8a17f

Court of Appeal dismissed the appeal on the basis that the application judge interpreted the Sale and Dissolution Agreement as one that produced a commercially sensible result:

> Where, as here, words of a contract can bear two constructions, the preferred meaning is the one that best promotes a sensible commercial result and advances the objective of the parties in entering the commercial transaction in the first place.[13]

In *Bank of Nova Scotia v. Isaacs*[14], the Court of Appeal upheld the motion judge's decision on its merits based on the fact that the judge concluded that the bank acted in a commercially reasonable manner and thus there was no genuine issue for trial.

Deerhurst Investment Ltd. v. FPI Management Systems Ltd.[15] is an example of how the Court will closely analyze the wording of a statute and the agreements between parties from a commercially reasonable, mercantile perspective. In this case, the owner of a high-rise apartment building rented 10 apartments in their building to a businessman ("Aptel") who ran a small apartment hotel, attracting transient and weekly renters. There was a commercial lease in place. After 10 years, the landlord decided that the apartment hotel was a nuisance because its "guests" often disrupted the other tenants in the building. The landlord refused to renew and informed Aptel that he would have to vacate at the conclusion of the lease.

Aptel relied on the security of tenure provisions of what was then Part IV of the *Landlord and Tenant Act*[16] to argue that as the premises were residential, the landlord could not require him to vacate. While this sounded like a hopeless argument at first, Aptel gave it purported merit by relying on a decision of the Divisional Court which held that an apartment hotel was subject to the *Residential Premises Rent Review Act*[17], on the basis of an identical definition of "residential premises" in the latter statute.[18]

The applications judge, Borins Co. Ct. J. (as he then was) made a commercially reasonable decision distinguishing the *Matlavik* case. The Divisional Court dismissed the appeal in these words:

> The learned district court judge found as a fact that the situation in this case fell within the 'hotel' exception, and there was evidence to support that finding. On this basis, the case is distinguishable from and not governed by *Re Matlavik Holdings Ltd. et al. and Grimson et al.* (1979), 24 O.R. (2d) 92, 97 D.L.R. (3d) 522 (Div. Ct.). We agree with the reasons of Judge Borins for his disposition of this case on both grounds involved. Appeal dismissed with costs on a party-and-party basis.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=d408bac1-4e53-4be9-9f31-2408bfa8a17f

In *114567 Canada Limited* v. *Attwell*,[19]the Court of Appeal upheld the trial judge's decision because, on the facts of the case, the judge had come to a reasonable conclusion that the contract sued on was unenforceable. In its decision, the Court of Appeal considered several matters to justify the trial judge's conclusion on the unenforceability of the contract as one that was commercial reasonable. First, even though the corporate vendor, an RV dealership, knew of the statutory illegality of the contract, it took no steps to cure it. Second, the salesman was not registered as a salesperson under the *Motor Vehicle Dealers Act.*

Although failure of regulatory compliance does not always invalidate a commercial transaction, the Court of Appeal affirmed the trial judge's view that the purpose of the Act was to protect the public from dishonest or unscrupulous dealers and salespersons. The purchaser was a member of the class of persons entitled to protection under the Act. Therefore, the contract was voidable. This reasoning was consistent with the concept of "commercial reasonableness" because it takes careful account of the public's expectation in commercial transactions.

Examples where Appeal Allowed

In *Morris v. Call the Car Alarm Guys*[20],the Court of Appeal allowed the appeal and held that the trial judge erred in holding a shareholder/operator of corporation personally liable under a supply contract made with his incorporated business. The shareholder/operated had signed a "credit application" without reading it. Imbedded in the credit application was a personal liability clause which the supplier had not mentioned. The trial judge held, in essence, "you signed it, you're liable." The Court of Appeal (Weiler, Moldaver, and Simmons JJ.A.) took a more pragmatic approach to determining the appellant's personal liability:

> In our opinion, the trial judge erred in holding the appellant personally liable on the contract. Paragraph 8 when read in conjunction with the signing line on the contract is ambiguous. Paragraph 8 states: "The signatory" of the contract is personally liable. At the end of the contract the name Don Barrie is typed on the line reading: "Full name of Signatory". Underneath are printed the words, "For and on Behalf of Call The Alarm Guys Inc." The contract does not say "For and on Behalf of Call the Alarm Guys **As Well As Personally"**. The omission suggests that the contract is being signed in a representative capacity only and may be seen as a contradiction of paragraph 8. The implication is reinforced by the fact that opposite the line "Title of Signatory" are the words "Secretary/Treasurer". [21]

In the course of argument, Moldaver J.A. noted that when a business person signs a contract on behalf of the corporation for which s/he is employed, s/he does not expect to be personally liable

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=d408bac1-4e53-4be9-9f31-2408bfa8a17f

unless the written agreement makes this absolutely clear and the person is signing both personally and on behalf of the corporation. In reaching this conclusion, the Court of Appeal applied a commercial reasonableness approach to consumer contracts similar to that adopted 28 years ago by the Court of Appeal in relation to automobile rental agreements.

In *Tilden Rent-A-Car Co. v. Clendenning,*[22] the Ontario Court of Appeal upheld a trial judge's decision dismissing a claim for damage to a rented vehicle on the basis that Tilden failed to alert the customer to onerous liability provisions in fine print on the reverse of the standard form contract. The Court held that in the absence of making these terms clear to the opposing party, Tilden could not rely on those clauses. In coming to its decision in *Tilden*, the Court of Appeal referred to a judgment of Lord Denning which sums up the commercially reasonable approach to standard form contracts: "We do not allow printed forms to be made a trap for the unwary."[23]

Consumer protection legislation in the United States and, increasingly, in Canada requires the provisions in fine print or on the reverse of standard form documents be clearly and boldly pointed out to consumers. Section 5 of Ontario's *Consumer Protection Act, 2002*[24] places an onus on suppliers not only to disclose information to consumers in a clear, comprehensible and prominent manner, but also to deliver the information in a form in which it can be retained by the consumer. The ambit of commercial reasonableness is also bound to be tested in the coming years in the language used in terms and conditions applicable to the use of various websites.

Another example of the application of commercial reasonableness in the sale of businesses or professional practices was demonstrated in *Schwartz Levitsky Feldman (SLF) v. Stone*,[25]where the trial judge had to interpret a partnership agreement between an accounting firm and an accountant, Stone, who had sold his practice and client base to the firm. The issue on appeal was whether the trial judge failed to award all that Stone was entitled to under the partnership agreement by which SLF acquired his accounting practice.

The trial judge found a breach of fiduciary duty by SLF but failed to award Stone any damages and also found support in the partnership agreement for reducing Stone's recovery to the date of his departure from the firm. Moreover, the trial judge treated Stone's re-opening of an independent practice as a technical breach of the non-competition clause and awarded on partial damages for its breach. As result, Stone did not recover all he expected and, at the same time, SLF did not receive the full benefit of the liquidated damages provision in the non-competition clause, which took effect upon Stone leaving the firm and re-opening his own practice anew.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=d408bac1-4e53-4be9-9f31-2408bfa8a17f

The Court of Appeal (O'Connor, ACJO, Laskin and Goudge JJ.A.) took a "big picture" approach to the whole transaction between SLF and Stone. It was commercially reasonable to conclude that the parties had intended the transaction to provide a sum to Stone but also penalize him if he competed during the prohibited time period without consent. As a result, the Court of Appeal awarded Stone the amount he would have recovered had the contract been performed but treated a portion of the award as fiduciary damages to recognize the egregious conduct of SLF toward him.

At the same time, and notwithstanding SLF's breach of the partnership agreement, the Court awarded SLF damages for Stone's breach of the non-competition covenant. The important lesson of this decision is the effort the Court will make to enforce fair agreements between persons of equal bargaining position. That is the essence of the concept of "commercial reasonableness."

Business people seek certainty. To maintain that certainty in contractual obligations, one must look at the entire agreement between the parties and for mechanisms to enforce the intention of the parties. In *Stone*, the Court of Appeal held that where a vendor of a business or professional practice signs a non-competition clause on the sale of a business or professional practice and agrees to liquidated damages, the Court will enforce the intention of the parties even where the purchaser has *prima facie* breached the agreement by not paying the whole purchase price.

In *Transportation Lease Systems Inc. v. Guarantee Co. of North America*,[26] the Court of Appeal interpreted a contract for a company leased vehicle and overturned the lower court decision on the basis of commercial reasonableness. The Court stated:

> The only commercially reasonable interpretation of the policy is that the rights and obligations of the co-insured T Inc. and B are several, not joint. It would be commercially unreasonable to suggest that the only party with an actual interest in the vehicle in question can have its protection under the insurance contract revoked unilaterally by another party without appropriate prior notice.

In *SimEx Inc. v. IMAX Corp.*[27], the Court of Appeal interpreted a transfer agreement and a production agreement between a corporation and its wholly owned subsidiary. The Court allowed the appeal, and held that the contract was unambiguous and should have been interpreted in a commercially reasonable manner. The Court outlined the way in which a court should strive to interpret contracts:

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=d408bac1-4e53-4be9-9f31-2408bfa8a17f

> . . . while the court strives to interpret a contract in a manner consistent with the intent of the parties, the parties are presumed to have intended the legal consequences of their words. The court will consider the context or factual matrix in which the contract was drafted, including commercial reasonableness, to understand what the parties intended. The court will not adopt an interpretation that is "clearly" commercially absurd. The court must also consider the contract as a whole. The various provisions "should be read, not as standing alone, but in light of the agreement as a whole and other provisions thereof": *Scanlon v. Castlepoint Development Corp.* (1992), 99 D.L.R. (4th) 153 (Ont. C.A.), at 179.[28]

Do all appeals have to be argued?

You won at trial and you are beaming about the result. Your client is thrilled. Just as you're sending your final account, it happens. The other side serves the Notice of Appeal. Your heart sinks.

Was the result too good? Will the judgment hold up on appeal? And the big question: Is the result of the trial commercially reasonable? What if it's not? What can you do? Do you negotiate settlement because you may have done too well at trial? Or do you hang on tight and hope for a result, such as *Wigmore Farms Inc. v. A & BB Rice*[29]?

In *Baldwin v. Daubney*,*[30]* 19 plaintiffs sued five banks for damages alleging a breach of fiduciary duty arising from the banks' promotion of investments on which the plaintiffs lost money. On a motion for summary judgment dismissing the action, Spence J. held that the banks did not owe the plaintiffs a duty of care, nor were they obligated to advise the plaintiffs about the risks of investing their loans in mutual funds and that the advice was directed to financial advisors not to the investors themselves.

On appeal by the Plaintiffs, the Court adopted Justice Spence's reasons and dismissed the appeal. Specifically, the Court reinforced the settled law that barring a special relationship or exceptional circumstances, the relationship between a bank and its customer borrower is solely that of debtor and creditor, and is not a fiduciary one. The decision reinforces the concept that when a decision makes logical commercial sense, the Court of Appeal will not overturn it. Conversely, where the appellants seek a result which would be commercially absurd, the Court of Appeal will resist it.

When the result is too good to be true

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=d408bac1-4e53-4be9-9f31-2408bfa8a17f

In rare cases, you may be called upon to defend on appeal a trial judgment that was too good to be true. What should you do?

This is what happened in *Park Lane Homes v. Pecotic.*[31] The vendor recovered judgment at trial for damages for the purchaser's breach of the agreement for the purchase of a new home in a subdivision. The case was litigated in a completely different real estate market from the current one in southern Ontario. Between the making of the agreement and the projected closing date, the market had collapsed and first mortgage interest rates were in the range of 15%. The purchaser had lost interest in the purchase and was not to have to close. He did this by ignoring the transaction until the date before closing, when he hired a lawyer to submit five pages of requisitions to the vendor's solicitor.

The case turned on the purchaser's reliance on the "time is of the essence" clause on the eve of the closing date. The vendor countered by using a unilateral right in the agreement of purchase and sale to extend the closing for 60 days. However, at the time, the vendor had not started the construction of the house because of its concern that the purchaser had no interest in closing and the fact that the house model selected by the purchaser would difficult to resell. In other words, the vendor was counting on the purchaser to default. The trial judge held that the purchaser was wrong to invoke the "time is of the essence clause" on the eve of the closing. By so doing, the purchaser gave the vendor the right to extend the closing date. When the purchaser rejected the extension, he breached the agreement, forfeited the deposit and was liable for damages.

On appeal, the lower court decision was overturned based on the rationale that the trial judge's decision did not take commercially reasonable factors into consideration. In an oral decision, the Court of Appeal held:

In this real estate transaction the parties extended the closing date three times, the last being June 28, 1983. The original contract and all extensions contained the "time of the essence" clause. On the last date, the house had not been constructed; indeed the first work leading to construction had started only the day before. In these circumstances the purchaser was entitled to refuse to close and to claim the return of his deposit. In our opinion, there were no circumstances disentitling the purchaser to that remedy. Even if the vendor had been entitled to extend the date for closing beyond June 28th, he chose an unrealistic date and therefore cannot be considered to have kept the contract alive. The vendor being in default was not entitled either to retain the deposit or to damages.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=d408bac1-4e53-4be9-9f31-2408bfa8a17f

The Court allowed the appeal, dismissed the action, allowed the counterclaim and reversed the costs awards. In this case, the purchaser was uncompromising. He was unwilling to accept anything less than getting all of his money back and plus costs. The trial judge's decision was unsupportable because it did not pass the test of commercial unreasonableness. Purchasers should not forfeit their deposits when the vendor has no house to sell. One might say the judgment did not have a strong foundation.

Makachurk and Mid Transportation[32] is another example of a case where the result at trial was so good that it the successful plaintiff had to be concerned about what would happen on appeal.

At trial, the plaintiff was successful in obtaining judgment and costs against the defendant for a particular nasty wrongful dismissal. A very successful truck salesman was summarily fired on allegations of fraud, which the employer refused to withdraw for six years despite the fact that the police and a bonding company had concluded that there was no evidence of any dishonest behaviour.

The trial judge held that not only was the salesman dismissed without reasonable cause, but was also seriously hampered in his ability to find similar employment, given that there relatively few employers his area of expertise, heavy-duty truck sales. The trial judge awarded 14 months' notice, and additional damages for "compromise of the competitive position in the labour market" and punitive damages.

The trial judge awarded more damages than any other employment law case for a similarly situated employee. Moreover, it was the first case to award punitive damages and damages for compromise of compromise of competitive position in the labour market to a wrongfully-dismissed plaintiff. New and more senior counsel was retained by dealership for the appeal. At the time, the award was revolutionary and there was reason to be concerned that the Court of Appeal would adjust the result downward.

The employee was interested in the result, not in breaking legal records, and instructed counsel to negotiate a settlement if it would avoid further litigation and preserve most of the result. Negotiations pending appeal resulted in a settlement which avoided the risks and costs associated with appeal but left the employee no worse off financially because the payment was better structured in a more tax-friendly manner.

Little did counsel appreciate at the time that this case was a forerunner important for shifts in employment law damages. Five years later, the Supreme Court of Canada awarded punitive

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=d408bac1-4e53-4be9-9f31-2408bfa8a17f

damages in an employment law case in *Vorvis v. Insurance Corp. of British Columbia.*[33] *Makarchuk* was referred to in *Vorvis*[34], which remained the seminal decision on punitive damages in wrongful dismissal cases until the concept was altered by the Supreme Court of Canada in 1997 in *Wallace v. United Grain Growers*.[35]

What should you know for your first appeal?

The next section serves as a set of pointers for young counsel facing their first appeal, whether it may be in small claims court, divisional court, or the appellate court.

1. Don't be afraid to lose. Not all appeals are meant to be won. If you're the appellant, remember there is a lot of deference to trial judges and make sure that you assess the standard of review.
2. Not every appeal has to be appealed. Before proceeding to the next level, whether you are representing the appellant or the respondent, ask yourself: can a settlement be reached?
3. Written advocacy is just as important as oral advocacy: make sure that your case could be decided based on the factum alone.
4. Make sure you have law to back up every point. If you are trying to propose novel law in the commercial setting, tell the judge that you are doing that!
5. Keep it simple – Use short paragraphs in your factum – judges don't like to read long paragraphs and sentences.
6. Know your opponent – an understanding of their arguments is just as important as an understanding of your own.

A Final Word

At the heart of all appeals is the Appellant's burden to persuade the appeal panel that the trial or application judge erred. The intellectual process of persuading an appellate judge to overturn a judgment has been the subject of intellectual analysis.

The best and most eloquent discussion of this topic we have found is Justice John Laskin's article, *"What persuades (or, What's going on inside the judge's mind)"*[36], in which the learned appellate judge expresses how appellate judges go about their decision-making. On the topic of persuasive burden, Justice Laskin wrote:[37]

Here I have borrowed from Richard Posner because he has succinctly captured how most appellate judges go about their decision making. In his book *Overcoming Law*, [38] [Richard

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=d408bac1-4e53-4be9-9f31-2408bfa8a17f

Posner] gives this simple piece of advice to litigators: the best arguments are those that reduce the costs of persuasion. I have reduced his advice to this equation: *persuasive burden = distance x resistance.*

Minimize the legal distance we must travel to agree with you, and minimize our resistance to being moved. In practical terms, this equation translates into making the court as comfortable as you can with your position. Aim for a reasonable solution to the dispute. Give the court narrow, not adventuresome, grounds to decide in your favour, and narrower, not broader, rules to adopt.

A keen understanding of the concept of commercial reasonableness combined with a well-rooted appreciation of what is in fact, commercially-reasonable in the circumstances of your case, will increase the prospects for success on commercial appeals. We also recommend careful attention to Justice Laskin's sage advice.

Toronto, April 19, 2007.

Igor Ellyn is senior partner of Ellyn Law LLP, a Toronto Business Litigation boutique. This article was prepared with the collaboration and assistance of Michelle E. Gordon, a former associate of the firm.We express our sincere thanks to our colleague, Orie H. Niedzviecki, a partner of Ellyn Law LLP, for his useful comments and insights in the preparation of this paper.The article was first presented at a conference of the Ontario Bar Association in May 2007. Some amendments have been made since the article was first presented. *© Igor Ellyn, QC 2007.* *The author can be reached at* iellyn@ellynlaw.com.

[1] Rosenberg J.A. in *SimEx Inc. v. IMAX Corp.*,(2005), 11 B.L.R. (4th) 214 at para. 23.

[2] " *What Persuades(or, What's going on inside the judge's mind)*" The Advocates Society Journal, June 2004.

[3] Canadian Encyclopedic Digest, Secured Transactions in Personal Property.

[4] *Benedict v. Ontario*,(2000) 51 OR (3d) 147 (CA) at QL para. 11.

[5] (1994), 8 P.P.S.A.C. (2d) 203 (Ont. Gen. Div.).

[6] Greyvest Leasing Inc. v. Merkur; 1994 CarswellOnt 780; 8 P.P.S.A.C. (2d) 203 at para. 45.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=d408bac1-4e53-4be9-9f31-2408bfa8a17f

[7] (1994), 6 P.P.S.A.C. (2d) 295 (Ont. Gen. Div.).

[8] (1991), 2 P.P.S.A.C. (2d) 114 (Ont. Gen. Div.).

[9] 2007 ONCA 273.

[10] *Ibid*. at para. 5.

[11] (2002), 29 B.L.R. (3d) 190.

[12] [2004] O.J. No. 4493.

[13] *Ibid*. at para. 13.

[14] [2004] C.C.S. No. 5001.

[15] (1984) 50 O.R. (2d) 687, appeal dismissed by Div. Ct. (Eberle, Trainor and Gray JJ.) on April 19, 1985.

[16] R.S.O. 1980, c. 232, s. 1(c)(i).

[17] 1975 (Ont.) (2nd Sess.), c. 12, ss. 1(j), 14(1)(b)

[18] *Re Matlavik Holdings Ltd. et al. and Grimson et al.* (1979), 24 O.R. (2d) 92, 97 D.L.R. (3d) 522 (Div. Ct.)

[19] (2000), 11 B.L.R. (3d) 207.

[20] (2005), 193 O.A.C. 238.

[21] *Ibid*. at para. ???

[22] (1978), 18 O.R. (2d).

[23] *Neuchatel Asphalte Co v. Barnett*, [1957] 1 W.L.R. 356 , at 360, [1957] 1 All E.R. 362 at 365.

[24] S.O. 2002, c. 30, Sched. A.

[25] [1999] O.J. No. 4070 (C.A.).

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=d408bac1-4e53-4be9-9f31-2408bfa8a17f

[26] (2006), 77 O.R. (3d) 767.

[27] (2005), 11 B.L.R. (4th) 214.

[28] *Ibid*. at para. 23.

[29] [2005] O.J. No. 4966.

[30] (2005), 78 O.R. (3d) 693, 14 B.L.R. (4th) 24 (Ont. S.C.J.), granting summary judgment to defendants.

[31] [1989] O.J. No. 1777.

[32] [1985] O.J. No. 1016.

[33] [1989] 1 S.C.R. 1085

[34] [1989] 1 S.C.R. 1085 QL para. 53

[35] [1997] 3 S.C.R. 701.

[36] The Advocates Society Journal, June 2004, reproduced at http://www.ellynlaw.com/includes/pdf/Justice Laskin - What Persuades (2).pdf.

[37] Ibid., p.6-7

[38] Richard A. Posner, *Overcoming Law* (Cambridge, MA: Harvard University Press, 1995) at c. 24, “Rhetoric, Legal Advocacy and Legal Reasoning” at 500–501. Posner relies on Akira Yokoyama, “An Economic Theory of Persuasion” (1991) 71 Public Choice 101.