The Five Most Significant Decisions of the Courts in 2008-2009

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Introduction

Identifying the five most significant decisions of Canadian Courts in the last year is always a daunting challenge. In their own way, all cases are important. Moreover, the importance of a case may be not be apparent until some time after it was decided. Some cases are "headline grabbers" but do not necessarily have far-reaching legal consequences. Here are the ones we consider the most significant:

1) *Alberta v. Hutterian Brethren of Wilson Colony (SCC – Jul 24, 2009)* [1] – the requirement that all drivers licences have a photograph of the licencee does not violate the licencee's regarding freedom of religion under s. 2(a) of the *Charter*;

2) *R. v. Patrick (SCC – April 9, 2009)*[2] – Whether a person has abandoned the right to privacy in the contents of his garbage when s/he places it them at edge of his property for collection and whether an accused's Charter rights to be free from unreasonable search and seizure is violated by the police searching their garbage;

3) *Greater Vancouver Transportation Authority v. Canadian Federation of Students (SCC – July 10, 2009)*[3] - whether a regulation created by a transit

[1] [2009] SCC 37 (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella and Rothstein JJ.)
[2] [2009] SCC 17 (McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron and Rothstein JJ.).
[3] [2009] SCC 31 (McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.)

authority disallowing placement of "political" advertisements on the buses violates the Charter right to freedom of expression;

4) *Shafron v. KRG Insurance Brokers (Western) Inc.(SCC – January 23, 2009)* [4] – Whether an ambiguous restrictive covenant can be rectified and made enforceable by the Court severing the unclear portions by "notional severance" or "blue-pencil severance" or by "reading down" ; and

5) *Rick v. Brandsema (SCC – February 19, 2009)*[5] – Whether a final separation agreement is unconscionable when made in the face the husband's knowing exploitation of the wife's mental fragility and his failure to make full disclosure.

ANALYSIS OF THE FIVE MOST SIGNIFICANT CASES

Alberta v. Hutterian Brethren of Wilson Colony – SCC - July 24, 2009

Since 1974, the Province of Alberta (the "Alberta") has required all persons who drive motor vehicles to hold a driver's licence containing a photo of the individual, with the exception of individuals who objected to having their picture taken for religious purposes. In 2003, the Alberta amended the existing legislation and made it a universal requirement that all drivers' licences contain photo identification (the "Regulation"). Of the 450 existing licences issued before the Regulation came into force which did not contain photo of the individual, 56% of these licences were held by members of Hutterian Brethren colonies.

The Wilson Colony of Hutterian Brethren ("Hutterian Brethren") is a group which maintain a rural, communal lifestyle while carrying on different commercial ventures. It is their sincere belief that the Second Commandment of the Old Testament prohibits them from wilfully having their photograph taken. They, therefore, objected to having their photo taken in association with the issuance of a driver's licence.

[4] [2009] SCC 6 (McLachlin C.J. and Binnie, LeBel, Deschamps, Abella, Charron and Rothstein JJ.)
[5] [2009] SCC 10 (McLachlin C.J. and Binnie, Deschamps, Fish, Abella, Charron and Rothstein JJ.).

Prior to the Regulation, Alberta and the Hutterian Brethren had unsuccessful discussions on possible amendments to the proposed Regulation to allow the members of the Hutterian Brethren to acquire drivers' licences without photos. The Hutterian Brethren challenged the Regulation on the grounds that the requirement that all licences contain a photo of the licencee infringes the section 2(a) *Charter* rights of the Hutterian Brethren.

At trial, the Hutterian Brethren led evidence asserting that if their members could not obtain driver's licences, the viability of their communal lifestyle would be threatened. Alberta countered by leading evidence establishing a connection between the universal photo requirement and a new system that Alberta is implementing to minimize the occurrence of identity theft occurring through the use of fraudulent driver's licences.

The trial judge found the Regulation violated s. 2(a) *Charter* rights and struck it down. He also found Alberta's objective of preventing identity theft and the various forms of mischief which identity theft may facilitate to be "pressing and substantial" and the implementation of mandatory photographic licences to be "rationally connected to the objective of safeguarding the system of issuing operator's licences from fraud and for that mat[t]er the larger objective of limiting identity theft". However, the trial judge did not find that the Regulation satisfied the requirement that the challenged law be minimal impairing or that its effects were proportional and therefore could be saved by s. 1 of the Charter.

The Alberta Court of Appeal split. The majority agreed with the trial judge. Slatter J.A., dissenting, found that the salutary effects of the universal photo requirement outweighed the deleterious effects on the members of the Hutterian Brethren's freedom of religion and

concluded that "in a free and democratic society minor infringements of this kind on religious doctrine can be tolerated."

All seven judges of the Supreme Court of Canada, agreed that the Regulation infringed the Hutterian Brethren's s. 2(a) *Charter* rights but the Court split 4 – 3 on the issue of whether the photo requirement was minimally impairing and proportional under s. 1 of the *Charter*. The majority judgment of McLachlin C.J., states in part:

> *[a] measure of leeway must be accorded to governments in determining whether limits on rights in public programs that regulate social commercial interactions are justified under s. 1 of the Charter... Section 1 of the Charter does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but only that it be "reasonable" and "demonstrably justified". Where a complex regulatory response to a social problem is challenged, courts will generally take a more deferential posture throughout the s.1 analysis that they will when the impugned measure is a penal statute directly threatening the liberty of the accused.*[6]

The Chief Justice concludes that the Regulation requirement is pressing and substantial and that it is both rationally connected to the purpose and minimally impairing and, is, therefore, saved by s. 1 of the Charter. The majority was cognizant of the important role the new Regulation played in reducing identity theft, which has become a serious problem in modern Canadian society.

When determining whether a limit is minimally impairing the majority states that the question to be asked is "*whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit*".[7] The majority notes the legislature should be accorded a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives.

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[6] *Supra* Note 1 at para 35.
[7] *Ibid*. at para 53.

Justices Abella, Lebel and Fish dissented on the issue of minimal impairment and the proportional effects of the Regulation on the Hutterian Brethren. They conclude it is the role of the court not to assess whether the infringing measure fulfills the government's objective more perfectly than any other, but whether the means chosen impair right no more than necessary to achieve the objective. For this reason, the minority finds the Regulation fails to be minimally impairing. Further, they find that the burden is squarely on the government to satisfy the courts that a law found to violate a *Charter* right can be justified under s. 1 of the *Charter*, including whether the effects are proportional. Their view was that the harm the Brethren will suffer is greatly disproportionate to the minimal gains achieved by the Province by requiring universal photos mainly due to the existence of more than 700,000 Albertans who do not have a driver's licence and, therefore, will not be part of the proposed database.

The 4-3 split in the Supreme Court reflects the difficulty of the issue in this case. On the one hand, every Canadian should be able to express a genuinely-held religious choice not to be photographed, if indeed, one's religion so provides. On the other hand, it is naïve to expect that a decision which affects a person's identity and which hinders the rampant problem of identity theft (and also, of security) in Canadian society will not be abused.

Had the Supreme Court decided that a person could opt for a non-photo licence by stating that the photo contravened his or her religious beliefs, the statement would have to be accepted at face value. The government could not investigate whether the statement was a genuinely-held belief, even if it had the resources to do so. It follows that all photo IDs, not just a driver's licence, would then become optional. This would clearly be undesirable, far beyond the impact on the Hutterian Brethren Colony in Alberta.

R. v. Patrick – **SCC - April 9, 2009**

In *R. v. Patrick* the SCC addressed an issue which is increasingly important in our "cyberworld" – privacy. In this case, the SCC ruled that the accused's *Charter* rights were not violated when the police removed garbage located at the edge of his property and used this information to obtain a warrant to search Patrick's house and garage. In arriving at this conclusion, the SCC analyzes the boundaries of a person's privacy interests and determines when an individual abandons their right to privacy.

Police investigators suspected Patrick was operating an ecstasy lab in his home. On several occasions, police took bags located inside garbage cans located inside Patrick's property line. The officers had to reach through the airspace over the property line to retrieve the bags but never had to set foot on Patrick's property.

The materials seized included chemical recipes and instructions, packaging for a scale, a product card for a vacuum pump, a receipt for muriatic acid and an empty clear plastic bag with residue inside, amongst other things. Some of these items were contaminated with ecstasy. Based on these items, the Police obtained a warrant to search Patrick's house and garage. The police searched Patrick's house and found further evidence that he was operating an ecstasy lab and he was charged accordingly.

The trial consisted essentially of a *voir dire* to determine the admissibility of the evidence obtained from the garbage. Patrick contended that without the items seized from his garbage, the police would have been unable to obtain a warrant to search his home and, therefore, the evidence was gathered in violation of his s. 8 *Charter* rights.

The critical issue was identified as whether Patrick had a reasonable expectation of privacy in the contents of the garbage bags. The trial judge, though not hearing evidence that Patrick had a subjective expectation of privacy, found an expectation of privacy could be presumed in the circumstances but stated that: "*at some point [Patrick] clearly waived that expectation by placing the garbage where he did and abandoning it*".[8] The judge found that, although the garbage remained on private property, "*location is not the litmus test for determining the expectation of privacy*".[9] The trial judge held that Patrick did not have a reasonable expectation of privacy in the items seized from his garbage and that the subsequent search warrant and the search of Patrick's home was done according to the law and not in breach of his *Charter* rights. Patrick was convicted of violating numerous provisions of the *Controlled Drugs and Substances Act*[10]. This finding was upheld on appeal although for different reasons.

In the SCC. Justice Binnie, writing for the majority, analyzed whether an individual who places his garbage out for collection has abandoned his right to privacy by addressing the issue of "abandonment" as follows:

> *"[t]he concept of abandonment is about whether a presumed subjective privacy interest of the householder in trash put out for collection is one that an independent and informed observer, viewing the matter objectively, would consider reasonable in the totality of the circumstances having regard firstly to the need to balance "societal interests in protecting individual dignity, integrity and autonomy with effective law enforcement" (R. v. Plant, [193] 3 S.C.R. 281 at 293); secondly, whether an accused has conducted himself in a manner that is inconsistent with the reasonable continued assertion of a privacy interest and, thirdly, the long term consequences for the due protection of privacy interests in our society".*[11]

[8] *Supra* Note 2 at para 6.
[9] *Ibid*.
[10] (1996, c.19)
[11] *Supra* Note 2 at para 20.

The majority finds that defining the subject matter of the search as "garbage" is an oversimplification that misses the point in issue. As residential waste includes an enormous amount of personal information about what is going in the homes of the garbage producer, a garbage bag should be more accurately described as a "*bag of "information" whose contents, viewed in their entirety, paint a fairly accurate and complete picture of the householder's activities and lifestyle*"[12].

The Court continued by finding that there was a search, that there is a presumption in favour of Patrick and that he has an expectation of privacy with respect to the contents of the garbage bags. When determining whether Patrick's expectation privacy was objectively reasonable, the SCC considered four factual elements:

(1) the garbage was put out for collection;

(2) the location of the garbage was near the property line;

(3) there was no manifestation of a continuing assertion of privacy/control; and

(4) the police took the bags to search for information about activities within the home as part of a continuing criminal investigation.

The Court found, aside from the issue of abandonment, the circumstances in this case favour a finding that Patrick's expectation of privacy is objectively reasonable.

The Court the proceeded to analyze whether Patrick had abandoned his privacy interest in the property. Examining other decisions involving an assessment of the privacy associated with garbage, the majority finds that Patrick abandoned his privacy interests in the contents of the garbage bags when he placed them for collection in the open container at the back of his property adjacent to the property line. As the bags were within easy reach of anyone walking

[12] *Ibid* at para 30.

in a public alleyway, including street people, bottle pickers, urban foragers, nosey neighbours and mischievous children, not to mention dogs and assorted wildlife, as well as the garbage collectors and the police, they are considered to be abandoned. The majority continued by stating "*until the garbage is placed at or within reach of the lot line, the householder retains an element of control over its disposition and cannot be said to have unequivocally abandoned it*"[13].

The SCC agrees with the trial judge and the majority of the court of appeal in finding Patrick had abandoned his privacy interest in the contents of the garbage when he placed them in the bin on the laneway for collection. The taking of the garbage by the police did not constitute a search and seizure within the scope of section 8 of the *Charter* and, therefore, the evidence was properly admissible. As Patrick's section 8 *Charter* right was not infringed, the SCC did not need to examine whether s. 24(2) of the *Charter* could be applied to render the evidence admissible[14].

Justice Abella, writing for herself, takes the analysis further than the majority. She states that abandonment is but one of the factors to be considered when determining whether Patrick has a reasonable expectation of privacy. The other factors that must be considered include whether the search exposed intimate details of an individual's life and the location of the search. She continues by stating that it is beyond a reasonable expectation for a person to

[13] *Ibid* at para 62.
[14] In the companion cases of *R. v. Harrison* (2009 SCC 34) and *R. v. Grant* (2009 SCC 34), released this year, the SCC creates a new test to determine when admitting evidence obtained by a Charter breach 'would bring the administration of justice into disrepute'. The SCC states that a trial judge must consider three factors prior to admitting evidence pursuant to s. 24(2) of the Charter. They are:

1. the seriousness of the Charter-infringing state conduct;
2. the impact of the breach on the Charter-protected interests of the accused; and
3. the societal interest in an adjudication on the merits.

expect the personal information contained in their household waste to be publicly available for random scrutiny by anyone, let alone the state. She then balances an individuals want to keep the information contained in the waste private with their actions of abandoning the same information. She finds that there is a diminished expectation of privacy associated with garbage but that the State cannot arbitrarily search through garbage and there must be at least be a threshold of reasonable suspicion about the possibility of a criminal offence before household waste left collection is searched.

Greater Vancouver Transportation Authority v. Canadian Federation of Students and British Columbia Teachers' Federation – SCC July 10, 2009

This case addresses the whether a government body is entitled to disregard an individual's right to political expression. The case examines whether a government entity's policies must comply with the *Charter*.

The Greater Vancouver Transportation Authority and British Columbia Transit (collectively, the "Transit Authorities") earn revenues by posting advertisements on their buses. In the fall of 2004, The Canadian Federation of Students and the British Columbia Teachers' Federation (collectively, the "Federations") both wanted to purchase advertising space on the buses of the Transit Authorities to encourage increased voting from specific segments of society. The Transit Authorities refused to post the advertisements on the basis that "political" advertisements are not permitted by their advertising policies.

The Federations challenged the policies of the Transit Authorities (the "Policies") as the Policies violate the Federations' right to freedom of expression as guaranteed by s. 2(b) of the *Charter*. The Policies were identical and state, amongst other things:

2. *Advertisements, to be accepted, shall be limited to those which communicate information concerning goods, services, public service announcements and public events*

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7. *No advertisement will be accepted which is likely, in the light of prevailing community standards, to cause offence to any person or group of persons or create controversy; and*

9. *No advertisement will be accepted which advocates or opposes any ideology or political philosophy, point of view, policy or action, or which conveys information about a political meeting, gathering or event, a political party or the candidacy of any person for a political position or public office.*

The Federations sought an Order under s. 52 of the *Constitution Act, 1982*, that the challenged articles are unconstitutional and, therefore, of no force and effect. At trial, the Federations' claim was dismissed on the basis that the Federations' right to freedom of expression had not been infringed due to the lack of history of permitting political or advocacy advertising on the sides of buses. Therefore, the location was not deemed a "public place". Had the Policies infringed the Federations' freedom of expression, the trial judge would have concluded that the total ban on political and other advocacy advertising was not a reasonably minimal impairment of the freedom of expression and that the benefits of the advertising restrictions did not outweigh the detrimental effects of same.

The British Columbia Court of appeal reversed the trial judgment on the basis that the trial judge erred in finding that the Policies did not infringe the Federations' *Charter* right by mistakenly elevating the historical use of the sides of buses from a potential indicator that a place is a "public place" to an actual prerequisite for finding that it is. That court decided not to embark on their own section 1 analysis as the parties' submissions were insufficient.

The majority of the SCC commences their analysis by determining whether the Transit Authorities are subject to the *Charter*. The majority restates the two well-known ways to determine whether the *Charter* applies to an entity's activities: 1) by determining that the entity is "government", either because of its very nature or because the government exercises

substantial control over it; or 2) by determining whether the entity performs "governmental activities", activities which are governmental in nature. If either question is answered affirmatively then the entity, or its activities, must comply with the rights as set out in the *Charter*. The majority finds that because the Transit Authorities were created by statute a goal of placing more powers in the hands of local governments, the Transit Authorities are considered "government" and bound by the *Charter*.

Turning their attention to s. 2(b) of the *Charter*, the majority reaffirms the generous and purposive approach to the interpretation of *Charter* rights, as set out in *Hunter v. Southam Inc*.[15] and *R. v. Big M Drug Mart Ltd.*[16]. The majority states that an activity by which one conveys or attempts to convey meaning will prima facie be protected by the s. 2(b) of the *Charter*, as set out in *Irwin Toy Ltd. v. Quebec*[17]. Further, the majority reaffirms that s. 2(b) protects an individual's right to express him or herself in certain public places, as set out in *Montréal (City) v. 2952-1366 Québec Inc.*[18]

After examining the nature of the Policies, the majority finds that the proper approach to determining whether the actions of the Transit Authorities violate the s. 2(b) rights of the Federations is the approach described in *City of Montreal*. In performing this analysis, this requires determining whether expression in a specific government location is protected by the *Charter*. The basic question is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve. The majority finds that the space currently allows for a broad range of expressions and could actually further the underlying

[15] [1984] 2 S.C.R. 145.
[16] [1985] 1 S.C.R. 295.
[17] [1989] 1 S.C.R. 927.
[18] [2005] 3 S.C.R. 141 ("City of Montreal")

values of s. 2(b) and, therefore, there is no aspect of the location that suggests the expression within it would undermine the values of a free and democratic society. As the Policies limit the Federations' right to freedom of expression, they must be justified by s. 1 of the *Charter*.

The majority then commences the s.1 analysis with first determining whether the Policies satisfy the requirement of being 'prescribed by law'. To make this determination, it must be determined whether the government entity was authorized to enact the impugned policies and whether the policies are binding rules of general application. If answered affirmatively, then the Policies are considered to be 'law'. The courts have historically taken a flexible approach to the "prescribed by law" requirement and this is not disturbed in this decision. The majority states:

> *In order for a policy to be legislative in nature, it must establish a norm or standard of general application that has been enacted by a government entity pursuant to rule-making authority. So long as the enabling legislation allows the entity to adopt binding rules, and so long as the rules establish right and obligations of general rather than specific application and are sufficient accessible and precise, they will qualify as "law which prescribes a limit on a Charter right".*[19]

As the enabling statues confer discretionary powers on the Transit Authorities to adopt rules regulating the conduct of their affair and the Policies were both accessible and precise, the majority finds the Policies to be prescribed by law.

In the final part of the analysis of whether the Policies violate the Federations' *Charter* rights, the majority examined whether the infringement is justified in a free and democratic society. The majority finds that the purpose for the Policies of providing "a safe, welcoming public transit system" is not being rationally connected to the objective of the Policies. The majority was not convinced advertisements containing political messages could create a safety risk or an unwelcoming environment for the transit users. The majority continues by stating

[19] *Supra* Note 3 at para 64.

that even if a rational connection did exist, the Policies would have been found to be neither reasonable nor proportionate to the Federations' interest in disseminating their message pursuant to the s. 2(b) *Charte*r rights.

The majority ultimately finds that the appropriate remedy for an invalid rule of general application is one under s. 52(1) of the *Constitution Act, 1982*, not 24(1) of the *Charter*. The majority finds that the Transit Authorities used their rule-making power to adopt the Policies which violated the Federations' *Charter* rights and are, pursuant to s. 52(1) of the *Constitution Act, 1982*, declared of no force or effect.

Justice Fish, writing for himself, came to the same conclusion with respect to the findings that the Transit Authorities are government and bound by the Charter, that the Policies infringe the Federations' s. 2(b) Charter rights and that the infringement cannot be justified under s.1. However, Justice Fish uses what he refers to as a simpler method to arrive at the same result, namely, a new framework for addressing whether a government, or the government's actions, violate an individual's s. 2(b) *Charter* rights. He elaborates on both limitations and finds that the Transit Authorities Policies prevented the Federations' from exercising their *Charter* rights and that this rejection of the advertisement was not merely an effect of the restrictive effect of the Policies but rather was the very purpose. For this reason, Justice Fish believes that the Policies should be found to be unconstitutional and of no force and effect. He also finds that the Policies do not fit within any of the exceptions to the limitations and therefore cannot be saved.

Shafron v. KRG Insurance Brokers (Western) Inc. – SCC - January 23, 2009

In Shafron, the SCC addresses the effect of ambiguous terminology found in a restrictive covenant, specifically a non-competion clause in an employment contract arising upon the sale of shares in a business. The SCC addresses whether 'notional' or 'blue pencil' severance or rectification can be used to resolve an ambiguity found in the restrictive covenant or whether the ambiguous restrictive covenant should be found unenforceable.

In 1987, Shafron sold the shares he owned in his own insurance agency to KRG Insurance Brokers Inc ("KRG"). Subsequent to the share acquisition by KRG, the name of the business was change to KRG Insurance Brokers (Western) Inc. ("KRGW"). Shafron continued to be employed by KRGW. Over the period of the next 13 years, Shafron entered into successive employment contracts with KRGW. The different contracts all contained a non-competition clause. The clause stated:

> *Shafron agrees that, upon his leaving his employment…for any reason save and except for termination…without cause, he shall not for a period of three (3) years thereafter, directly or indirectly, carry on, be employed in, or be interested in or permit his name to be used in connection with the business of insurance brokerage which is carried on within the metropolitan City of Vancouver. [Emphasis added.]*

In December 2000, while still under contract, Shafron left KRGW's employment and in January 2001 began working as an insurance salesman for an agency located in Richmond.

KRGW commenced an action claiming that Shafron was competing with KRGW in breach of the non-competition clause. The trial judge dismissed the action on the basis, *inter alia*, that the term "Metropolitan City of Vancouver" was neither clear nor certain and, in any event, was unreasonable and of no force and effect.

The British Columbia Court of Appeal reversed the decision of the trial judge. While it was acknowledged that the term "Metropolitan City of Vancouver" was ambiguous, the Court

of appeal applied the doctrine of 'notional' severance to construe it as applying to "the City of Vancouver and municipalities contiguous to it". Richmond was found to included within the notional description.

In reversing the Court of Appeal's decision, a unanimous SCC acknowledges the tension that exists with respect to restrictive covenants as they exist between the concept of the freedom to contract and the public policy considerations against restraining trade. Historically, the courts have held that a restraint of trade and interference with individual liberty of action may only be justified by the special circumstances of a particular case and that it is a sufficient justification if the restriction is reasonable.

The SCC then examines the role of restrictive covenants in employer-employee relationships and concludes that, based on the existing power imbalances and the lack of a payment for goodwill, a more rigorous scrutiny of restrictive covenants should be employed in an employer-employee relationship than when scrutinizing restrictive covenants in commercial contracts.

The SCC states that a requirement for a determination of reasonableness to be made is that the terms of the restrictive covenant be unambiguous. An ambiguous restrictive covenant will be *prima facie* unenforceable because the party seeking enforcement will be unable to demonstrate the term is reasonable in the face of an ambiguity.

The SCC then turns its attention to whether a restrictive covenant that is unreasonably wide in its geographic scope can be severed in some manner so as to leave in place what is reasonable. The Court acknowledges the possibility of 'blue pencil' severance and 'notional'

severance which have both been applied to remove illegal features of a contract and render the contract legally enforceable. However, as both 'blue pencil' severance and 'notional' severance involve altering the terms of the original contract between the parties, the Court finds this should only be done to give effect to the intention of the parties.

Under the "blue pencil" test, severance is only possible if the judge can strike out, by drawing a line through, the portion of the contract that is to be removed. This will leave the portions that are not tainted by illegality without affecting the meaning of the remaining part. 'Notional' severance, on the other hand, involves reading down an illegal provision in a contract that would be unenforceable to make it legal and enforceable. 'Notional' severance should only be applied where there is a "bright line" for when a term is illegal.

Severance of a restrictive covenant in an employment contract poses additional concerns. While the Court seeks to uphold the agreement between the parties, applying severance to an unreasonably wide restrictive covenant invites employers to draft overly broad restrictive covenants with the prospect that the court will only sever the unreasonable parts or read down the covenant to what the court determines to be reasonable. Therefore, the SCC holds that 'blue pencil' severance should only resorted to sparingly and only in cases where the part being removed is clearly severable, trivial and not part of the main purport of the restrictive covenant.

The SCC further finds that 'notional' severance has no place in the construction of restrictive covenants in employment contracts. This is so as there is no objective "bright-line" rule that can be applied in all cases to render the covenant reasonable and would amount to the courts rewriting the covenant in a manner that it considers reasonable in the specific

instances. To introduce the doctrine of 'notional' severance to "read down" an unreasonable restrictive covenant to what is reasonable provides no inducement to an employer to ensure the reasonableness of the covenant. It will result in an inappropriate increase in risk as that employee will be forced to abide by an unreasonable covenant.

The Court proceeds to restate the test as to whether a restrictive covenant is reasonable as follows:

> *A restrictive covenant is prima facie unenforceable unless it is shown to be reasonable. However, if the covenant is ambiguous, in the sense that what is prohibit is not clear as to activity, time, or geography, it is not possible to demonstrate that it is reasonable. Thus, an ambiguous restrictive covenant is, by definition, prima facie unreasonable and unenforceable. Only if the ambiguity can be resolved is it then possible to determine whether the unambiguous restrictive covenant is reasonable.*[20]

The SCC rejects the decision of the Court of Appeal to resolve the ambiguity by reading down the covenant and implementing what it believes the parties intended. The SCC states that this practice is not permitted with respect to restrictive covenants in an employment contract. The SCC finds this to not be an appropriate instance for the principle of rectification as there was no evidence of what the parties actually intended by "Metropolitan". As KRGW cannot point to any agreement, written or oral, that explains the term "Metropolitan City of Vancouver", there is no indication that the parties agreed on something and then mistakenly included something else in the written contract.

Rick v. Brandsema - SCC - February 19, 2009

In the singularly emotional negotiating environment of a marriage breakdown, special care must be taken to ensure that the negotiations and informational flow are free from

[20] *Supra* Note 4 at para 43.

psychological and informational exploitation. If there is exploitation, the agreement may be reopened by the exploited party. As the Supreme Court of Canada notes, "Where exploitation results in an agreement that deviates substantially from the objectives of the governing legislation, the resulting agreement may be found to be unconscionable and, as a result, unenforceable."

Nancy Rick and Berend Brandsema were married in 1973. They separated in February 2000 and divorced in January 2002. During their marriage, they acquired land and established a dairy farm, vehicles, real estate and RRSPs. They had five children, one of whom died in early childhood and two, who were under the age of 19 at the date of separation. During their marriage, Rick was mainly a homemaker, but contributed to the operation of the farm.

After their separation, the corporation created to manage the farm provided funds to Rick to purchase a new home. Brandsema facilitated this transaction on condition that Rick resign as director and officer of the corporation. Both parties had continued access to funds held by the corporation until they entered into the separation agreement.

Four months after the separation and the commencement of the divorce proceedings, a mediator was engaged to aid with the distribution of the family's assets and liabilities. It was both parties stated intention to divide the assets equally. Ultimately, it was decided that Brandsema would retain the dairy farm business while Rick would retain her newly acquired house and an additional $750,000 "to equalize the parties' net family property and assets". Rick was not to receive additional spousal support.

In May 2001, Rick retained a lawyer to commence the divorce proceedings and to review the unsigned memorandum prepared as a result of the negotiations. The lawyer made numerous requests of Brandsema's lawyer to provide a Form 89 financial statement. This document was produced in September of 2001.

In September 2001, the parties retained a different mediator to continue the negotiations. The husband's financial statement stated that the farm was worth $300,000 more than had been represented to Rick in previous negotiations. A second memorandum of understanding was signed on October 10, 2001 substantially similar to the previous agreement except that the new agreement contained a child support provision. Rick hired another lawyer who believed his responsibilities extended only to ensuring that the terms of the memorandum of understanding were accurately incorporated into a binding agreement and that the terms of the agreement were implemented.

Before the signing of the separation agreement, Brandsema hired accountants to ensure that the shares of the dairy farm business were transferred in a way that minimized the tax consequences associated with the transfer. The separation agreement was signed on December 13, 2001. On January 17, 2002, the parties were divorced and a consent order, prepared by Rick's lawyer, was granted dismissing her family law claims against Brandsema. In February 2002, the tax plan and the terms of the separation agreement were completed.

On March 6, 2003, Rick sought to set aside the separation agreement and related share transfer on the grounds of unconscionability and misrepresentation. In the alternative, she sought relief under s. 65 of the B.C. *Family Relations Act*[21].

[21] R.S.B.C. 1996, c. 128.

At trial, Brandsema claimed that Rick's negotiating tactics were deliberate and manipulative. The trial judge rejected this argument and found Rick to be a "deeply troubled person" and "her perception of reality was significantly affected by an unhealthy condition of the mind" at the time of separation. The trial judge found her "mental condition rendered her vulnerable" during the negotiating process. Further, it came to light at trial that Brandsema had written a cheque to himself for approximately $80,000 and advanced $154,000 to a friend and later redeemed by Brandsema. There was no mention of these transactions in his financial statement,

As Brandsema had knowingly presented misleading financial information to Rick at the outset of negotiations and was aware of Rick's disordered thinking and impetuous behaviour, the trial judge concluded that Brandsema knowingly took advantage of Rick's vulnerabilities by providing what he alone knew to be erroneous financial information, resulting in an equalization payment that fell short of Rick's entitlement.

The B.C. Court of Appeal reversed most of the trial judge's findings of fact. While conceding that Rick was a troubled a woman, the Court of Appeal ejected the trial judge's finding that her mental instability impeded her ability to understand the negotiation process or the legal processes available to her. The Court of Appeal also found that any vulnerability that Rick had were adequately addressed and compensated for by the availability of professional assistance.

Writing for a unanimous Supreme Court of Canada, Justice Abella re-affirmed the the trial judge's decision. The SCC restated the test in *Miglin v. Miglin*[22] where the Court held that bargains entered into on marriage breakdown are not subject to the same rules as those applicable to commercial contracts negotiated between two equal parties of equal strength due to the uniqueness of the negotiating environment. In *Miglin*, the SCC further stated:

> *[W]here the parties have executed a pre-existing agreement, the court should look first to the circumstances of negotiation and execution to determine whether the applicant has established a reason to discount the agreement. The court would inquire whether one party was vulnerable and the other party took advantage of that vulnerability. The court also examines whether the substance of the agreement, at formation, complied substantially with the general objectives of the Act.*[23]

Notably, in *Miglin,* the Court also stressed the importance of respecting "*the parties' right to decide for themselves what constitutes for them, in the circumstances of their marriage, mutually acceptable equitable sharing*".[24] The SCC affirms the principle that parties should generally be free to decide for themselves what bargain they are prepared to make but contractual autonomy depends on the integrity of the bargaining process.

Justice Abella finds that a duty to make full and honest disclosure of all relevant financial information is required to protect the integrity of the result of the negotiations in these uniquely vulnerable circumstances. The deliberate failure to make such disclosure may render the agreement vulnerable to judicial intervention where the result negotiated for is substantially at variance from the objectives of the governing legislation. This duty anchors the ability of separating spouses to genuinely decide for themselves what constitutes an acceptable bargain while also protecting the possibility of finality in agreement.

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[22] [2003] 1 S.C.R. 303
[23] *Ibid* at para 4.
[24] *Ibid* at para 73.

Based on Brandsema's payment to himself, the undervalued properties and Rick's known mental fragility, the trial judge's decision remains supportable by the facts. The fact that professional assistance is available does not neutralize the vulnerability of Rick in this instance. Here, Rick's vulnerabilities were not compensated for and her emotional and mental condition left her unable to make use of the professional assistance available to her.

While the historical remedy for unconscionability is recision, damages in the form of "equitable compensation" are imposed to provide relief to the wronged party. This case demonstrates that the Supreme Court of Canada has a continuing appetite for commenting on family law issues and the categories available to set aside a final separation agreement are not closed unless the emotional, financial and contractual elements are equitably addressed.

Honourable Mentions

A few other cases deserve mention here even though they do not trump the five cases referred to above:

- The Ontario Superior Court's decision in *Leduc v. Roman*[25] addresses a new phenomenon in society in which individuals are waiving their rights to privacy without knowing it.
- The murder of Toronto teenager Stefanie Rengel also captured the public's attention as few in society can believe such a crime could be committed.[26] She was killed by her former boyfriend who was counselled by his new girlfriend that he had to kill her. In a high-profile trial, Melissa Todorovic, who was 15 at the time, was convicted of first degree murder and given an adult sentence – life imprisonment without parole for seven years - for counselling her boyfriend to kill his former girlfriend. In a separate

[25] 2009 CanLII 6838 (ON S.C.)
[26] http://www.cbc.ca/canada/toronto/story/2009/03/20/murder-rengel-trial.html

proceeding, the boyfriend, now identified as David Bagshaw, who was just under 18 at the time, pleaded guilty to murder and also received a life sentence without parole for 10 years.

Private Facebook Profile Discoverable – Leduc v. Roman – **February 20, 2009**[27]

Leduc was involved a car accident in February of 2004. He claimed that the negligent driving of Roman caused the accident and his injuries. Leduc commenced an action against Roman in which he claimed his enjoyment of life has been lessened that there are now limitations on his personal life.

Mr. Leduc provided Roman's lawyers with an unsworn Affidavit of Documents, which . did not refer to his Facebook profile or the contents of his account. The defendant's lawyers, unable to access Leduc's Facebook account due to the security features, brought a motion seeking (1) an order that Mr. Leduc preserve the information contained on Facebook profile; and (2) an order to produce all information on the Facebook profile.

Facebook.com, for those few who don't know (is there still anyone?), is a free-access social networking website which allows individuals to interact with each other. Users can create a profile into which they can enter contact information, personal facts and views, and interests. Facebook also has features which allow users to upload pictures, a "wall" where friends can post messages and "status" where the individual can inform their "friends" of their thoughts, whereabouts and actions.

[27] 2009 CanLII 6838 (ON S.C.)

Master Dash, applying Rule 30 of the Rules of Civil Procedure (Ontario), ordered Leduc to produce the contents of his Facebook profile as the profile is considered to be a "document" within the meaning of the Rules. If Leduc had posted photos or other information depicting his activities and other enjoyment of life, these documents should be listed in his Affidavit of Documents.

Master Dash found the mere existence of a private Facebook profile does not constitute reason to believe it contains relevant information about Mr. Leduc's lifestyle or any matter at issue in the case. He found that because Mr. Leduc had not posted public photos on his Facebook profile and had not given the opposing party photos as part of his productions, the opposing party had insufficient evidence to believe that the private portion of his Facebook profile contained relevant documents.

On Appeal, Brown J. found that Master Dash erred in his decision:

> *Mr. Leduc exercised control over a social networking and information site to which he allowed "friends" access. It is reasonable to infer that his social networking site likely contains some content relevant to the issue of how Mr. Leduc has been able to lead his life since the accident...*
>
> *To permit a party claiming very substantial damages for loss of enjoyment of life to hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposing party of access to material that may be relevant to ensuring a fair trial.*[28]

Justice Brown did not disturb Master Dash's order that Leduc was to preserve his Facebook profile and provide a supplementary affidavit of documents, but ordered that Roman have the right to cross-examine Leduc on his supplementary affidavit of documents to learn what relevant content, if any, was posted on Leduc's Facebook profile.

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[28] *Ibid* at para 35.

This decision serves as a reminder that if a party posts content that is relevant to an issue in an action on Facebook, or any other social networking site (Twitter, MySpace, etc.), the party must identify these documents in its affidavit of documents. Lawyers must also be mindful when advising their clients who are preparing affidavits of documents. As stated by Justice Brown: "*It is now incumbent on a party's counsel to explain to the client, in appropriate cases, that documents posted on a party's Facebook profile may be relevant to allegations made in the pleadings.*"[29]

15 year old tried as adult - R v. Todorovic[30] **– July 17, 2009**

The tragic and bizarre "love triangle" resulting in the murder of 14-year-old Stefanie Rengel and the subsequent murder trial of Melissa Todorovic has both captivated and horrified the residents of Ontario since the details surrounding Stefanie's murder came to light early in 2009. The senseless the crime has shocked many young Canadians into questioning how they can prevent suffering the same ill-fate as Stefanie and wondering whether there is anything that can be done to prevent a similar crime from happening again.

Stefanie Rengel was murdered outside of her home at around 6 pm on January 1, 2008. D.B. has since pleaded guilty[31] to stabbing Stefanie and has stated that he committed the crime because his girlfriend at the time, 15 year-old Melissa Todorovic, had manipulated him into it. On March 20, 2009, a jury found Todorovic guilty of first degree murder on the basis

[29] *Ibid* at para 28.
[30] 2009 CanLII 40313 (ON S.C.)
[31] On September 28, 2009, David Bagshaw, previously only known as D.(B.) was sentenced as an adult to life in prison with no chance of parole for 10 years. Even though Bagshaw admitted to the crime and was deemed by psychologists to be capable of rehabilitation, Justice Nordheimer held "[a]ll of those mitigating factors cannot, however, overcome the nature of David's actions - the planned and deliberate killing of a young girl…Nor can they blind us to the fact that David still poses a threat to the safety of the public…I accept that David was the more reluctant of the two partners to this evil endeavour, but that does not change the fact that he knowingly and actively participated in it".

that she was a party to the murder by having abetted or counselled D.B. to commit this murder. The only question left to be addressed was whether Todorovic was to be sentenced as a youth or as an adult. Justice Nordheimer of the Ontario Superior Court considered 3 factors prior to making his determination. He considered:

1. the seriousness and circumstances of the offence;
2. the age, maturity, background and previous record of the young person; and
3. any other factors that the court considers relevant.

The analysis was based on the principle issue of whether the duration of a youth sentence would have sufficient length to hold Todorovic accountable for her offending behaviour.

Justice Nordheimer found that Todorovic should be sentenced as an adult. Among the various factors that influenced this decision were:

- her lack of remorse for the killing of Stefanie;
- her denial of any responsibility for Stefanie's death;
- her admission to telling D.B. that she wanted Stefanie dead and her continued reaffirmation of this want;
- her obsessive-compulsive tendencies and that she suffers from a borderline personality disorder;
- the inability to determine the continued risk that she could pose to society if free.

Further, Justice Nordheimer found that Todorovic engaged in an unrelenting campaign to cause the death of Stefanie, an individual that she had never met. Todorovic demonized Stefanie as a threat to her relationship with D.B. even though there was no factual foundation to support this belief. Justice Nordheimer rejected the argument that she should be shown lenience as she was not the one who actually killed Stefanie. On this point, Justice

Nordheimer stated: *[t]he puppet master is no less blameworthy than the puppet.*[32] He concluded that Todorovic's young age, her positive family life and her lack of any prior criminal record is outweighed by the above-listed factors and therefore determined that she should be sentenced as an adult.

Conclusion

We hope that the light we have shed on interesting cases will be useful to readers of this paper.

[32] *Supra* Note 29 at para 33.