Lang Michener LLP
Lawyers – Patent & Trade Mark Agents

In Brief

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

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There are a wide variety of topical business and corporate matters discussed in this issue. Proper resignation as a corporate director, good governance of natural resource industries, effective government relations and a comprehensive policy of whistleblower protection are canvassed in full-length articles. Unresolved Aboriginal land claims and their effect on developers and property owners are discussed by Annie Thuan, and Sergio Marchi weighs in on the new frontier for Canada-China relations. There are also articles dealing with practical issues such as special-use leases and the notion of unconscionability in settlements and releases, and a look at the disruption caused by U.S. sub-prime mortgages on Canadian asset-backed commercial paper.

LAW NOTES update a number of cutting-edge issues: Prospectuses are discussed (disclosure issues and the passport system), and there are NOTES on addressing the problems of ending mandatory retirement, the complexity of "purchaser in Canada" rules and trade sanctions against Burma and others. There are also some thoughts on the dangers of eroding solicitor-client privilege and the Supreme Court ruling that shooting another member of one's hunting party is not an indirect use of one's motor vehicle.

In *Life Bites*, two tributes and some lighter material; and in the hard copy, your *Letters and Comments,* and a little bit about us.

Whistleblower Protection and a Comprehensive Policy

Karl Gustafson

With scandals involving law-breaking and corruption in government and business headlining the news in recent years, there has been a growing awareness of the need to protect and, indeed, to encourage "whistleblowers." There are various definitions of "whistleblowing" but, in essence, it is the act of an employee who, with a *bona fide* belief that there is a public interest overriding the interests of the employer, reports or discloses illegal, fraudulent or corrupt activity.

In considering some media reports, one could easily form the view that "whistleblowers" are exposed and vulnerable to retaliation from their employers. However, it would be a very serious mistake for any employer to retaliate against an employee who reports a violation of federal or provincial laws.

Amendments to the *Criminal Code* (Canada), in effect since September 15, 2004, provide broad protection for whistleblowers by making it a criminal offence to retaliate against any employee who reports unlawful conduct on the part of the employer or by directors, officers or other employees of the employer.

Section 425.1(1) of the *Criminal Code* states:

> No employer or person acting on behalf of an employer… shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so, (a) with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, in respect of an offence that the employee believes is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer…

Section 425.1(2) provides that any person who contravenes section (1) is guilty of an indictable offence and liable to imprisonment for a term of up to five years.

It is important to note that the provisions of the *Criminal Code* are very broad. Given the pervasive nature of government regulation of business, it is difficult to imagine any area of inappropriate conduct that would fall outside the scope of section 425.1(2). For example, it protects an employee who reports a breach or potential breach of any federal or provincial legislation or regulation related to the environment, human rights, competition, employment standards, workplace safety or protection of privacy. Similarly, any interaction between an employer and an employee that can be interpreted as having an adverse effect on the employee would be caught by that section.

In those circumstances, and given the potential consequences of any sort of retaliation against a whistleblower, employers need to take exceptional care to avoid even the perception of any adverse treatment of an employee who is or might become a whistleblower. The unfortunate reality is that a substandard or otherwise troublesome employee could create a certain amount of job security for themselves by becoming a whistleblower.

Accordingly, employers would be well advised to create and implement their own internal protections for whistleblowers. To state the obvious, all employers ought to be highly motivated to identify and prevent or correct any potential or actual violation of federal or provincial laws. However, a secondary benefit of adopting and following such a policy will be to lessen the risk that a whistleblower protected by the provisions of the *Criminal Code* will be able to argue that any negative treatment by his or her employer is necessarily done with the intent to compel the employee from reporting unlawful conduct or retaliating. A comprehensive whistleblower policy, one that is actively implemented and is not merely window-dressing, will be a relevant consideration to answer an allegation that the employer's motivation in its subsequent treatment of an employee was motivated by a desire to retaliate.

A comprehensive whistleblower policy will be a relevant consideration to answer an allegation that the employer's motivation in its subsequent treatment of an employee was motivated by a desire to retaliate.

Effective whistleblower policies must have the following characteristics:

- ensure anonymity;
- provide for effective and independent investigation of complaints;
- protect against retaliation of any sort by the employer;
- protect against negative treatment by other employees; and
- demonstrate that the employer is serious in adhering to the policy and is actually encouraging the reporting of unlawful or inappropriate conduct.

In addition, employers should also follow the conventional wisdom of clearly documenting employee reviews, reasons for disciplinary action and all other dealings with employees. However, when dealing with a whistleblower, even greater care and vigilance is required.

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The Importance of Properly Resigning as a Corporate Director: Don't Get Hit on the Way Out

Hartley Lefton

What are the benefits of following the rules? Can they be quantified? For one director, following the rules saved him over $3.3 million. For another, not following the rules cost him tens of thousands of dollars.

Two recent cases demonstrate the importance of directors resigning properly. In each case, the individual argued that he was no a longer a director at the time that the corporation incurred various liabilities. If those individuals were seen as directors, they would have been personally responsible for the liabilities. In one case, the individual was successful in escaping liability; in the other case, he was not. The two situations provide valuable lessons for directors seeking to terminate their directorships.

In the case of *Shier (Re)* (in the Manitoba Court of Appeal), Rodney Shier was a director, Vice-President of Finance and Chief Financial Officer of Bissett Gold Mining Company Limited ("Bissett"), a mining company operating in Manitoba. When the company had difficulty securing financing that would allow continued operation of the mine, the directors decided to cease operations. Shier tendered his written resignation as a director of Bissett to the solicitor for Bissett's corporate parent. A half-hour later, the local mine manager was instructed to shut down the mine, but for safety reasons, the miners were not told until more than five hours later. The resignation letter that was given to the solicitor for Bissett's corporate parent was brought to Bissett's corporate office after the manager was instructed to shut down the mine, but before the miners were told.

In each case, directors faced potentially enormous personal liability in their capacity as directors. While these cases were each decided largely on the basis of particular fact situations and statutes, they raise issues that corporate directors would be well-advised to consider.

Under the law of British Columbia, where Bissett was incorporated, Shier's resignation as a corporate director was only effective when delivered to the registered office of the company. As a result, Shier's resignation only became effective after instructions were given to close down the mine. The implications of these few hours were very serious for Shier. If the employees were laid off before he resigned, he would be personally liable, as a director, for unpaid wages of over $3.3 million.

On the specific facts of this case, which the Manitoba Court of Appeal ruled could not be appealed, Shier was not held liable. However, the court observed that, despite his resignation, Shier may have been liable had he acted as a director after his resignation, and that, where directors continue involvement in a company as directors, they may still be liable under the law. In Shier's case, his post-resignation activities on behalf of the company were clearly in his capacity as an *officer*, and the title under his signature noted him as an officer. In large part, this notation saved him from being liable for unpaid wages.

The case of *Leger* v. *The Queen* (in the Tax Court of Canada) provides some contrast. Gabriel Leger was a shareholder and director of a privately held security company incorporated in New Brunswick. Whereas Shier was an officer of Bissett and knowledgeable about company matters, Leger, due to his busy medical practice, was unable to pay close attention to the company's operations. When the other directors resigned, Leger remained as the sole director, but delegated supervision of the company to his accountant and the company's senior managers. The corporation was dissolved by the government of New Brunswick for failure to file returns, but Leger claimed that he had no knowledge of the dissolution, nor of the company's subsequent revival.

The Minister of Revenue pursued Leger personally for unpaid GST, income tax and source deductions. Leger argued that, as the company had been dissolved years earlier – and beyond the limitations periods in the relevant legislation – he was not liable for the amounts owing since he ceased to be a director of the corporation upon dissolution. Unfortunately for Leger, the legislation provided that where companies are dissolved and subsequently revived, the revival is retroactive so that it is as if the corporation was never dissolved. As a result, Leger was found to have continued as a director during the dissolution period, and continued to be personally liable for various taxes owing. (However, the Tax Court found that since Leger had done "due diligence" in checking the backgrounds of those he tasked to run the company, his tax liability would be decreased.)

In each of these cases, directors faced potentially enormous personal liability in their capacity as directors. One director managed to escape liability and one was unable to do so. While these cases were each decided largely on the basis of particular fact situations and statutes, they raise issues that corporate directors would be well-advised to consider:

- Ensure that they are resigning in accordance with the appropriate law in their jurisdiction;
- Check their directors' and officers' liability insurance policies (if any) for exclusions of coverage, and pay special attention to their actions with respect to these exclusions;
- Keep a paper trail of dates and times that resignation steps are taken, including board meetings attended and presentations made;
- After resigning, refrain from doing anything that is "director-like," such as attending board meetings, or signing documents as a director;
- Where they are resigning due to a disagreement with the direction of the board, have their objections noted either in meeting minutes, or in a letter to all other board directors that is attached to meeting minutes; and
- Consult with a lawyer to ensure that they are protected to the extent possible.

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Asset-Backed Commercial Paper: Canadian Lessons

David Thring

The Canadian market for asset-backed commercial paper ("ABCP") grew dramatically from $10 billion in 1997 to $115 billion in 2007. In that decade, the mix of assets underlying commercial paper changed as well. In 2007, collateralized debt obligations ("CDOs") and residential and commercial mortgage-backed securities together comprised more than 50% of the underlying assets.

In particular, the growth of CDOs has been exponential. A CDO is a stand-alone, special purpose vehicle ("SPV") that invests in a portfolio of assets. CDOs are different from mutual funds where all investors share in the risk and reward of the investments equally. In a CDO, the SPV borrows money by selling different classes of notes to investors, each class having a different risk/reward profile. If any of the assets in the underlying asset pool default, the lowest ranking note class is first to suffer a loss.

There is no limit to what financial architects can do with CDOs. Initially CDOs were structured as cash flow CDOs, because the SPV used the money received from investors to actually buy cash-generating assets, and used the cash to pay back the investors. In recent years, synthetic CDOs have become far more popular than cash flow CDOs. In a synthetic CDO, debt securities in a portfolio of assets are only referenced through credit default swaps ("CDSs"). Each CDS effectively transfers (synthetically) the risk of the portfolio of assets from a third party to the SPV, but not ownership of that portfolio. CDOs comprised of CDSs have risk characteristics relating to leverage, market-to-market, hedging, collateral quality and liquidity which are complex and difficult to mitigate.

The spark which caused this disruption in the Canadian asset-backed commercial paper market was worry about the inclusion of U.S. sub-prime residential mortgages in underlying assets of Canadian ABCPs.

Under applicable securities laws in Canada, ABCP is sold to investors pursuant to a short-term debt exemption from prospectus and registration requirements. The requirements are simply that the ABCP has a maturity date of less than one year from its date of issue, and that it is not convertible into other securities and has an approved credit rating from an approved credit rating organization. The short-term debt exemption was not intended for securities as complex as today's ABCP.

About two-thirds of the issuers of ABCP in Canada are bank-sponsored conduits, and the remaining one-third of Canadian ABCP issuers are non-bank conduits. When troubles developed in 2007 in the Canadian ABCP market, the Office of the Superintendent of Financial Institutions Canada ("OSFI") pointed out that it is not the role of OSFI to use its powers over banks to regulate capital markets. OSFI's role is to protect bank solvency, not to tell Canadian investors what to invest in, nor to tell unregulated sponsors in the ABCP market how to go about their business. But the banks are key players in the ABCP market, both as providers of liquidity and as CDS counterparties, so OSFI does not take a totally "hands off" approach. Furthermore, mono-line insurers who are also CDS counterparties come under OSFI's regulatory reach.

Since August 2007, ABCP issued by non-bank conduits has not traded, and discussions continue to restructure ABCP which has matured but no longer trades. The cost of this restructuring exercise is unknown, but will be substantial. The spark which caused this disruption in the Canadian ABCP market was worry about the inclusion of U.S. sub-prime residential mortgages in

underlying assets of Canadian ABCPs. But the volume, complexity and value of the CDOs in ABCP portfolios is also a significant concern in Canada as well as the U.S. and Europe.

What can be done to make the Canadian ABCP market work more efficiently and protect investors? Here are two suggestions:

There needs to be better disclosure and transparency. CDOs are extremely complex products. People selling and buying ABCP typically do not understand the mix and complexity of the underlying assets. It should be mandatory that issuers of such products provide offering memoranda which contain full, true and plain disclosure about the ABCP securities being offered, their underlying assets and the risk profiles of those assets. Dealers and other distributors of ABCP must be satisfied with and take responsibility for disclosure documents and other marketing materials which incorporate materials provided by issuers of ABCP. There should also be continuous disclosure requirements.

The unfettered use of credit derivatives needs to be studied. Supporters of CDSs argue that they offer greater liquidity and flexibility than underlying cash investments, such as bonds issued by the same referenced credit entity. But since CDSs are synthetic derivatives, physical assets do not form a constraint, and the notional value of CDSs on particular referenced entities is often a substantial multiple of the outstanding debt of that entity. The rating agencies work with the financial architects of these products, and cannot be relied upon as the sole check-and-balance in the CDS markets. OSFI and regulatory bodies in other countries are developing capital adequacy standards to regulate investments by banks and other financial institutions in CDSs. The securities commissions in Canada should also be considering whether legislative limits or safeguards need to be developed to protect investors in ABCP having CDSs in their portfolio investments.

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The Next Frontier for the Canada-China Relationship


Sergio Marchi

Ed.: *On Oct. 13, 1970, Canada was one of the first Western countries to recognize China diplomatically. Accordingly, the friendship and connections between the two countries run deep. Speaking as President of the Canada-China Business Council ("CCBC"), here is an edited version of a small part of an address delivered by Sergio Marchi at a Conference in Ottawa on "The Canadian-China Strategic Challenge: Which Way Ahead" organized by The Canadian Institute of Strategic Studies.*

In 1972, Richard Nixon surprised the world with his visit to China. While Nixon and Henry Kissinger (U.S. Secretary of State) were euphoric with the overall success of their trip, Nixon also noted the following words in his personal diary:

> "Not only we, but all the people of the world, will have to make our very best effort if we are going to match the enormous ability, drive and discipline of the Chinese people."

Almost 35 years later, this observation is particularly true and captures very accurately, the core of the so-called "China Challenge," which is the theme of your conference.

The latest Chinese Five-Year Plan focuses on quality of life issues and we should be asking how we in Canada can leverage our experience and expertise, in an attempt to reach out and assist the Chinese government and its people.

Where Do We Go from Here?

Beyond deepening our existing bilateral ties, where do we go from here? In other words, how can we expand our current rapport and write an even richer next chapter in the Canada-China story?

I'm sure that all of you have your own ideas and priorities. Let me offer you a few of my own, although in this article I shall outline only one.

Helping With the Economic Divide

At this point in its development, China is in some ways a tale of two cities. One consists of China's urban centres, which are creating incredible economic wealth. The other is a somewhat gloomier depiction – namely, the impoverished reality that characterizes the rural countryside of China.

There is a deep and growing economic disparity. And this is one of the leading preoccupations for the Chinese government. It represents a potential source of future instability, and in a county of 1.3 billion people, maintaining stability is a huge priority. The government has therefore placed a political emphasis on building a "harmonious society," a society where all of its people can partake in the economic prosperity.

Accordingly, the latest Chinese Five-Year Plan focuses on the

quality of growth, or as we in Canada would say, quality of life issues. Their plan includes environmental protection standards and enforcement, social safety nets, educational improvements, health care reform and measures to improve conditions for migrant labour.

In regards to this monumental challenge, we should be asking how we in Canada, through both our public and private sectors, can leverage our experience and expertise, in an attempt to reach out and assist the Chinese government and its people?

Work with China in Developing its Corporate Social Responsibility

With the advent of globalization, corporations are increasingly recognizing the importance of being socially responsible. While Corporate Social Responsibility ("CSR") is a relatively new idea, it has become more important in boardrooms across the globe. This is also increasingly the case in China, especially in light of their widening economic gap.

The Chinese government understands that it, alone, cannot meet all the diverse needs of its vast population. And given that the private sector is assuming more and more space, CSR will be an invaluable public-private tool in helping to provide citizens with the quality of life that they desire.

The Chinese government understands that it, alone, cannot meet all the diverse needs of its vast population. And the private sector is assuming more and more space.

CSR, therefore, must be more than just corporate philanthropy. CSR means embracing and balancing economic, social and environmental sustainability. And it imposes a set of values that permeate all aspects of a company's operations and culture.

Given its economic expansion at home and around the world, CSR must inevitably also become a part of China's business vocabulary. However, one of the obvious challenges for China is its sheer scale. China faces unique pressures that stem from having a very large population, diverse regional differences and a rapidly growing and industrializing economy.

The record of foreign investors is mixed. Some firms that have developed CSR programs in their home countries have done limited work in China. The competition in China is fierce and, as a result, some managers have placed low priority on CSR programming in China until they have become more established. There may also be a gap between the rhetoric – what companies are claiming that they have done in China – and reality. Other companies have more elaborate CSR initiatives. And so, at a time when the Chinese government is looking for non-government partners to lead, there is an opportunity for Canadian institutions and companies to distinguish themselves, to be entrepreneurial in CSR, and to engage Chinese society.

Again, Canada can share its story in this corporate domain. Not in a lecturing mode. But rather, to have CIDA, our Canadian legal and accounting firms, our stock exchanges and securities commissions, and other public and private entities, share our experiences and best practices, and to help determine how these can be adapted to best fit the Chinese reality.

Through this kind of involvement, I am confident that more and more corporate boardrooms in China and Canada would view a policy of CSR as meaning good business, good earnings, and a good reputation. In other words, that the cost of CSR is a price worth paying.

And, in the living rooms of our nations, one would hope that citizens would regard this as a new level of corporate leadership – one that is more engaged with the community around it, more responsible and accountable to society's needs, and a more effective response to the national and global realities of the day.

Assertive Multi-lateral Partnership

I believe we should go beyond just building a healthy bilateral relationship with China. Let us also contemplate how our two countries can pursue a multilateral agenda that serves our mutual interests and those of the international community.

For example, if we were to apply such an approach, what could this possibly mean for our joint actions at the World Trade Organization? Or at the United Nations? Or in APEC? Could our joint efforts help bridge the divide that exists between developing and developed nations?

I am of the belief that, in areas of shared views and complementarities, China and Canada can find common ground and jointly pursue common goals, and help to strengthen the international consensus around some of the current generational issues facing our globe.

Besides, the timing is right. China has taken up the challenge of participating more actively in the global economic and political system. An accelerated timetable of World Trade Organization accession, for instance, which imposed significant hardships for Chinese domestic firms, demonstrated just how determined China was to become a full global player.

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Aboriginal Land Claims: A Primer on the Elephant in the Room

Annie M. Thuan

Recent events such as those in Caledonia, Ontario demonstrate the devastating effect that unresolved Aboriginal land claims can have on property owners, vendors, purchasers and developers.

Property owners who unknowingly purchase lands that are subject to an Aboriginal land claim may later find that their property value has suddenly decreased significantly. Developers may find themselves in similar situations with their proposed development subject to enormous delays and additional costs as a result of opposition by Aboriginal groups claiming title to that land.

What is an Aboriginal Land Claim?

A land claim is a formal assertion by an Aboriginal community that it has legal entitlements over a tract of land. Aboriginal land claims generally fall into two categories:

1) comprehensive land claims, which are based on Aboriginal title, and

2) specific land claims, which generally include allegations of non-fulfillment of terms under a treaty or improper dealing with reserves as regulated by the *Indian Act*.

Property owners who unknowingly purchase lands that are subject to an Aboriginal land claim may later find that their property value has suddenly decreased significantly.

In short, comprehensive land claims are claims made by First Nations who have not entered into a treaty with the Crown and are based on the assertion of continuing Aboriginal title to the lands in question. Aboriginal title arises by virtue of the Aboriginal people's prior occupation of the lands which were never extinguished or surrendered to the Crown by treaty. Prior to modern times, the treaty process across provincial regions in Canada was inconsistent. For example, while most of the land area of Ontario is subject to historical treaties, only a small portion of the land area of British Columbia is. Therefore, Ontario has far fewer comprehensive land claims than British Columbia.

Now, a further word or two about specific land claims. Many historical treaties provide that Aboriginal peoples give up their title to the land in exchange for reserves, small annual payments, and the right to hunt and fish off the reserve in certain circumstances. Specific land claims include claims by First Nations of non-fulfillment of terms under a treaty, the improper administration of lands by the government, that tracts of lands were illegally taken away from reserves, that lands have been illegally occupied or that reserves were not surveyed correctly. Treaty land entitlement ("TLE") claims refer to lands that the Crown failed to provide to First Nations under the terms of a treaty. According to Indian and Northern Affairs Canada, a total of 277 land claims have been filed in Ontario and 522 have been filed in British Columbia against the federal government.

These claims relate to allegations that the federal government failed to provide lands as required by treaty, took reserve lands without a proper surrender, failed to live up to the terms of a reserve land surrender, failed to protect reserve lands in violation of the Crown's fiduciary duty, or mismanaged First Nation trust funds. There are also claims that certain lands were never given up by treaty; that is, that the First Nation still has Aboriginal title to the lands.

Coping with Outstanding Aboriginal Land Claims

Unless the Aboriginal title or treaty right was extinguished prior to 1982 or surrendered or otherwise given up by treaty, such Aboriginal land claims continue to be a burden on the Crown's underlying title and, in some cases, may even bring into question the validity of the Crown patent.

This was the case in *Chippewas of Sarnia Band* v. *Canada (Attorney General),* which involved an action for the recovery of private lands over a large area within the City of Sarnia, which was formerly part of the Chippewas' reserve.

Fortunately for the innocent landowners, the Court found that the Aboriginal title and treaty rights in the disputed lands were extinguished by the application of a modified defence of *bona fide* purchaser for value without notice. The Court considered the Chippewas' 150-year delay in asserting their claim and the reliance of innocent third parties on the apparent validity of the patents. This modified doctrine of *bona fide* purchaser for value without notice was based on balancing the interests of innocent landowners with that of an innocent First Nation, where the First Nation interest could be satisfied by receiving damages from the Crown for a breach of fiduciary duty.

Discovering Outstanding Land Claims

This raises the question of the scope of the title search that would be necessary to preserve the modified defence of *bona fide* purchaser for value without notice. The issue is further complicated by the fact that there is currently no adequate mechanism for searching whether a property is subject to a land claim. The courts have indicated that notice of an Aboriginal land claim is not an interest that is capable of being registered on the Land Registry in either British Columbia or Ontario pursuant to the applicable *Land Titles Act*. The federal and

provincial governments have websites that contain information on the various outstanding land claims alleged by First Nations. These sites, however, are by no means kept current daily nor are they guaranteed to be comprehensive. This area of law is still developing.

Is Title Insurance a Viable Option?

Currently, many standard title insurance policies contain specific exclusions with respect to Aboriginal title claims. Given the risks involved, it would be unlikely that title insurers would be willing to provide coverage for risks related to Aboriginal land claims. There are situations where title insurers may be willing to provide some limited coverage, such as when the First Nation is not seeking a return of the lands but only compensation, and the negotiations with the government are close to settlement.

Some Final Thoughts

Aboriginal land claims continue to be an active issue for the real estate industry, particularly as development spreads beyond the well-established urban centres of the country, where opportunities for development are increasingly scarce. Regrettably, Aboriginal land claims, whether in the form of Aboriginal title or treaty lands, if left to be resolved between the government and the First Nations on their own, will continue to infuse uncertainty and unpredictability into real estate transactions.

Ed.: *This is an abridged version of a longer paper which was prepared for a presentation delivered by Annie Thuan at the Law Society of Upper Canada, Six Minute Real Estate Lawyer Program in November 2007.*

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Unconscionability and the Finality of Settlements and Releases

Aaron Rousseau

When an employer dismisses an employee on an indefinite contract with no termination provision, it is standard practice to offer a severance package that goes beyond the statutory minimum, and require the employee to sign a release in exchange. Where the employee takes the deal and signs the release, but later brings an action for wrongful dismissal, the enforceability of the release is a key issue.

In *Titus* v. *William F. Cooke Enterprises Inc.*, the employer appeared to do everything right, but at trial, the release was nonetheless set aside. The trial judge took an unexpected step and turned to the principles in *Wallace* v. *United Grain Growers* to evaluate the release. The trial judge held that the release was unfair and represented an exercise of power by an employer in a secure position over an employee in a very insecure one. The court concluded that the release represented a breach of good faith and set it aside. The Ontario Court of Appeal disagreed with the trial judge's reading of *Wallace*, holding that the judge had failed to recognize the distinction in *Wallace* between a substantive tort of bad faith discharge, which was rejected, and enhanced damages for bad faith conduct by the employer in the manner of dismissal, which were accepted. And so, the Court of Appeal proceeded to assess the release under the traditional considerations of "unconscionability."

The plaintiff, Douglas Titus, was a very experienced in-house corporate counsel with extensive exposure to contract and employment law. He had 18 months' service with the employer. When the employer terminated him as part of a broader downsizing, Titus was offered a separation package of three-months' salary, with a requirement to execute a release of all claims against the employer. The employer indicated that Titus would be paid his termination pay entitlement under the *Employment Standards Act* whether or not he accepted the separation package. The employer gave Titus a week to decide whether or not to accept the package, and encouraged him to take it home over the weekend. Titus declined to wait, and signed the release on the spot.

To analyze the release, the Court of Appeal relied on the Alberta Court of Appeal decision in *Cain* v. *Clarica Life Insurance Co.*, requiring four elements for unconscionability:

1. a grossly unfair and improvident transaction;
2. the victim's lack of independent legal advice or other suitable advice;
3. an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility or similar disability; and
4. the other party knowingly taking advantage of this vulnerability.

Gross Unfairness

Although the reasonable notice period was determined at trial to be 10 months, the Court of Appeal concluded that the offer of three months in the separation package was not grossly unfair. The

Court pointed out that accepting the offer would give a number of advantages to the employee: he would receive the money immediately; he could seek new employment without setting off that income against his damages; and he would avoid the delay, costs and uncertainty of litigation. The Court also noted that the employer sought legal advice in preparing its offer.

The Court suggested that a threat to withhold a letter of reference could provide support for an employee's claim that a release was unconscionable. On the facts before it though, the Court held that the issue was insignificant to the employee and he never requested such a letter.

Advice

The Court held that there was no lack of advice, as the employee was a senior lawyer with extensive experience in contract and employment law. In other words, Titus only had himself to blame when it came to the effect of the release.

Vulnerability

The Court acknowledged the presence of certain factors pointing to Titus's vulnerability, including the fact of the dismissal, the recent death of his father, and his high personal debt load. At the same time, the Court showed little sympathy for Titus's financial difficulties, noting his high salary and the fact he placed most of the severance money in his RRSP account. More significantly, the Court concluded that because Titus was a senior lawyer and knew his options, his vulnerability was diminished.

Taking Advantage of Vulnerability

The Court found nothing problematic in the employer's conduct. The Court highlighted that the employer sought legal advice about an appropriate severance package, prepared a reasonable package, presented the package in private, in a polite and professional manner, and strongly advised Titus to take time to consider the offer.

Having reviewed the factors, the Court concluded that there was no unconscionability and the release was valid and enforceable.

Some Final Remarks

The Court of Appeal's decision is significant because it reverses the trial judge's attempt to import the bad faith analysis of *Wallace* into the evaluation of releases. The case reaffirms the role of unconscionability as the appropriate measure for a release.

The case also serves as a reminder that employees who know their options (because they have access to proper legal advice) and have time to consider their options, have their eyes wide open. Employees who accept severance offers and sign releases when aware of the consequences will likely have a very difficult time escaping that choice at a later date.

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Six Principles of Effective Government Relations


Keith Cameron

Let me begin with a short passage from *The Art of War* by Sun Tzu: "Those who do not know the plans of competitors cannot prepare alliances. Those who do not know the lie of the land cannot manoeuvre their forces. Those who do not have local guides cannot take advantage of the ground."

Much of those keen observations also apply to the field of government relations ("GR"). That is, the political and bureaucratic landscape is, by its very nature, meandering and disorganized. The task of a GR professional is to help negotiate and advocate throughout this terrain while leveraging relationships for the benefit of his/her client. In so doing, these six basic principles will help create effective lobbying and avoid pitfalls:

1. Registration

Accountability is a sign of the times. It is a means to recognize that lobbying is a legitimate democratic activity and that the public ought to know who is attempting to influence public officials. Before an elected official will even schedule a meeting to hear your point of view, s/he will very likely consult the Lobbyist Registry. Therefore, be sure you are duly registered. If you are paid to communicate with a federal public office holder, then you must register pursuant to the *Lobbyists Registration Act*.

2. PPP: Patience, Perseverance and Professionalism

Getting a commitment is the ultimate goal in any lobbying effort. As such, it is integral to recognize that this takes time. In effect, lobbying is like mining with hammers: both the lobbyist and client must remain patient and persevere to obtain success. If a decision maker is pushed too early and too hard it may destroy hopes of cooperation with that decision maker in the future.

If success is not obtainable on a particular matter, remain professional. Never burn bridges; never patronize and never threaten. You never know when you may have to knock on that same door again. A particular decision maker may be of assistance to you on another matter in the future or with respect to another client's interests.

3. Keep It Simple

Your advocacy documents should not be complex. Although public officials may have time to analyse detailed reports, elected officials want messages to be as short and simple as possible. Politicians do not have time to review lengthy documents in great detail. They want a general overview and are looking for a document that is full of substance, yet brief. Moreover, provide the Government with flexible, alternative means of obtaining your objective. The more rigid your objective, the less chance of success you will have.

Be forthright and candid. Do not overstate your case, as this goes to the heart of your credibility, now and in the future. As a U.S. Governor once told me, "You only get one chance to mislead me." Therefore, make sure you never use it! Work from objective data and prepare appropriately. Know your opposition's view point and be prepared to fairly represent it whilst advocating your point of view. Honesty and integrity cannot be overstated.

4. GR Is Essentially Soft Advocacy

In a pluralistic society such as ours, the exercise of power often shifts with the changing social and cultural dynamics. Such shifts depend on the issues of the day and how different segments of society mobilize and utilize their resources. Elected and public officials very often have only a limited knowledge of the industry for which they create policy. GR affects the form and content of such policy by facilitating two-way dialogue with different levels of government.

GR is not the sale of relationships. Shared ideology only really matters on the macro issues. Decision makers have personal contacts from various sides of issues. A phone call rarely, if ever, rectifies an issue with the government.

5. Never Underestimate the Influence of Political Staff and the Bureaucracy

Delay, diversion and redirection are all techniques used by politicians and bureaucrats to avoid commitment. Just as GR professionals have techniques for dealing with decision makers, so does the government. Beware of passing the buck. Politicians can blame the bureaucrats and bureaucrats can blame the politicians for the lack of advancement of a file. Remember the PPP principle.

6. Politics Truly Does Make Strange Bedfellows

There are no lasting friendships, only allies for the moment. Do not turn your back easily on making what would otherwise be viewed as a strange alliance. For example, the Marijuana Party of Canada should have been rather pleased to read a 2004 Fraser Institute report that advocated the legalization of marijuana, a measure that could likely add $2 billion to government revenue and lower levels of crime. To be sure, when trying to influence policy, one can never have too many "friends" advocating on one's behalf.

Some Final Thoughts

A pluralistic society compels proactive participation in the political process to effect change or even to maintain the course. Failure to act will likely lead to an imbalance in power and benefits derived by the government. If one interest group in society does not exercise its rights and privileges, then another group fills the void and attempts to influence the government's agenda. This does not necessarily mean that a group needs to fight every battle waged on Parliament Hill; however, if its forces (GR professionals) are not already on the ground maintaining lines of communication and goodwill, then others are more likely to be in a stronger position to effectively influence power. In other words, if you want to have your issues heard and acted upon by public officials, then you need to be politically active. Arm-chair quarterbacks are never heard out on the grid-iron.

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A New Governance Standard for the World's Natural Resources Industry

Ed.: *Hearings on this topic were recently held in the U.S. Congress.*


Sunny Pal

That natural resources create national wealth sounds like a reasonably obvious statement, but that may not always be the case. To hold true, there has to be present a human element, and that human element is called *good governance*. A paradox in some countries has been that mineral wealth has left its people poor and its societies in turmoil.

Clearly, natural wealth of itself is not the problem. It is the human intervention in the extraction and development of those natural resources – in the absence of *good governance* – that may create unrest and perpetuate poverty. Unfortunately, natural resources and good governance do not always go hand-in-hand.

A New Milestone on the Road to Change

Since this resource paradox results from human intervention, its elimination must come through human effort, and that is the *raison d'être* for the new international body called the Extractive Industries Transparency Institute ("EITI"), which formally opened its office in Oslo, Norway in the fall of 2007.

EITI has been in the making since 2003, when that initiative was launched by Tony Blair, the then British Prime Minister. EITI's sole objective is to ensure that a country's natural resource revenues end up in economic development and poverty reduction in the country itself, and not in private bank accounts. In other words, EITI encourages natural resources and good governance to coexist, where previously they have not.

The Objective: Transparency

The first and basic step towards achieving such good governance in natural resource exploitation is transparency. And transparency begins with disclosure of payments made and of revenues generated. What the EITI seeks to achieve is greater disclosure and openness in these matters.

But there may be a reluctance and hesitancy to enter into a regime of public disclosure of payments and revenues. There are many practical and pragmatic reasons for this. First and obviously, the disclosure regime must be agreed to by both the "payer" (the resource-seeker) and the "payee" (the resource-owner). Secondly, there could be fear that the introduction of the new disclosure regime may lead to questions about past behaviour, to which both parties have to be prepared to respond. Thirdly, demands for restitution of past wealth may arise. Next, the "payer" may well become exposed to legal risk in its home jurisdiction, particularly if it is based in a country which is bound by the anti-bribery convention of the Organization for Economic Co-operation and Development ("OECD"). Then, for a natural resource company operating in several jurisdictions, there could be a dilemma in introducing the disclosure system with regard to its operations in one jurisdiction (where the host government, the "payee," is EITI-friendly), but not with regard to its operations in other countries (where the host government is not). Last but not least is the political risk of a future change-of-heart by the host nation – a new government (elected or otherwise) may choose to withdraw from the EITI disclosure regime.

The G8 countries (of which Canada is one), Australia, Netherlands and Norway are providing EITI with financial and other support. More than 20 countries have agreed to implement the EITI's "Principles and Criteria."

Actual Progress

EITI is now an established fact. Mineral-development companies and related associations are indeed taking note and are discussing implementation of the new disclosure regime. EITI's progress has been slow, but its message is being heard and implemented. *Festina lente* – make haste, slowly – seems to be an apt description.

Being a purely voluntary organization, EITI does not have the power of an international treaty or convention. Its role does not go beyond providing incentive and, of course, guidance and direction. EITI's real power is through peer pressure, and what may be described as "public exposure" of the non-conforming governments and companies.

Wide and Influential Support

The G8 countries (of which Canada is one), Australia, Netherlands and Norway are providing EITI with financial and other support. More than 20 countries have agreed to implement the EITI's "Principles and Criteria" and, of those countries, many have actually started implementation.

Several major multinational companies in the resources business (to name a few: Alcoa, Anglo American, Barrick, BHP Billiton, BP, CVRD, DeBeers, Exxon, Norsk Hydro, Rio Tinto, Shell, Talisman, Total, Teck Cominco and Xstrata) are actively supporting EITI objectives.

Some of the largest international institutions (such as the World Bank, the International Monetary Fund, the OECD and the European Bank of Reconstruction and Development) are also working with EITI.

Canada's Contributions

In February 2007, Canada joined the EITI-supporting countries when Ottawa announced a $750,000 initial contribution to EITI and a further $100,000 in annual funding. In a public statement, Ottawa said that Canada supports "accountability, transparency, fairness … designed to increase the disclosure of resource revenues in developing countries … [to ensure] that citizens, not just governments or foreign companies, share in their nation's prosperity."

Canadian companies engaged in the natural resources business abroad are, obviously, taking notice of the EITI movement, particularly where the host government itself has turned EITI-friendly.

Good governance in the same sector domestically in Canada has not been an issue, but globalization may well require Canadian companies to adopt the new disclosure regime with regard to their domestic operations, particularly if their foreign operations are made subject to disclosure.

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Avoiding Heartburn: Restaurant Leases


Celia Hitch

Ed.: *This is an edited version of the second of three articles on restaurant leases that appeared, in series, in our* Real Estate Brief. *They were prepared by Celia following her addresses at a two-day conference in New York City which focused strictly on restaurant issues and leases. The last of these articles deals with noise and nuisance, odours, valet and other parking issues.*

While there is obviously some commonality among different commercial leases, restaurants often have specific issues that arise from their use which are not encountered in a standard retail tenant negotiation. One of the most fundamental differences between a restaurant and a clothing store is hours of business. Few of us expect to buy clothes much past 9 o'clock at night, but most of us expect sit-down restaurants to still be open at that time. Similarly, we may shop for clothes at 10 o'clock in the morning, but we rarely patronize licensed sit-down restaurants in shopping centres before lunch time. Indeed, both food court and sit-down restaurant tenants will likely want to be able to operate independent of the general operating hours for the shopping centre.

Although much of a restaurant lease negotiation will resemble any other retail lease negotiation, there are specific issues that are solely related to restaurants.

Use

The restaurant's proposed use itself will also need to be considered in the context both of existing and prospective uses in the centre. A restaurant tenant will likely not be prepared to be tied to a sample menu appended to the lease for its entire lease term but, on the other hand, the landlord will want some certainty that the restaurant will be compatible with, rather than competitive with, existing and prospective users. A use clause, for instance, of "foods derived from various Mediterranean cuisines," although potentially appealing to the demographics the landlord wants to reach, may cross over the themes of several other food sellers in the property including, for example, an Italian restaurant and a Greek restaurant. Even in the absence of any exclusive covenants protecting those uses, a prudent landlord will want to ensure that a new tenant is not cannibalizing the sales of an existing tenant.

Other Tenants' Expectations

As with many retail uses which fall outside of the standard "store" type use, there may be controls in place which prohibit a landlord from proceeding with the deal. A food anchor, for instance, may prohibit a sit-down restaurant within 300 feet of its entrance. Many anchor tenants prohibit "arcade" type uses, whether or not they sell food as well, so there needs to be clarity as to whether or not four or five pinball or arcade-type machines within a restaurant will cause a problem for the landlord. Similarly, some anchor tenant leases prohibit "nightclubs and discotheques." This wording may have had a clear meaning in the 1970s but is often difficult to interpret in the context of a 21st century shopping centre.

Some in-line retailers may also require that the landlord not lease to food uses on either side of their space. This is uncommon, but not unheard of, with the more expensive ladies' wear stores as they do not want their merchandise ruined by careless hands holding ice cream cones, cups of coffee or other food items.

Liquor Licences

Although food court and coffee outlets generally do not need a liquor licence, almost all sit-down restaurants will want to serve some sort of alcoholic beverages. Obtaining a liquor licence generally involves a sufficiently complex process that the time between signing the lease and opening the business may be longer than that for most retail uses, partly because of the delays involved in obtaining the licence. For landlords, there should be a clear understanding that the tenant will apply for a liquor licence as soon as possible and pursue its application diligently to completion. Although some tenants will "pre-open" while waiting for their licence, for a roadhouse type of tenant, for instance, opening makes little sense without a liquor licence. Although it is self-evident, the use clause should provide that the tenant will only sell liquor if it is properly licensed to do so.

Patios

Here in Canada, where winter can seem endless, patios are treasured additions to restaurants, as the first sunny day of spring will usually find the patios packed full – even if everyone has to wear a sweater!

There are certain complexities to adding patio space into the tenant's use which need to be considered up front. Is the tenant to pay rent on the patio space? Often, a landlord will not want to charge rent because the patio is an exclusive-use common area for five months of the year but, for the other seven months of the year, the landlord wants it to revert to common area so that there is no shortfall for that period. A landlord will, however, expect to see the sales from the patio included in the tenant's Gross Revenue for Percentage Rent purposes.

Some Final Thoughts

Although much of a restaurant lease negotiation will resemble any other retail lease negotiation, there are specific issues, such as patios and liquor licences, that are solely related to restaurants. In approaching a restaurant lease negotiation, it is important to understand these issues so that the parties can create the solutions which are best for them in the lease document.

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LAW NOTES

Privilege; Mandatory Retirement; Prospectuses; Sanctions; Purchaser in Canada Rules, and Too Remote


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Peter E. J. Wells


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Cyndee Todgham Cherniak


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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 Solicitor-Client Privilege: Down the Slippery Slope?

When a client communicates with legal counsel, he or she expects and relies upon the confidential nature of those communications. A client's ability to speak frankly and honestly with his or her legal counsel, without fear of self-incrimination, for the purpose of obtaining professional legal advice, forms the very foundation of our solicitor-client relationship and is a critical factor in ensuring access to justice. The court protects these communications from disclosure under the rubric of solicitor-client privilege, if the communications meet three criteria: (1) It was between a client and his or her legal counsel, who must be acting in a professional capacity as a lawyer; (2) It was given in the context of obtaining legal advice; and (3) It was intended to be confidential.

There are, however, several strictly delineated exceptions to the protection afforded by solicitor-client privilege. Communications made in furtherance of unlawful conduct, for example, are not protected and must therefore be disclosed by legal counsel. The courts have typically defined unlawful conduct as meaning crimes or acts of fraud. The question, however, is whether this definition of unlawful conduct can be extended to include tortious conduct such as, for example, intentional or negligent infliction of emotional harm.

In *Dublin* v. *Montessori Jewish Day School of Toronto,* Justice Perell concluded that solicitor-client communications that *may* have been in furtherance of *tortious conduct* are not protected by solicitor-client privilege. According to Justice Perell, there is a line of authorities that can be used to expand the definition of unlawful conduct to include torts, if the client *knew or should have known* that the communications in question were with respect to the conduct of a tort.

Since the release of Justice Perell's decision, permission to appeal has been granted. In fact, in a brief endorsement, The Honourable Justice Carnwath has brought into question Justice Perell's decision, stating that: "[T]here is good reason to doubt the correctness of Perell J.'s decision. Given the sanctity of solicitor-client privilege, the expansion of the exception for furtherance of crime to tortious acts of the kind alleged in this Statement of Claim, may go too far."

—**Joseph D'Angelo**, Lang Michener LLP (Toronto)
—**Benjamin Bathgate**, Lang Michener LLP (Toronto)

Ed.: *This Note was extracted and edited from an article that appeared in* Commercial Litigation Brief Winter 2007/2008. *To subscribe to this publication, please go to langmichener.ca and visit our Publications Request page.*

2 Mandatory Retirement Ends: Problems Begin?

British Columbia now falls into step with most other Canadian provinces, including Ontario, by ending mandatory retirement.

The elimination of mandatory retirement in British Columbia has been achieved through a change in the definition of "age" under the *Human Rights Code* (British Columbia) ("Code"). Although "age" is presently a prohibited ground of discrimination under the Code, legal protection is provided only to employees between 19 and 65 years of age. The amendments to the Code extend protection to employees who are age 65 years or older.

As a result, employers in British Columbia will no longer be able to rely on corporate policies, collective agreement provisions, or individual contract terms that may require retirement at age 65.

Although employees will gain the right to remain employed beyond the age of 65 years should they choose to do so, it is important for employers to understand that they will still be able to rely upon age-based distinctions which may be contained in *bona fide* retirement, superannuation or pension plans, or *bona fide* group or employee insurance plans. For example, many if not most long-term disability plans do not provide coverage or benefits beyond 65 years of age. Similarly, many pension plans provide that employee contributions must cease and benefits must commence at a specified age.

One question that some employers are asking is whether the change in the *Human Rights Code* will provide for any exceptions which could permit employers to institute a blanket mandatory retirement at a particular age, depending on the nature of the business. Although it is possible in certain safety-sensitive industries, in the vast majority of circumstances, employers will be obliged to make individual assessments about the mental and physical capacities of employees in determining whether or not they are able to continue to work in a safe and productive manner.

For many employers, the change in the law may not be a matter of concern, especially in a buoyant economy where there are more jobs than there are available employees. Many employers recognize that older workers have the experience and skills which make them a valuable addition to the workforce. However, in other cases, employers may be concerned about how the change in the law may affect the ability to address such circumstances where the performance levels or capabilities, or sometimes enthusiasm for the job, has begun to diminish. Indeed, employers may want to consider developing attractive voluntary retirement packages which will hopefully avoid the necessity of dealing with employees who may have simply decided to remain working for too long.

—**David McInnes**, Lang Michener LLP (Vancouver)

3 Prospectuses: Disclosure and Cost Lessons – Another Look at *Danier*

Almost ten years ago, Danier Leather Inc. ("Danier") issued a prospectus in connection with its initial public offering ("IPO"). The prospectus contained a forecast of anticipated revenues and earnings for the fiscal quarter ending June 27, 1998 and the usual warning that actual results could vary significantly from the forecast.

After the final prospectus was filed on May 6, 1998, but before the IPO closed on May 20, a Danier internal report (reviewed by management on May 16) showed that the intraquarter sales were lagging behind the forecast. The prime suspect was unusually warm weather across most of Canada. Despite the challenge, management concluded that it could still meet projections by the end of the quarter. Danier did not disclose this internal report before the IPO closing. On June 4, approximately two weeks after the closing, Danier issued a news release revising its forecast downward. This precipitated a sharp decline in the share price. By the end of the fourth quarter, sales had recovered and Danier substantially achieved its original forecast.

A class action was launched against Danier and its senior officers alleging that, because of the internal report showing the lagging sales, the forecast in the prospectus should have been updated. Since it was not, it therefore contained a misrepresentation at the time of the closing. Over the next several years the case went to trial, was appealed to the Ontario Court of Appeal and appealed again to the Supreme Court of Canada.

The Supreme Court of Canada decision was released in the fall of 2007 and turned down the heat under Danier and its senior officers, and significantly turned it up under the representative plaintiffs in this class action law suit. It upheld the Ontario Court of Appeal decision that Danier and its officers were not liable for misrepresentation and awarded costs to Danier and its officers (a departure from what some thought was to be expected in class actions).

The Supreme Court also expressed the view that when a material change, as defined in securities legislation, occurs it must be disclosed. Although delivered in a case involving prospectus disclosure, the Court's comments on this point will undoubtedly impact questions relating to issuers' continuous and timely disclosure obligations as well.

—**Charlotte A. Morganti**, Lang Michener (LLP) Vancouver

—**Peter E. J. Wells**, Lang Michener (LLP) Toronto

4 Prospectuses: The Passport System

The Canadian Securities Administrators ("CSA") expect to implement the "Passport System" for prospectus review this spring. The good news is that the Passport System will likely feel to users much like the current Mutual Reliance Review System ("MRRS"), albeit slightly improved. The bad news is that for prospectus filings, fees will still have to be paid in all the jurisdictions where securities will be offered. Documents and fees will be filed in all the offering jurisdictions and with the principal regulator as before. In general, the principal regulator will issue one final receipt for all jurisdictions included in the offering.

The Passport System should eliminate or reduce the delays that occasionally occur under our present MRRS due to the involvement of securities regulators in all the jurisdictions included in the offering. Currently all jurisdictions must sign off.

Under the Passport System, at most two regulators will be involved in reviewing routine prospectus filings, and at most two final receipts will be issued. (However, if there is a novel issue, the principal regulator may decide to consult with other jurisdictions.) The usual review timeframes may be extended for complex or novel issues. Whether or not costs will decrease will likely depend on whether the various jurisdictions decrease prospectus filing fees.

—**Susan Goscoe**, Lang Michener LLP (Toronto)

5 Update on Canada's Sanctions Against Burma and Others

As of December 13, 2007 Canada's economic sanctions against Burma are in force. In short, the *Special Economic Measures Act (Burma) Regulations* impose several economic sanctions, including:

- a ban on all goods exported from Canada to Burma, excepting only humanitarian goods;
- a ban on all goods imported from Burma into Canada;
- a freeze on assets in Canada of any designated Burmese nationals connected with the Burmese State;
- a prohibition on the provision of Canadian financial services to and from Burma;
- a prohibition on the export of any technical data to Burma;
- a ban on new investment in Burma by Canadian persons and companies;
- a prohibition on Canadian registered ships or aircraft from docking or landing in Burma; and
- a prohibition on Burmese registered ships or aircraft from docking or landing in Canada or passing through Canada.

Canada has economic sanctions in place against countries other than Burma, but the Burmese sanctions are some of the most severe. Canada imposes some form of economic sanction against the following countries and non-countries: Belarus, North Korea, the Democratic Republic of the Congo, Iran, Iraq, Lebanon, Liberia, Rwanda, Sierra Leone, Sudan and terrorists.

Certainly, anyone exporting to those countries should consult with a Canadian trade lawyer.

—**Cyndee Todgham Cherniak**, Lang Michener, LLP (Toronto)

Ed.: *The article on which this brief edited Note is based first appeared on Canada Law Blog and on the tradelawyersblog.com posted by Cyndee Todgham Cherniak.*

6 Purchaser in Canada Rules Are Complex When Selling to Mass Retailers

The thorny issue of whether one is a "purchaser in Canada" for the purpose of customs valuation was recently considered by the Federal Court of Appeal.

In *Cherry Stix Ltd.* v. *The President of the Canada Border Services Agency* ("CBSA"), the Court was satisfied that the Canadian International Trade Tribunal ("CITT") had correctly determined that Cherry Stix Ltd. ("Cherry Stix") was not a purchaser in Canada.

The issue for the CITT was the timing of the purchase by Cherry Stix in order to determine if Cherry Stix had an agreement to sell the goods to a resident of Canada prior to importation. The CITT determined that pursuant to an agreement with Wal-Mart, Cherry Stix had an agreement to sell the goods to a resident prior to importation. In making this determination, the CITT considered the *United Nations Convention on Contracts* and the *Sale of Goods Act* (Canada).

As a result, the value for customs duty purposes was the price charged by Cherry Stix to Wal-Mart rather than the price charged by the overseas supplier to Cherry Stix.

Clearly, the phrasing and terms of a contract are very important. Those with concerns about the application of Canada's purchaser in Canada rules to existing or proposed contracts should consult a Canadian customs lawyer. Indeed, the purchaser in Canada rules are complex and are evolving and some of the important guiding information is not in the public domain.

—**Cyndee Todgham Cherniak**, Lang Michener, LLP (Toronto)

Ed.: *The article on which this brief edited Note is based appeared as a blog entry on the tradelawyersblog.com posted by Cyndee Todgham Cherniak. The article then appeared in* International Trade Brief Winter 2007/2008. *To subscribe to this publication, go to langmichener.ca and please visit our Publications Request page.*

7 Too Remote: Insurance and the Indirect Use of a Motor Vehicle

In *Lumbermens Mutual Casualty Co.* v. *Herbison*, the Supreme Court of Canada had to consider whether the Ontario Court of Appeal was correct in its view that an insurer was liable under the Ontario *Insurance Act* when an insured motorist, who thought he was shooting at deer, shot another member of his hunting party. Justice Binnie delivered the unanimous view of the Supreme Court, agreeing with the dissent of the Ontario Court of Appeal, "that not every 'circumstance or activity associated with the use or operation of a motor vehicle will … engage s. 239(1) of the Act and the corresponding coverage condition of a motor vehicle liability insurance policy,' and that the negligent shooting 'was an act independent of the ownership, use or operation of the hunter's truck.'"

Remembering; Anniversary/Retrospective; Sound Predictions

Ed.: *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 Remembering

The Right Honourable **Antonio Lamer** passed away in November of last year at the age of 74. He was Chief Justice of the Supreme Court of Canada from 1990 to 2000 and joined the Court in 1980, two years before the *Charter of Rights and Freedoms* was enacted. Speaking at his funeral service, the current Chef Justice, Beverley McLachlin, said: "Antonio Lamer was an eminent jurist and a fierce defender of the independence of the judiciary. His decisions left an indelible mark on both the law and Canadian Society." Interviewed on CBC, his friend and former Executive Legal Officer, Eugene Meehan, Q.C. said Lamer "in Court was principled, practical and pugnacious." When asked what we have lost, Eugene replied: "A bright shining star in Canada's legal universe has fallen to earth with dignity, with grace, with poise."

Between 1969 and 1973, the Commission of Inquiry into the Non-medical Use of Drugs carried out an extensive study of recreational drug use in Canada. The Commission held 46 days of public hearings and heard from some 12,000 Canadians. The Chair of that Commission was **Gerald Eric Le Dain** who passed away in December of last year at the age of 83. That Commission, commonly referred to as the Le Dain Commission, will most likely define his career, although he was an accomplished legal scholar and Dean of Osgoode Hall Law School before being selected by Pierre Trudeau's government to head the Commission. Le Dain was appointed to the Federal Court of Appeal and the Court Martial Appeal Court in 1975, and sat on the Supreme Court of Canada for some four years. He retired in 1988 at the age of 64 due to hospitalizing depression. He was made a Companion of the Order of Canada in 1989.

2 Anniversary/Retrospective: 10 Down, 10 to Go?

This year marks my tenth anniversary as editor of *In Brief* following the resignation of my predecessor in the spring of 1998. There was such a shock and settling in period that I may have missed one of the seasonal issues, and so, it is debatable whether my editorship began in the spring or summer of 1998.

Prior to then, I had edited a number of the firm's subject *Briefs*, but for each of those publications the contributor-group was small, essentially colleagues practicing a similar area of law. *In Brief* brought me out of the close-knit practice community and face-to-face with those writing in their specialized area of expertise and practice. For each issue, I now interface with many different colleagues at our various offices,

and the number of contributors and participants has grown exponentially and continues to grow.

But back to the beginning: My first *In Brief* publication was modest by today's standards, but nevertheless in line with previous ones at that time. It contained four articles in four different subject areas. Following the model of past publications, each article was written in a generally formalized style and was quite lengthy.

Over the course of ten years, I have been happily involved in establishing a number of format features: a table of contents, a summary, a seasonal imprint, contributor's pictures and, indeed, worked on the design and color formatting of the very front page. Features such as "Firm Facts," "Book Reviews," "Tax Notes," "Law Notes," "Brief Life Bites," "Letters and Comments" and historical photographs were all introduced along the way. (Indeed, even for this issue, we have introduced two new presentation features, one in the hard copy (see the new "face" of "Law Notes") and one for the e-copy which will now include "Brief Life Bites.")

Of all the features, I would say that "Law Notes" (evolving from "Tax Notes") is the most significant. It permits a quick review and update of an area of interest and allows us to canvas a wide variety of subjects informally in a small space. At a broader level, the writing style of *In Brief* has changed over the last 10 years. Historically, the articles seemed more destined for a legal publication or academic discussion than for practical application and use.

Clearly, it takes more time and skill to write about complex matters and organize and express them in an understandable way than to use the vocabulary of the particular area and rely on the reader to study and sort it out. As the editor of the *Science* journal has recently stated, nowadays, expertise is so focused that even those studying neighbouring fields are laypersons when it comes to understanding specialized areas unless their work and papers are expressed in plain language.

In general, editors hope or believe they are invaluable in making the final product look better. And that may be the case now and then. But if the truth be told, it is often the initial effort and work of the contributor that makes the editor look good. No one, least of all an editor, can make a silk purse from a sow's ear.

Your comments and feedback provide guidance and encouragement – indeed, enthusiasm – for which we are truly grateful, and we extend a further invitation to keep us on track.

My sincere and personal thanks to those that regularly assist with the formatting, finalizing and distribution: **Scott Whitley, Lynda Infantino** and **Leah Gryfe**.

3 Patents, Patients, Sildenafil and the Doctrine of Sound Predictions

Ed.: *Concerning delicate issues of patents and "patients," the Supreme Court of Canada refused leave to appeal in the case of* Pfizer Canada Inc., Pfizer Inc. *v.* Apotex Inc. and the Minister of Health. *The full text of this case, as well as a synopsis, edited below, appeared in Lang Michener's* S.C.C. L@aw Letter*, Issue No. 57, prepared by Eugene Meehan, Q.C.:*

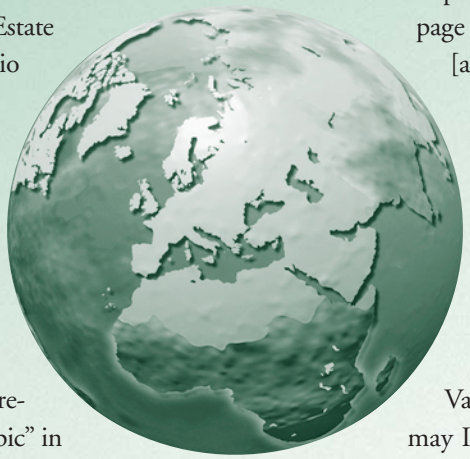
Apotex sought to obtain a Notice of Compliance ("NOC") to allow it to market its version of a medicine containing Sildenafil, a compound for which Pfizer owns Canadian patent 2,044,748. Sildenafil is the active ingredient in Pfizer's medicine, Viagra, used in treating erectile dysfunction by inhibiting certain enzymes in the body, called PDEs. This causes the smooth muscles that surround blood vessels to relax. Sildenafil is biologically active as a potent and selective cGMP PDE inhibitor, a property that can give rise to beneficial platelet anti-aggregatory, anti-vasospastic and vasodilatory activity. The 748 patent suggested a number of possible clinical applications for this compound, including the treatment of hypertension, heart failure and angina.

On Pfizer's motion for an order prohibiting the Minister from issuing an NOC to Apotex, Pfizer was required to prove Apotex's allegations that the 748 patent was invalid because it had failed to demonstrate the utility of the compounds or satisfy the requirements of the sound prediction doctrine.

Despite the strong arguments made, the Federal Court Trial Division dismissed the Applicants' application for a prohibition order. Nor could those arguments stand up in the Federal Court of Appeal that dismissed the appeal. Issues include: should the doctrine of sound prediction apply to a patent where there can be no "paper invention" since the compound had been made, and the utility identified, before the patent was filed; how can this doctrine be reconciled with the law that indicates that an apparatus invention is made when the apparatus is physically constructed.

Letters & Comments

1 There were a number of requests for the unexpurgated version of the article, "Derivative Actions: Mitigating the Risks for Directors and Officers" co-authored by **Frank Palmay**, including one request from a law firm in Edmonton, Alberta and a former mayor in British Columbia. There were also a number of requests received by **Bruce McKenna** for the complete version of his article entitled "Real Estate Title Fraud and Insurance: Recent Ontario Changes." Permission was granted to reprint an expanded version of the article by **Carol Lyons**, "Significant Changes for Foreign Insurers on the Horizon," in the inaugeral issue of *Canadian Insurance Regulation Reporter* published by LexisNexis. Recalling the 1980s, when the Canadian Olympic Committee purportedly attempted to eliminate any pre-existing trade name with the word "Olympic" in it, a Calgary lawyer sought the full version of the article by **Karl Gustafson** in the last issue of *In Brief* called "Proposed Federal Law Aims at Regulating Olympic Trade Mark Use."



2 We hope this blip, conveyed to us by a corporate executive in Montreal, was only one-off: "I was a reporter in my youth and understand how gremlins get into publications. We deal with **Michael Flavell** [International Trade Law] in the Ottawa office. I wanted to read "The Law of Refusal to Deal: Distributors as Lifetime Partners?" [written by **James Musgrove** and **Janine MacNeil**], but in the winter *In Brief* that I received, it is missing, despite being listed on your masthead. The culprit seems to be page 4 which is reprinted on page 6. Kindly e-mail me the missing article" [and we were happy to so oblige].

3 With reference to the story in "Brief Life Bites" about **Eugene Meehan, Q.C.** contracting Guillain-Barré Syndrome, a number of notes and messages from across Canada – "glad that the recovery went well" – including these healing words from Vancouver, B.C.: "To my surprise and dismay I learned of the serious health issues you were confronted with [in the spring of 2007]. It sounds like a formidable challenge; however, I am not surprised that the man who traveled to the north in his kilt has been progressing well. My healing thoughts and prayers go out to you as you work on getting your strength back and move towards a full recovery. You deserve to be rewarded with good health for your generosity of spirit and contributions to society."

Firm Facts and Other Notes

Born In Lacombe, Alberta, Daniel Roland Michener completed his undergraduate degree at the University of Alberta. On a Rhodes Scholarship, he obtained graduate degrees at Oxford, where he met Lester B. Pearson, and the two became lifelong friends.

But it was in October of 1957 that Progressive Conservative Prime Minister John G. Diefenbaker ("the Chief") named Roland Michener as Speaker of the House of Commons, a position he maintained until the Diefenbaker government fell in 1962. It was under Prime Minister Pearson's government that Roland Michener was appointed as Canada's High Commissioner to India and then Governor-General.

An avid sportsman and athlete, Roly Michener often took to the ice with friends for exercise and fun. The picture at right (taken in the early 1920s) shows Roland Michener (left) and Lester B. Pearson.

We have just passed the 50th anniversary of "Mike" Pearson being awarded the Nobel Peace Prize for his creation of the United Nations peacekeeping force during the 1956 Suez Crisis. According to Alfred Nobel's will, the Peace Prize should be awarded "to the person who [has] done the most or the best work for fraternity between the nations, for the abolition or reduction of standing armies and for the holding and promotion of peace congresses."

Lang Michener, In Brief…

Announcements

Lang Michener's Eastern Division Welcomes New Associates

We are pleased to announce that the following associates have recently joined the firm.

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Lang Michener's Western Division Welcomes New Partners

We are pleased to announce that the following lawyers have been admitted into the partnership.

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Cyndee Todgham Cherniak Joins Lang Michener's Eastern Division as Counsel

Cyndee Todgham Cherniak
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and Business Law
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We are pleased to announce that Cyndee Todgham Cherniak has recently joined our International Trade Law Group, Tax Law and Business Law Group as counsel in Lang Michener's Toronto and Ottawa offices. Her wide ranging practice includes, but is not limited to, international law, including World Trade Organization ("WTO") and Regional Trade Agreements ("RTA") analysis, interpretations, and opinions, government relations strategies, and dispute settlement and North American Free Trade Agreement ("NAFTA") verifications.

Dr. Alvira Macanovic Joins Lang Michener's Eastern Division as Scientific Consultant

Alvira Macanovic
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We are pleased to announce that Alvira Macanovic has joined the firm as a Scientific Consultant. Alvira is a chemist with significant hands-on experience in industry and academia; developing and optimizing bioanalytical methods in accordance with Good Laboratory Practices for the development of drug therapeutics.

News

The 2008 Lexpert/ALM Guide to the Leading 500 Lawyers in Canada Recognizes Lang Michener Leading Lawyers

Three Lang Michener lawyers have been recognized as leading practitioners in the 2008 Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada. Lawyers in this year's publication include: **C. J. Michael Flavell, Q.C.**, Chair, International Trade Group, **Donald MacOdrum**, Partner, Intellectual Property Group, and **James Musgrove**, Chair, Competition & Marketing Law Group.

New Publication: *Fundamentals of Canadian Competition Law*

James Musgrove, Chair, Competition & Marketing Law Group is Editor of the CBA/Carswell publication *Fundamentals of Canadian Competition Law*. The publication, which provides lawyers and law students with a brief overview of Canadian competition law, was also contributed to by **Janine MacNeil**, **Michael Flavell**, **Martin Masse**, **Donald Plumley** and **Alison Hayman**.

Events

Advanced Commercial Leasing Institute

March 26–28, 2008
Georgetown University Law Center Hart Auditorium
600 New Jersey Avenue NW
Washington, DC

Celia Hitch, Counsel, Real Estate Law Group, will be presenting The Greening of North America: LEED and Beyond, at this conference presented by Georgetown University Law School. This is a unique program for advanced-level commercial leasing attorneys.

Managing Privacy Compliance: Enforcing Sound Practices, Reducing Vulnerabilities and Mitigating Risks

March 27 & 28, 2008
Metropolitan Hotel
Toronto, ON

David Young, Co-Chair, Privacy Law Group, will be lecturing at this course focused on privacy issues, presented by Federated Press.

InBrief

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