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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In This Issue

LAW NOTES highlight a number of current issues: In the employment context, failure to acknowledge one's mistakes is discussed as grounds for dismissal, and two other NOTES look at the likely rise in the cost of doing business, one resulting from a new statutory holiday and the other from judicializing the human rights complaint system. Our tax experts discuss new options for independent contractors, and there is a NOTE about cross-border whistleblower protection; a commentary NOTE by François Tougas on abolishing the rail monopoly in Canada, and another about controversial proposed changes to Canada's copyright law.

There are full-length articles on a wide range of business topics including identity theft and technology, security in electronic records, and as it relates to the workplace, articles on reasonable notice, the obligation to mitigate and a different perspective on the *Keays* case.

There are also alerts for directors and officers and an article about corporations now being prosecuted under the *Criminal Code*. In separate articles, Canadian antitrust class actions and patent law are discussed and compared to that in the U.S.

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

Asset Backed Commercial Paper: Alerts for Directors and Officers


Frank Palmay

As an investment vehicle, asset backed commercial paper ("ABCP") grew dramatically from $10 billion in 1997 to $115 billion in 2007. Some $32 billion of that amount (Canadian non-bank ABCP) is in the process of being restructured under the *Companies' Creditors Arrangement Act*. This is due to mismatching between the cash flows from the underlying assets (i.e., receivables) and the funds needed to make payments on maturity of the notes held by investors, and a liquidity crisis that traces its roots to the sub-prime meltdown in the United States that involved securities that are themselves an example of asset backed commercial paper.

Background

Sponsors, namely corporations that made a business of making asset backed commercial paper available to investors, established Special Purpose Vehicles in the form of trusts that, in the context of ABCP, are known as "conduits." These conduits issued debt to investors in series, typically on a 365-day commercial paper basis. The different series were designed to reflect different levels of risk. The debt was rated by approved credit rating agencies. It should be noted that both the duration and the rating are requirements for these investment vehicles to be exempted under applicable securities laws in Canada.

The debt issued by the conduits, in turn, was used to purchase or secure assets from asset providers, that, for the most part, consisted of financial institutions. The types of assets pooled included more traditional financial assets such as residential and commercial mortgages, corporate loans, and credit card receivables. In the case of the Canadian non-bank ABCP, traditional financial assets accounted for approximately 19% of the underlying assets. The remaining 81% consisted of derivative contracts (sometimes called synthetic assets), mainly in the form of credit default swaps. Of these synthetic assets, the majority (approximately 54%) were leveraged super senior swaps.

There was a significant mismatch between the asset backed commercial paper held by the investors, which was short-term, and the underlying assets, that consisted of medium- and long-term financial assets. The whole structure was predicated on investors "rolling over" their asset backed commercial paper. This assumption evaporated in the week of August 13, 2007 when, despite the previous actions of a number of central banks arising from the sub-prime mortgage problems in the United States, there was a sudden liquidity crisis and conduits faced a run by investors who no longer wished to roll over their asset backed commercial paper. This effectively caused the market to freeze, since no one was prepared to hold medium- or long-term financial assets due to the risk of default. Thus, the need to restructure the conduits under the *Companies' Creditors Arrangement Act*.

Possible Outcomes of the Proposed Restructuring

If the proposed restructuring of the Canadian non-bank ABCP proceeds as the applicants have requested, a multitude of lawsuits will be replaced with a supposedly orderly and long-term solution in which the investors will be required to wait for a period of years before return of their investment, and in which a number of other players have agreed to provide funds and support, also for a prolonged period of time.

If the restructuring arrangement is not successful, and for other asset backed commercial paper structures that are not able to restructure in a similar fashion, the allegations made by some of the participants in the Canadian non-bank ABCP, as well as the experience of the United States in the sub-prime crisis, are suggestive of the type of claims that could be expected.

Simply put, investors who suffer loss can be expected to sue. Class actions involving investors can be expected and investor class actions are already prominent in the United States sub-prime litigation scene. Their targets will likely include broker dealers for inappropriate and negligent advice (i.e., suitability), breach of fiduciary duties, misrepresentation, and worse, if the broker dealers were affiliated with the architects of the scheme. Conduits that issued the ABCP may be targeted for inadequate disclosure and for other breaches of the securities legislation if the exemptions on which they relied were improper. Again, to the extent that conduits are affiliated with other actors, they may be involved, and the allegations may rise up the ladder of impropriety. The allegations include acting in conflict of interest, bad faith, and potentially even fraud.

> *Class actions involving investors can be expected and investor class actions are already prominent in the United States sub-prime litigation scene.*

Based on the American experience, directors and officers are also directly in the line of fire. In 2007, 97% of the sub-prime related litigation named them as defendants and, to date this year, 72% of the cases also targeted directors and officers.

Dangers and Pitfalls

Directors and officers and their corporate counsel should be aware of some of the dangers and pitfalls that might arise in the event that they become targets. In this abridged article, only some of these will be identified as they relate to directors and officers insurance policies ("D&O policies").

D&O policies are not standard form policies and the wording varies widely:

- Does the policy provide for presumptive indemnification and thereby presume that the corporation is providing indemnification on a broader basis than may actually be the case? If so, there is a gap between the exposure and the policy cover.
- If fraud is alleged, does the exclusion operate immediately or only after there has been a final adjudication that fraud has

occurred? The difference may mean being provided with a defence or not.

- Are there coverages in favour of the company or entity (for example, for "Securities Claims") that would reduce or even exhaust the limits available for coverage for directors and officers?
- Are there majority shareholder actions that could arise and that might result in claims being excluded from coverage in the policy?
- Are the claim notice provisions either too short in terms of timing or too onerous in terms of the level of detail required? If the claim notice provisions are too short or too restrictive, a potential claim may not be able to be reported in time. When and on what basis must or can an insured report a claim or a circumstance that could give rise to a claim?

A Few Final Words

The sub-prime crisis in the United States and the related ABCP events in Canada will no doubt take much time, effort, money, and angst to ultimately resolve. Corporate counsel will need to be actively engaged to assist their corporations in identifying potential exposure and undertaking effective risk management.

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Ed.: *The unabridged version of this article was co-written by Frank Palmay,* **Jordan Solway**, *and* **Patrick Bourk**. *Jordan is Regional Vice President – Claims & Legal with Arch Insurance Canada. Patrick is an Associate within the Management Risk Practice of Integro (Canada) Ltd., an insurance brokerage firm. The views, information and content expressed herein are those of the authors and do not necessarily represent the views of any of the organizations or firms represented. The unabridged version of this article appeared in* Ultimate Corporate Counsel Guide *published by CCH Canadian Limited.*

A copy of the full-length article may be obtained from any of the co-authors.

Antitrust Class Actions in Canada: Not So Fast!

James Musgrove

For more than two decades Canada has had a regime permitting actions for damages to be recovered by persons injured by criminal conduct under Canada's *Competition Act*. Over that period of time Canada has also been developing class action legislation, which now exists in virtually all provincial courts as well as in the Federal Court. As a result, and particularly over the last half dozen years or so, class actions with respect to cartels and alleged cartels have become commonplace in Canada – sometimes launched after a guilty plea or conviction, but frequently launched as soon as knowledge of a cartel investigation has become public. No such class actions have yet resulted in a final decision on the merits against the defendants, but many have been settled, often for tens and sometimes for hundreds of millions of dollars.

Indirect Purchasers

A peculiar feature of Canadian class actions has been the approach to indirect purchasers of the allegedly cartelized product. In the United States, under its federal antitrust law, direct purchasers have a cause of action against price fixing conspirators, whether or not they were able to pass on the "overcharge" to someone who bought the product from them, but indirect purchasers have no right to sue. Under various state antitrust laws, however, indirect purchasers do have claims in many U.S. states. In Canada, this issue was explored some years ago before the Ontario Court of Appeal in the case of *Chadha* v. *Bayer*, but the court did not have to decide the question to resolve the case. Consequently, the issue as to whether indirect purchasers may pursue antitrust claims in Canada for conspiratorial conduct is an open question.

The way the indirect purchaser issue has been dealt with in Canada, as a practical matter, is that cases have been brought on behalf of both direct and indirect purchasers in a single action. Global settlements have been achieved against the defendants, and then plaintiffs' counsel, together with their economic experts, have proposed, for the approval of the court, a distribution scheme as between the various classes of purchasers. All of these, however, have been in the context of settled cases.

A very recent case from the British Columbia Supreme Court, however, involving Dynamic Random Access Memory ("DRAM") has called this practice into question and emphasized the importance, at least in Canadian antitrust law, of the need to show injury as an element of the cause of action.

Need to Show Injury

The case of *Pro-Sys Consultants Ltd.* v. *Infineon Technologies AG, et. al,* involved claims by both direct and indirect purchasers of DRAM in the province of British Columbia against defendants who represented between 76% to 82% of worldwide production of DRAM during the period of the alleged conspiracy. The allegation was that the conspiratorial agreements were designed to limit the rate of price decline for DRAM as it was declining significantly over the period. Most of the defendants or affiliates of those defendants, as well as certain individuals employed by them, had already pleaded guilty and been fined in the United States for price fixing in relation to DRAM. In Canada, at the time of the decision, no charges had been brought against any of the defendants or any other persons in relation to DRAM.

Mixed Class of Direct and Indirect Purchasers

Pro-Sys Consultants Ltd., on behalf of the class of direct and indirect purchasers of DRAM in British Columbia, brought an action against the defendants in British Columbia. Pro-Sys itself had purchased a computer in British Columbia containing a DRAM chip – so it was an indirect purchaser.

The evidence before the court was that the total sales of DRAM, on a worldwide basis, during the alleged period of conspiracy was approximately $80 billion. By contrast, the total direct sales of DRAM into British Columbia by all of the conspirators (only two of the alleged conspirators made direct sales into British Columbia) totaled $3.4 million. The evidence was that DRAM was being used primarily in personal computers (over 80%), but also being used in many other products, including servers, mainframes, automobiles, GPS devices, cell phones, cameras and video games.

The claim in *Pro-Sys* alleged various causes of action including those under Section 36 of the *Competition Act* (the civil damages provision of the Act), claims for tortuous conspiracy, tortuous interference with economic interest, unjust enrichment, waiver of tort, constructive trust, as well as punitive damages. The trial judge, Mr. Justice Masuhara, noted that this was the first case of a class action seeking to certify a mix of direct and indirect purchasers. Presumably, he meant the first contested case, as a number of such cases had been certified in conjunction with settlements.

Mixed Class – Common Issues

Coming to the heart of the issue, the plaintiff argued that the common issues to be determined were the issue of liability and questions as to the existence, scope and effect of the conspiracy to fix the prices of DRAM.

The defendants argued that the issue relating to the existence of the conspiracy was common, but there was no methodology of establishing harm on a class-wide basis. In particular, they argued that there was no credible methodology to establish that there was a pass-through of any increased prices to the subsequent indirect purchasers, let alone a methodology capable of estimating the amount of such an effect.

The court noted that in a pass-through case, the court must be persuaded that there is sufficient evidence of the existence of a viable and workable methodology capable of relating harm to class members. It stated that "given the inherent complexities, the scrutiny cannot be superficial" and that "the evidence must establish that the proposed methodology has been developed with some rigour and [was] sufficiently robust to accomplish the stated task," and further, that the plaintiff's suggestion of working things out "in the laboratory of the trial court" would be inconsistent with judicial economy or fairness in a case such as this.

The court went on to explore in some detail what it viewed as the weaknesses in the proposed estimate of pass through. Ultimately, it concluded: "It is apparent that the methods proposed by the plaintiff do not avoid the need for a vast number of individual inquiries regarding the participants and conditions in the market place for DRAM. As a result, I find that the plaintiff has not sufficiently demonstrated that a workable class-wide methodology is available to establish harm."

The court found that the only common issues which could be certified were the existence of the conspiracy to fix prices and possibly breaches of the Competition Act, *but not liability on a class-wide basis.*

The court found, therefore, that the only common issues which could be certified were the existence of the conspiracy to fix prices and possibly breaches of the *Competition Act,* but not liability on a class-wide basis. It then turned to consider whether determining those few issues on a class-wide basis would be a preferable procedure under the class action legislation. The court concluded that the absence of class-wide means to prove liability would lead to an unmanageable process, so that class notification for the purposes of determining breaches of the *Competition Act* would not move the litigation forward in a meaningful way, and that the individual issues would overwhelm the remaining common issues.

Establishing Harm

In its penultimate paragraph the court noted: "This application reflects the continuing difficulty that has been encountered by the courts over many years; namely, the failure to propose a viable class-wide method of establishing harm and thus liability when the proposed class includes indirect purchasers. This combined with the vast array of products and channels, serve to dilute the semblance of a manageable and workable process."

Some Final Remarks

The *Pro-Sys* case does not conclude that indirect purchaser cases under the *Competition Act* are not possible or that they are not possible as class actions. While it suggests some skepticism in that regard, it leaves the question open. At the trial level, the *Pro-Sys* case also suggests that, at least for indirect purchasers of allegedly cartelized products, the class action route to riches may not be an altogether easy road. It will no doubt take some time for the courts to clarify these issues, but for now, plaintiffs and their counsel are likely to proceed with some degree of caution.

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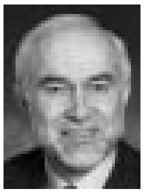
Security of Electronic Health Records: Is Current Legislation Sufficient?



David Young

In seeking to identify the existing legislative framework for security of electronic health records ("EHRs") systems, we have reference to the two basic precepts of confidentiality and privacy. Within the health sector, these are the key existing rules from which the security obligations emanate. Confidentiality and privacy are often treated interchangeably; however, they are different, although overlapping, concepts.

Confidentiality

Confidentiality is an obligation imposed on health professionals and providers, including institutions, to protect and not disclose patients' or clients' personal health information ("PHI") except as expressly permitted. For doctors, the rule emanates initially from the Hippocratic Oath, but is now found in their professional codes of practice as well as in legislation such as the *Medicine Act*. For other professionals such as nurses, physiotherapists and pharmacists, the confidentiality rule is found in their professional codes of practice and in applicable legislation. Institutions such as hospitals and social agencies are subject to confidentiality obligations contained in the *Public Hospitals Act,* the *Long-Term Care Act, 1994*, and other similar legislation.

Privacy is distinct from confidentiality because it derives from the right of individuals to control their personal information

Clearly, confidentiality implies security; but security rules and standards constitute a distinct category. Essentially, they are the means by which confidentiality is to be achieved. Therefore, while the confidentiality obligation exists for health providers, it contains no explicit directions or rules that address security, or guidance as to the standard of care that can be expected. The obligation does impose potential liability on providers if it is breached and that creates an incentive for providers to adopt appropriate security measures.

Privacy Law

The other key precept from which security criteria emanate is privacy law. Privacy is distinct from confidentiality because it derives from the right of individuals to control their personal information, in contrast with the obligation on providers, which is to keep PHI confidential. However, maintaining confidentiality is an aspect of protecting privacy, and so the two precepts overlap.

Privacy implies security because one of the principles of a privacy regime, such as is in the Canadian Standards Association's *Model Code for the Protection of Personal Information* ("CSA Model Code"), is that an individual has the right to have any of his or her personal information that is held by a data collector protected from unauthorized disclosure. The privacy precept, therefore, is more specific than the confidentiality precept in that it expressly articulates a security requirement.

This security requirement is set out expressly in the privacy laws, and it is these laws that form the primary mandate to health care providers to establish appropriate security systems with respect to PHI both generally and, potentially, specifically with respect to EHRs and systems. It is worth emphasizing, therefore, that the primary source of statutory direction for security of PHI is in the privacy laws.

The significance of stipulating the security requirement under the privacy laws is important. Not only does it set a regulatory standard, but it creates a civil standard of care, which means that if practitioners or institutions fail to meet this standard, they may be liable in damages to the individuals whose information has been compromised.

The privacy laws not only articulate a required standard of security but contain, in varying degrees, guidance for data collectors as to the nature of the security systems and procedures that should be adopted. However, the primary security obligation contained in Ontario's *Personal Health Information Protection Act, 2004* ("PHIPA") is stated in quite general terms. And to date, only regulations relating to network service providers have been enacted. There are no regulations respecting records management or electronic data procedures, although such regulations are clearly contemplated by the legislation. This deficiency is particularly relevant to the adoption of EHR systems.

PHIPA's limited detailed guidance respecting security procedures contrasts with the federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA") which through its adoption of the CSA Model Code provides an outline of the nature of the protections that should be adopted. The PIPEDA rule makes clear that such protections should include physical, organizational and technological measures and provides examples of each of those categories. The PIPEDA rule also stipulates that organizations must ensure that their employees are trained in security procedures. PHIPA's approach also contrasts with the other health privacy laws which follow the particularity stipulated in PIPEDA.

While this specificity of required procedures is not currently found in PHIPA, it is clear that, in order to comply with the legislation, custodians are expected to adopt detailed procedures. The only difficulty with this approach is that the law itself does not provide the required guidance. Instead, practitioners and institutions must look to other sources, such as international standards-setting bodies, industry associations and other stakeholder organizations.

While electronic health records offer significant advantages to effective health care, they pose challenges to security.

Security is Critical

Why is security such a critical element of a privacy regime?

Firstly, the elemental concept of privacy implies an individual's control over and in effect ownership of his or her personal information. Recognition of this concept dictates that if that information is entrusted to another person, that person must take appropriate precautions to prevent the information from being misused, lost or stolen. Furthermore, implicitly, a privacy regime recognizes that if personal information is misused, an individual may suffer injury whether it is financial, psychological or physical. The security rule seeks to prevent such injury.

Electronic Health Records

While electronic health records offer significant advantages to effective health care, they pose challenges to the security of PHI. Locks and pass-keys, though potentially sufficient in a paper-based system, are inadequate in an electronic environment. Further, in a computerized environment the detriment made possible in the event of unauthorized access is magnified. Computerized databases of personally identifiable information are more vulnerable than paper-based systems because they may be accessed, changed, viewed, copied, used, disclosed or deleted more easily and by many more people than paper-based records. The technological means to secure or render unidentifiable PHI do exist. The challenge is not to invent the technology, but rather to ensure that the law has done all that it can to protect the individual's reasonable expectation of privacy and security of PHI.

How Do the Privacy Laws Address Electronic Security?

We see, therefore, that it is under the privacy laws that security of PHI is addressed. As mentioned above, PIPEDA provides substantial guidance in this area; however, it only applies to commercial entities (and the commercial activities of other entities) and, therefore, has certain limitations in scope when dealing with the health sector. Four provinces have adopted specific health-sector privacy legislation (Ontario, Manitoba, Saskatchewan and Alberta). Furthermore, all of these laws address, with greater or lesser specificity, the security requirement. All of the provincial laws, except Ontario's, mandate health information custodians to address the three categories of safeguards identified in PIPEDA: administrative, physical and technological.

However, only Manitoba has addressed with any specificity electronic security. In that province's statute and regulations, protection respecting unauthorized interception, secure destruction and mobile devices is addressed and user logs and audit trails are required. The rules stipulated are quite general in nature but can be contrasted with the other provincial statutes and PIPEDA, which at present contain no rules specifically addressing EHRs and the use of electronic systems by custodians.

In the absence of legislative guidance, the Ontario Information and Privacy Commissioner has articulated certain criteria through her order-making power and through informal guidelines. For example, the Commissioner has set out certain criteria to address the security of PHI maintained on portable electronic devices. The Commissioner's Order contains a number of recommended administrative procedures; its specific application for portable devices addresses recommended procedures for maintaining and providing access to PHI held on such devices. Essentially, the Order mandates effective encryption of such information and the use of multi-layered access authorization procedures.

The question that may be posed is the following: Should Canada's laws reflect a pro-active leadership role in establishing basic principles for EHR security, or should we rely on general legal precepts of security to ultimately generate a set of rules, through a more circuitous process? If we believe that privacy laws should be instructive and preventative, not reactive, then providing guidance for users to avoid pitfalls is preferable to penalizing them for breaches. More importantly, compliance and breach avoidance protects those who would suffer injury; that is, the individual users of the system.

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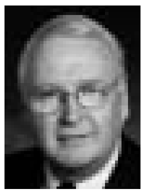
Ed.: *The unabridged version of this article (with statute references and case citations) appeared in* Privacy Brief *Summer 2008. To subscribe to this publication, please visit the Publications Request page of our website.*

Significant Differences Between Canadian and American Patent Law (Part 2)

Keith Bird

Orin Del Vecchio



Donald H. MacOdrum

In the last issue of *In Brief*, some of the significant differences between Canadian and American patent law were briefly discussed. There are others and some of these will be summarily canvassed below.

Canadian Prosecution Strategies

Unlike in the United States, examination is not automatic in Canada. A separate Request for Examination, along with the requisite fee, must be submitted, and this Request may be delayed for up to five years from the filing date of the application. By delaying examination, the results from the prosecution of the U.S., or other priority applications can be integrated into the prosecution of the Canadian application which may lead to the Canadian application being allowed without any objections from an Examiner.

On the other hand, it may be useful for the applicant to have the examination of the Canadian application proceed at an accelerated pace so as to have an early-issued Canadian patent. Typically, the patent application will be examined and issued within a year, often even faster than that.

These two approaches allow the applicant to control the time of issue of the Canadian patent to maximize its usefulness.

As of January 28 of this year, a one-year pilot project for a Patent Prosecution Highway ("PPH") between Canada and the U.S. was initiated. Under the PPH, when a first-filed application is allowed in one of the two countries, a second-filed application in the other country that claims priority over the first-filed application can be expedited for allowance in the second country. Given that expedited examination is more easily available in Canada than in the U.S., the introduction of the PPH creates a new factor to be considered by patent applicants when developing a prosecution and examination strategy for Canada and the U.S.

Amending a Canadian Application

There is no doctrine of file wrapper *estoppel* in Canada. Nor does Canada have an equivalent of the U.S. *Festo* decision. In litigation, reference to the prosecution history and statements made during prosecution is not permitted for the purpose of construing claims. Therefore, amendments and arguments may be made with very little, if any, consequence, and should be used to overcome rejections where possible.

In Canada, there are no continuation or continuation-in-part applications or their equivalents. Therefore, amendments should be carefully considered.

However, in Canada there are no continuation or continuation-in-part applications or their equivalents. Therefore, amendments should be carefully considered to avoid deleting important claims and new subject matter may only be added by filing a new application. If the original application has been published, it can act as prior art against the potential new application, possibly rendering it obvious.

Examination and Issue

Once examination of a Canadian application has been requested, it typically takes about two to three years before the first office action is issued, although shorter response times do occur in some technology areas. The deadline for responding to the office action is usually six months from its mailing date, and an application will become abandoned if a response is not filed in a timely manner. As noted below, it is possible to reinstate an application up to one year after it is abandoned by paying the requisite fee and filing a satisfactory response to the office action.

One may schedule a telephone or personal interview with an Examiner to discuss a response to an office action and it is not unusual to receive two or three office actions before a final rejection is issued. Such a rejection may be appealed to the Patent Appeal Board and its decision may be further appealed to the Federal Court, the Court of Appeal and, with leave, to the Supreme Court of Canada. But appeals beyond the Patent Appeal Board are quite rare.

As in the U.S., if all substantive and technical objections are overcome, the Canadian Patent Office will allow the application and requisition the payment of the issue fee within six months thereafter.

While no substantive changes may be made to an application once it has been allowed, it is possible to allow the application to become abandoned by not paying the issue fee, but it can be reinstated and the application amended and, thereby, returned to examination.

Reissue and Disclaimer

An application for the reissue of a Canadian patent must be filed within four years of the date the patent was issued. Unlike the U.S., there is no distinction made between a reissue that enlarges, rather than narrows, the scope of the patent. Therefore, it may be possible to apply for a reissue of a Canadian patent to expand its scope even after the deadline for doing so in the U.S. has passed, provided the original narrower scope was the result of an error, accident or mistake.

It is also possible to amend the claims after issue by way of disclaimer. A disclaimer is simply filed; there is no review of it by the Patent Office.

Re-examination

Either a patent owner or third party may institute re-examination proceedings, and these are similar to the *ex parte* re-examination process in the U.S. Canada has no equivalent to the U.S. *inter partes* re-examination procedure. In a re-examination, a patentee may amend claims, but not to increase their scope.

Opposition

In Canada, there is no formal method for opposing a pending patent application. As in the U.S., a third party is permitted to file prior art against a pending application, along with an explanation of its relevance. However, other than an acknowledgment of receipt of its submissions, there is no further notification to the third party of any action taken by an Examiner as a consequence of the submitted materials, nor is there an apparent requirement to cite the prior art against the application or to otherwise consider it.

Given the lack of participation for the protesting party, as well as the discretion an Examiner has in considering whether to rely on the submitting material, protests are rarely filed in Canada.

Once examination of a Canadian application has been requested, it typically takes about two to three years before the first office action is issued, although shorter response times do occur in some technology areas.

Infringement

Any making, using, selling or offering for sale in Canada of a claimed invention constitutes infringement, and inducing others to infringe is also actionable. Infringement may occur by selling a non-patented product in Canada that was made outside Canada using a process or product that is covered by a Canadian patent. There is a six-year limitation period for infringement.

Patent Litigation

While the overall concept of patent infringement is similar between Canada and the U.S., the actual litigation process is quite different.

The majority of patent cases are heard by the Federal Court that sits throughout Canada with traveling judges, so that forum shopping is not a significant issue. Provincial courts have concurrent jurisdiction for most matters, but their decisions are only binding in their particular province and between the specific parties, and so they are used infrequently. On the other hand, if a patent action is intertwined with issues outside the jurisdiction of the Federal Court, resort must be made to the Provincial courts. There are no jury trials for patent cases; all patent cases are before a judge alone.

Not only the patentee, but also a licensee (even a non-exclusive licensee) may assert a claim for infringement.

Pleadings in Canadian patent actions are generally more detailed than in the U.S., but documentary disclosure is much less extensive. Interlocutory injunctions are very rare in Canada, as irreparable harm must be proven.

In Canada, there is both documentary and oral pre-trial discovery, but in practice such discovery is more limited than in the U.S. Typically, a representative of each party is examined and the inventors may be examined, but there is no general deposition of witnesses without leave and such leave is rarely granted by most courts. There is no pre-trial deposition of expert witnesses. Expert evidence is provided to the other party in affidavit form before trial and experts may be cross-examined at trial.

There is no equivalent of a *Markman* hearing in Canada.

Remedies include either the damages suffered by the plaintiff or the profits made by the defendant, although the latter remedy is at the discretion of the court. However, there is no trebling of damages for wilful infringement. Punitive damages are fairly rare and, when awarded, are relatively modest.

The unsuccessful party in Canadian litigation typically bears one-third or more of the legal costs of the successful party, and there are very few contingency patent litigation cases.

Conclusion

While Canadian and American patent law share many similarities, there are several key differences that justify involving a Canadian patent lawyer or agent to conduct a review of an American application before it is filed as a corresponding Canadian application. Such counsel and advice is likely to result in broader claims, fewer rejections and faster approvals during prosecution, and more efficient litigation, thereby saving the client time, aggravation and expense.

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Identity Theft and Technology – How Bill C-27 Responds

Howard Simkevitz

The methodologies of committing crimes in cyberspace are different from their counterparts in real space. The importance of addressing this difference becomes more pronounced in light of society's increasing reliance on information and technology infrastructure. As such, legislators must duly account for the use of technology as an integral piece of sound legislative initiatives. It can no longer be a case of using old laws to adapt to new technology.

Identity theft provides an excellent example of the impact technology has had on crime. Reports of identity theft run rampant in the popular press. However, the *Criminal Code*, as currently written, does not contain a specific identity theft offence. In fact, most of the provisions attempting to address identity theft are fraud provisions that predate the advent of the Internet, save for offences dealing with credit and debit cards, and "unauthorized use of computer." This latter section is useful insofar as it can be used to capture fraudulent use of identity information over the Internet.

The effectiveness of the Code provisions regarding unauthorized use of a computer and fraudulent use of credit or debit cards is limited. For example, although it is illegal to fraudulently use personal information, there is nothing to address the unauthorized collection, possession or trafficking of such personal information. Seemingly, policymakers have caught on (or have been impelled to catch on) that there is a need to close such legislative gaps. In short, not only is Canada lacking a clear definition of the crime of identity theft, but law enforcement lacks the ability to intervene until, more often than not, it is too late.

In short, not only is Canada lacking a clear definition of the crime of identity theft, but law enforcement lacks the ability to intervene until, more often than not, it is too late.

Bill C-27

Bill C-27 had its second reading on January 30th of this year and is now in committee.

The general purpose of the Bill is to create three new offences:

- obtaining or possessing identity information with the intent to use it to commit certain crimes;
- trafficking in identity information with knowledge of or recklessness as to its intended use in the commission of such crimes; and
- possessing and trafficking certain government-issued identity documents belonging to another person – expanding the relevant documents from passports to include Social Insurance Numbers, drivers' licences, birth certificates, and a number of other identity papers.

Furthermore, and importantly, the Bill introduces the concept of restitution for the victim.

What It Does

The Bill's proposed amendments are laudable in three ways. First and foremost, by criminalizing the foregoing, the Bill gives law enforcement the ability to intervene at the stage of possession and trafficking, before fraud has actually been committed.

Second, the Bill is forward thinking and tries to anticipate the use of technology and not shy away from it. For example, the Bill does a good job of capturing the various technical manifestations of identity, including biometrics which will undoubtedly be a significant source of identity theft in future years. The anticipatory nature of the Bill becomes evident when looking at the very definition of "identity information" in the section 402.1 of the Code:

> For the purposes of sections 402.2 and 403, "identity information" means any information – including biological or physiological information – of a type that is commonly used alone or in combination with other information to identify or purport

to identify an individual, such as a fingerprint, voice print, retina image, iris image, DNA profile, name, address, date of birth, written signature, electronic signature, digital signature, user name, credit card number, debit card number, financial institution account number, passport number, Social Insurance Number, health insurance number, driver's licence number or password.

Although more restrictive than the definition of "personal information" in the *Personal Information Protection and Electronic Documents Act*, the list in section 402.1 is non-exhaustive, so it does leave room for other incarnations of identity-information as technology evolves.

Third, the Bill appears to recognize the power of market forces in assisting in regulating the prescribed conduct. As mentioned above, in addition to jail time for fraudulent acts, identity thieves will now be facing the possibility of having to reimburse their victims for costs incurred as a result of the fraud (e.g., the price of rehabilitating one's identity, replacing cards and documents, and correcting one's credit history).

This notion of restitution becomes increasingly relevant in the scenario where the accused is an employee of a company. Although the focus of this article is not one of corporate liability, it is important to note that this concept can be found in the present Code.

Criminal intent may become attributable to an organization where: (i) the organization benefits, to some degree, from the offence; and (ii) a senior officer is a party, or where a senior officer has knowledge of the commission of the offence by other members of the organization and fails to take all reasonable steps to prevent or stop the commission of the offence. However, such a finding requires that there is a threshold of reasonableness by which criminal intent can be imputed.

Section 402.2 of the Bill states:

(1) Everyone commits an offence who knowingly obtains or possesses another person's identity information in circumstances giving rise to a *reasonable* inference that the information is intended to be used to commit an indictable offence that includes fraud, deceit or falsehood as an element of the offence.

(2) Everyone commits an offence who transmits, makes available, distributes, sells or offers for sale another person's identity information, or has it in their possession for any of those purposes, knowing or believing that or being *reckless* as to whether the information will be used to commit an indictable offence that includes fraud, deceit or falsehood as an element of the offence. [emphasis added]

Issues

Two issues come to the fore:

1) What are the circumstances that would give rise to a "reasonable" inference that the information is intended for fraud?

2) How is one to determine that a person was "reckless" as to whether such information could be used for fraud?

The standard(s) by which one could impute reasonableness and recklessness in the realm of identity theft is/are less than clear.

The Bill comes at time when there is increased support for the notion that something must be done to combat identity theft. However, the Bill may not represent the panacea, and stakeholders should recognize that there is still a need to develop a comprehensive framework for contending with identity theft.

When one talks about identity theft, whether one uses the term identity information or, more broadly, the term personal information, these are distinct privacy-related terms. To date, there are standards for security only and there are no equivalents for privacy. Thus, without clear standards related to privacy, it may be difficult for companies to mitigate against risk and to assess what is reasonable and what is reckless.

Until a comprehensive set of standards are developed in this area, it may be helpful to look to the following for guidance: i) industry standards and best practices; ii) Privacy Commissioners, specifically orders they render that include promulgation of standards; iii) relevant legislation (e.g., privacy acts such as *PIPEDA*); and iv) jurisprudence in the area.

The Bill comes at a time when there is increased support for the notion that something must be done to combat identity theft. However, the Bill may not represent the panacea, and stakeholders should recognize that there is still a need to develop a comprehensive framework for contending with identity theft. Privacy standards would be an invaluable addition to the mix. Furthermore, public awareness about how individuals and organizations should handle identity information would also go a long way to ensure the Bill succeeds.

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Supreme Court Makes an Impact: *Keays* v. *Honda Canada*

Howard Levitt

In Canadian legal history, there have been only 11 Supreme Court of Canada cases in non-union employment law. When that Court writes a decision, it intends it to make an impact. The recent decision in *Keays* v. *Honda Canada Inc.* does that, although its significance has been grossly mischaracterized and misunderstood.

Keays was periodically absent with chronic fatigue syndrome for several years. Honda, noting that his doctor's notes were becoming increasingly limited, ordered him to see its specialist. It warned that failure to do so would result in dismissal. On the advice of legal counsel, Keays demanded to know "the purpose, methodology and parameters of the assessment." When he persisted in refusing the assessment, Honda fired him.

The trial judge awarded 15 months severance, nine months in *Wallace* damages, $500,000 in punitive damages – a high-water mark in employment law – and increased costs.

The Court of Appeal reduced the punitive damages to $100,000.

The Supreme Court of Canada, however, struck out *Wallace*, punitives and extra costs, leaving only the basic 15 months severance. It is reasonable to assume Keays' legal costs are many times more than what he ultimately ended up with.

Reports on the case have focused on the removal of punitive and *Wallace* damages, suggesting they are now much more difficult to achieve. That is incorrect. Moreover, they have misunderstood significant aspects of the case.

Dismissing the employee's medical evidence, Keays' doctor provided uninformative notes so Honda contacted two doctors who were skeptical about his complaint, suggesting a lack of cogent evidence of disability. The company then ordered him back to work. The trial judge concluded Honda was playing hardball. However, the Supreme Court disagreed, noting "Honda had no reason not to accept the expert advice it was receiving" and criticized the trial judge for "faulting Honda for relying upon the advice of its medical experts."

Employers have been averse to questioning employees' doctors and have permitted far too much latitude in time off without cogent evidence of any disability. The Court made clear companies, like employees, are entitled to retain medical experts and rely on their views.

"The employer's responsibility to manage its workforce" provides it with "the right to monitor the absence of employees who are regularly absent."

Determining severance, the Court reaffirmed the primary determinants of severance are the nature of the job, age, length of service and the availability of similar employment. Although it noted that higher status employees are generally entitled to greater severance because their positions are usually more difficult to replace, the Court called on counsel to adduce evidence of this in any particular case.

In Honda's case, although Keays was not a manager, lack of formal education and long illness rendered him less employable. The decision is a message to employers to stop providing severance based on formula and review each case individually.

The Court changed how *Wallace* damages are defined and determined. The Court noted that nearly always an employee can sue only for the lack of sufficient notice or severance, not for pain associated with dismissal. Such damages can be sued for only in rare cases where both parties understand at the time of hiring that a future dismissal could lead to extraordinary damages.

The Court noted that nearly always an employee can sue only for the lack of sufficient notice or severance, not for pain associated with dismissal. Such damages can be sued for only in rare cases.

However, the notion that awards can be made for damages contemplated at the time of hiring creates a greater opportunity for creative employee counsel to obtain *Wallace* and aggravated damages. *Wallace* damages also can be based on the manner in which the employee was terminated, such as defaming them, lying about why they were fired or firing them to avoid their pension vesting.

The trial judge faulted Honda for ignoring employee's counsel and dealing directly with Keays after he requested negotiations be with his lawyer. But the Supreme Court noted, as long as the employee was employed "parties are always entitled to deal with each other directly." This underlines employers need not allow employee's lawyers to attend internal management investigations.

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Reasonable Notice and "Fixed-Term" Contracts

Katherine Reilly

In a recent B.C. Supreme Court decision, the issue of whether an employee with a fixed-term contract is continuously employed and, therefore, entitled to reasonable notice was clarified in *Monjushko* v. *Century College Ltd.* In that case, the plaintiff argued that he was entitled to damages in lieu of reasonable notice for the nine years he was employed by the defendant. The defendant claimed that the plaintiff was hired on a fixed-term contract and was, therefore, not entitled to any reasonable notice.

The Facts

The plaintiff, Dr. Monjushko, was a Ukrainian mechanical engineer who worked as an instructor and associate professor before he immigrated to Canada in 1995. In 1996, Monjushko began working for the defendant, Century College Ltd. ("Century"), as an instructor for Century's math and computer science–related distance education courses provided under contract with Athabasca University.

Century gave Monjushko an appointment letter at the start of each academic term, the first one in January 1996. Each of these appointment letters stated that the plaintiff's appointment as instructor had been approved for the upcoming semester, and noted which courses the plaintiff would be teaching that term as well as the exact start and end dates of the semester. From 1996 to 2004, Century issued a total of 40 appointment letters to Monjushko. The form of the appointment letters for each semester were nearly identical to the others, with only the semester start and end dates and the particular course names changing. In return, Monjushko issued invoices to Century under the name of AVM Computing, a business name he used. All invoices listed AVM Computing's address as Monjushko's home address.

A party's reasonable expectations must be considered and employers cannot be allowed to evade traditional legal protections by merely applying the "fixed-term" label to the employment relationship.

The issue of whether Monjushko was an independent contractor or an employee was considered by the Canada Customs and Revenue Agency ("CCRA") in 2004. A letter was sent by CCRA to Century and it did not appeal the CCRA ruling. Rather, Century issued T4 statements to Monjushko for each year that he worked.

Around the end of October 2004, Century learned that Athabasca University did not intend to renew its partnership agreement after the current agreement expired in June 2005. After learning this, and prior to the sale of the company some months later, Century issued one last appointment letter to Monjushko in December 2004. That letter covered the spring 2005 semester that ran from January 10, 2005 to April 22, 2005.

Sometime in April 2005, Monjushko was informed without warning that his employment would be terminated at the end of the semester. On April 28, 2005, Century issued a Record of Employment ("ROE") to Monjushko that noted the first day worked as January 2, 1996 and the last day paid as April 22, 2005. This was the one and only ROE that Century issued to Monjushko.

The Case at Bar

In this case, Madam Justice Loo found the facts of this case to "fly in the face" of the defendant's assertion that each of the 40 appointments was a separate fixed-term contract that did not require any termination notice. In particular, she made note of the start and end dates quoted on the ROE issued to Monjushko, as well as the fact that there was only one ROE, instead of a ROE being issued at the end of each semester.

These facts, combined with the fact that Century never appealed the CCRA ruling that Monjushko was an employee and not an independent contractor, led the judge to conclude that Monjushko was considered by both parties to be continuously employed from January 2, 1996 to April 22, 2005. In light of this conclusion, the judge held that the plaintiff was entitled to reasonable notice of the termination of his employment.

Madam Justice Loo's decision in this case appears to have been strongly influenced by Justice MacPherson's reasoning in the *Ceccol* decision.

The reasoning, it seems, is that employers should not be able to evade the traditional protections of the ESA and the common law by resorting to the label of "fixed-term contract" when the underlying reality of the employment relationship is something quite different; namely, continuous service by the employee for many years coupled with verbal representations and conduct on the part of the employer that clearly signal an indefinite term relationship.

Applying this reasoning to Monjushko's case appears to be at the heart of the court's decision. A party's reasonable expectations must be considered and employers cannot be allowed to evade traditional legal protections by merely applying the "fixed-term" label to the employment relationship.

Interestingly, while Madam Justice Loo found that there were insufficient facts to support a finding for *Wallace* damages (aggravated damages awarded against an employer for their bad-faith conduct in the manner in which the employee was dismissed), she found another way to penalize Century for its behaviour. The Judge states that:

Century knew at the end of October 2004 that it would no longer have work for Dr. Monjushko after its partnership agreement with Athabasca University ended in June 2005, or even sooner, when the semester ended in April 2005. However, it did not make that fact known to Dr. Monjushko when it ought to have.

Judge Loo does not indicate the precise extent to which this factor increased the damages award she made; however, it was held that 15 months was the appropriate notice period in this case.

Based on the result of this case, employers should be warned that the courts will not hesitate to search below the surface of an employment contract, and the "fixed-term" label, to determine whether an employee is entitled to and has received reasonable notice.

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Fixed-Term Employment Contracts and the Obligation to Mitigate

Lai-King Hum

The obligation to mitigate refers to the duty of a person claiming damages to do whatever is reasonable to minimize those damages. This obligation applies to all breach of contract claims, including fixed-term employment contracts. However, as highlighted in the recent case of *Orr* v. *Magna Entertainment Corp.*, there are exceptions to this general principle. One exception is where the fixed-term contract of employment provides for a severance amount that is immediately payable, or shortly thereafter, upon termination.

Graham J. Orr had worked for the Magna group of companies for 13 years. He had a very senior position and was paid handsomely. In the fall of 2000, Magna's Frank Stronach offered Orr a job as CFO at Magna Entertainment Corp. ("MEC").

Orr insisted on and obtained an employment agreement with a generous termination clause. If fired in the first three years of the agreement, MEC was obliged to provide severance pay or notice of 24 months. If fired after three years, severance pay or notice was then reduced to 12 months. Severance pay in either case was payable within 30 days of termination.

Orr started working for MEC in January of 2001, but by mid-2002, Stronach and the CEO of MEC were unhappy with Orr's performance and decided to replace him as CFO. In March of 2003, Orr was given notice he would be replaced, but no date was given for the effective date of termination.

Orr and Magna executives, including Stronach, discussed the possibility of a comparable position within the Magna group of companies. Ultimately, Orr was told that his last day as CFO would be in July of 2003 but Magna would continue looking for a position for him.

Orr grew frustrated. He felt Magna was playing him. He was worried that if he stayed with MEC until January 2004 (the three-year mark), MEC would try to pay him only one year's severance instead of two. A senior executive assured Orr that Magna had no intent to string him along until after three years were up and then try to pay him only one year's severance. Stronach also addressed Orr's concerns and frustrations, and told Orr not to worry. A job was arranged for Orr within the Magna group of companies. Although it was a lesser position, he was promised that Magna was still looking for a comparable position.

The principle of mitigation applies to a claim arising from any breach of contract, whether fixed-term or of indefinite duration.

Despite these assurances, on January 9, 2004, just nine days after three years were up, Magna gave Orr one year's working notice of termination from his lesser position. Orr was again told that this did not mean anything, and that Magna was still looking for a comparable position for him.

In June of 2004, however, Orr was finally told not to bother going into work. There was no other position for him at Magna.

Orr sued the Magna companies and Stronach personally, claiming 24 months' severance pay of $1,650,000 from the March 2003 notice of termination.

Stronach and the Magna companies defended by saying that Orr had taken another job within the Magna group after his termination from MEC, and that since Orr had stayed on at Magna past three years, under the contract, he was only owed 12 months' severance pay.

In his decision released early this year, Justice Klowak of Ontario's Superior Court of Justice awarded Orr the full amount claimed plus interest. He found that Orr stayed on with Magna and agreed to forgo demanding his severance only because of the assurances of a comparable position. Orr had not given up his claim to severance pay. Orr had been left "in the twilight zone" of having neither his old position nor a comparable one, and no comparable position was ever offered. Instead, Orr's worst fears came true; that is, from March 2003 until June 2004, he had been strung along.

Ultimately, Justice Klowak found only the Magna companies liable to pay the severance amount of $1,650,000 to Orr. The claim against Stronach personally was dismissed.

Regarding mitigation, Justice Klowak cited with approval Justice Nordheimer's decision in *Graham* v. *Marleau, Lemire Securities Ltd.*, which also dealt with a fixed-term employment contract. Justice Nordheimer summarized the jurisprudence to date, and listed the principles with respect to the obligation to mitigate:

a) The principle of mitigation applies to a claim arising from any breach of contract, whether fixed-term or of indefinite duration.

b) The principle of mitigation also applies where there is an agreed-upon severance provision.

c) Even where there are agreed-upon severance provisions, there are exceptions to the principle of mitigation. In some cases, the contract of employment can be interpreted as having exempted, expressly or by implication, the employee from the duty to mitigate. Examples of such exemptions are:

   i) There is an express waiver of the duty to mitigate.

   ii) There is an express obligation to continue the payments under the employment contract.

   iii) The employment contract provides that the severance amount is payable immediately at, or very shortly after, the date of termination, implicitly suggesting a waiver of the obligation to mitigate as neither the employer or the employee could know whether mitigation could occur.

Justice Klowak, accordingly, concluded that there was an implied waiver of the duty to mitigate in the case before him. Since the parties had agreed to severance pay being payable within 30 days of termination, well prior to when either Magna or Orr could know whether mitigation could occur, the implication was that there was a waiver of the duty to mitigate.

Orr was therefore entitled to the full amount of his claim against Magna pursuant to the termination provisions in his original fixed-term employment agreement, with no obligation to mitigate.

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Corporation Prosecuted Under New Criminal Negligence Provisions

Pradeep Chand

In the early spring of this year, Transpave Inc., the first company charged with "criminal negligence causing death" under the *Criminal Code*, was ordered to pay a fine of $110,000 as a result of a workplace accident resulting in the death of an employee.

On December 7, 2007, Transpave Inc., a concrete block manufacturer northwest of Montreal, pled guilty in Saint Jerome, Quebec to charges of "criminal negligence causing death" under the *Criminal Code*. That charge arose from a 2005 workplace fatality at the company. A 23-year-old worker, Steve L'Écuyer, was killed while trying to clear a jam in a machine. Investigations by Quebec's Health and Safety Board and provincial police found the company was negligent when it allowed L'Écuyer to operate the machine while its motion detector safety mechanism was deactivated.

This case is the first prosecution of a corporation under the new criminal negligence provisions of the *Criminal Code*. On March 31, 2004, as a result of Bill C-45, safety at the workplace became a matter for criminal enforcement. Bill C-45 amended the *Criminal Code* to impose a new duty on organizations and corporations to ensure workplace health and safety.

This new duty contained in the criminal negligence provisions of the *Criminal Code* (s. 217.1) requires that "everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task."

What is important to note is that the word "everyone" includes individuals, organizations and corporations. Should a workplace accident occur, the amendments made by Bill C-45 make it possible for a corporation (or its supervisors or representatives) to be charged with criminal negligence.

In the *Transpave* case, the Crown and the Defence attorney made a joint submission to the Court and agreed that a fine of $100,000 would be an appropriate punishment. In sentencing Transpave Inc., the Court noted that the severity of the offence was high given that a death of a person ensued. However, the Court also noted that Transpave is a family corporation, and it had derived no advantage from the perpetration of the offence. Further, there had been no planning of any sort to commit the offence in question. The Court also commented that safety regulations had been in place prior to the accident, and noted that there was an existing health and safety committee at Transpave, as well as a code of conduct for the employees to follow.

In addition to the above noted factors, the Court, in deciding what an appropriate penalty would be, took note of the amount of money Transpave had invested in its safety systems subsequent to the accident. For instance, in 2006, Transpave spent more than half a million dollars to put its two plants at a safety level comparable to those in Europe, and one that is higher than the one in place in North America. Following the accident, Transpave undertook many measures to help ensure that such an accident would not recur.

What this decision demonstrates is that, while there are no hard and fast rules to play by to ensure an organization remains insulated from liability, it would be prudent for a corporation to incorporate all the best practices and industry standards into an occupational health and safety management system. This will help demonstrate to a court that all reasonable steps are being taken by the organization to ensure the workplace is safe.

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What's New in the World of Brownfields

Annie M. Thuan

When the Ontario government enacted the *Brownfields Statute Law Amendment Act* (the "Brownfields Act") in 2001, more certainty was injected into the process of redeveloping properties that have or are perceived to have environmental contamination (brownfield properties) in Ontario.

Under this brownfields regime, parties (including property owners, developers, lenders and receivers) are provided certain protection against regulatory cleanup orders and cost liability. The phase-in of the new brownfields regime was completed in October of 2005.

In an effort to clarify some of the provisions dealing with regulatory liability protections and to further encourage brownfield development, Ontario introduced the *Budget Measures and Interim Appropriation Act, 2007* (Bill 187) early last year.

Bill 187 received Royal Assent on May 17, 2007, although not all sections came into force. In order for many of these amendments to take effect, revisions are required to O. Reg. 153/04, the Records of Site Condition regulation.

This article briefly discusses some of the recent changes in the brownfields regulatory landscape as a result of Bill 187, as well as the proposed cleanup standards currently being considered by the Ministry of the Environment (the "Ministry").

> *While uncertainty exists regarding the new proposed cleanup standards, parties that are currently engaged in remediation should complete their remediation and file the RSC as soon as possible.*

Existing Regulatory Protections

The Brownfields Act introduced a regime which allowed for protection against certain cleanup orders upon filing of a Record of Site Condition ("RSC") on the Environmental Site Registry. Unless there is a change in property use to a more sensitive use, such as going from industrial to residential, the filing of an RSC is voluntary and there is no provision requiring that an RSC be filed.

The benefit of filing an RSC, however, is that it protects certain parties from being issued Ministry cleanup orders. This allows eligible parties to move forward with the development of a brownfield site, with protection from facing a cleanup order in the future. The eligible parties include: (a) the person who filed the RSC and any subsequent owners of the property, (b) occupants of the property at any time after the RSC was filed, and (c) persons with charge, management or control of the property at any time after the RSC was filed.

Bill 187 Limits Circumstances When RSC Protection May be Lost

There are certain "reopeners" or circumstances in which RSC protection may be lost. Bill 187 clarifies the circumstances in which immunity is lost. Many of these clarifications limit the potential liability of "innocent parties" who did not cause or contribute to the contamination.

New Process for Filing RSC

In the past, there were significant uncertainties as to when the Ministry would conduct audits on the information submitted for an RSC, leading to uncertainty in the process. Bill 187 introduces a new process for filing an RSC and the possible audit of that RSC. This amendment has not been proclaimed into force and regulations will be required before this new process will take effect.

Under the new process, when an RSC is submitted, the Ministry will conduct an initial review and must be satisfied that all the required documents have been submitted. Once satisfied, the Ministry will issue a notice of receipt.

Other Bill 187 Amendments

Bill 187 eliminates the option of addressing contamination by means of "horizontal severances" (separating ownership of the property at the surface level so the owner of the air rights does not have liability). All contaminants in the land and groundwater that are on, in or under the property and prescribed by the regulations or standards specified in a risk assessment must now be within the standards. This is a significant change because remediating a property using "horizontal severances" was seen as a cost-effective approach. This amendment is now in force.

All contaminants in the land and groundwater that are on, in or under the property and prescribed by the regulations or standards specified in a risk assessment must now be within the standards.

Bill 187 extends civil liability protection for municipalities and conservation authorities who rely on RSCs in issuing planning approvals and building permits if the RSC is inaccurate. This revision provides additional comfort to municipalities and eliminates the need for peer reviews (having another consultant review the RSC materials), thereby expediting the process and reducing the time municipalities would otherwise take in issuing planning approvals and building permits. This amendment is also now in force.

New Cleanup Standards Being Proposed

In the spring of last year, the Ministry proposed new clean-up standards for assessing and undertaking cleanup work. These are the technical specifications as to the permissible level of contaminants.

Under the proposed guideline, some of the current standards have become more stringent, for example with respect to benzene and trichloroethylene. In other cases, existing standards have become less stringent, as for example, with respect to vinyl chloride.

Once the new standards are finalized, the Ministry intends to introduce a phase-in period (an 18-month time period has been discussed) to permit parties already engaged in existing brownfield redevelopment plans to use the existing standards for the filing of an RSC. The new updated standards are not intended to apply retroactively. Rather, the updated standards are intended to apply only after the phase-in period has passed.

Concluding Remarks

Bill 187 amendments have injected further certainty into the brownfields regulatory regime and the process of obtaining an RSC. Of significance are the amendments that clarify and limit the circumstances in which RSC protection from Ministry cleanup orders may be lost. These amendments are designed to encourage brownfields development and should reduce some of the risk of uncertainty for developers, owners, purchasers and vendors.

While uncertainty exists regarding the new proposed cleanup standards, parties that are currently engaged in remediation should complete their remediation and file the RSC as soon as possible to ensure that they receive the benefit of the existing cleanup standards.

It is also important to note that Bill 187 does not address civil liability related to contamination, including claims associated with off-site migration to neighbouring properties. As a result, it remains important that vendors and purchasers adequately allocate this risk in any agreement of purchase and sale by conducting the necessary environmental due diligence and ensuring that the appropriate indemnities, representations and warranties, and perhaps environmental insurance, are included in the purchase agreement.

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LAW NOTES

Refusal to Acknowledge Mistake; Copyright Reform; Statutory Holiday Costs; Ramifications of Changes to Human Rights; New Options for Contractors; Abolish Rail Monopoly; Cross-Border Whistleblower Protection


François Tougas


Kalle Soomer


Peter Botz


Gary Fraser


Howard Simkevitz


Alison Hayman


George Waggott


Matthew L. Dewar


Tom Hakemi

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

1 Refusal to Acknowledge One's Mistake: Grounds for Dismissal

Employee insubordination is generally recognized as a cause for dismissal when an employee refuses to submit to the lawful instructions of an employer in performing a task or job. Even a single act of insubordination will justify termination if the refusal is found to be so serious that it affects the fundamental nature of the employment relationship.

But what about a situation where the employee's insubordination takes the form of refusing to formally acknowledge a mistake made? This issue was central to the determination in the B.C. Supreme Court case of *McGachie* v. *Victoria Immigrant & Refugee Centre Society ("McGachie").*

In *McGachie*, the plaintiff had been employed as an employment counselor by the Victoria Immigrant and Refugee Centre Society for five years. During the course of her employment, she had been warned on several occasions that her job performance was unsatisfactory. Her supervisor had recommended more than once that she be terminated for incompetence. When the plaintiff made two errors regarding one file, she was given a written warning stating that "any more serious mistakes like this will certainly lead to the termination of your employment in the future." Following a subsequent error, she was warned in writing that "this e-mail will be kept on your personnel file for the appraisal."

Several months later, the plaintiff made another mistake at work. Even though the employer's policy was that certain documents sent to Human Resources and Social Development Canada ("HRSDC") be approved first by the plaintiff's supervisor, the plaintiff, with full knowledge of the policy, sent the documents to HRSDC without obtaining the supervisor's prior approval.

Following this latest mistake, the plaintiff was asked to meet with her supervisor to discuss what she had done. At that time, the employer asked the plaintiff to acknowledge her mistake in writing. The plaintiff failed to do so, but instead indicated that she would, in the words of the Court, "pursue her own approach to serving clients."

At trial, the Court found that the plaintiff's mistake with respect to sending documents to HRSDC was not inconsequential; however, it was not so serious as to warrant summary dismissal. Neither could it be construed as the culminating event in a series of earlier mistakes for which she had received warning.

The Court did find, however, that the mistake was serious enough to warrant discipline in the form of requiring the plaintiff to acknowledge her mistake in writing. The Court further held that in light of the plaintiff's previous infractions, the discipline imposed was reasonable and that her refusal to comply with the direction to acknowledge her mistake in writing constituted insubordination that justified dismissal for cause. The Court noted that the plaintiff's response to the employer's direction was "an indication [that the plaintiff] did not feel bound to follow directions from her superiors."

While *McGachie* does not create any new law regarding the effect of insubordination on the employment relationship, it does serve to illustrate that insubordination justifying dismissal for cause is not limited to the refusal to perform one's job duties. In *McGachie*, the Court found that the plaintiff's refusal to acknowledge her mistake in writing, together with her indication that she would continue to approach her job duties as she saw fit, constituted a repudiation of the employment agreement which justified her summary dismissal.

—**Gary Fraser**, Lang Michener LLP (Vancouver)

Ed.: *The unabridged version of article appeared in the* Employment & Labour Brief *Spring 2008. To subscribe to that publication, please visit the Publications Request page of our website.*

2 The Next Chapter in Canadian Copyright Reform: Bill C-61

Barring a federal election, Bill C-61, *an Act to Amend the Copyright Act*, should receive second reading this fall. Key topics addressed in the controversial Bill include: file sharing and format shifting, circumvention of technological measures in digital material, liability of ISPs, copyright in photographs and statutory damages available for infringements by individuals.

The Bill has generated significant debate and some commentators are concerned that it follows too closely the American approach to copyright protection in the digital age, and accordingly grants excessive protection to rights-holders at the expense of users of copyrighted materials. However, others see the Bill as necessary to create a predictable copyright regime that will attract business to Canada.

Among other things, the Bill seeks to prohibit individuals from sharing digital music by granting additional rights to makers of sound recordings to control the sale and distribution of their works, including the sole right to communicate a sound recording to the public via the Internet. The Bill would allow individuals to transfer legally acquired musical recordings from one format to another for private use, referred to as "format shifting." For example, individuals would be able to copy legally obtained musical recordings onto their MP3 player.

However, there are numerous restrictions. Most notably, because the music must be legally obtained and not borrowed or rented, copying music from a friend's CD would not be allowed. Moreover, the individual must own the medium on to which the music is reproduced and the copy must not be distributed, even to friends for their own private use. Any copies made must be destroyed before the individual gives the sound recording to another person. Finally, it would not be permissible to tamper with a technological measure designed to prevent copying, often called a "digital lock."

Similarly, the Bill permits format-shifting for photographs and works in books, periodicals, newspapers and videocassettes on similar terms. DVDs are not covered by the exception so it would seem that copying a DVD to another medium, even if there is no digital lock to prevent doing so, is not permitted, whereas digitizing one's VHS collection would be.

The Bill seeks to support businesses like iTunes that distribute digital materials on the Internet by providing that the terms to which their users are bound will govern in the event of an inconsistency with the Bill.

Recording broadcast television or radio programs using a personal video recorder ("PVR") or any other broadcast recording device will be permitted under the Bill provided that the program is viewed only once and is kept "no longer than necessary in order to listen to or watch the program at a more convenient time." Furthermore, the copy made must be for private use and cannot be given away. Of course, it would be illegal to circumvent a technological measure to record the program.

Commentators have criticized the fact that the "time-shifting" proposal makes it illegal for a person to create a library of his/her favorite shows even if maintained strictly for private use. In addition, while a show can be recorded using a PVR, if an individual forgets to do so, he or she cannot later download the show from the Internet using a peer-to-peer BitTorrent application.

As discussed above in relation to format shifting, for individuals who subscribe to video-on-demand services, the terms governing such services will govern in the event of an inconsistency with the Bill.

—**Howard Simkevitz**, Lang Michener LLP (Toronto)
—**Alison Hayman**, Lang Michener LLP (Toronto)

Ed.: *The unabridged version of this article appeared in the Special Issue of* Intellectual Property Brief *in the summer of this year. To subscribe to this publication, visit the Publications Request page of our website.*

3 New Statutory Holiday Costs Employers

One of the first acts of Ontario's re-elected McGuinty government last fall was to add Family Day as a new statutory holiday under the *Employment Standards Act*. As a result, some, but not all, workers in Ontario have an additional day off with pay on the third Monday of each February.

While the government's purpose in making this change was to give people more time with their families, the move represents a significant expense to many employers, with some estimating Ontario's aggregate business costs to range from $500 million to $2 billion. The City of Toronto has reportedly increased payroll by $2.3 million as a result. And while this follows through on the Liberal Party's election platform, some feel the proposal did not receive significant discussion at the election campaign or public consultation levels.

Employers will need to examine this regulation and see how it relates to their holiday policy and/or their collective agreements for unionized groups, because providing this day as a paid holiday is not an automatic requirement. For instance, where the employer already provides employees with a greater right or benefit, they are not required to give employees Family Day off. While there are now nine public holidays in Ontario, some employees may already be receiving additional holidays not listed in the *Employment Standards Act*, such as Easter Monday and Civic Holiday in August.

Each time a new statutory holiday is added (such as with

Boxing Day in 1989), employers need to review their package of holidays for employees. Essentially, an employer and employee can contract out of the *Employment Standards Act* holidays as long as employees receive an equal or greater number of days off. For instance, an employer could provide 10 paid days off at dates other than the statutory holiday dates and that would exceed the current requirement of nine days off.

Employers will also need to consider the costs involved. If an employee is required to work on a holiday and there isn't a written policy or agreement providing for a substitute holiday, work on that day is payable at time-and-a-half.

The addition of Family Day to Ontario's statutory holidays reinforces the importance of regularly reviewing the provisions in applicable company policies, employment contracts, handbooks or collective agreements in order to focus on the whole holiday package being offered to employees.

—**George Waggott**, Lang Michener LLP (Toronto)

Ed.: *The unabridged version of this article appeared in* Employment & Labour Brief *Spring 2008. To subscribe to that publication, please visit the Publications Request page of our website.*

4 New Challenges for Employers: Changes to Human Rights Code

Late in December of 2006, the Ontario *Human Rights Code Amendment Act, 2006*, better known as Bill 107, received Royal Assent. The Government's stated goal for Bill 107 has been to "modernize the human rights system and shorten the pipeline from complaint to resolution." The bill had a rocky road in 2006 as most stakeholders opposed it. But now that it is law, employers are prudent to take the time to appreciate what the new system means for them.

Under the Ontario *Human Rights Code*, employees are assured of equality and employment without discrimination because of a range of prohibited grounds, including race, ancestry, colour, creed, sex, sexual orientation, marital status, family status and disability.

The passage of Bill 107 eliminated the Commission's investigative role. Now, employees will have to file their own complaint directly to the Human Rights Tribunal and pursue their own case. While the government has made some funding available for access to legal services, it is not clear whether every claimant will have access or will need to pay his or her own legal fees in addition to a Tribunal user fee. While it could be seen as a more open system, with complainants enjoying direct access to the Tribunal, the burden of assembling a case will now be on the individual employee, not the Commission.

For employers, the process will be judicialized; that is, the Commission will no longer be conducting investigations. Employers will be charged with marshalling all of their evidence in defence of their position. Because of the Complainant's automatic access to the Tribunal, most cases will be referred there for adjudication.

The employer's exposure to damages for violations of the Code have also been significantly increased. For example:

- the cap of $10,000 in compensation for damages for mental distress will be revoked;
- willful or reckless conduct will no longer be required to be proven to obtain such damages;
- the limitation period for claims will double from six months to one year after the alleged infringement;
- the Tribunal will have the authority to impose fines of up to $25,000 for violating human rights; and
- employees will now be able to sue an employer and claim damages for a breach of the *Human Rights Code* as a cause of action.

Ontario's Attorney General stated that it took an average of five years to resolve a human rights complaint using the Commission. But while the government has assured Ontarians of a more streamlined process to deal with a backlog of human rights complaints, in reality, the volume of complaints will simply shift from the Commission to the Tribunal. It remains to be seen how the Tribunal will establish practices and procedures to ensure an expeditious processing of complaints and the screening out of frivolous proceedings.

Employers now face the prospect of more regular litigation on human rights complaints either through the Ontario Human Rights Tribunal or through the court system. Clearly, the cost of doing business in Ontario will rise significantly.

—**Matthew L. Dewar**, Lang Michener, LLP (Toronto)

Ed.: *The unabridged version of this article appeared in* Employment & Labour Brief *Spring 2008. To subscribe to this publication, please visit the Publications Request page of our website.*

5 New Options for Contractors

The *Income Tax Act* sets out a detailed set of rules governing the taxation of stock options granted to employees, directors and officers. In general, these rules treat the value inherent in the option (measured at time of exercise) as an employment benefit, but often subject to a deferral and a special deduction that effectively taxes the benefit at capital gains rates.

None of these rules apply to options granted to independent contractors. The interpretation of jurisprudence in this area by the Canada Revenue Agency ("CRA") has been that the option benefit represents 100% taxable business income to an independent contractor, and that this benefit may have to be quantified and included in income at time of grant, on exercise, or potentially both. Compared to the potential deferral and capital gains tax rates often available to employees, directors and officers, this has put independent contractors at a significant disadvantage.

The landscape here may be changing as a result of the recent Federal Court decision in *Henley* (2008 DTC 6017).

Henley is not a decision dealing with independent contractors, but it does deal with an issuance of warrants to an individual outside the normal scope of the employee stock option rules in the *Income Tax Act*, and in that sense it may be analogous to the circumstances of independent contractors. This decision was significantly in favour of the taxpayer.

Based on certain principles now enunciated in *Henley* and general principles under the *Income Tax Act*, in most cases it may now be appropriate to take the following approach to the taxation of stock options granted to independent contractors for future services:

1) Any value inherent in the stock option at time of grant represents fully taxable business income to the contractor. However, if an option is granted with a fair market value exercise price, the inherent value of the option at the time of grant may be minimal or at least low, even if a Black-Scholes valuation is applied (and in the past, CRA has not insisted on a Black-Scholes valuation).

2) Share sale proceeds received following the exercise of the option should not be considered business income as payment for services but may, depending on all the circumstances, yield capital gains treatment.

If CRA follows the principles in *Henley* and the Department of Finance does not respond by amending the *Income Tax Act* to impose additional restrictions, many of the significant tax impediments to issuing options to independent contractors can be largely eliminated and that is a sensible and welcome development. Pending clarification of any response by the government, it is prudent to consult with a tax advisor before implementing such options.

—**Peter Botz**, Lang Michener LLP (Vancouver)
—**Kalle Soomer**, Lang Michener LLP (Toronto)

6 Abolish the Monopoly: Make Rail Services More Like Other Network Industries

Canadian National and Canadian Pacific operate monopolies on significant parts of their railway networks. They enjoy almost unlimited power over rates and service in uncontested or "captive" markets and at present there are no market-based solutions to counteract that power. Why should Canadians care? Because unfettered railway monopoly power is undermining the competitiveness of a number of important Canadian industries, including suppliers of steelmaking and thermal coal, base metal concentrate and industrial minerals, lumber and pulp.

The best way to regulate a natural monopoly is to introduce competition by allowing others (a "guest" railway, in this case) to access the track infrastructure of the incumbent (the "host" railway) to vie for the business. Modern economies already do this with other network industries like telecom, cable and electricity and gas distribution.

This solution is commonly called "running rights" and it is not a new idea. The Australians have forged ahead with running rights, realizing efficiencies on various state rail systems. Railways throughout Canada and the U.S. grant each other these rights regularly, by agreement. In Canada, the statutory ability to compel those rights has been in force for over a century.

The economic case justifies it. Not every Canadian shipper needs running rights, as some already have truck or marine alternatives for the shipment of their products. For others who are captive to a single railway, limited running rights – subject to certain tests to ensure that the guest railway can demonstrate its fitness to operate a railway – may be appropriate. Of course, the guest railway would have to pay the host railway for track access and there may be debates over the appropriate level of that compensation.

All Canadian enterprises expect suppliers to compete to get their business; in the case of essential facilities like rail, it is critical. Easing access to railway infrastructure through limited running rights will improve Canada's international competitiveness and allow resource industries to take advantage of global value chains.

Despite increased fuel costs and a weakening economy, CN and CP are financially healthy. They are very viable enterprises, paying their capital expenditures and raising capital without difficulty. They are also incumbents on their own systems, in the same way the original telecom carriers are on theirs. New entrants have an inherent disadvantage. CN and CP should be able to compete against new entrants, and provide lower rates and better service to keep their customers.

It is simply in Canada's best interests for our resource industries to realize the benefits of competition generally. Equity dictates that rail carriers should not be preferred over those who are captive to rail.

—**François Tougas**, Lang Michener LLP (Vancouver)

Ed.: *The unabridged version of this article first appeared in the "FP Comments" section of the* National Post.

7 Cross-Border Whistleblower Protection

A recent New York District Court decision seems to extend whistleblower protection to employees working outside the U.S.

In 2002, the U.S. enacted the *Sarbanes-Oxley Act,* commonly referred to as SOX. Among other things, the intent was "to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws and for other purposes."

To further that goal, the Act provides a private right of action to any employee of a publicly traded company who suffers retaliation for reporting fraud. If successful, the employee may be entitled to relief that includes back pay, reinstatement and compensatory damages.

To succeed in a whistleblower claim under SOX, the following must be shown:

- the employee engaged in "protected activity" (reporting to the U.S. government or a supervisor at their place of employment information that the employee reasonably believes relates to fraud);
- the employer knew of the protected activity;
- the employee suffered an "unfavourable personnel action," including termination, demotion or any other negative treatment that would reasonably be likely to deter other whistleblowers; and
- it can be seen that the protected activity was a contributing factor to the unfavourable action.

Early this year, in the *O'Mahoney* case, the U.S. District Court for the Southern District of New York issued a decision to the effect that the SOX whistleblower provisions may indeed, under certain circumstances, apply to employees working outside the U.S.

For Canadians, *O'Mahoney* teaches that the SOX whistleblower provisions may apply to employees working in Canada for a company publicly listed in the U.S. if:

- the employee has some history of working for a U.S. entity related to the employer (even if, at the time of the complaint, the employee happens to be working for a foreign entity); and
- the decisions to engage in fraud and to retaliate were made within the U.S.

Companies with publicly traded securities in the U.S. would be well advised to consider adopting effective whistleblower policies in their efforts to comply with the SOX provisions.

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

Ed.: *The unabridged version of this article appeared in* Employment & Labour Brief *Spring 2008. To subscribe that that publication, please visit the Publications Request page of our website.*

Brief Life Bites

Charter Sniffers; Exotic Laws; Memoirs for a Child Lawyer; Indecent Exposure

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 Charter Sniffers

In the *National Post*, **Eugene Meehan, Q.C.** commenting on the sniffer dog cases in the Supreme Court of Canada said: "While some may sleep better knowing the fundamental constitutional principles of individual rights are upheld, others may not sleep quite as well knowing drug dealers are well protected from sniffer dogs at school and in the bus station. Man's best friend, indeed." Frankly, I, too, was uncomfortable with the Supreme Court decisions, but equally uncomfortable with Eugene's comments, thinking that, if anyone, lawyers should be able to appreciate the legal thinking that appears in those cases. But, upon reading the comment and thoughts of Roland Stefani, Insurance Corporation of British Columbia, you may find it difficult to know where to stand. He asks: "Am I not correct that exactly the same principles apply when airport security checks my bags at the airport? That is, the search is arbitrary for reasons unconnected to behavior, and thus also violates a person's constitutional rights?" Justice Binnie seems to have addressed that distinction characterizing a drug search as part of "routine crime investigation" as opposed to less routine police work involving explosives, guns or other public safety issues: "What is required is to strike an appropriate balance between the state's need to search (whether the need be public safety, routine crime investigation or other public interest) against the invasion of privacy which [a sniffer dog search entails] including disruption and prejudice that may be caused to law-abiding [citizens]."

2 Exotic Laws: No Mirage and No Lying Here

Lest anyone think he might have been irresponsible when the pet African lion in his charge escaped into the community near Maniwaki, Quebec, the caretaker advised the 20 officers looking for "Boomer" that the animal was not dangerous.

Reportedly more than 150 pounds and five feet in length, this cub was not a kitten, and the police chief wasn't prepared to buy the docile line hook-line-and-sinker. Schools were locked down, police cruisers escorted school buses, and a helicopter with heat-sensing equipment was brought in for the search. The animal was purportedly brought to the area a couple of days before, and residents said they had seen a man walking the cub lion on a chain before the animal escaped from its pen. Confused, the animal was rounded up the following day without serious incident and placed in a police cell until provincial wildlife officials could take charge. The full cost to the community and province were not disclosed, but upon conviction, the pet owner could face a fine of up to $1825 for having an exotic animal without a permit. Apparently, there is no law against permitting an African lion (irrespective of size) to escape into the community. In any case, you may be interested to know that one of the owners was asking for the animal back to be raised as the family's pet. The lion had been getting along quite well with his children.

3 Memoirs for a Child Lawyer

Sunny Pal (at the Ottawa office) has just finished a book of stories for his seven-year-old grandson, recording his memories. As Sunny sees it, the experiences and lessons of the past are easily buried and lost, and it is up to the living to record them, be they private or public, so that they do not become part of a lost world. Sunny's tales start in the days of World War II (in what was then British India facing the threat of Japanese invasion), and goes on through Indian independence, religious riots, law school and rowing at (not for) Cambridge University, a 40-year world-wide career as in-house counsel, the FLQ, and the repatriation of Canada's constitution while he served in Pierre Trudeau's riding committee of Mont Royal. Sunny says that once you start, the writing comes easily, but the illustrating (selecting out of photograph albums and scrap-books and then scanning into electronic form) requires real perseverance and some "due diligence." But, the end-product will be satisfying and precious for family, and perhaps even for history. "Just do it!" he says. A footnote: Seeming to have some lawyer intuition, his seven-year-old grandson wondered if he could require that permission be sought before anyone else looked through "his" book. After all, the whole endeavour was purportedly being done "for him."

4 Indecent Exposure: Sue Yourself

Morris Kertzer, a Life Member of the Law Society of Upper Canada, brought this passage from Justice Hoilette to my attention: "A gentle raising of the corporate veils arguably reveals what might be described as an indecent exposure.… The result is that, *de facto*, we have the same person being named as plaintiff and defendant in the same action": the *Ridgley* case, 1991. (Ed.: *Now you may think that the key phrase in the first line may have been an adaptation of a Hollywood movie title of that era. But the movie, "Indecent Proposal," with Demi Moore and Robert Redford, was not released until 1993.)*

Letters & Comments

1 The article entitled "A New Governance Standard for the World's Natural's Resources Industry," contributed by **Sunny Pal** in our Spring issue, described the Extractive Industries Transparency Initiative ("EITI") based in Oslo, Norway. The article has received acknowledgement and appreciation from **Dr. Peter Eigen**, Chairman of EITI.

2 With reference to the lead article in the last issue of *In Brief*, "Significant Differences Between Canadian and American Patent Law," co-authored by **Keith Bird**, **Orin Del Vecchio** and **Donald MacOdrum**, there were a number of requests for the unabridged version and we were happy to fulfill those requests.

3 Following a series of articles in *In Brief* and in our subject Briefs, **Annie Thuan** and **Graham Matthews** (at our Vancouver office) were interviewed and quoted in the *Canadian Lawyer* magazine in an article entitled "The Landmine of Land Claims." In one of the callouts, Annie is quoted: "There is no comprehensive method of determining the existence of Aboriginal land claims that [a] property may be subject to."

Lang Michener, In Brief…

News

Corinne Brûlé Joins Lang Michener

We are pleased to announce that Corinne Brûlé has joined the International Trade Group. Corrine's practice is focused on international trade and competition law matters, procurement review, and federal regulatory law.

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Lang Michener's Vancouver Office Expands IP Practice

We are pleased to announce that **Ted Urbanek**, Associate Counsel and **Irene Waller**, Associate Counsel, have joined the Intellectual Property Group in the Vancouver office. **Corin Bowman** has also joined the Technology and Intellectual Property Groups as an Associate.

Ted Urbanek is a registered Patent Agent and Trade-mark Agent. His practice extends to all aspects of intellectual property including the preparation and prosecution of domestic and foreign patent applications, patent strategy counselling, due diligence investigations, licensing and technology transfer, trade-mark counselling and practice, and copyright and industrial design practice. Irene Waller is a lawyer and a scientist having obtained her Ph.D. in chemistry with specialization in chemical dynamics, her M.Sc. in theoretical chemistry and her B.Sc. as a Chemistry Specialist. Irene's practice is focused on the protection of intellectual property and the resolution of disputes involving intellectual property and technology.

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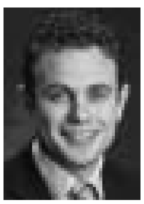

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Lang Michener's Vancouver Office Welcomes New Associates

We are pleased to announce that **Tom Hakemi**, **Siobhan O'Sullivan** and **Alexis Cloutier** have joined the Vancouver office.

Tom Hakemi is experienced in advising in complex commercial, civil and regulatory litigations and appeals. He has represented clients in matters before courts and regulatory bodies in Canada and the United States. His practice focuses on securities and competition law matters, often with multi-jurisdictional elements.

Siobhan O'Sullivan is a member of the Business Law Group. Her practice focuses on the transportation and logistics industry with a particular emphasis on the rail industry. In this capacity she assists senior counsel in representing many of the largest shippers and rail-users in Canada in a variety of matters.

Alexis Cloutier is a member of the Venture Capital Group, with a practice that focuses on transactional, regulatory and general corporate and commercial matters

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Cyndee Todgham Cherniak Appointed Secretary Treasurer of National Commodity Tax, Customs and Trade Section, CBA

Cyndee Todgham Cherniak was appointed the Secretary Treasurer of the Canadian Bar Association, National Commodity Tax, Customs and Trade Section. She will hold this position from September 2008 until August 2010.

James Bond Elected Vice President of the Canadian Bar Association (British Columbia)

Lang Michener is proud to announce that **James Bond**, a Partner in our Vancouver office, has recently been elected Vice President of the Canadian Bar Association (British Columbia).

François Tougas Co-Chair of the Organizing Committee for the Canadian Transportation Research Forum

Lang Michener is pleased to announce that **François Tougas** has been appointed as the Co-Chair of the 2009 Victoria Organizing Committee for the 44th Annual General Meeting of the Canadian Transportation Research Forum.

Events

The 10th Annual Investigative and Forensic Accounting Conference

October 20–21, 2008
Sheraton on the Falls Hotel
Niagara Falls, ON

David Debenham, Partner, will be speaking at the 10th Anniversary of the Annual IFA Conference. This is the premier conference for CA-IFAs working in the field of investigative and forensic accounting. Conference sessions range from primers on fraud investigation and litigation to advanced workshops on cross-border issues, damages and disputes.

ICSC 2008 Canadian Convention – Deal Making and Trade Exposition

October 27–29, 2008
Metro Toronto Convention Centre
Toronto, ON

Lang Michener is proud to be an exhibitor at the International Council of Shopping Centers' (ICSC) 2008 Canadian Convention – Deal Making and Trade Exposition. ICSC is the definitive international association for the shopping centre industry and the annual Canadian Convention attracts thousands of participants from the Canadian real estate industry.

Deals

ShawCor Ltd. Acquires Flexpipe Systems Inc. for C$130 Million

On June 27, 2008, ShawCor Ltd. completed its previously announced acquisition of Flexpipe Systems Inc. for total consideration of approximately C$130 million.

ShawCor was represented by Lang Michener LLP with a team that included **William Sheridan** and **John Conway** (corporate finance/securities).

In Brief

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