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Article TOPICS

1 Damages for Misleading Advertising
3 Exclusions for Faulty or Improper Design
4 Proposed Corporate Governance Rules
6 Claiming Customers' Damages as Own
7 *Anton Piller* and Copyright Actions
8 Spy on Employees and Pay the Price
9 Employer and Worker's Mental Distress
10 Using the Courts to Enforce Union Fines
11 Comparative Advertising – Patent Infringement
12 Tenants in Dangerous Times
14 Replacement Workers – Essential Services

15 **Law Notes**
- Dealing with the Older Worker
- Class Action For Overtime Dismissed
- Shareholder Vote in Acquisitions
- Union Counters Employer's Loss Claim
- Easements and Rescission
- China as a Non-Market Economy
- Taipei Vies for Government Procurements
- Management Fees Exempt from GST

20 **Brief Life Bites**
- Award
- Virtual Friendships
- Almost Close Enough

21 **Letters & Comments**

22 **Lang Michener, In Brief…**

In this issue

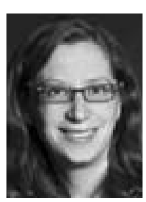
LAW NOTES cover a wide gamut from China, as a non-market economy, to the nitty-gritty of dealing with older workers. Shareholder rights, property rights, union counter moves, overtime claims and a possible GST exemption make for some profitable and interesting reading.

The lead article by James Musgrove and Esther Rossman discusses the very first damages award for misleading advertising in Canada. Workplace issues, like spy cameras and responsibility for workers' mental distress, are fully canvassed in separate articles. On the corporate side, Amandeep Sandhu discusses proposed new governance rules, and Peter Wells and Hartley Lefton look at policy exclusions for faulty or improper design. Matt Dewar joins in to discuss an interesting case to be heard in the highest court where food safety and illegal strike action will form the backdrop to other absorbing legal issues. Dale Schlosser discusses a private search warrant in the context of a copyright action, and there are also intriguing articles about claiming your own losses and also those of your customers, and another about the unintended consequences of comparative advertising.

Some virtual matters and some details about this year's Michener Award in *Brief Life Bites*; we have *Letters and Comments* and, at the end, a little bit about us.

Damages Awarded for Misleading Advertising – First in Canada

James Musgrove



Esther Rossman

In *Maritime Travel Inc.* v. *Go Travel Direct.com Inc.*, a Canadian court, for the first time in a reported case, awarded damages to a plaintiff for misleading advertising in breach of the *Competition Act*.

This case arose out of advertisements for package holidays placed by Go Travel Direct in various newspapers, including the Halifax Chronicle Herald. Commencing in January 2003, Go Travel Direct ran advertisements comparing the price of southern holidays it offered to the price offered by Maritime Travel for such trips. The following January, Go Travel Direct again ran price comparison advertisements, as it did again in January 2005. Maritime Travel attempted, unsuccessfully, to obtain an injunction against the 2003 advertisements. After the 2005 advertisements, it sued for damages.

Madam Justice Hood undertook a fairly detailed review of the comparative advertising jurisprudence in Canada, from which she distilled eight principles, as follows:

1. The general impression of the advertisement must be determined, and to do so, one has to consider the portion of the public to whom the advertisement is directed.
2. The literal meaning of the advertisement is to be considered as well as the general impression.
3. To try to determine whether the advertisement is false or misleading in a material respect, outside evidence may be considered, but not for the purpose of altering the general impression created by the advertisements.
4. The question is whether the advertisement is misleading in a material respect; that is, it must be something that would have an effect on the purchase decision.
5. Aggressive advertising is permitted, unless it is untruthful disparagement.
6. The Court should not interfere with advertising unless the advertising is "clearly unfair."
7. Even advertisements that "push the bounds of what is fair" may not be misleading in a material respect.
8. In the civil context, the burden of proof on the plaintiff is a balance of probabilities; but it is a heavier burden. In the Court's words there must be "substantial proof of activity that is a very serious public crime."

The Court found that Go Travel Direct's 2003 and 2005 advertisements were not materially false or misleading. Indeed, it found that they were accurate. In particular, the Court found that some of these advertisements had two possible meanings, one of which was true. This same issue had been analyzed in the case of *R.* v. *R. M. Lowe Real Estate Ltd.*, where the Court concluded that advertisements with two possible meanings, at least one of which is true, are not misleading.

While the Court found that the 2003 and 2005 advertisements were not materially false or misleading, it came to a different conclusion in the case of the 2004 advertisements. The Court found that those advertisements were misleading in a material respect, primarily because the advertisements gave the impression that Go Travel's holiday packages were less expensive generally than Maritime Travel's, whereas the specific information in the advertisement was only for one trip, available only for a very limited time.

The question then was what damages were caused by the misleading advertising. Since no case thus far in Canada has sought to award damages for misleading advertising, this was a case of first impression. The plaintiff led evidence from a chartered accountant and a chartered business valuator. It sought to obtain damages for the defendant's entire advertising campaign and for the defendant's conduct in competing with the plaintiff's campaign, but the Court indicated that damages would only be available with respect to injury caused by the misleading advertisement, and that other factors affecting the industry should not contribute to the damages suffered by Maritime Travel compensable as a result of the conduct of Go Travel Direct.

The Court found that the effects of the misleading advertisement were not limited to a week or even a month, but extended for the entire winter travel season even though the ads themselves ran for only a few days.

Maritime Travel also sought an accounting for profits earned by Go Travel Direct, but the Court noted that an accounting for profits is not an available remedy under Section 36 of the *Competition Act*. Damages can only be awarded for injury actually caused by the improper conduct.

The Court found, with limited evidence on the point, that the effects of the misleading advertisement were not limited to a week or even a month, but extended for the entire winter travel season even though the ads themselves ran for only a few days. This is because the Court found the false advertisements had given the impression that Go Travel Direct's prices generally were less expensive than Maritime Travel's prices.

The approach that the Court took was to determine the percentage of the market that Maritime Travel had in years in which there was no misleading advertising, then attempted to ascertain whether there were other factors operating in the year in which the misleading advertising occurred, and to the extent there were no other relevant factors operating, the Court attributed the difference between Maritime Travel's average percentage of sales of holiday packages in other years and its percentage of sales in the year in which misleading advertising had occurred to the market advertising. Based on the average commission that would have been earned on the number of trips not sold over the affected season, the Court found that Maritime Travel had suffered damages of some $216,000 as a result of the misleading advertising.

As noted, this is the first misleading advertising case in Canada in which it has been necessary to actually calculate damages suffered. It seems to us that the Court got many of the important principles right. While it is possible to take issue with some approaches taken in the case, and in particular, it is possible to question the appropriateness of attributing lower-than-average sales for the entire season to one short set of misleading advertisements, the case nevertheless provides a method for approaching the determination of damages in a misleading advertising setting, which is a very difficult matter. It is the first such method set out in a Canadian case.

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Ed.: *The decision in* Maritime Travel Inc. *v.* Go Travel Direct.com Inc. *was affirmed on appeal.*

A version of this article appeared previously in Lang Michener's Competition & Marketing Brief.

Policy Exclusions for Faulty or Improper Design


Peter Wells


Harley Lefton

A recent judgment by the Supreme Court of Canada ("SCC") has clarified the standard necessary for the "faulty or improper design" insurance exclusion to apply. Typically, this exclusion would relieve an insurer from providing indemnity for a loss resulting from design problems that led to the claim. This SCC judgment has profound implications for all insurers and insureds whose policies include this kind of exclusion.

In *Canadian National Railway* v. *Royal and Sun Alliance Insurance Co. of Canada* ("CN Railway"), the SCC addressed the issue of "faulty or improper design" in an insurance contract. Prior to CN Railway, some authorities suggested that a design was faulty if it did not work for its intended purpose, while another line of authorities suggested that a faulty design was one that could not cope with all foreseeable risks. In CN Railway, the SCC rejected both of those approaches and paved its own way.

This SCC judgment has profound implications for all insurers and insureds whose policies include this kind of exclusion.

Canadian National Railway sought to build a railway tunnel under the St. Clair River, between Sarnia, Ontario and Port Huron, Michigan. This required the construction of a large tunnel boring machine ("TBM") nearly 10 metres in diameter and 83 metres in length. In order to keep rock and dirt contaminants out of the mechanism that drove the TBM forward, a complicated system of 26 seals was used. It was thought that the TBM would only be stopped if all 26 seals failed, but that the redundancy built into the system would make this failure very unlikely. However, approximately 14% of the way through the project, dirt was found to have bypassed the elaborate seal system entering the main bearing chamber. During design, the engineers appreciated that if differential deflection between key components exceeded ±3 mm, dirt could penetrate and bypass the seals. Based on detailed computer analysis of the design, the engineers were satisfied that differential deflection could be kept within the ±3 mm range. In operation, this proved not to be the case. Consequently, the project had to be paused, modifications made to the boring machine, and the project subsequently restarted. Construction was delayed 229 days at a total cost of approximately $30M.

Canadian National Railway sought indemnification for this cost from its insurers under its "all risks" insurance policy. The insurers rejected the claim, relying on an exclusion to the insurance policy that provided, in part, that the insurance policy did not insure the cost of making good "faulty or improper design" (the "Exclusion").

The key question for the Court to address was whether the failure of the design to withstand the foreseeable and, indeed, foreseen risk that differential deflection could exceed ±3 mm was itself sufficient to establish that the design was "faulty or improper."

At the SCC, the majority found that an engineering design cannot be said to be faulty if it conforms to the state-of-the-art and that a simple failure does not discharge the onus of establishing a "faulty or improper design." That is, the Court found that failure alone was not sufficient evidence of inadequate design. An insurer is entitled to the benefit of an exemption such as the Exclusion "unless the design met the very highest of standards of the day and failure occurred simply because engineering knowledge was inadequate to the task at hand." The majority said quite clearly that where the risk is broadly defined and the design addresses that risk with state-of-the-art diligence and expertise, an insurer is not entitled to benefit from the Exclusion simply because the state of the art falls short of perfection and omniscience.

The decision in CN Railway, while a win for the insureds in the specific case, should also be seen as a win for the broader insurance industry.

While the SCC stated quite clearly that a standard of omniscient perfection is too high a standard, it determined that the state-of-the-art is the appropriate standard rather than a lesser standard such as "industry practice." Insurers seeking to rely on a "faulty or improper design" exclusion must show that existing scientific/technical knowledge could have predicted the risk of damage and provided a design that would avoid the problem.

Future insureds claiming under insurance policies that have "faulty or improper design" exclusions will certainly be required to demonstrate that their design met the state-of-the-art standard. The problem that insurers will face will be proving that innovative and novel equipment is not state-of-the-art, particularly when technology is proprietary or it is otherwise difficult to locate witnesses willing and able to testify that a design is not state-of-the-art.

However, in practical terms, policies with a "faulty or improper design" exclusion, as in CN Railway, will only be appropriate for unique, high-priced goods. Indeed, some products occupy a segment of the market that are intentionally of lower quality and lower price, and therefore more accessible to a wider swath of consumers, yet producers of such goods may still desire liability coverage. A policy with a "faulty or improper design" exclusion, in light of CN Railway, would not provide any protection with respect to such goods, and producers should seriously consider saving the cost of their premium, unless the exclusion is redrafted.

Further, even some unique goods, such as manufacturing plants, are intentionally designed and built to a standard less than that of the "state of the art" and more reflective of a standard that is cost-effective under the circumstances. In light of the holding of the SCC that a design below that of the state-of-the-art would not be covered by a policy with a "faulty or improper design" exclusion, such owners are again left with the choice of saving the premium or negotiating a more appropriate policy.

Insurance is a contract for the reallocation of risk. A "faulty or improper design" exclusion allocates to the insurer only the risk that despite the best efforts of the designer to eliminate all risk, some risk may remain. If the design is intended to avoid eliminating all possible risk, on the basis that the cost of eliminating the residual risk is not considered to be worth the cost, then a policy which accepts this additional risk is essential, and a policy with a "faulty or improper design" exclusion is a waste of money. If the premium for a policy which assumes the additional risk is prohibitive, then the designer's evaluation of the risk needs to be considered.

With this new guidance from the SCC, insurers and policyholders are advised to:

- Review their general insurance policies, paying particular attention to the wording of any exclusions, specifically those relating to "faulty or improper" design or use;
- Ensure that, to the greatest extent possible, their design of products approaches the state-of-the-art standard and that it has the documentary record necessary to demonstrate that this is so;
- Discuss with their legal counsel, their insurance broker and their insurer ways to bring their practice up to the state-of-the-art; and
- Consult with legal counsel when reviewing current insurance policies or when considering entering into new policies that may have exclusions for "faulty or improper design."

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Ed.: *A version of this article was published in* International Law Office *and* Lexology, *and in* Construction Law International *(the quarterly construction journal of the International Bar Association).*

Proposed New Corporate Governance Rules

Amandeep Sandhu

The Canadian Securities Administrators ("CSA") has proposed a revised corporate governance practice and disclosure regime.

The Proposed CG Principles are more principles-based and broader than the current corporate governance guidelines. They contain nine broad corporate governance principles and commentary explaining the principles, as well as examples of corporate governance practices that can be used to achieve the objectives of the principles.

The CSA indicates that through the Proposed CG Disclosure Rule, the existing "comply or explain" model of applicable disclosure requirements would be replaced with more general disclosure requirements that would apply to both venture and non-venture issuers.

Additionally, the current rules-based approach to determining director and audit committee independence would be replaced by a principles-based approach. Accordingly, the bright-line tests for independence would be replaced by a principles-based definition along with guidance on the types of relationships that could affect a director's independence.

This reformulation was undertaken by the CSA partly in response to the fact that the Canadian market has a large number of small issuers and controlled issuers. While the Alberta Securities Commission supports the objectives of the new proposals, it is concerned that the new rules will not substantially improve the current rules.

When it first published the final form of the current corporate governance rules and policy, the CSA acknowledged that corporate governance was constantly evolving. Since then, the CSA carried out a broad review of the corporate governance rules and policy, and examined corporate governance regimes in other jurisdictions and considered the realities of the large number of small issuers and controlled issuers in the Canadian market. Through the Proposed CG Principles, the Proposed CG Disclosure Rule and the Proposed Audit Committee Rule, the CSA aims to provide guidance to issuers, greater transparency to the marketplace and a framework for strong, effective and independent audit committees.

The Proposed CG Principles, Proposed CG Disclosure Rules and Proposed Audit Committee Rules, as proposed, were open for comment until April 20 of this year, and the CSA intends to give issuers six months' notice before the new rules take effect.

Proposed CG Principles

The nine principles under the Proposed CG Principles do not create obligatory practices or minimum requirements. The CSA recognizes that other corporate governance practices achieve similar objectives, corporate governance evolves as an issuer's circumstances change, and issuers should have flexibility to determine the practices appropriate for their circumstances. What follows is an outline of some of the principles, together with some commentary provided by the CSA in the Proposed CG Principles:

The Proposed CG Principles are more principles-based and broader than the current corporate governance guidelines.

Create a Framework for Oversight and Accountability

An issuer should establish the respective roles and responsibilities of the board and executive officers.

The rationale for defining such responsibilities is to promote accountability to the issuer and its shareholders. The division of responsibilities will depend on the size, complexity and ownership structure of the issuer. In general, it is the board that is responsible for setting the issuer's overall vision and long-term direction, and the executive officers' role is to develop and implement an appropriate strategy that meets such vision and direction.

Structure the Board to Add Value

The board should be comprised of directors who will contribute to its effectiveness.

The CSA indicates that an effective board is structured such that it allows directors to fully and effectively carry out their fiduciary duties, and add value to the issuer with a view to its best interests.

Attract and Retain Effective Directors

A board should have processes to examine its membership to ensure that directors, individually and collectively, have the necessary competencies and other attributes.

While the responsibility for selecting and appointing directors rests with the board, a board nomination committee could facilitate the process. Smaller boards may not need a formal committee.

Continuously Strive to Improve the Board's Performance

A board should have processes to improve its performance and that of its committees, if any, and individual directors.

The board should provide comprehensive orientation and continuing education that covers the issuer and its business, financial condition, operations and risk-management practices, as well as its industry and competitive position.

Promote Integrity

An issuer should actively promote ethical and responsible behaviour and decision-making.

The board has a responsibility to set ethical standards applicable to the issuer's directors, executive officers and employees.

Recognize and Manage Conflicts of Interest

An issuer should establish a sound system of oversight and management of actual and potential conflicts of interest.

This can be accomplished through establishing an ad hoc or standing committee to identify, review, report and record actual or potential conflicts of interest. Additionally, obtaining independent advice on the situation related to the actual or potential conflict of interest can be important. Further, where an ad hoc or standing committing for conflicts of interest has been established, such a committee should be composed of directors who are not interested in any matter being discussed or considered and have terms of reference and provide it with the authority to engage and compensate any internal or external advisor.

Recognize and Manage Risk

An issuer should establish a sound framework of risk oversight and management.

Risk oversight and management includes the culture, processes and structures that are directed towards taking advantage of potential opportunities while managing potential adverse effects. Risk oversight and management should focus on identifying the most significant areas of exposure that could have an adverse impact on the achievement of the issuer's goals and objectives.

Proposed CG Disclosure Rule

The Proposed CG Disclosure Rule provides one disclosure regime for both venture and non-venture issuers. Under this rule, issuers would be required to disclose the practices it uses to achieve the objectives of the nine principles set out in the Proposed CG Principles and disclose certain factual information, such as the board's composition and information about any of its committees. This is a departure from the current corporate governance disclosure requirements, which require issuers to "disclose whether or not…" they complied with the current corporate governance guidelines and, if not, explain why they have not.

The Proposed CG Disclosure Rule requires issuers to describe many aspects of its governance structure. Issuers should refer to the full text of the Proposed CG Disclosure Rule for a full list of the matters to be described.

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Ed.: *Without cost or obligation, contact Amandeep for the unabridged version of this article, which appeared previously in Lang Michener's* Securities/M&A Brief.

Claiming Your Customers' Damages as Your Own

Benjamin Bathgate

In contract disputes, the parties who are permitted to bring an action following a breach of contract, and the scope of the damages which they are entitled to seek, are limited by the legal principle known as *privity of contract*. Black's Law Dictionary defines *privity of contract* as the relationship between the parties to a contract which allows them to sue each other but which prevents a third party, outside of the contract, from doing so.

These strict limitations have loosened over time to allow third parties and their damages (under certain circumstances) to be recoverable from a contract when that third party's involvement in the subject matter of the contract and the contract's impact upon them produce certain foreseeable results. The difficulty arises when one attempts to delineate how far the courts are prepared to expand coverage for such "foreseeable" results.

This question is particularly relevant for businesses involved in multi-party transactions that result in a breach of contract or warranty. Consider the following hypothetical.

The Ontario and British Columbia Courts have indicated that, in the proper case, the law as stated in Randall v. Raper*, allowing a claimant to claim its customers' losses as its own, if that claimant is "responsible for paying" for such a loss, may be correct.*

Apple Growers Inc. owns several apple orchards. Wholesale Apples Inc. enters into a contract for and purchases apples in bulk from Apple Growers. Wholesale Apples then enters into a separate contract with and sells a portion of those apples to either a manufacturer, such as a baby food manufacturer, or a retailer, such as a fruit market, which we will call Fruit Markets Inc. The necessary condition is that Fruit Markets, the third party, is not a party to the contract between Apple Growers and Wholesale Apples, but rather has its own separate contract with Wholesale Apples.

A breach of contract arises after the apples are found to be of a lower grade than that which was bargained for. This results in litigation between Wholesale Apples and Apple Growers, whereas Fruit Markets, in this instance, does not commence litigation of its own against Wholesale Apples but rather sits on the sidelines. (It is of course possible that Fruit Markets would commence its own litigation against Wholesale Apples, claiming a breach of their contract. This article, however, assumes that Fruit Markets does not do so, either for business reasons or because of the costs involved, and, instead, remains outside of the litigation.)

Under this hypothetical, the question is whether Wholesale Apples can claim Fruit Markets' losses, as its own, in its litigation with Apple Growers even if Wholesale Apples has not paid Fruit Markets for its losses. Some answers can be found by applying this hypothetical to the case law.

The judicial consideration of such a scenario is surprisingly limited, with most cases focusing on facts where the reseller (Wholesale Apples) pays the third party retailer or customer (Fruit Markets) for its losses and then claims those losses in its litigation with the original manufacturer or supplier (Apple Growers). But what if Wholesale Apples' customers, such as Fruit Markets, hold-off on commencing litigation against Wholesale Apples, or what if Wholesale Apples simply has insufficient funds to pay Fruit Markets? Will the courts still allow Wholesale Apples to claim Fruit Markets' losses as its own? Under certain circumstances it appears that the courts may do so.

The seminal case on this area of the law is the United Kingdom case of *Randall* v. *Raper*. The majority decision of the Court was that the plaintiff could recover its customers' losses as its own damages so long as the plaintiff was liable to compensate its customers, and the customers' losses were a probable, natural and necessary consequence of the defendant's breach of contract.

The subsequent United Kingdom decision in *Total Liban SA* v. *Vitol Energy SA* agreed that there was no general common law rule that liability without payment was not a recoverable loss. The Court explained that when there is a breach of contract and a proven liability to a third party, then the party claiming the third party loss must simply satisfy the Court that the loss was caused by the breaching party and that the unlawful act was not too remote from the third party loss, the same tests any claim for damages must satisfy. Interestingly, the Court went on to explain that this had to be the case, otherwise an impecunious claimant, unable to pay a third party loss, would be left with liability to that third party and no remedy with which to satisfy it, whereas the breaching party would escape part of the consequences of its breach.

The Canadian case law has only briefly touched on such a scenario. The Ontario and British Columbia Courts have, however, indicated that, in the proper case, the law as stated in *Randall* v. *Raper*, allowing a claimant to claim its customers' losses as its own, if that claimant is "responsible for paying" for such a loss, may be correct.

Applying the hypothetical, the circumstances under which a claimant may be able to claim its customer's losses as its own, even having not paid its customers, are as follows: (1) when there are legal obligations between Wholesale Apples (the reseller) and Fruit Markets (the customer), apart from and in addition to the separate liability between the supplier, Apple Growers, and Wholesale Apples; (2) when the breach of all the legal obligations are caused by Apple Growers; (3) when Wholesale Apples' breach of its legal obligations to Fruit Markets is not too remote from Apple Growers' breach of its legal obligations to Wholesale Apples; (4) when there is a probability of future claims by Fruit Markets (the customer) against Wholesale Apples; and (5) when Wholesale Apples (the reseller) is impecunious and is otherwise unable to pay Fruit Markets (the customer).

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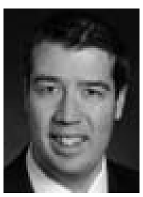
Ed.: *Ben wishes to thank Natasha Wirtanen, articling student, for her research work on this topic.*

Anton Piller and Preservation of Evidence in Copyright Actions



Dale E. Schlosser

An *Anton Piller* order has been described as a private search warrant. This reference has been described as "uncomfortable" by the Supreme Court of Canada.

Such orders are used to preserve evidence on the basis that the defendants would hide or destroy relevant evidence if notified of the action. The order permits the plaintiff to demand entry to the defendant's premises to search them and to remove documents and other evidence.

Where there is a *prima facie* case of copyright infringement, the recovery of possession of copies, and plates, is specifically provided for in the *Copyright Act*. But in view of commentary from the Supreme Court that the *Copyright Act* is an exhaustive statutory regime, it raises the question as to whether there are limits as to what material a plaintiff may obtain in a seizure order in a copyright action.

The *Copyright Act*

Section 38 of the *Copyright Act* provides the following:

38. (1) Subject to subsection (2), the owner of the copyright in a work or other subject-matter may
- (a) recover possession of all infringing copies of that work or other subject-matter, and of all plates used or intended to be used for the production of infringing copies, and
- (b) take proceedings for seizure of those copies or plates before judgment if, under the law of Canada or of the province in which those proceedings are taken, a person is entitled to take such proceedings,

as if those copies or plates were the property of the copyright owner.

(2) On application by
- (a) a person from whom the copyright owner has recovered possession of copies or plates referred to in subsection (1),
- (b) a person against whom proceedings for seizure before judgment of copies or plates referred to in subsection (1) have been taken, or
- (c) any other person who has an interest in those copies or plates,

a court may order that those copies or plates be destroyed, or may make any other order that it considers appropriate in the circumstances.

(3) Before making an order under subsection (2), the court shall direct that notice be given to any person who has an interest in the copies or plates in question, unless the court is of the opinion that the interests of justice do not require such notice to be given.

(4) In making an order under subsection (2), the court shall have regard to all the circumstances, including
- (a) the proportion, importance and value of the infringing copy or plate, as compared to the substrate or carrier embodying it; and
- (b) the extent to which the infringing copy or plate is severable from, or a distinct part of, the substrate or carrier embodying it.

(5) Nothing in this Act entitles the copyright owner to damages in respect of the possession or conversion of the infringing copies or plates.

In the Federal Court it has been found that, provided the plaintiff establishes a *prima facie* case of copyright infringement, Sections 38(1)(a) and (b), in conjunction with Rule 377(1) of the *Federal Courts Rules,* allow the plaintiff to seize, before judgment, all infringing copies of the work in which it owns the copyright.

The *Anton Piller* Order

With an *Anton Piller* order, no notice is given to the party against whom it is issued. As Justice Binnie of the Supreme Court of Canada stated in *Celanese Canada Inc.* v. *Murray Demolition Corp.*: "The order is not placed in the hands of a public authority for execution, but authorizes a private party to insist on entrance to the premises of its opponent to conduct a surprise search, the purpose of which is to seize and preserve evidence to further its claim in a private dispute. The only justification for such an extraordinary remedy is that the plaintiff has a strong *prima facie* case and can demonstrate that on the facts, absent such an order, there is a real possibility relevant evidence will be destroyed or otherwise made to disappear. The protection of the party against whom an *Anton Piller* order is issued ought to be threefold: a carefully drawn order which identifies the material to be seized and sets out safeguards to deal, amongst other things, with privileged documents; a vigilant court-appointed supervising solicitor who is independent of the parties; and a sense of responsible self-restraint on the part of those executing the order."

The *Anton Piller* order may relate to "documents or things." The party obtaining an *Anton Piller* order obtains possession, not as property, but to preserve it for the court. On the other hand, s.38 of the *Copyright Act* explicitly deals with the copyright owner's property rights in the copies and plates, and provides a means for obtaining interim possession of its property pending a trial.

In *Théberge* v. *Galerie d'Art du Petit Champlain Inc.*, Justice Binnie stated that "copyright in this country is a creature of statute and the rights and remedies it provides are exhaustive." Since Section 38 provides for seizure before judgment and is restricted to copies or plates, there is an issue as to whether the other documents or things that may be obtained through an *Anton Piller* order are available through Section 38. And so, in light of *Théberge* one question is whether there is jurisdiction to grant such an order. It would appear that there may be under s. 34(1) of the Act which entitles the owner of copyright "to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right." An *Anton Piller* order is a common law order that may be conferred by the courts, thus s.34(1) would appear to provide jurisdiction.

Some Final Remarks

The evidence to obtain an *Anton Piller* order must be given with candour and full and frank disclosure to the Court. Therefore, it will be interesting to see whether this issue is openly discussed when *Anton Piller* orders involving copyright are sought.

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Spy on Employees Without Cause and Pay the Price

Howard Levitt

If this were a tale of an exhibitionist meeting a voyeur, it might have been a merry one. That, however, was not the case.

There is an extremely fine line between what might be considered voyeurism and employee surveillance as Cornerstone Properties learned. It also learned that a high price can be exacted if an employer installs a secret camera to monitor its employees.

Colleen Colwell, commercial manager, had been working for the company for more than seven years, when she learned a secret camera had been installed in the ceiling of her office almost a year earlier by her boss, Trent Krauel, Cornerstone's vice-president in finance.

Shocked, she immediately had the camera removed. But Colwell felt psychologically violated and emotionally distraught, and sought medical attention. She was prescribed sedatives. In the next few weeks, she and Krauel had several meetings to discuss this.

He claimed the camera was installed to detect theft by maintenance staff. There had been several incidents of theft on the premises in the year prior to this secret camera installation, he said. He did not intend to spy on her, he said, but had been concerned that her office was used by the thieves to "review the loot."

He assured her he trusted her, wanted her to remain in her position, and that she was not a suspect. To Colwell, these explanations had a tin ring.

To top it off, Krauel maintained his right to install the camera secretly in her office. He was sorry she was upset, but he owed her no apology.

Colwell was incredulous. No money was ever kept in her office and no theft had taken place there. Worse, since she was responsible for the maintenance staff, why had she never been told they were under suspicion? Krauel's explanation exacerbated her sense of violation.

Blind to the impact on Colwell, Krauel asked her to stay on for six months, while Cornerstone tried to sell the mall. He said the company would "look after" her at the end of the six months.

Colwell could not bear the thought of continuing to work for Krauel, given how he had betrayed her sense of trust. In a last-ditch effort to resolve the situation, Colwell went to Anthony Graat, president of Cornerstone, with an offer to train her replacement in exchange for a letter of recommendation and a severance package. Graat did not respond.

Colwell resigned and sued both Cornerstone and Krauel for constructive dismissal.

Justice David Little found in favour of Colwell. He had little patience for Krauel, characterizing his explanations as "preposterous" and "unbelievable."

He concluded that the secret installation of the camera, Krauel's lack of apology or repentance, and his declaration he had a right to install the camera in Colwell's private office without advising her, coupled with his preposterous explanation, the court said, made it impossible for Colwell to continue in her employment.

There is an extremely fine line between what might be considered voyeurism and employee surveillance.

Justice Little wondered, "What was the real reason for installing the camera?" He could draw no conclusion.

The court sympathized with Colwell because she was left in a position of being unable to rely upon the honesty and trustworthiness of her immediate supervisor. Krauel's conduct amounted to more than "bad faith" and "unfair dealing," and Colwell was justified in leaving this "poisoned environment."

What right do employers have to spy on their employees?

- Monitoring and surveillance are powerful tools against workplace theft. However, employers must have a reasonable apprehension of abuse by employees to justify their use.
- Employers have the right to install cameras in the workplace. However, that right is limited by the obligation to exercise it in good faith and fair dealing.

Otherwise, spying on employees will open the door to the court's meting out both financial sanction and an embarrassing public decision.

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Ed.: *John Steinbeck wrote: "I hate cameras. They are so much more sure than I am about everything." The article by Howard Levitt appeared previously in Howard's weekly column on the first page of the Working section of the* National Post.

Employer Not Always Responsible for Worker's Mental Distress

Aaron Rousseau

Illnesses related to workplace stress are endemic for employees of every level of seniority.

Work can be very stressful, and employees sometimes end up quite ill as a result. But even where an employee gets sick as a direct result of something at work, the employer is not necessarily responsible.

Not many employees become as ill as Maria Amaral did, as is described in her case against the Canadian Musical Reproduction Rights Agency Ltd. Despite causing her illness, however, her employer was not liable.

Amaral had worked for her employer for more than 20 years. She applied to become the manager of her department, but the employer selected someone else instead. The employer acknowledged that Amaral was a hard worker, but felt she wasn't the right person for the position. Amaral was deeply resentful. She felt that the decision was not objective. Amaral's new manager was a no-nonsense taskmistress who did not step gingerly around Amaral's disappointment. To make matters worse, Amaral had to train her new manager.

The new manager asked Amaral to write a letter to a customer. Amaral refused saying that this was a task for the management job the employer had refused to give to her. Confused and somewhat annoyed, the employer reprimanded her and instructed her to write the letter. After the incident, Amaral's performance began to deteriorate. Her productivity went down, while her lateness and absenteeism went up. At the same time, she began to look dishevelled and fatigued. She was seen crying a few times at work. Amaral told one manager that she was on medication for stress and was seeing her doctor. The employer focused on the performance issues. It reduced her responsibilities and put her on probation.

Amaral rapidly descended into the severest depression. She said that if she could find a gun she would shoot everyone at work and then herself. She attempted suicide several times, sometimes in front of her children. She was confined to a mental institution, and she never worked again. The court assessed her damages at over $1.5 million.

Amaral sued the employer for intentional infliction of mental suffering. The court held that to make out such a tort it was necessary to show flagrant and extreme conduct, plainly calculated to produce some effect of the kind produced, and a visible and provable illness.

The court found that the employer had caused Amaral's depression by passing her over for the promotion and then disciplining her. It ruled, however, that the employer's conduct was firm but fair. The court upheld the employer's right to make proportionate and reasonable responses to legitimate employee problems, such as declining performance and punctuality. The employer's progressive discipline and transfer of responsibilities stayed within those bounds.

A crucial point for the court was that the employer did not know Amaral was ill, because Amaral never told the employer. The court was also reluctant to find that the employer should have known about the illness. As a result, the court pointed out that the employer had in no way failed to accommodate the illness.

An even more crucial point was the employer's lack of malice. The court noted that the employer had been unsympathetic to Amaral. Her manager did not sugar coat her legitimate criticism of Amaral. When Amaral's performance became problematic, the employer changed Amaral's responsibilities in part so that it would be able to terminate her if she failed in her new functions. Nonetheless, the court stressed that these were permissible, reasonable actions. Amaral was unable to show any intention by the employer to harm her or any knowledge that its actions were likely to harm her. Ultimately, this was fatal to the claim.

Amaral also argued, in the alternative, that the employer was liable for negligent infliction of mental suffering. The court affirmed that there is no tort of negligent infliction of mental suffering in the employment context.

The Amaral decision underlines the importance of an employer's actual knowledge of an employee's illness. Until the employer is put on notice of an employee's vulnerability, the employer will not likely face liability when a fragile employee suffers from the emotional rough-and-tumble of the workplace. The decision in this case also upholds the employer's traditional prerogatives to reasonably promote, manage and discipline its employees in the pursuit of its legitimate goals. Unless an employee can show that an employer acted out of malice, illnesses stemming from workplace stress and disappointments will not be successful in a tort claim against the employer.

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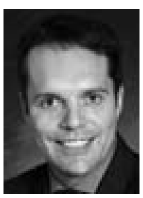
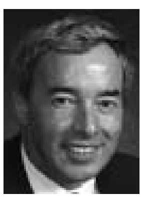
Using the Courts to Enforce Union Fines



George Waggott



Norm Fera

Two cases, one in Ontario and the other in Alberta, have recently addressed the question of whether a trade union may invoke the jurisdiction of the courts to enforce fines that it has imposed against its members for crossing a picket line.

In Ontario, in the *Birch* case, the Union of Taxation Employees, Local 70030 brought disciplinary proceedings against two members for allegedly violating the union's constitution by working during a legal strike. The union suspended these members for three years (one year for each day that they had crossed the picket line), and fined each the equivalent of their gross salary ($476.75) for the three days they crossed the picket line. When the members refused to pay their fines, the union sought to enforce payment in the Small Claims Division of the Ontario Superior Court of Justice.

When the members refused to pay their fines, the union sought to enforce payment in the Small Claims Division of the Ontario Superior Court of Justice.

The parties later agreed that the matter should proceed as a test case by way of application in the Superior Court itself on an agreed statement of facts. Justice Robert Smith held that a provision in the union's constitution authorizing the fines was an unenforceable penalty clause. The case then proceeded to the Ontario Court of Appeal, which affirmed the earlier result. For the majority, Armstrong J. A. wrote:

> In my view, the application judge applied the correct test for unconscionability to the agreed facts and to the inferences which he drew from those facts. I can see no basis upon which this [appellate] court could or should interfere with his conclusion that the penalty clause in the constitution is unconscionable and therefore unenforceable.

Not finding this acceptable, the union sought leave to appeal, but its application in the Supreme Court of Canada was dismissed with costs.

In the *MacMillan* case, decided in Alberta, three union members crossed their union's picket lines during a legal strike and were "charged" with violating the union's constitution. The Telecommunications Workers Union, Local 202 convened a trial board though none of the three attended to answer the charges. Following hearings, the union members were found "guilty" and fined for cause detrimental to the welfare of the union and for crossing or working behind a picket line.

None of the union members paid the fines and two were suspended. The union then sued them in provincial court, civil division, seeking a judgment in debt or, alternatively, damages to enforce the trial board's fines, together with interest.

The Alberta Provincial Court decided that, while the federal *Trade Unions Act*, which applies to federally-regulated workers such as the three fined employees, did not preclude the union from advancing its claims in provincial court, there was no basis to sue because: (1) the union's claims were not an action in either debt or damages; (2) no cause of action arose at common law or by statute authorizing the unions enforcing its disciplinary penalties in a court of law, and (3) neither the union's constitution nor by-laws authorized it to seek redress in the courts for an internal disciplinary matter. Erb J., on appeal in the Alberta Court of Queen's Bench, dismissed the appeal from that judgment. In the Supreme Court of Canada, the union's application for leave to appeal was dismissed with costs.

Employers and management may be quietly gleeful with the outcome of these recent cases. But hidden beneath the surface and outside of their specific facts, there be some hidden ramifications. This point may best be made with a stark analogy. If an invasion and occupation is inevitable, it is often better to be occupied by a unified and disciplined army than an unruly one, particularly if its leadership is even somewhat reasonable. In these fact situations, it may be said that management may have benefited from the actions of individual members. However, in future confrontations and, while admittedly, likely on matters peripheral to the main battle, it is now open to union leaders to periodically and legitimately assert that they cannot harness the extreme and unreasonable acts of its members. And so, misconduct during labour disputes may become increasingly more contentious and less easy to control without union power to administer internal discipline of its members.

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Ed.: *The decision of the Supreme Court of Canada not to grant leave to appeal in each of the above cases was reported in Lang Michener's* S.C.C. L@wLetter *(Issue 25, 2009) edited by* ***Eugene Meehan, Q.C****. The* Birch *case, also often referred to as the* PSAC *case, took some five years to reach the Supreme Court of Canada. In 2004, some 200 union workers crossed picket lines and continued to work for the federal government. As a result of this judicial ruling, it can now be said that, among all of the Canadian provinces, only Saskatchewan has specific legislation permitting the collection of union fines. In the other provinces, fines can now only be collected on a voluntary basis.*

Comparative Advertising: The Unintended Path to Patent Infringement

Rosamaria Longo

Comparative advertising is a marketing strategy in which an advertisement for a particular product or service refers to a competitor for the express purpose of showing why the competitor's product or service is inferior to the named product, or alternatively, how it compares with the named product.

In *Charles D. Maclennan and Quadco Equipment* v. *Les Produits Gilbert Inc.*, the Federal Court of Appeal held the defendant manufacturer liable for inducing end users to infringe the plaintiff 's patent by advertising the comparability of the defendant's product with the patented combination. In other words, by advertising that its product could be used in the patented combination, the defendant induced purchasers to use its product with the patented combination, and in so doing, infringed the plaintiff's patent.

Quadco's patent was directed to the combination of a saw tooth and a tooth holder used with circular saw discs in the logging industry. There were no claims to the tooth itself.

The Quadco patented combination was aimed at alleviating the damage done to circular saw blades during the cutting process by providing a saw tooth and holder combination which, on contact with rock, would break and shear from the circular saw disc, leaving the disc undamaged. Gilbert manufactured replicas of the Quadco tooth with the same configuration and dimensions that could only be used with the Quadco tooth holder.

In its comparative advertising campaign, Gilbert ran advertisements that highlighted the compatibility of the Gilbert tooth with the Quadco holder and distributed price lists which identified the series number of the original Quadco tooth and the corresponding Gilbert replica that was designed to replace it.

The test for inducing patent infringement requires that (1) an act of infringement has been completed by the direct infringer; (2) the act of infringement was influenced by the acts of the seller/inducer such that without said influence the direct infringement would not occur; and (3) the influence must be knowingly exercised (i.e., the seller/inducer knows that his/her influence will result in the action of infringement by the direct infringer).

The Federal Court of Appeal found that all aspects of the test for inducing infringement had been met in this case. Firstly, there was direct infringement by the forestry operators that remade the patented combination every time they combined the Gilbert tooth with the Quadco holder. Secondly, the acts of infringement were influenced by the price lists handed out by Gilbert. Thirdly, Gilbert knowingly exercised its influence through its price lists by indicating that the Gilbert tooth was intended to replace a specific Quadco tooth. In regard to the aspect of knowing influence, Noel J. A., for the majority, stated that although the making of a component of a patented combination was itself not sufficient to establish infringement by inducement, "this state of affairs becomes inculpatory when the seller indicates to his clients the use that should be made of the component…the seller is making its clients aware of the fact that its product is intended to work the patented invention, which is the only reason they are buying it."

By this decision, the Federal Court of Appeal has widened the ambit as to what constitutes sufficient influence to meet the test for inducing infringement. In the case of *Windsurfing* v. *Bic Sports*, the Court had found that there was sufficient influence by the seller who provided end user purchasers with a kit of parts and an instruction sheet for assembling the component parts into the patented product.

The Quadco decision holds that merely advertising the compatibility of a component part to a competitor's patented product may be sufficient influence for a finding of patent infringement by inducement. Companies that utilize comparative advertising must now be wary that this marketing strategy may lead down the unintended path to patent infringement.

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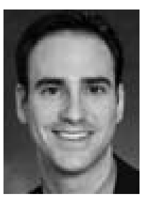
Ed.: A version of this article appeared previously in Lang Michener's Intellectual Property Brief.

Tenants in Dangerous Times



Matthew German

As evidenced by the rise in vacancy rates across Ontario, it is no secret that the current economic environment has had its effect on the province's commercial leasing industry, and this is most likely the situation in other areas as well.

During these times, landlords spend a great deal of energy determining how to best protect themselves from financially unstable tenants. While this is a valid concern for landlords, tenants should be equally concerned about landlords who may be encountering their own financial problems.

Although most landlords conduct extensive due diligence on a potential tenant before entering into a lease, the same cannot typically be said of tenants. Many tenants know little about their landlords. This article is intended to highlight some of the key ways in which a tenant can better protect itself from a landlord who may encounter financial problems.

> *Some of the ways in which a tenant can get comfort as to the landlord's financial position are by requesting a review of the landlord's financial statements or requesting a bank reference.*

Know Your Landlord

The first step a tenant can take to protect itself is to increase the level of due diligence it carries out on a landlord at the offer stage.

A tenant should not assume that all landlords are financially sound. This is even more important in the case of a subtenancy where a sublandlord is trying to divest itself of excess space, often an indicator that the sublandlord is struggling financially.

A tenant should be particularly concerned about a landlord's financial strength in situations where the landlord is required to pay the tenant an inducement allowance or if the landlord has significant construction, maintenance or repair obligations, especially when the landlord is an individual or not a well-known institution or public company.

Some of the ways in which a tenant can get comfort as to the landlord's financial position are by requesting a review of the landlord's financial statements, conducting a credit search or requesting a bank reference as a condition precedent to the offer. Where a landlord is obtaining financing to complete the construction of a property, the tenant may also request a copy of the landlord's mortgage commitment with its bank.

Obviously, for some of the major landlords this request may not be accommodated and is likely unnecessary.

Subsearch of Title

One of the most important due diligence items for the tenant is to conduct a subsearch of title to the property before entering into a binding agreement. This can be carried out by the tenant's lawyer by reviewing the public registry records.

The tenant's lawyer should review the records to confirm that the landlord actually owns the property in which it is purporting to grant a lease. The tenant's lawyer should also determine if there are prior interests such as mortgages, ground leases or easements to which the lease will be subject.

If there are prior interests registered on title, these interests will have priority over the lease unless the tenant makes other arrangements with those prior interest holders. If the prior registered interest is a mortgage and the landlord defaults under the mortgage, the common law is well established that a prior lender is not bound by the lease and can force a tenant out of the premises by terminating the lease.

The common law has also established that a tenant under a lease that is subordinate to a mortgage is likewise not bound by the lease if the mortgagee takes possession and, accordingly, the tenant may vacate the premises rather than recognize the mortgagee as its landlord. In tough times, a tenant may actually benefit from being able to terminate the lease if a mortgagee goes into possession.

Once a subsearch discloses a prior mortgage, the prudent tenant should try to obtain an NDA from any existing mortgagee simultaneously with negotiating the lease or as soon as possible after the lease has been executed.

Non-Disturbance Agreement

While there may be circumstances in which it would be beneficial for a tenant or a mortgagee to terminate the lease upon a mortgagee taking possession of the premises, generally mortgagees and tenants prefer to have the security of knowing that the lease will be preserved in the event that the mortgagee takes possession. A Non-Disturbance Agreement ("NDA") is the tool used to preserve the lease, as it alters the rights of termination provided by common law.

Once a subsearch discloses a prior mortgage, the prudent tenant should try to obtain an NDA from any existing mortgagee simultaneously with negotiating the lease or as soon as possible after the lease has been executed. While most NDAs will provide the tenant with the basic protection needed in the event of a mortgagee going into possession, the tenant should carefully review the form of NDA as there are several significant issues to consider when negotiating the document. For instance, most NDAs simply provide that the mortgagee will not disturb the tenant's possession so long as the tenant is not in default. However, a tenant should try to make the mortgagee go one step further and covenant to be bound by the terms and conditions of the lease while in possession. Without such an obligation, tenants may find themselves unable to enforce important rights for which they have bargained.

In most cases, a mortgagee will not agree to be bound by the rental account that exists between the landlord and tenant. For example, many mortgagees will refuse to be bound by any prepayments of rent, security deposits or other sums that may be payable by the landlord to the tenant, so that the mortgagee does not find itself out-of-pocket for these items. Tenants are also often required to waive any rights of set-off, defences or claims that they may assert against the landlord.

Notice of Lease

A tenant should also protect its leasehold interest against subsequent mortgages by registering its lease or notice of it on title with the local land registry office. The notice alerts the public that the property is leased and sets out the names of the parties, a description of the premises and the term of the lease, including any options to renew.

Some Final Words

Although it has typically been the landlord who evaluates the financial strength of a tenant before leasing space, especially during difficult economic times, a tenant should spend the necessary time evaluating the financial position of the landlord before entering into a lease. A tenant should no longer assume that as long as it pays its rent, the landlord will abide by all of its obligations under the lease. The reality is that a tenant may find itself out on the street as a result of the financial difficulties of its landlord. A tenant should make every effort to conduct the appropriate due diligence on both the landlord and the property prior to entering into a lease. In addition, registering a notice of lease and obtaining an NDA will help protect a tenant should a landlord default on its mortgage and a mortgagee is entitled to go into possession.

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Ed.: *A version of this article appeared previously in Lang Michener's* Real Estate Brief. *Without cost or obligation, contact Matthew directly for the lengthier version.*

Replacement Workers Not Strictly Prohibited During Essential Services Strike

Karen Carteri

An employer is not entitled to use the services of replacement workers to perform bargaining unit work during a strike, pursuant to section 68(1) of the *Labour Relations Code* (the "Code") of British Columbia.

By definition, replacement workers include any workers that have been hired by the employer after notice to bargain has been given. This restriction prevents employers from flooding their workforce with new hires, typically outside of the bargaining unit, to pick up the workload during the strike.

However, section 68(1) of the Code does not distinguish between new hires within the bargaining unit and new hires outside the bargaining unit. Therefore, arguably, replacement workers include employees hired into the bargaining unit after notice to bargain.

When a strike threatens essential services in British Columbia, section 72 of the Code provides that the Minister of Labour may direct the Labour Relations Board to make an order designating the level of essential services for the purpose of eliminating an immediate and serious danger to the health, safety or welfare of the residents of British Columbia as a result of the strike.

By definition, replacement workers include any workers that have been hired by the employer after notice to bargain has been given. This restriction prevents employers from flooding their workforce with new hires to pick up the workload during the strike.

The Ambulance Paramedics of British Columbia, CUPE Local 873, have been on strike against their employer, the Emergency and Health Services Commission, since April 1, 2009. The parties are subject to an essential services order from the Board and one of the main effects of the essential services order is that the union members are required to perform essential service levels of work during the strike.

What if the employer needs to use the services of the union members hired after notice to bargain in order to maintain designated essential service levels? What if resignations and attrition during the course of an extended strike require the employer to hire new employees to fill vacancies in order to maintain essential service levels? Since section 68(1) prohibits employers from scheduling workers hired after notice to bargain, how can essential services be maintained in such situations?

Shortly after replacement worker legislation was introduced in British Columbia in the early 1990s, in a case known as *Chantelle Management Ltd.*, the Labour Relations Board established that there needs to be a balance between section 68 and section 72 of the Code. Up until April 1, 2009, it was generally understood that the section 68 restrictions on use of replacement workers and rights to refuse to work could be restricted as required in order to maintain essential services.

On April 1, 2009, the Board decided in *Compass Group Canada (Health Services) Ltd.* that it could not order managers who were hired after notice to bargain to perform work during an essential service strike, on the premise that the Board could not order a contravention of section 68 of the Code. This decision appeared to reverse the precedent set in *Chantelle Management*, hampering the Board's flexibility to restrict the application of section 68 in the interest of maintaining essential service levels for the citizens of British Columbia.

In the paramedics strike, the union relied on *Compass Group* as the basis for an application to the Board for a determination that the Emergency and Health Services Commission was acting in contravention of section 68 of the Code by scheduling paramedics who were hired after notice to bargain. Their employer opposed the application on various grounds, including an argument that *Compass Group* was wrongly decided and should not be followed.

The Board dismissed the union's application in *Emergency Health Services Commission and Ambulance Paramedics of British Columbia, CUPE Local 873.* The Board found that Compass Group was wrongly decided, largely because the facts in *Compass Group* did not provide the Board with a context where essential services would be threatened if post-notice hires could not be utilized. The Board concluded that an essential services order displaces section 68(1) of the Code: once there is an order designating essential services, section 68 no longer applies.

The Board stated that under an essential services order, "all bargaining unit employees may be used to provide essential services, whether they were hired before or after notice to bargain was issued, and all management and excluded personnel must be used to the best extent possible," even if hired after notice to bargain.

As such, managers hired after notice to bargain must work the 60-hour week found in a standard essential service order, and all union members can be scheduled to work in accordance with the essential services order, regardless of whether they were hired after notice to bargain. Any question of who must work (and who is or is not essential) in order to meet essential service levels is to be addressed by the Board pursuant to its broad jurisdiction under section 72.

Although this has likely settled the matter, an application for reconsideration of the *Compass Group* decision has been filed.

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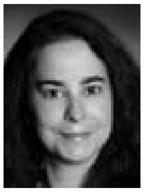
Older Worker; Overtime as a Class Action; Shareholders and Acquisitions; Union Counter Moves; Easements and Rescission; China as a Non-Market Economy; Taipei Vies for Government Procurements; GST Exemption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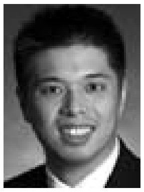
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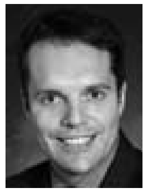
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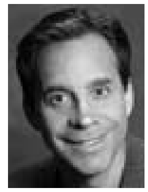
Matthew Dewar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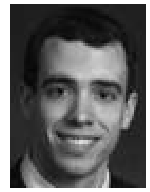
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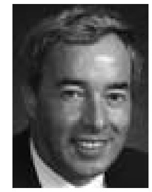
Norm Fera

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

1 Dealing with the Older Worker

Kathleen Fisher was pleased to hear the company president say, "You can stay with our company for as long as you wish." Fisher, at 65 years of age, wanted to keep working for Lakeland Mills Ltd. where she had worked for 18 years. She initiated a meeting with Keith Andersen, the President of Lakeland Mills, to inform the company of her intention to stay on. And with his well-intentioned response, Andersen unwittingly infused Fisher with a sense of entitlement; that is, a job for life.

A year later, Lakeland's office manager, Annie Horning, wished to replace Fisher with someone more versatile, someone who could rotate through various positions as required. The more Horning pressed Fisher to retire, the more Fisher became entrenched, a common experience for companies trying to nudge older workers toward retirement.

Instead of terminating Fisher and replacing her, Horning devised a temporary solution. Fisher would back-up the shipping clerk, while maintaining her job in accounting. These shipping duties required computer skills that Fisher did not have. But, eager to remain, she professed a willingness to acquire them.

Next, Horning played the poor-performance card. Fisher was told that unless she did a better job learning the shipping clerk's job or retired in the near future, the company would also hire someone to take over part of her accounting work. Sensing she was being forced to retire, Fisher turned to Andersen for reassurance. He did nothing to disabuse Fisher of her fears. Fisher resigned and sued for constructive dismissal.

The B. C. Court concluded that the addition of shipping work and the deletion of her other duties constituted a fundamental change. The court awarded Fisher 10 months' severance, with bonus and benefits.

Long-service employees often believe they have a job until they decide to retire. But, in law, there is nothing unique in a wrongful dismissal of an older employee. Provided the termination is not based on age, an older employer can be terminated with the same impunity as any other.

Given the demographics of the workforce and the devastation of most employees' retirement accounts, more will postpone retirement at the very time employers are looking to reduce staff. However, it is a mistake to raise employees' expectations by reassuring them they have a job for as long as they wish.

Some suggestions for employers:

- If staffing requirements change, make reasonable adjustments to job duties, but remain alert to the perils of constructive dismissal.
- Provide yourself the right to unilaterally change duties through your offer letters and employment agreements.
- If a long-service employee no longer fits your needs, instead of hoping s/he retires, terminate, as you would any other employee.
- Consider providing working notice to reduce severance costs while searching for new staff. Often the long-service employee is a prime candidate for working notice because of their maturity and dedication. Working notice allows a more graceful exit and time to perhaps adjust to the retirement they would not have embraced voluntarily.

Howard Levitt is counsel in the Employment & Labour Law Group in Toronto. Contact him directly at 416-307-4059 or hlevitt@langmichener.ca.

Ed.: *This article appeared previously in Howard's weekly column on the first page of the Working section of the* National Post.

2 Class Action for Overtime Dismissed

A recent decision from the Ontario Superior Court in favour of the Canadian Imperial Bank of Commerce ("CIBC") is being proclaimed as a major win for employers in their efforts to contain the flurry of employee class actions for overtime claims which have emerged in recent years.

In *Fresco* v. *Canadian Imperial Bank of Commerce,* released in June of this year, the Court refused to certify a class action on behalf of non-managerial and non-union CIBC employees who were claiming an excess of $600 million in damages for allegedly unpaid overtime. The Court found that there was no commonality to the large class of employees seeking redress in the claim, with the group numbering potentially in the range of 30,000 having what are essentially individual claims.

"The central flaw in the plaintiff's case," said the Court, "is that instances of unpaid overtime occur on an individual basis." CIBC successfully asserted that its existing overtime policy, which provided for compensation for overtime in specific circumstances, did not, on its face, create an illegal arrangement. Under the CIBC policy, employees were obliged to obtain managerial approval in advance of working overtime unless an emergency did not warrant obtaining such approval. In all cases, CIBC's process required that claims be submitted promptly. The judge said there was nothing illegal in having such a policy, and there was certainly no evidence to support the assertion by the representative plaintiff and her counsel that CIBC had a systemic policy or practice to deprive eligible employees of their statutory rights under the *Canada Labour Code* to be paid overtime.

In rejecting the class action, each potential class member was found by the Court to have an individual claim. Therefore, the judge directed that any such cases required "individual examination of the specific circumstances that underline each class member's claim."

The CIBC class action was one of a number of similar claims filed in recent years, and each of these has received significant media attention. The decision in this case is, on a very narrow basis, mere confirmation of how the class action procedure will be applied to unpaid overtime cases. The more broad trend that this case reflects, however, is the continuing swing of the pendulum back towards more pro-employer reasoning.

This case does not in any way amend the requirement that employers compensate employees for overtime which they work. Indeed, one of the reasons why CIBC appears to have been successful in this case was the existence of a clear policy for how individuals could be compensated for working overtime. As a result, this decision reinforces the importance of employers reviewing and being in compliance with applicable employment standards legislation and, if challenged, being able to marshal appropriate evidence to reflect compliance with legal requirements and company policies.

George Waggott is a partner in the Employment & Labour Law Group in Toronto. Contact him directly at 416-307-4221 or gwaggott@langmichener.ca.

3 Shareholder Vote for Public Company Acquisitions

The TSX is proposing to amend its Company Manual with reference to pubic company acquisitions. This comes in the wake of the Ontario Securities Commission's decision to overrule the Toronto Stock Exchange ("TSX") and to require HudBay Mineral Inc. to obtain shareholder approval to issue in excess of 100% of its outstanding shares to acquire Lundin Mining Corporation.

The proposed amendment would require that shareholder approval be obtained for acquisitions of public companies where securities of the acquiror issued or issuable as payment of the purchase price exceed 50% of the number of issued and outstanding securities of the acquiror on a non-diluted basis.

Currently, the TSX does not require an acquiror to obtain approval from its shareholders for the acquisition of another "public" company (a reporting issuer or issuer of equivalent status having 50 or more beneficial security holders, excluding insiders and employees), regardless of the number of shares issued or issuable. Acquisitions of non-public companies will continue to require shareholder approval where the number of securities issued or issuable will exceed 25% of the acquiror's outstanding securities.

The proposed amendment, first introduced by the TSX in 2007, reflects the TSX's belief that shareholders should be provided with an opportunity to vote on acquisitions of public companies which considerably alter their investment and control rights through dilution. In addition, the TSX believes that the proposed amendment is appropriate since other remedies available to shareholders, such as derivative actions, oppression remedies or proxy contests, may not be practical alternatives for shareholders that do not have significant economic resources or sufficient economic incentive to initiate such actions.

Neither Canadian securities law nor corporate law presently requires shareholder approval of arm's length dilutive transactions.

In the spring of this year, the TSX requested comments on the proposal, and unlike the 2007 proposal (that did not proceed following receipt of widely divergent views), the current proposal is likely to be adopted.

Denno Chen is an associate in the Corporate Finance/Securities Law Group in Toronto. Contact him directly at 416-307-4210 or dchen@langmichener.ca

Ed.: *This article appeared previously as a Lang Michener* Securities Alert.

4 Union Counters Employer's Loss Claim from Illegal Strike

In what could prove to be an interesting case, the Supreme Court of Canada has granted leave to hear an appeal from the judgment of the Quebec Court of Appeal in *Canadian Food Inspection Agency* v. *Professional Institute of the Public Service of Canada, Dany Beauregard et al. and Olymel et al.*

The facts and background in this case are generally this: In December 2001, Olymel and others operated hog and poultry processing plants in Quebec, and Dany Beauregard and some other veterinarians were employees of the Canadian Food Inspection Agency.

The veterinarian employees, represented by the Professional Institute of the Public Service of Canada (the "union"), were responsible for inspecting Olymel's slaughterhouses.

On December 17, 2001, however, the veterinarians, who had been without a collective agreement for more than a year, did not report for work. And so, the Food Inspection Agency ordered Olymel to stop production.

Four days later, the Federal Court issued an interim interlocutory injunction ordering the union to stop using pressure tactics that interfered with the inspections required under the regulations in force. Later, in January of 2002, the Public Service Staff Relations Board of Canada concluded that the actions on December 17, 2001 constituted an illegal strike.

In February of 2002, the Food Inspection Agency decided that the meat from animals slaughtered during the labour dispute and destined for human consumption would have to be destroyed or treated as unfit to eat.

Accordingly, Olymel suffered losses, and in December of 2004, instituted an action in damages against the union and the veterinarians.

The union and the veterinarians then filed motions to institute proceedings in warranty against the Food Inspection Agency. They accused the Food Inspection Agency of having acted negligently in managing the situation resulting from the dispute that occurred on December 17, 2001. They also alleged there was no causal link between the work stoppage and the damage suffered by Olymel. That damage was rather the result of the Agency's wrongful decisions to interrupt the slaughter, and then order the destruction of the slaughtered animals.

In the Quebec Superior Court, the Food Inspection Agency filed motions to dismiss the actions in warranty but failed.

The Trial Court held the actions in warranty (against the Inspection Agency by the union and veterinarians) appeared to be related to the principal action (commenced by Olymel against the union and veterinarians) and established a *prima facie* possibility of liability with the Agency. Furthermore, an otherwise valid decision of the Food Inspection Agency could be a civil fault and form the basis of an action in damages in Superior Court against a federal board, commission or other tribunal.

That judgment was upheld in the Quebec Court of Appeal where clearly the focus was on the provision in the civil code to the effect that all necessary parties be engaged in the process so that there may be a complete judicial determination.

This appeal may have a number of interesting facets, not the least of which is the claim by the union against the Canadian Food Inspection Agency.

It may well be that the Supreme Court can decide this appeal without having to directly or indirectly address or to be seen to ponder two seemingly remote but broad and underlying matters: the safety of the nation's food supply, and whether those responsible for illegal strike action must be held responsible for its serious ramifications.

While the law and policy considerations related to those core matters may not be in the forefront, they may influence the whys and wherefores of the more particular legal issues that will more likely be centre stage in the Supreme Court.

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Norm Fera is a partner and editor of this publication. Contact him by e-mail at nfera@langmichener.ca.

5 Easements and the Purchaser's Right to Rescind

Typical language in an agreement of purchase and sale provides that the purchaser agrees to accept title "subject to any easements for sewers, drainage, public utilities, phone or cable lines or other services that do not materially affect the present use of the property."

Language such as this is usually found in either a preprinted form that may be used by the parties or in specifically negotiated "Permitted Encumbrances" in larger transactions.

In Ontario, the test for whether an easement materially affects the use of a property was set out by Justice Moldaver in *Stefanovska* v. *Kok*, a 1990 case of the High Court:

> …the test to be applied is whether the vendor can convey substantially what the purchaser contracted to get. In this regard, all of the surrounding circumstances must be considered to determine if the alleged impediment to title would, in any significant way, affect the purchaser's use or enjoyment of the property.

More recently, Justice Forestell, in *Ridgely* v. *Nielson*, outlined four factors to be considered in determining whether an easement is material: the location of it; the size of the easement; the point of access; and the owner's enjoyment of the property.

The point at which an easement "materially affects" a purchaser's use of a property was considered last year by the Ontario Superior Court of Justice in *Macdonald* v. *Robson*.

In this case, the parties entered into an agreement of purchase and sale for a two acre property. The purchaser gave evidence at trial that the property suited his interests as its layout would enable him to build a structure on the west side of the property to house his tractor.

The real estate listing for the property made no reference to any easements. In fact, an easement in favour of the local town affected approximately 25% of the property. The terms of the Easement Agreement permitted access to the property by the Town to deal with sewer systems and required the property owner to keep the easement area free of all obstructions, including buildings and structures. The restrictions imposed by the easement would have prevented the purchaser's planned construction of a shed and future building projects.

On discovery of the easement, the purchaser's lawyer requisitioned its removal on the basis that it materially affected the purchaser's intended use for the property. The vendor's lawyer countered that given the size of the property there were alternate areas where a shed could be constructed. An application to court was launched.

At trial, Justice Wilson of the Ontario Superior Court of Justice considered the tests in *Stefanovska* and *Ridgely* (noted above). Given the purchaser's intention to use the property to indulge his building hobby, and given the size and location of the easement, it had a material effect on the present use of the property. Justice Wilson ordered the return of the deposit and held that the purchaser was entitled to rescind the agreement of purchase and sale.

On appeal, Justice Carnwath of the Ontario Superior Court of Justice (Divisional Court) upheld Justice Wilson's decision.

This case is important as it provides insight into when an easement crosses the line between a permitted encumbrance and something that has a material effect on the benefit received by the purchaser. Whether an easement is "material" will be determined on an objective basis, taking into consideration the view of the purchaser. This case also highlights the importance of a thorough title investigation early in the purchase transaction.

Bob Fraser is an associate in the Real Estate Group in Toronto. Contact him directly at 416-307-4230 or bfraser@langmichener.ca.

Ed.: *A version of this article appeared previously in Lang Michener's* Real Estate Brief.

6 Court Rules on China as a Non-Market Economy

The Federal Court of Appeal has recently provided direction on the application of the non-market economy provisions of Canadian anti-dumping legislation. The Court upheld the decision of the Canada Border Services Agency ("CBSA") that the Chinese market for seamless petroleum casing was not operating under "market conditions."

In *Tianjin Pipe (Group) Corporation* v. *TenarisAlgomaTubes Inc.* (Court File A-104-08), the Applicant, Tianjin Pipe (Group) Corporation, ("TPCO") sought judicial review of the anti-dumping determination of the CBSA. The principal issue addressed by the Court was whether Canada's non-market economy provisions in subsection 20(1) of the *Special Import Measures Act* ("SIMA") were properly applied by the CBSA.

Subsection 20(1) states that recourse may be had to that section where "in the opinion of the [CBSA] President, domestic prices are substantially determined by the government of that country and there is sufficient reason to believe that they are not substantially the same as they would be if they were determined in a competitive market." Where these conditions apply, pricing and cost information from the Chinese market cannot be relied upon, and alternate methodologies for the determination of "fair" market pricing must be employed.

The Applicant TPCO argued that there was no evidence that the Government of China directly set prices of seamless casing in the Chinese market. The Court of Appeal was of the view that the expression "substantially determined" necessarily implied something less than the direct setting of prices. The Court continued on to indicate that the phrase supported the view that governments can exert an influence on pricing directly or indirectly.

The Applicant TPCO had also argued that the "substantially determined" threshold was a jurisdictional issue upon which the CBSA had to be correct to satisfy the standard of judicial review. The Court of Appeal disagreed, noting that the subsection in question included the qualifying words, "in the opinion of the [CBSA] President," which indicated that Parliament had expressly conferred discretion on the President to make that decision. The Court concluded that the issue as to whether prices in China were substantially determined by government was an "intensely factual question."

It should be noted that the definition of government under *SIMA* is very broad, and does not mean only a central government. Government is defined to include provincial, state, municipal or any other local or regional government authority, as well as any person, agency or institution acting for, or on behalf of, or under the authority of, or under the authority of any law passed by any level of government, in the country of export.

The decision of the Federal Court of Appeal confirms the methodology of the CBSA whereby foreign government intervention in their domestic markets may be established through indirect influences by the actions of a wide range of potential government actors.

The Court also heard a companion judicial review of the CBSA determination that TPCO had received countervailable subsidies. (Refer to *Tianjin Pipe (Group) Corporation* v. *TenarisAlgoma Tubes Inc.*, A-103-08). The Court of Appeal again upheld the decision of the CBSA.

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Ed.: *Lang Michener LLP was counsel to the successful Respondent, the Canadian producer TenarisAlgoma Tubes Inc.*

7 Significance of Chinese Taipei Joining WTO Agreement on Government Procurement

In July of this year, the World Trade Organization ("WTO") announced that the Separate Customs Territory of Taiwan, Phengu, Kinmen and Matsu ("Chinese Taipei") formally became a full Party to the WTO Agreement on Government Procurement ("AGP"). The AGP makes government procurement contracts open to international competition. Opportunities to provide goods and services to government is important in terms of market access, because government is usually the largest purchaser of goods and services.

Chinese Taipei joins 41 WTO members which have signed the AGP, namely: Canada; the European Communities, with its 27 member states; Hong Kong, China; Iceland; Israel; Japan; Korea; Liechtenstein; the Kingdom of the Netherlands with respect to Aruba; Norway; Singapore; Switzerland; Chinese Taipei; and the United States.

Other WTO members that are in the process of negotiating their accession to the Agreement on Government Procurement are Albania, Armenia, China, Georgia, Jordan, the Kyrgyz Republic, Moldova, Oman and Panama. A further five WTO members, namely Croatia, the Former Yugoslav Republic of Macedonia, Mongolia, Saudi Arabia and the Ukraine, have provisions committing them eventually to seek accession to the Agreement in their respective Protocols of Accession to the WTO.

This is important to discuss for two reasons. First, in light of the "Buy America" restrictions, it is important to see countries willing to open their government procurement to other WTO members. Chinese Taipei may be a strategic thinker because the U.S. Buy America legislation is stated not to apply to countries which have signed the AGP. So, this would mean that companies from Chinese Taipei would have access to certain federal and state government procurements (based on the U.S. schedules to the AGP).

The China Post reports that as a result of joining the AGP, "Taiwanese computer makers Acer Inc. and Compal Electronics Inc. will have a leg up over Chinese and Indian competitors in winning U.S. economic stimulus contracts…." Three other sectors mentioned in the article are energy equipment, telecommunications parts, and flat screen televisions.

Chinese Taipei was ranked first in the world for research and development capacity in 2008 by the Economist Intelligence Unit and has long been one of the top suppliers of various high tech products for U.S. and global industries, accounting for about three-quarters of global PC production, half of the world's flat panel displays, a quarter of the world's semiconductors and about a fifth of the world's mobile phones.

Secondly, the fact that Chinese Taipei has signed the AGP, and China has not, highlights that, for WTO purposes, Chinese Taipei has a separate identity from China. Within the WTO, the term "Chinese Taipei" is used and the words "separate customs territory" is used to accommodate Beijing's view that Taiwan is part of China. It is also important to remember that Chinese Taipei agreed to its terms of accession to the WTO in 1999 and waited until September 2001 to receive final approval to join the WTO, the day after China's WTO accession was cleared. Both China and the Separate Customs Territory of Taiwan, Phengu, Kinmen and Matsu acceded to the WTO in December 2001.

Chinese Taipei is the first signatory to the AGP since 2001.

Cyndee Todgham Cherniak is counsel in the International Trade Group in Toronto. Contact her directly at 416-307-4168 or cyndee@langmichener.ca.

8 Certain Investment Management Fees Exempt from GST

Earlier this year, Canada's Federal Court of Appeal issued a very important decision in *Her Majesty the Queen* v. *The Canadian Medical Protective Association*. The case does not relate to medical services, but to management fees paid in connection with investment management services. As a result, the case is highly relevant to portfolio and investment managers in Canada as well as holding companies.

In a well written decision, the Federal Court of Appeal unanimously determined that:

"[T]he services performed by investment managers cannot be divided. It is a mix. They do not provide advice, since there is no one to provide advice to except themselves. The end result of their services is to 'cause to occur a transfer of ownership … of a financial instrument.' They fall within paragraph 123(1)(d) and (l) of the Act,… the services they provide are exempt financial services."

The Federal Court of Appeal has determined that certain services provided by investment/money/asset managers are exempt suppliers for goods and services tax ("GST") purposes. However, many persons in Canada have been paying GST and harmonized sales tax ("HST") on such fees as Revenue Canada (in its various forms) has taken the position that such fees are taxable under the *Excise Tax Act* (Canada). The Tax Court of Canada disagreed with Revenue Canada and the Federal Court of Appeal has also disagreed with Revenue Canada.

This decision may have an important impact for individual Canadians who have entrusted their hard-earned after-tax (and RRSP) money to mutual fund companies, asset management companies, money management companies, investment management companies, etc., and companies, partnerships and trusts with such services provided within a structure like the Canadian Medical Protection Association. Such individuals, companies, partnerships and trusts may be entitled to claim a refund for GST/HST paid in error. Some amounts paid are significant. But, it does not matter if a person has paid a small amount or a significant amount in error – all would be entitled to claim a refund of GST/HST paid in error.

It is important to note that at the time of writing, it was still possible for the Government of Canada to appeal this decision to the Supreme Court of Canada. It is also important to note that the investment managers who have collected and remitted the GST are not the persons entitled to claim the refund if GST paid in error. They cannot file one big refund claim on behalf of a group of interested parties. Each person who has paid GST to an investment/asset/money manager will have to file a refund claim. The refund claim cannot go back to the beginning of the GST – rather there is a two year limitation period for refund claims of GST/HST paid in error.

We would be pleased to assist persons with large refund claims to compile the evidence to support a refund claim. Those who cannot justify asking for assistance given the amount of the refund claim may go to the following link to obtain the form – http://www.cra-arc.gc.ca/E/pbg/gf/gst189/gst189-fill-08e.pdf. Since there may be an appeal, the way to maximize one's refund is to complete and submit a rebate form for payments made in the last two years and another refund claim for payments as they are made in the future. The reason for the refund claim is set out in Box 1 of the form "Amounts paid in error." For those persons in the HST provinces, the HST would also be refundable in respect of the investment management "arranging for" fees. If you do not have the information about the investment management "arranging for" fees you have paid, contact your investment/money/asset manager and ask them to provide that information to you in a letter or summary and on their stationery.

Cyndee Todgham Cherniak is counsel in the International Trade Group in Toronto. Contact her directly at 416-307-4168 or cyndee@langmichener.ca.

Ed.: *It should also be noted that in the face of large paybacks, there is the questionable precedent for government regulation or legislation to retroactively amend the* Excise Tax Act, *nullifying the effect of any judicial decision and any possibility of a claim (unless, perhaps, speedily made in the interim period).*

Brief Life Bites

Award, Virtual Friendships and Almost Close Enough

1 Award

Earlier this year, *CBC/Radio-Canada* and the *Canadian Press* ("CP") were jointly awarded the 2008 **Michener Award**. The public broadcaster and CP won the award in recognition of their reported findings that more than 10 percent of the Taser stun guns used by law enforcement were either defective or behaved unexpectedly. The prestigious honour is named after Roland Michener who some 40 years ago, as Governor General, conceived of a plan to establish an annual award to honor the best of meritorious public service journalism. The Taser is a hand-held weapon that delivers a jolt of electricity that causes muscle contractions intended to immobilize and fell the recipient. They have been used by police forces since 1999, but at least 20 people, including Robert Dziekanski, are believed to have died as result of being so jolted. In June of this year, the RCMP recalled and reviewed 1600 of its Tasers.

2 Virtual Friendships

With increasing population and more urbanization, one would think that the opportunity to develop connections and meaningful relationships would be ideal. Apparently this is not the case. But, as mentioned in the last issue, this is not to say that virtual ones are absolutely stable.

In northern Australia, a man broke into an adult shop and stole a full sized blowup-doll. Forensic officers found the discarded doll in an alley, took fingerprints, DNA samples and pictures. The culprit was identified and charges for break, enter and theft were laid.

Although we have looked at the lighter side of this phenomenon or pointed to some of the extremes in which some of those who lean towards the "virtual" world engage, in reality, the problem is very real, truly serious and extremely pervasive. Even religious leaders have recently cautioned against substituting "virtual friendship" for real human relationships. Indeed, **Stephen Maddex** notes that a recent U.S. study clearly suggests that those who simply watch a TV series regularly feel the characters on the show are real. A study in the *Journal of Broadcasting and Public Media* conducted on parasocial relationships determined that for some people, it is not uncommon to feel as though a real friendship has ended when a television show goes off the air.

3 Almost Close Enough

In Eastern Ontario, when a 24-hour convenience store was robbed for a fifth time in one month, the owners went to the media to publicize their plight. When asked about what they were doing to deal with these repeated crimes, police initially indicated that they had assigned a full-time investigator to the case and had stepped up patrols in the area. Indeed, on the day the fifth robbery occurred, at about 4 a.m., there was purportedly a patrol car close-by and one in the store's parking lot.

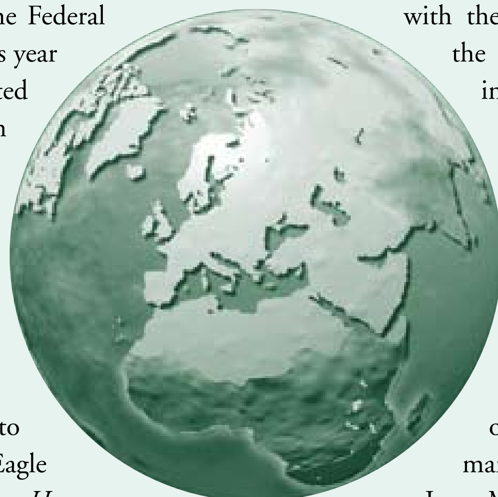
Letters and Comments

1 Shortly after publication of the summer *In Brief*, it was brought to our attention that the arbitration decision considered in the article "Even Off-Duty Blogging Can Lead to Discharge" by **George Waggott** was the subject of an application for judicial review filed with the Court of Queen's Bench of Alberta [*Alberta Union of Provincial Employees* v. *Alberta, 2009 ABQB 208* (CanLII)]. The union successfully applied to have the majority award (which upheld the discharge) set aside on the basis of a breach of the collective agreement provisions regarding the right to union representation during disciplinary interviews. In light of this procedural defect, the Court ordered the case to be remitted back to the arbitration board. Even if the result in this case is now in doubt, we remain of the view that the substantive points in this decision pertaining to blogging will continue to be applied. That is, notwithstanding the reviewable errors, the facts and reasoning remain compelling.

2 In a prior issue of *In Brief*, **Ron Petersen** contributed a LAW NOTE on "Stipulated Price Contract: The New CCDC2." Since then, he has been contacted by the *Law Times* and interviewed for an article being prepared by Ian Harvey of that publication.

3 Permission was granted to *Corporate Governance Quarterly*, a publication of Chartered Secretaries Canada, to reprint the article by **Stephen Maddex** that appeared in an earlier *In Brief* entitled "The Next Great Business Trend from South of the Border." Also, in an article in the July issue of the *Law Times*, Stephen was acknowledged as "one of the few…lawyers who have hands-on trial experience both in the Canadian and American legal systems."

4 A former senior partner at Lang Michener, **John D. Richard**, Chief Justice of the Federal Court of Appeal, retired in July on this year on his 75th birthday. He was appointed to the Trial Division of the Court in 1994, and was the chair of the Lang Michener partnership prior to that date. **Pierre Richard, Q.C.**, John's brother, is counsel at the Ottawa office of Lang Michener LLP.



5 **Stephen Wortley** discussing Lang Michener's expansion into Hong Kong in the article "Legal Eagle Spreads Wings" featured online with the *Hong Kong Trader*, said: "Our decision to open in Hong Kong is not driven by short-term economic factors, but by our long-term commitment to Hong Kong and the Chinese market and by our future growth strategy."

6 At a press conference in May of this year, representing Member of Parliament Ruby Dhalla against allegations of mistreatment of domestic workers, **Howard Levitt** produced witness statements, affidavits, receipts and even old airplane boarding passes and commented: "Whoever has decided to target her has made a grievous error. Happily, [she] is punctilious in her affairs and keeps records of her dealings."

7 Reported in the *Ottawa Citizen* (June 17): Three hoodlums, one brandishing a gun, entered a home just after midnight in the west end of the City and startled the homeowner and his wife in their bedroom, a short distance from their two children. **Eugene Meehan, Q.C.**, the former president of the Canadian Bar Association, was so taken with the occurrence that he offered to replace the stolen money. Eugene was particularly impressed with the courage of the family's 12-year-old daughter who crawled under the legs of the gunman to call 911, causing the robbers to flee.

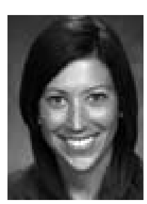
8 A frequent commentator on CFRA radio during the trial of Mayor Larry O'Brien charged with offenses against the administration of law and justice, **Michael Rankin**, managing partner of the Ottawa office of Lang Michener LLP, was quoted in the Ottawa Citizen (August 4, 2009): "This isn't a made-for-TV movie. You have to have nailed down the specifics if you really want to say to a judge, this is proof beyond a reasonable doubt. As an observer, you were expecting more compelling evidence to be presented. You kept wondering when's the blockbuster day going to be? I'm not sure it ever happened." In the National Post (August 5, 2009), Michael correctly predicted an acquittal due to contradictory evidence.

Lang Michener, In Brief…

News

Lang Michener Lawyers Listed in Expert Guides Leading Patent Practitioners 2009

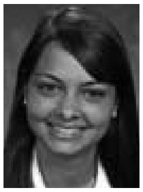
We are pleased to announce that **Keith Bird**, **Donald MacOdrum** and **Donald Plumley** from our Intellectual Property Group have been listed in the Legal Media Group's *Expert Guides Leading Patent Practitioners 2009*.



Judith Atwood

Judith Atwood Joins Lang Michener

We are pleased to announce that Judith Atwood has joined the Lang Michener Ottawa office as an associate in the Business Law Group. Judith's practice includes general corporate and commercial matters, and the negotiation and drafting of contracts, agreements and corporate documents.



Stephanie White

Stephanie White Joins Lang Michener

We are pleased to announce that Stephanie White has joined the Ottawa office of Lang Michener as an associate in the Commercial Litigation and Family Law Groups. Her practice focuses on civil and commercial litigation and family law matters

Events

11th Annual Investigative and Forensic Accounting Conference

Presented by Canadian Institute of Chartered Accountants

September 14–15, 2009
Toronto, ON

David Debenham will be speaking at The 11th Annual Investigative and Forensic Accounting Conference presented by the Canadian Institute of Chartered Accountants. The conference will cover topics including fraud investigations, litigation support, dispute resolutions and much more.

Lang Michener is Proud to Sponsor RealLeasing 2009

Presented by Real Estate Property Association of Canada

September 17, 2009
Toronto, ON

The Lang Michener Real Estate Group is proud to sponsor RealLeasing 2009. This conference provides an opportunity for high-level executives to analyze and enhance their leasing strategies and to gain greater insight into the trends, challenges and issues that permeate the industry.

2009 ICSC Canadian Convention, Deal Making and Trade Exposition

Presented by the International Council of Shopping Centers

September 21–23, 2009
Toronto, ON

Lang Michener will be an exhibitor at the International Council of Shopping Centers' (ICSC) 2009 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.

Practising Commercial Real Estate in a Changing Environment

Presented by Osgoode Professional Development

September 22, 2009
Toronto, ON

Bill Rowlands will be speaking at the Practising Commercial Real Estate in a Changing Environment seminar, presented by Osgoode Professional Development. The expert faculty will consider the critical areas and issues of commercial real estate practice, and provide a thorough refresher and update on areas that are newly relevant in the changing economic times. Special attention will be given to the problems raised by insolvency situations and/or involving 'distressed' real estate.

16th Competition Law Conference (2009) – Canadian Competition Law The Next 25 Years

Presented by the Canadian Bar Association's National Competition Law Section and the Continuing Legal Education Committee

September 24–25, 2009
Hilton Lac-Leamy, Gatineau, QC

James Musgrove and **Daniel Edmondstone** are acting as moderators at the 16th Competition Law Conference (2009) – Canadian Competition Law The Next 25 Years. The conference will cover several topics including new antitrust enforcement, anticompetitive agreements, merger review, deceptive marketing and changes to the *Investment Canada Act.*

Deals

Viterra Inc. Purchases Canola Crush Operation From Associated Proteins Limited Partnership

On June 25, 2009, Viterra Inc. completed a C$64 million plus working capital asset purchase from Associated Proteins Limited Partnership in Ste. Agathe, Manitoba. The acquisition included a canola crush plant with a capacity of 1,000 metric tonnes per day. Associated Proteins was represented by Lang Michener LLP with a team that included **Eric Friedman**, **Patrick Phelan** and **Greg McIlwain** (corporate); **Daniel Edmondstone** (competition); and **Michael Mulroy** (employment). **Devin Anderson**, a summer law student at Lang Michener, was also a part of the team.

Fralex Therapeutics Inc. Completes Plan of Arrangement

On June 1, 2009, Fralex Therapeutics Inc., was purchased by Baylis Medical Company Inc., pursuant to a court approved plan of arrangement involving Fralex Therapeutics Inc., Baylis Medical Company Inc. and Attwell Capital Inc. The terms of the court approved plan of arrangement included each holder of Fralex Therapeutics Inc. common shares exchanging each Fralex Therapeutics Inc. common share held by them for one common share of Attwell Capital Inc. and cash consideration of C$0.0001. Baylis Medical Company Inc. acquired from Attwell Capital Inc. all of the issued and outstanding shares of Fralex Therapeutics Inc. and its current business of developing Complex Neural Pulse ("CNP") therapy in exchange for C$900,000. Attwell Capital Inc. acquired Fralex Therapeutics Inc.'s non-CNP related assets, including all its cash, and assumed all of Fralex Therapeutics Inc.'s liabilities. Fralex Therapeutics Inc. and Attwell Capital Inc. were represented by a team at Lang Michener LLP, including **John Andrew** (business/corporate), **John Conway**, **Andrew Tam**, **Stephen White** and **Christos Gazeas** (securities/corporate) and **Brent McPherson** (litigation).

Teck Resources Limited Completes US$4.225 Billion Note Offering

On May 8, 2009, Teck Resources Limited completed a private placement offering in the U.S. and Canada of US$4.225 billion in aggregate principal amount of senior secured notes. J.P. Morgan Securities Inc., Banc of America Securities LLC and Citigroup Global Markets Inc. acted as joint book-running managers for the initial purchasers of the notes. The net proceeds of the note offering were applied by Teck to repay borrowings under its existing bridge credit facility. Teck was represented in-house by Peter Rozee, Senior Vice-President, Commercial Affairs, and Nick Uzelac, Corporate Counsel, and in Canada by Lang Michener LLP with a team in Toronto that included **Hellen Siwanowicz**, **Andrew Tam**, **Denno Chen**, **Stephen White**, **David Mendicino** and **Christos Gazeas** (securities/corporate), and **Bob Cranston** and **Eric Friedman** (banking); and a team in Vancouver that included **Peter Botz** and **Christine Man** (tax), **John Morrison** (banking), and **Amandeep Sandhu** and **Corin Bowman** (securities/corporate).

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Lang Michener's Environment, Energy & Emissions Trading Group is pleased to add to the firm's extensive newsletter program with the inaugural edition of the *Environment, Energy & Emissions Trading Brief*. This Brief features current developments and issues relating to energy and environment focused matters.

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In Brief

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