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CommercialLitigationBrief

Spring 2008

In This Issue

There are probably two main reasons why true litigators love what they do: the sheer variety of cases they encounter, and the intellectually challenging nature of the issues that arise in those cases. This issue of the *Commercial Litigation Brief* contains elements of both. Karen Carteri discusses a recent case in which the court subordinated the parties' contractual rights in the context of approving a plan of arrangement. Keith Clark then concisely describes a lengthy judgment which has the potential to create massive uncertainty in forestry and mining rights both in BC and the rest of Canada. Ruba El-Sayegh explores the delicate issue of when medical examinations can be videotaped. The final article by Joseph D'Angelo and Benjamin Bathgate questions how a recommended law governing the use of apologies in the litigation context may impact on the resolution of disputes.

BC Courts Uphold Controversial Plan of Arrangement

Karen Carteri

Typically, courts will only rarely and sparingly interfere with contractual rights that parties freely negotiate and agree upon.

However, in *Protiva Biotherapeutics Inc.* v. *Inex Pharmaceuticals Corp.*, the British Columbia Court of Appeal recently determined that the courts can adjust contractual rights in order to achieve a workable plan of arrangement proposed by a company under the British Columbia *Business Corporations Act* (the "Act").

A plan of arrangement is a mechanism by which a company may reorganize its affairs in order to achieve an economic benefit for the company and its stakeholders. Convenience and flexibility are at the heart of the purpose for the arrangement provisions of the Act. Plans of arrangement may consist of virtually any kind of corporate reorganization that a company wants to propose and must be voted on by the stakeholders directly affected by the arrangement. Once the plan of arrangement is approved by those stakeholders, it must be approved by the court.

In the *Inex* case, Protiva appealed an order of the Supreme Court of British Columbia approving a plan of arrangement proposed by Inex to transfer all of its property, rights, interests and liabilities to a company called Tekmira Pharmaceuticals Corporation with the result that Inex's contractual obligations with Protiva were also transferred to Tekmira.

The plan of arrangement was opposed by Protiva because the assignment of the contracts it had with Inex required Protiva's consent and Protiva was not willing to provide that consent. Inex argued that the court had broad discretion under the Act to approve any plan of arrangement as long as the arrangement was fair and reasonable to all of those affected by the arrangement.

The issue before the court in the Inex case was whether the broad

discretion of the court under the Act included the ability of the court to approve an arrangement that would essentially circumvent Protiva's contractual rights. Mr. Justice Pitfield was able to reconcile the principle of freedom of contact with the purpose of the arrangement provisions in the Act. Because the reorganization proposed by Inex was otherwise fair and reasonable from a business perspective, the court preferred to approve the plan of arrangement, as long as it could find a way to address any prejudice that might be suffered by Protiva as a result of circumventing its right to withhold consent to the assignment of its contracts to Tekmira.

Protiva asserted, among other things, that Tekmira would be better positioned than Inex to compete with Protiva. It also asserted that if the contracts were assigned to Tekmira, thereby relieving Inex from its contractual obligations, Inex would be under no obligation to respect the contracts' confidentiality provisions and would not be constrained from carrying on the business activity prohibited by those contracts.

Mr. Justice Pitfield held that there was no prejudice to Protiva that could not be removed by means of court orders. He found that the power to remove any such prejudice by court order is contemplated in the language of the Act (section 291(4)(c)). For instance, Inex was permanently enjoined from disclosing any confidential information and from pursuing any business activity as provided in the contracts.

Protiva unsuccessfully appealed the decision of the Supreme Court of British Columbia. The Court of Appeal held that "third party rights must be considered and accommodated within the discretionary analysis but they cannot be erected as an impermeable barrier to an arrangement."

Had the court not balanced the parties' interests and exercised its discretion in this way, the restrictions on assignment contained in the Inex/Protiva contracts would have allowed Protiva to effectively exercise a veto over the plan of arrangement. As stated by the Court of Appeal, "were it otherwise, the third party could exercise powerful leverage wholly out of proportion to the value of the rights compromised by the arrangement, or the party could simply act as a spoiler for purposes unrelated to those rights."

The balancing of third party contractual rights against an otherwise fair and reasonable plan of arrangement had not previously been considered in British Columbia in connection with the arrangement provisions of the Act. This issue had also not been considered in the other provinces with similar arrangement provisions, except in *PetroKazakhstan Inc.* v. *Lukoil Overseas Kumkol B.V.*, [2005] A.J. No. 1415 (Alta.Q.B.), where the Alberta Court of Queen's Bench applied a similar analysis to that approved by the British Columbia Court of Appeal.

The actual extent to which contractual rights might actually be compromised under the arrangement provisions of the Act, and similar provisions in other provinces, will likely depend on the severity of the prejudice that can be demonstrated by a third party trying to assert its contractual rights in opposition to a plan of arrangement.

It is now certain that the courts are empowered by the Act to affect contractual rights in connection with the approval of a plan of arrangement. The actual extent to which contractual rights might actually be compromised under the arrangement provisions of the Act, and similar provisions in other provinces, will likely depend on the severity of the prejudice that can be demonstrated by a third party trying to assert its contractual rights in opposition to a plan of arrangement. As long as any prejudice to that third party can be minimized or eliminated either through the plan arrangement itself, or by way of a proposed court order in connection with court approval of the plan of arrangement, such resistance will not be a bar to a company's access to the arrangement mechanism in the Act.

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Why the *Tsilhqot'in* Case Should Be Appealed


Keith Clark

Unresolved issues concerning Aboriginal rights and title are creating problems for the business community across Canada. Businesses operate best in environments where legal rights and rules are known and respected.

In British Columbia, where most of the land base is not subject to a treaty, it was hoped that the *Tsilhqot'in* v. *British Columbia* case would bring more certainty to the issue of where, and under what circumstances, Aboriginal title might be found.

Unfortunately this case, decided in November 2007 by Mr. Justice Vickers of the Supreme Court of British Columbia, may have only added to the confusion.

Although the *Tsilhqot'in* case was a massive undertaking, it was not the longest Aboriginal title case in B.C. At 339 days of evidence and argument, it fell short of the 374 days taken up by the trial in *Delgamuukw.*

The *Tsilhqot'in* case was almost certainly the most expensive Aboriginal case to be heard in Canada – it is estimated that the cost of the litigation that was funded by the Canadian taxpayers was $30 million.

However, where the *Tsilhqot'in* case really stands out is in the amount of *obiter dicta* in the reasons for judgment. *Obiter dicta* is defined as "an incidental and collateral opinion that is uttered by a judge but is not binding." The vast majority of the 473 pages of the judgment in the *Tsilhqot'in* case are expressly intended to set out only the opinion of the trial judge, with no binding or legal effect.

In the *Tsilhqot'in* case an Indian band with less than 400 members sought a declaration of Aboriginal rights and title over an area of B.C. forming part of what is known as the Chilcotin – a remote area of the province between Williams Lake and Bella Coola, about 200 kilometres north of Vancouver, with no paved roads or even electrical power. It is one of the few areas of the world where wild horses still run free.

The court dismissed the claim for a declaration of Aboriginal title to the claimed area. However, that was only for a technical reason, relating to the "all or nothing" way the claim was pleaded. The judge determined that he could not find Aboriginal title to the entire area, but went on in *obiter dicta* spanning several hundred pages about what he would have found had the case been presented slightly differently.

> *If the judge's* obiter dicta *were to be accepted as the law, then the forestry and mining rights held by businesses over about half of the province of B.C. could be invalid, and rights to private land throughout the province, which are also based on provincial legislation, would be thrown into question.*

What the judge said he would have found if the pleadings had allowed it was that about half of the claimed area was Aboriginal title land, and provincial legislation purporting to regulate that land would be of no effect. It is reasonable to conclude that if his *obiter dicta* were to be accepted as the law, then the forestry and mining rights held by businesses over about half of the province of B.C. could be invalid, and rights to private land throughout the province, which are also based on provincial legislation, would be thrown into question.

In what would appear to be considerable understatement, the judge observed, "I am aware of the serious implications this conclusion will have on British Columbia."

The judge ended his reasons by stating that he hoped that the parties would not appeal his judgment and would instead use his reasons as a basis to negotiate a settlement that would lead to reconciliation. The almost immediate reaction of the Aboriginal community to the judgment was to issue a declaration in which they demanded complete recognition of their claimed rights and title as a precondition to any further treaty negotiations.

It is difficult to see how a non-binding opinion of a judge that puts fundamental issues of jurisdiction over land into question, without any solutions, could lead to a recon-

ciliation of Aboriginal issues throughout the country. It would be fair to say that the decision has not so far furthered the reconciliation process, but has rather added to the already huge uncertainty concerning the nature and extent of Aboriginal rights and title in British Columbia.

The issues in this case are not only of great importance to the approximately 300 people living in the claims area, but also to the more that 4 million people living in British Columbia, and the almost 35 million people living in Canada.

At this point, all of the parties have filed notices of appeal, but are engaged in settlement discussions as suggested by the judge.

It is not clear how one appeals an opinion as opposed to a judgment, but assuming the parties get over that hurdle, it is hard not to think that the interests of all of the people in Canada would be best served if the settlement discussions are not successful and this case is appealed to the Supreme Court of Canada, which is the body that actually makes the laws on what Aboriginal rights and title mean in this country.

With the greatest of respect to the Honourable Mr. Justice Vickers, we already have many opinions as to what Aboriginal rights and title might be. In order to achieve certainty in this highly charged area what we – Aboriginal and non-Aboriginal alike – need are legal precedents telling us what the law actually is.

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"It's your word against the Doctor's" – Videotaping Defence Medical Examinations


Ruba El-Sayegh

The issue of videotaping a medical examination sometimes arises where the physical or mental state of a party to a proceeding is in question (*CJA*, s. 105). Not surprisingly, the issue is often relevant in personal injury or disability cases where one of the injuries suffered by the injured party is a cognitive or neurological impairment.

Doctor-Patient Relationship

Although a doctor-patient relationship is generally based on fiduciary principles of trust, confidence and confidentiality, a medical examination conducted for the purpose of refuting a plaintiff's allegations, is not quite the same. Often, the injured party feels violated, and is skeptical about the impartiality of the doctor who is conducting the examination.

Injured Party's Position

"Bias" is an oft-cited reason by the plaintiff to push for the recording of a medical examination, however, other reasons include cognitive difficulties such as memory loss or difficulties concentrating, understanding or recollecting the questions, or the involvement of a child under disability. The subjectivity involved in a psychological assessment is what creates anxiety for most, if not all plaintiffs.

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Doctor's Position

While the issue may seem uncontroversial, generally, many doctors are uncomfortable with having their examinations recorded for fear that the presence of a recording device will alter the credibility and sincerity of the examination because the examinee may *act* for the camera. Alternatively, videotaping can call into question the doctor's methodology, observations and diagnosis because an unsophisticated jury may wrongly interpret certain statements or actions made by the examinee to suggest a disability, when in reality the examinee is not *clinically* disabled.

Rules of Civil Procedure

The Courts have often faced the issue of whether it is appropriate to record a medical examination. While the Rules do not specifically limit or prescribe the right to record a medical examination, the Rules grant the Court the jurisdiction to determine if *another person* can be present at the examination under Rule 33.05. Case law, such as *Simon* v. *Paslawski* has defined the scope of Rule 33.05 to include videotapes and audio recordings, since any one who watches or listens to the tape afterwards is effectively present at the examination.

Bellamy v. *Johnson*

To this day, the leading authority on recording medical examinations is the 1992 Ontario Court of Appeal decision of *Bellamy* v. *Johnson*. The Court of Appeal outlined a three-part test to determine whether it is appropriate to allow for a recording. The first of the following considerations predominates:

1. The opposing party's ability to learn the case it has to meet by obtaining an effective medical evaluation.
2. Fairness and effectiveness of trial.
3. Likelihood of achieving a reasonable pre-trial settlement.

The decision in *Bellamy* stands for the proposition that a plaintiff is not automatically entitled to determine how a medical examination is to be conducted. However, if a doctor refuses to allow the recording, on a motion, the court may exercise its inherent jurisdiction, and establish the terms and conditions surrounding the medical examination, which can include permitting the plaintiff to record the examination. This depends on the circumstances of each case, and the burden of proof rests with the person requesting the recording.

Recent Decision: *Dempsey* v. *Wax*

A number of cases post-*Bellamy* were decided either for or against recording medical examinations. The only consistency amongst these decisions was the application of the *Bellamy* principles.

Dempsey v. *Wax* is the most recent Ontario decision on this issue, which seems to have made it more acceptable to record medical examinations. In applying *Bellamy*, Justice Quigley held, "the recording should enhance, rather than detract, an examiner's ability to confidently express his/her observations, conclusions, diagnosis and prognosis." He further stated, "a full and reliable record of statements …would facilitate the fact finding process … providing context and avoiding potential ambiguity…." Besides mere preference, Justice Quigley found that the defendant presented no evidence to suggest that recording the neuropsychological assessment would affect the integrity of the examination. Interestingly, the Court awarded costs against the defendant, which could be signaling to counsel the Courts overall position on the issue.

If a doctor refuses to allow the recording, on a motion, the court may exercise its inherent jurisdiction, and establish the terms and conditions surrounding the medical examination.

Procedure When a Defence Medical is Recorded

According to *Willits* v. *Johnston*, to ensure the accuracy of videotaping, the following conditions should apply:

1. Camera should be set up in an unobtrusive manner.
2. Videotape shall not be edited.
3. Videographer should not be present in the examination room.
4. Tape should be of sufficient time capacity to eliminate interruptions.
5. Tape is to display the time in seconds on a continuous basis.

Final Thoughts

It is best to determine in advance whether the doctor will object to a recording. If at a standstill, one solution would be to suggest having the plaintiff's medical legal examination recorded as well.

Further, in applying *Bellamy*, it is insufficient for a party to cite the doctor's *preference* or *bias* as the reasons to either contest or endorse the recording of a defence medical.

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Better Safe Than Sorry? The Role of Apologies in Litigation

Joseph D'Angelo

Benjamin Bathgate

The Ontario provincial government may soon be getting into the business of regulating apologies.

A recommendation has been made by the Uniform Law Conference of Canada to the Ontario Bar Association to urge the Ontario government to enact apology legislation. Such legislation which would effectively stipulate that an apology:

- cannot be admissible in court for the purpose of proving liability or as an admission of liability;
- cannot be used as confirmation of a cause of action to extend a limitation period; and
- cannot be regarded as an admission of liability for the purpose of voiding an insurance policy.

Similar legislation already exists in British Columbia, Manitoba and Saskatchewan.[1] The objective of such legislation is to encourage early and cost-effective resolution of disputes and/or prevent the commencement of lawsuits where apologies are offered. This article examines the traditional role of apologies in the legal context and questions whether the intended legislation would accomplish its intended objectives.

In the absence of apology legislation, an apology would be considered a key admission in the course of a legal dispute. In particular instances, apologies can take on a significant role. For example, in defamation cases the plaintiff will inevitably request an apology from the defendant who committed the defamation, in order to redeem his or her reputation. And, assuming the plaintiff is successful at the end of the day, the plaintiff could win increased damages if the defendant refuses to apologize.

Apologies are also relevant in the civil litigation context where, for example, there has been a finding of contempt of court and the offending party wishes to purge the contempt, and in the criminal context during sentencing.

If the recommended apology legislation is enacted in its proposed form, apologies could potentially play a very significant role in a variety of commercial disputes. Even though commercial disputes typically involve a dispute over money (or some form of property or business interest which ultimately boils down to a monetary loss), invariably these disputes arise from a decision made or an action taken by a person. The person may have acted through or on behalf of a corporation, or may have acted as an individual, but that person's decision or action ultimately caused monetary loss to another person. Typically in these cases, there is also some feeling of injustice or damaged pride by the innocent "victim" which, from a litigator's perspective, often translates into the all too common desire by a client to litigate "out of principle" even when the economics do not justify it.

Apologies could potentially play a very significant role in a variety of commercial disputes. Even though commercial disputes typically involve a dispute over money (or some form of property or business interest which ultimately boils down to a monetary loss), invariably these disputes arise from a decision made or an action taken by a person.

In many of these disputes, an apology could help facilitate a settlement more quickly and for less money because, while a monetary payment would compensate for pecuniary loss, it would not compensate for the intangible losses described above. There is data from 1994, for example, which shows that, in the case of medical malpractice suits, a significant percentage of patients said that they might not have filed suits had they been given an explanation and apology.[2]

The danger, however, in enacting the proposed apo-

logy legislation is that it would eliminate the court's discretion to make a finding of liability in any way based on a clear admission of fault by the defendant. As it is presently worded, the draft *Uniform Apology Act* defines "apology" very broadly, such that it means "an expression of sympathy or regret…or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate." In some cases, the strongest (or only) evidence that a plaintiff may have to prove its case are admissions of fault spoken or written by the defendant. This proposed legislation would therefore tie the court's hands and disallow any consideration of such an admission of fault in determining liability.

In some cases, the strongest (or only) evidence that a plaintiff may have to prove its case are admissions of fault spoken or written by the defendant. This proposed legislation would therefore tie the court's hands.

This danger could be addressed by limiting the scope of the legislation to apply only to apologies or admission of fault that are given *after* the commencement of litigation. In other words, any such statements made by a defendant prior to the commencement of litigation could still be used as evidence of fault, whereas any such statements made after the lawsuit is commenced could not. Such a change to the proposed legislation would, theoretically, still satisfy the objective of encouraging early, non-litigious dispute resolution, but at the same time avoid the danger of disallowing important admissions of fault made at material times during the dispute.

Another concern is that apologies can become trivialized and meaningless if the defendant knows that they will not be admissible and the mere act of apologizing could either prevent a lawsuit from being commenced or reduce the amount of potential damages for which the defendant is liable.

The answer to this concern is that (a) human nature being what it is, if the defendant truly believes he has done nothing wrong, he is unlikely to apologize; and conversely (b) if the plaintiff believes the apology is insincere, he is unlikely to accept it.

The current status of the matter is that, although the Ontario Bar Association has hosted a debate as to whether or not the proposed legislation should be adopted, the question remains whether or not the Ontario government will draft a bill proposing an apologies act and, if so, whether such a bill would appropriately deal with the concerns outlined above.

1 *Apology Act*, S.B.C. 2006, c.19; *Apology Act*, S.M. 2007, c.25; *Evidence Amendment Act*, 2007, S.S. 2007, c.24; such legislation has also been adopted various states in the U.S. and in Australia

2 VanDusen, Virgil and Spies, Alan, "Professional Apology: Dilemma or Opportunity," *American Journal of Pharmaceutical Education* 2003; 67(4) Article 14, p.3

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Announcement and News

Announcement

Lang Michener's Eastern Division Welcomes New Associate

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We are pleased to announce that **Mark Wiffen** has joined the firm as an associate in the Commercial Litigation Group in the Toronto office. Mark has expertise in the areas of commercial, banking, municipal, construction lien and insurance defence litigation, and has acted on behalf of several corporations and financial institutions.

News

CCCA 2008 National Spring Conference

April 13–15, 2008, Hilton Toronto Hotel
Toronto, ON

Lang Michener Speaker: **Joseph D'Angelo**
"Litigation Risk I: The Litigator's Perspective on Common Trouble Spots That Can Land You in Court"

Lang Michener is proud to be a Silver Patron Sponsor of the CCCA National Spring Conference to be held on April 13–15, 2008 at the Hilton Toronto Hotel. The theme of this year's conference is Corporate Counsel, Corporate Leaders: Strategies for Risk Management and Business Planning.

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Publication Mail Agreement Number 40007871

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