

In Brief

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

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In this issue

LAW NOTES tackle disparate topics and the first may cause considerable disquiet: Ontario and other provinces are legislating employers' involvement in the domestic affairs of their workers. Other provincial requirements pertaining to annual reporting of greenhouse gas emissions are also canvassed. And there are NOTES on the perils of a personal services business; permitted variations to the terms of outstanding take-over bids, and on the lowly, legislated apology.

Heralded as bringing the law of defamation into the 21st century, in the articles section, we have another look at a recent Supreme Court decision from a different perspective.

And also from a business point of view, we canvass how to deal with vexatious parties; continued use of unlimited liability companies; the narrowing of federal labour law, and "voluntary" governance reform. In the green department, we discuss privacy reporting issues, and Canadian consequences if the U.S. continues to consider curtailing carbon leakage. And since it should come before the start of the relationship, there's an interesting article about job contracts – compared to prenuptials.

In *Brief Life Bites*, a "moving" story; then, *Letters and Comments* (including Arctic tales) and a little bit about us.

False Imputations About Business



Michael Rankin



Norm Fera

The recent victory in the Supreme Court of Canada for press freedom may not immediately resonate as something of interest or concern to business. But if one sees the ruling as allowing mistaken information to be published about the business enterprise or its leaders, then it may arouse more than cursory attention.

The rulings in *Quan v. Cusson* ("Quan") and *Grant v. Torstar Corp.* ("Grant") may not seem to go so far, but where the publication is on a matter of public interest, and the publisher was diligent in trying to verify the allegation (having

regard to a number of factors) then, notwithstanding error (i.e., defamation), the defence of “responsible communication in the public interest” does provide a safe haven.

In short, the common law of defamation has been modified to accord stronger protection to defamatory statements of fact published responsibly. Many an editorial has heralded this change as “bringing freedom of expression into the 21st century.” And some have called it “a victory for all,” but is it?

The Companion Cases in the Supreme Court

The facts in the *Quan* case are essentially these: Danno Cusson was a constable with the Ontario Provincial Police (“OPP”) who, shortly after the events of September 11, 2001, and without permission from his employer, traveled to New York City to assist with the search and rescue effort at Ground Zero. Initially, he was portrayed in the press as a hero, while the OPP was pilloried for demanding that he return to his duties in Ottawa. The *Ottawa Citizen* subsequently published three articles alleging that Cusson had misrepresented himself to the authorities in New York and possibly interfered with the rescue operation.

The facts in the *Grant* case strike closer to the point made in the introduction. Peter Grant and his company, Grant Forest Products Inc., sued the *Toronto Star* in defamation for an article the newspaper published in June of 2001, concerning a proposed private golf course development on Grant’s lakefront estate. The story carried the views of local residents who were critical of the development’s environmental impact and suspicious that Grant was exercising political influence behind the scenes to secure government approval for the new golf course. The reporter, an experienced journalist, attempted to verify the allegations in the article, *including* asking Grant for comment, which Grant chose not to provide.

Reportage

The article published in the *Toronto Star* included the following paragraph, which became the centerpiece of the libel action brought by Grant: “Everyone thinks it’s a done deal because of Grant’s influence – but most of all his [Ontario Premier] Mike Harris ties,” says Lorrie Clark, who owns a cottage on Twin Lakes.”

This is referred to as “reportage” – a defamatory statement clearly attributed to someone other than, and not adopted by,

the publisher. One view is that reportage is simply the accurate reporting of facts – the fact of what someone said. The media has argued that reportage is essential to comprehensive coverage of public debate. Charges flung back and forth between contending factions in a dispute are themselves, it is argued, an essential part of the story, and will be understood by the public as such.

Some Legal History

When the *Quan* case was before the Ontario Court of Appeal, Justice Sharpe undertook an extensive review of the Canadian law of “qualified privilege,” as well as the more recent developments in other common law jurisdictions. The Court concluded that the existing law should be developed in order to give “appropriate recognition and weight to the Charter values of freedom of expression and freedom of the media without unduly minimizing the value of protecting individual reputation.” The Supreme Court of Canada decided to leave the traditional defence of qualified privilege intact, and chose to name and shape a new defence that would encompass traditional journalism, as well as blog postings and other online media.

The Defence of “Responsible Communication”

The Supreme Court held that the defence of responsible communication on matters of public interest applies where (i) the publication is on a matter of public interest, and (ii) the publisher was diligent in trying

to verify the allegation, having regard to:

- a) the seriousness of the allegation;
- b) the public importance of the matter;
- c) the urgency of the matter;
- d) the status and reliability of the source;
- e) whether the plaintiff’s side of the story was sought and accurately reported;
- f) whether the inclusion of the defamatory statement was justifiable;
- g) whether the defamatory statement’s public interest lay in the fact that it was made, rather than its truth (“reportage”); and
- h) any other relevant circumstances.

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Determining Public Interest and Responsible Communication

When an issue arises, it is a judge that determines whether the publication was on a matter of public interest. If so, the jury then decides whether the standard of responsibility was met. And when determining responsibility, the jury must consider the broad thrust of the publication as a whole, rather than minutely parsing individual statements.

The Public Interest

The public interest is not synonymous with what interests the public. The public's appetite for information on a given subject – say, the private lives of well-known people – is not, on its own, sufficient to render an essentially private matter public for the purposes of defamation law. An individual's reasonable expectation of privacy must be respected in this determination.

But the authorities offer no single “test” for public interest, nor a static list of topics falling within the public interest.

In *The Law of Defamation in Canada*, Raymond Brown notes that to be of public interest, the subject matter “must be shown to be one inviting public attention, or about which the public has *some substantial concern because it affects the welfare of citizens*, or one to which considerable public notoriety or controversy has attached.” (Italics added.)

And so, public interest is not confined to publications on government and political matters. As the Supreme Court has acknowledged, “The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion, and morality.”

In *Quan*, the public interest test was found to be clearly met in that the Canadian public has a vital interest in knowing about the professional misdeeds of those who are entrusted by the state with protecting public safety. News of Cusson's heroism was

already a matter of public record, and there was no reason that legitimate questions about the validity of this impression should not be publicized as well.

In the *Grant* case, the Supreme Court noted that: “Care must be taken by the judge making [a public interest] determination to characterize the subject matter accurately. Overly narrow characterization may inappropriately defeat the defence at the outset. For example, characterizing the subject matter in this case simply as ‘Peter Grant's business dealings’ would obscure the significant public interest engaged by the article and thus restrict the legitimate scope of public interest.”

Some Concluding Remarks

One can feel generally comfortable with the application of the public interest test in *Quan*, for example – the case being vaguely political in nature and involving someone purporting to represent government agencies. But, as suggested, the public interest may encompass matters of health, product safety, financial well-being and so on. That being so, then a wide variety of activities in which business is regularly involved can be captured as well. And, in that case, journalists will only have to be found to have acted responsibly, notwithstanding publication of material containing errors and false imputations.

Looking ahead, whenever it appears that something has caught the attention of the media or that it might go viral, it seems prudent for corporate and business interests to immediately engage specialized legal counsel and public relations experts to be engaged from the outset in the initial inquiries and in the drafting of comments and responses and in assisting with any fallout.

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Revival of Unlimited Liability Companies



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The Fifth Protocol to the *Canada-United States Income Tax Convention* (the “Treaty”) introduced an anti-hybrid rule that negatively impacted the continued use of Canadian Unlimited Liability Companies (“ULCs”) by U.S. residents. However, statements by the Canada Revenue Agency (the “CRA”) suggest that the new rule will not be interpreted as negatively as anticipated, and pave the way for the continued use of ULCs in certain circumstances.

Background

A ULC is treated as an ordinary corporation for Canadian income tax purposes. However, a ULC owned by a U.S.–resident shareholder would typically “check the box” under U.S. rules so

as to be a disregarded entity for U.S. tax purposes. This “hybrid” nature of the ULC proved useful for many U.S. residents wishing to acquire or invest in Canadian businesses in a tax-effective manner. The U.S. tax advantages of structuring such an investment through a ULC included (i) the ability to utilize losses incurred in the ULC against income of the U.S. parent, (ii) the ability to maximize foreign tax credits in certain circumstances, (iii) through appropriate steps, the ability to “step up” the cost of ULC assets for U.S. tax purposes, and (iv) utilizing the ULC in certain “double-dip” financing structures.

While the use of a ULC could produce certain U.S. tax advantages, these structures would only be tax-effective if the rules permitted payments to flow from the ULC to its U.S. shareholders at Treaty-reduced rates of withholding tax (such as the 5% withholding tax on dividends). The anti-hybrid rule introduced in the Fifth Protocol to the Treaty could, on its face, deny the Treaty-reduced rates of withholding tax on amounts of income, profit or gain (such as dividends) paid by the ULC to a U.S. person. The denial would be on the basis that the U.S. tax treatment of the payment would be different than it would be if the ULC were not a hybrid entity. If Treaty relief is denied, the 25% statutory rate of Canadian non-resident withholding tax would apply, which would materially increase the Canadian tax on profits earned through a ULC. The additional withholding tax might not be recoverable by the U.S. shareholder through the foreign tax credit mechanism.

As the anti-hybrid rule is now in effect, many U.S. companies with Canadian ULCs have recently reconsidered their corporate structure in order to avoid the increased tax leakage.

Recent CRA Guidance

At a conference held in late 2009, the CRA commented on a number of proposals that had been considered by tax advisors as a way of avoiding the negative impact of the anti-hybrid rule.

Partial Relief by Capitalizing Retained Earnings

The CRA commented on a two-step alternative to paying a dividend. The ULC would first capitalize its retained earnings, resulting in an increase to the stated (and paid-up) capital of its shares. Next, the ULC would return capital to the U.S. share-

holder, up to the amount of the recently-increased stated (and paid-up) capital. The first step would trigger a deemed dividend for Canadian income tax purposes but would be disregarded for U.S. tax purposes, regardless of the hybrid nature of the ULC. The second step would not precipitate a deemed dividend.

Based on the fact that the U.S. tax treatment of the deemed dividend would be the same regardless of the hybrid nature of a ULC, the CRA stated that the deemed dividend would not be denied the Treaty-reduced rate of Canadian non-resident withholding tax. Further, the CRA stated that the domestic general anti-avoidance rule (“GAAR”) would not normally apply where the ULC is used by a U.S. parent to carry on an active branch operation in Canada and the two-step process is used to continue to qualify for the Treaty-reduced 5% rate of Canadian non-resident withholding tax on the distribution of the ULCs after-tax earnings.

The comments from the CRA suggest the drafting of the Treaty’s anti-hybrid rules may have been overly broad and that the use of a ULC by a U.S.-resident parent corporation should not be considered abusive in many circumstances.

Restructuring Using Third-Country Intermediary

The CRA also commented on the strategy of interposing a third-country blocker entity, such as a Luxembourg Société à Responsabilité Limitée (“Sarl”), between the ULC and the U.S. shareholder. As the ULC would pay dividends to the Sarl, a resident of Luxembourg, rather than the ultimate parent in the U.S., the intent would be to have the 5% rate of Canadian non-resident withholding tax under the Canada-Luxembourg treaty apply, rather than the Treaty and its anti-hybrid rules.

The CRA stated that the 5% rate under the Canada-Luxembourg treaty would apply provided that the Sarl was the beneficial owner of the dividend. The CRA also stated that the GAAR should not apply.

Restructuring Interest Payments

The CRA considered a scenario in which the shares of a ULC are owned by a U.S.-resident corporation (“US Subco”), US Subco’s shares are owned by another U.S.-resident corporation (“US Parent”) and the ULC is indebted to US Subco. For U.S. purposes, the interest received by US Subco from the ULC would be treated differently than would the receipt of interest by US Subco from a non-transparent entity. Accordingly, for Canadian purposes, the anti-hybrid rule would apply and the interest would be subject to the domestic 25% rate of non-resident withholding

tax rather than the Treaty-reduced rate.

The CRA commented on the strategy of restructuring the debt such that the interest would be payable to US Parent rather than US Subco. For U.S. purposes, the interest would be included in US Parent's income whether or not the ULC is a hybrid entity. Accordingly, the CRA stated that the anti-hybrid rule would not apply to deny the benefit of the Treaty. However, the CRA concluded by stating that the GAAR may apply if the ULC is part of a financing arrangement that results in, among other things, duplicated interest deductions or an internally generated interest deduction in one country without offsetting interest income in the other country.

Concluding Thoughts

The comments from the CRA are welcome news to taxpayers and their advisors. The comments suggest the drafting of the Treaty's anti-hybrid rules may have been overly broad and that the use of a ULC by a U.S.-resident parent corporation should not be considered abusive in many circumstances. More importantly,

the comments provide guidance for the continued use of ULCs in appropriate circumstances without some of the negative tax consequences initially anticipated by taxpayers and their advisors.

Shareholders of ULCs should carefully review their circumstances to consider the best course of action. The approach of capitalizing retained earnings and/or restructuring intercompany financing may be a practical solutions for many ULCs in straight-forward cross-border structures. However, such a transaction may invite a higher level of scrutiny where a ULC is used in financing structures that are considered abusive.

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Corporations Dealing with Vexatious Parties



Adam D.H. Chisholm

In Ontario, two regulations came into force at the beginning of this year that may impact on the ability of corporations to deal cost-effectively with claims by vexatious litigants. The province is undergoing civil justice reform, partially under the guise of access to justice, but corporate defendants may struggle with certain parties that take that access to justice for granted.

The Changes

The modifications, which are in force as of January 1, 2010, have been written about extensively. One significant change sees an increase in the Small Claims Court limit from \$10,000 to \$25,000. Another change pertains to codification of proportionality in the *Rules of Civil Procedure* in the Superior Court of Justice. Some of the other changes include altering the scope of documentary discovery, changing the summary judgment standard, and the requirement for a discovery plan.

The Vexatious Litigant

Conceptually, the idea of what makes a party "vexatious" exists in a spectrum, ranging from a delusional self-represented party

who brings repeated claims to a sophisticated represented person that has filed a single claim purely with the intent to exploit the corporation's reputation and wealth. Only some of these conceptually vexatious plaintiffs will be included in the legal definition and many will not.

Where a judge of the Ontario Superior Court of Justice is satisfied that a person has persistently, and without reasonable grounds, instituted vexatious proceedings or conducted proceedings in a vexatious manner, the judge may order that the person not be able to institute or continue any proceeding without leave of the court, pursuant to section 140 of the *Courts of Justice Act*. Vexatious actions include actions brought for the purpose of harassing other parties.

In applying section 140 and determining whether a person is a vexatious litigant, the court will consider whether a claim is repetitive of prior proceedings or rolls forward previous allegations into new claims, whether a claim cannot reasonably succeed, whether a claim is brought for an improper purpose, whether a litigant refuses to pay costs of prior proceedings, and whether the litigant persistently appeals decisions.

These principles suggest that a repetitively vexatious litigant will be prevented from bringing further actions. However, a

single unmeritorious claim will likely satisfy fewer than half of the criteria applied to section 140, and judges will typically give a litigant their “day in court” unless the claim is obviously frivolous. As such, section 140 will not save many corporations faced with a vexatious claim.

Challenges for Corporations

The increase in the Small Claims Court jurisdictional limit may be the civil justice reform which is most relevant to corporations facing vexatious litigants. Whereas formerly such litigants could only claim up to \$10,000, they now can file a Plaintiff’s Claim for up to \$25,000 without using the Superior Court of Justice. An apparent benefit to the increase in the Small Claims Court jurisdictional limit is that a corporate defendant now does not need to have a lawyer represent him or her for a claim between \$10,000 and \$25,000. However, corporations may be wary of asking in-house counsel to dedicate the time required to defend such litigation and may not be comfortable using a paralegal instead of a lawyer for a dispute worth \$25,000.

While provided for in different language than the *Rules of Civil Procedure*, the Small Claims Court has a rule providing a procedure for striking out documents on motion. If any part of any document is “inflammatory, a waste of time, a nuisance or an abuse of the court’s process,” the court may stay or dismiss an action.

A claim involving generalized allegations and insufficient details that plainly cannot succeed may also be struck; however, a claim will not be struck simply because it is novel. Although the court may also permit amendment of the claim, if the facts pleaded do not demonstrate a legally complete cause of action, there may be grounds for dismissal of the action. Also, vague allegations that make it impossible for an opposing party to reply may be struck, and lastly, claims that constitute a fishing expedition – an action brought solely to access the records of a corporation – may be struck.

The likely inability to dispose of spurious claims in the Small Claims Court through a motion for summary judgment only complicates things for corporations who wish to quickly dispose of vexatious claims that are not dismissed pursuant to rule 12.02.

Dealing with Vexatious Litigants

Here are some suggestions for dealing with vexatious litigants under the new rules:

- Contact counsel early. Pre-litigation conduct may determine whether a lawsuit is even filed by an unmeritorious claimant. A client should not be hesitant to contact reliable counsel early to save potential costs and liability down the road.
- Judge the merits of a seemingly vexatious claim up front. Once a claim is filed, a corporate defendant should perform an honest consideration of whether it bears fault in the manner alleged.

Even a claim that appears spurious should be considered in the context of the law to determine if the claim really is vexatious. Companies may make a business decision to settle a case based on costs, even if the law is in their favour. A client should be aware of such circumstances as soon as possible.

- Try to strike the claim. As detailed above, even if the litigant does not meet the section 140 test for status as a vexatious litigant, the claim may still be struck if it is frivolous or abusive.
- If you choose to litigate, do so aggressively. If you are going to spend the money to defend against a vexatious claim, win. Conduct the required investigations, retain the required experts, and, most importantly, be willing to spend the money to be properly prepared for a hearing.

Where a judge of the Ontario Superior Court of Justice is satisfied that a person has persistently, and without reasonable grounds, instituted vexatious proceedings or conducted proceedings in a vexatious manner, the judge may order that the person not be able to institute or continue any proceeding without leave of the court.

Some Final Words

Larger corporations may generally view themselves as being at a higher risk of facing a vexatious litigant because of their public profile. However, smaller companies may feel like their entire trade reputation rests on how they deal with any particular plaintiff. When dealing with vexatious claims under the new civil justice regime, hopefully the courts will remember that “People’s courts” govern not only individuals, but also corporations as legal persons.

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Ed.: *This article is an abridged version of a much lengthier article prepared by Adam that contains footnotes, citations and other references and details. Without cost or obligation, you may obtain the longer version by contacting Adam directly.*

Governance Reforms in Settlement Agreement



Amandeep Sandhu

In September 2009, Dell Inc. (“Dell”) agreed to settle a shareholder derivative action claiming breach of fiduciary duties by certain past and present Dell officers, employees and directors. As part of that settlement, which followed an investigation into its past accounting and financial reporting practices, Dell agreed to institute certain corporate governance reforms, including agreeing that its board of directors would be comprised of at least a substantial majority of independent directors.

Background to Litigation

In August 2006, Dell announced that the U.S. Securities and Exchange Commission (“SEC”) had commenced an investigation into certain of Dell’s accounting and financial reporting practices in August 2005, and that, as a result of SEC’s investigation, Dell’s Audit Committee had commenced its own investigation into such practices.

In August 2007, Dell announced that the Audit Committee investigation had been completed, and that Dell would be restating financial results for 2003 through to 2007 after the investigation found that Dell had overstated sales by US\$359 million and profit by US\$92 million during that period (the “Restatement”).

The Audit Committee’s investigation referenced numerous accounting issues, most of which involved adjustments to various reserve and accrued liability accounts. The investigation identified evidence that certain adjustments, that sometimes involved senior executives, may have been motivated by the objective of attaining financial targets, and that such activities typically occurred at the close of a quarterly period. The investigation found that, in some cases, incorrect or incomplete information about these activities was deliberately provided to internal or external auditors.

Shareholder Derivative Action and Settlement

In 2006 and 2007, after Dell’s announcement of the SEC investigation, certain shareholders of Dell (the “Plaintiffs”) commenced shareholder derivative actions in Texas that were consolidated into one action. The Plaintiffs alleged that certain of Dell’s past and present officers, employees and directors (the “Defendants”) breached their fiduciary duties by (i) engaging in insider trading,

(ii) failing in their oversight responsibilities, and (iii) making or permitting material, false, and misleading statements to be made concerning Dell’s business prospects, financial condition and expected financial results which allegedly inflated Dell’s stock price.

On September 11, 2009, Dell and the Defendants agreed to a settlement of all claims. Dell also agreed to pay the Plaintiffs’ legal fees and expenses of US\$1.75 million. Despite the settlement, the Defendants denied all claims made against them.

After the action was commenced, but before settlement was agreed to, Dell instituted certain remedial measures and corporate governance reforms. These reforms included (i) developing and implementing a remediation plan directed at the material weaknesses reported for Dell’s 2007 financial year, (ii) adopting an executive compensation recoupment policy, (iii) enhancing the

These developments serve as a further reminder for issuers to ensure that they monitor compliance with internal controls and disclosure controls and procedures on an ongoing basis.

finance function and establishing separate accounting and planning/forecasting functions, (iv) increasing the focus on review and monitoring by Dell’s accounting, internal audit and disclosure review functions, (v) enhancing recording procedures in connection with accrued liability and reserve accounting, (vi) establishing a global team of accountants for complex revenue recognition matters, and developing an

accounting code of conduct and a global accounting training initiative, (vii) improving information systems, (viii) enhancing ethics and compliance training, resources and communication, (ix) enhancing its internal misconduct reporting and investigation process, (x) enhancing its Audit Committee charter to allow for anonymous employee complaints regarding internal controls or auditing matters, (xi) enhancing and clarifying the general qualifications each member of its board of directors should possess and the scope of responsibilities for various board committees, (xii) instituting ongoing selective training on insider trading and misuse of Dell information, and (xiii) adopting a new securities trading policy. Dell agreed to maintain the above reforms for at least four years, unless a majority of Dell’s independent directors voted otherwise.

Dell also agreed to adopt additional corporate governance reforms, including (i) amending its corporate governance principles to provide that its board of directors must consist of a substantial majority (at least 60%) of directors meeting Dell’s standards for

director independence, (ii) permitting Dell directors to attend, at Dell's expense, an accredited director education program each calendar year, (iii) amending its corporate governance principles to provide that executive sessions of the independent directors must be held any time that an independent director requests and, in any case, during at least 60% of regularly scheduled board meetings, and (iv) amending its corporate governance principles to provide each director with complete and open access to Dell employees and eliminating the requirement to coordinate such access with the chairman of the board or Dell's board liaison office.

Dell agreed to maintain the above additional reforms for at least four years from the date that they are adopted, unless a majority of the Dell's independent directors voted otherwise.

Concluding Remarks

The settlement's instigation of the above-referenced corporate

governance reforms appears to be a unique feature of this litigation, which took the form of a shareholder derivative action. These developments serve as a further reminder for issuers to ensure that they monitor compliance with internal controls and disclosure controls and procedures on an ongoing basis. As evidenced by the reforms in question, policies such as corporate codes of conduct, securities trading policies and whistleblower policies can be important tools in monitoring such compliance. Given the evolving nature of an issuer's business and markets in general, issuers should review the adequacy of such policies regularly.

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Ed.: This article appeared previously in Lang Michener's Securities/M&A Brief.

Job Contracts – Like Prenups



Howard Levitt

In employment relationships, hindsight and calamity have an uneasy but seemingly constant co-existence. Terminating employees is often analogous to ending a disappointing marriage that has been rife with conflict and resulting too often, if unprepared, in significant payments. Just as a marriage contract can provide relief, so too can an

employment contract. Just as matrimonial agreements have technical obstacles to enforcement, the same is true of agreements in the field of employment law.

This became evident for Advanis Inc., an Edmonton-based market-research company, when confronted with the wrath of a recently terminated employee. Unfortunately for Advanis, its employment contract denied it the solace of protection.

In 2004, Advanis entered into an employment contract with Paul Dwyer. That contract purported to limit its payment obligations if it dismissed Dwyer without cause. Unbeknownst to the employer, the termination provision of the contract was ineffectually drafted.

Oblivious to the problems it was to imminently encounter, in 2006 Advanis promoted Dwyer to the position of executive vice-

president, sales and marketing. While entering into an amended employment contract with Dwyer, Advanis committed the error of relying on its original termination provision. It soon regretted that decision.

By 2007, Advanis was in financial crisis. Informing Dwyer that it had suffered a million-dollar annual loss, it terminated his employment, relying unfortunately on its badly drafted termi-

nation provision in the employment contract. That contract stated that “you will receive severance as determined by the *Employment Standards Act* (“ESA”), if it was determined that there was not a fit between your skills and the requirement of the job.”

As well, the court noted, the contract did not state that the ESA amount was all the employee would receive.

Also, the ESA requires the employee to maintain benefits during the notice,

whereas Advanis cut off Dwyer's benefits immediately. As the court noted, “The employer should not be afforded the protection of a contract it breached itself.”

Predictably, a disgruntled Dwyer sued for wrongful dismissal, claiming, among other things, entitlement to severance well

When drafted by an employment-law specialist, cognizant of the potential defences to the contract's enforceability, such contracts are a shield against litigation and excessive severance.

beyond what the contract provided. The court agreed, finding the contract vague and inapplicable to the circumstances. Specifically, Dwyer was dismissed for financial reasons, not because of his skill set, which was what the contractual termination provision was posited upon.

Much to the company's dismay, the court awarded Dwyer not the three weeks applicable under the ESA, but 12 months for his three-and-a-half years of employment.

The fate of Advanis, in this case, is all too common. This is commonly the result of the use of cookie-cutter employment contracts, borrowed from previous versions which have been either superseded by the law or are inapplicable to the new circumstances. It is entirely preventable.

When drafted by an employment-law specialist, cognizant of the potential defences to the contract's enforceability, such contracts are a shield against litigation and excessive severance. To obtain such a contract, employers should:

- ensure individualized employment contracts are drafted that are cognizant of the circumstances of each case;

- ensure contracts provide at least as much severance as required by minimum legislation as the employee's full entitlement, and better yet, to ensure there is consideration, provide one week more than that;
- ensure the employee obtains something new in exchange for the contract, remembering that contracts signed at any time after agreeing to the terms, such as on the first day of work, are unenforceable;
- ensure the employee is afforded the opportunity to obtain independent legal advice, whether or not they utilize that opportunity; and
- ensure employment contracts are drafted by an expert or at least reviewed and revised by an expert.

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Ed.: *The above article with a slightly different format and title previously appeared in Howard's weekly column on the first page of the Working section of the National Post.*

Federal Labour Law Narrowed



George Waggott

In a significant decision for many Canadian businesses, particularly those in the transportation sector that operate from locations across the country, the Supreme Court of Canada has narrowed the scope of federal labour law.

In *Consolidated Fastfrate*, the country's highest court clarified that multi-provincial operations will not automatically be subject to the *Canada Labour Code*.

Consolidated Fastfrate Inc. ("Fastfrate") is a national freight forwarding company headquartered in Ontario. A series of labour board and court decisions ensued when rival unions fought over a declaration about Fastfrate employees working in Alberta, Saskatchewan and Manitoba, being together subject to federal jurisdiction.

Fastfrate's operations were each confined to a particular pro-

vince, with the company using its own terminal employees and mostly local drivers and trucks to collect originating shipments. Third-party shippers then transported these consolidated shipments to various locations, with shipments regularly being sent across provincial boundaries. After goods were sent to a Fastfrate location in another province, the shipment would then be deconsolidated by Fastfrate employees and delivered to the relevant customer location.

Prior to the Supreme Court of Canada's decision, many would have considered the entire business of Fastfrate to be federally regulated, since it involved movement of goods between provinces.

This would have made the operation an interprovincial undertaking (i.e., an operation between provinces), which would then be governed by the *Canada Labour Code*.

Breaking new ground, the Court ruled that Fastfrate was

While the Canadian constitutional division of powers reserves certain matters to the national government, this should be limited to those areas of national importance.

governed by applicable provincial labour relations statutes. The company's employees and equipment did not cross provincial boundaries, so the Fastfrate operations were not part of the shipment of goods between provinces. The freight transportation network was thus subject to a divisible series of components, each of which needed to be reviewed individually.

The Court commented that federal jurisdiction over labour relations is exceptional and should be treated as such. While the Canadian constitutional division of powers reserves certain matters to the national government, this should be limited to those areas of national importance. There is no basis, held the Court, to find federal jurisdiction simply because an entity is connected to or conducts business with an interprovincial work or undertaking.

Fastfrate's operations were deemed to be entirely intra-provincial. The absence of any involvement with actual transportation between the provinces or internationally was the key determining factor. The fact that the company was able to offer a national network was not relevant.

This decision has clear implications for a number of businesses, particularly multi-site transportation and freight-forwarding operators.

This decision has clear implications for a number of businesses, particularly multi-site transportation and freight-forwarding operators. There is also a potential impact for those that offer services in several provinces and merely contract with federally regulated employers such as telecommunications companies, banks or the postal service.

For the industries identified above, the different rules under applicable labour laws may be important in terms of employee relations strategy. The *Canada Labour Code's* rules are unique, in a number of respects, including the requirements for certification and decertification, the bargaining cycle, and the ability to use replacement workers.

The Fastfrate decision is yet another example of the ongoing efforts by Canadian courts to streamline the approach to labour and employment topics that is indicative of a more pragmatic approach to regulating the workplace.

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Privacy in Greenhouse Gas Emissions



Peter Wells

In a separate article entitled "Reporting of Greenhouse Gas Emissions" that appeared in our *Environment, Energy and Emissions Trading Brief*, we described Ontario's new regime for reporting emissions of greenhouse gases. But one question that naturally arises is: "What is the government going to do with the data collected?"

The Ontario regulation does not specify any particular purpose or list of purposes, and the Ministry, in its press releases, has described the reporting regime as supportive of the coming cap and trade system. However, to those familiar with the National Pollutant Release Inventory ("NPRI") established under section 50 of the *Canadian Environmental*

Protection Act, 1999, the data to be reported for greenhouse gases looks very similar to the data to be reported for substances specified under the NPRI. (The data for the NPRI goes back to 1994, and can be searched online, and downloadable datasets are also available.)

During the consultation process, the issue of whether the data would be publicly available was raised. The decision on Ontario Regulation ("O. Reg.") 452/09, posted as 010-7889 on Ontario's Environmental Registry, provides the following summary with respect to comments received:

A number of comments received in writing and at the information sessions centered on the need to submit confidential business information and concerns over the protection of such information. The *Ontario*

A number of comments received in writing and at the information sessions centered on the need to submit confidential business information and concerns over the protection of such information.

Freedom of Information and Protection of Privacy Act (“FIPPA”) protects confidential commercial, technical, financial and other types of business information from disclosure. Confidential business information that is exempted from public disclosure under FIPPA will be protected during the implementation of the requirements. In addition, the data submission requirements in the draft regulation were reviewed and the submission requirements for data that are not essential for the design of a future cap and trade program or for a high level quality assessment of the reported emission have been removed from the final regulation. Most of the other information is required to be kept on site by the company for audit by the Ministry. This will help to reduce the reporting burden and the need to submit certain confidential business information.

Section 10 of FIPPA provides that every person has a right of access to a record or part of a record under the control of an institution, unless it falls within one of the exemptions provided for in sections 12 to 22 of the Act. Greenhouse gas reports are within the definition of a record, and the Ministry of the Environment is an institution under FIPPA. The exemption for third-party information provided for in section 17 of FIPPA provides that production of a record shall be refused where it “reveals a trade secret or scientific, technical, commercial, financial or labour relations information,” provided that disclosure would likely “prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization...result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied...result in undue loss or gain to any person, group, committee or financial

institution or agency; or reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.”

In light of the fact that NPRI data on emissions of hundreds of chemicals have been publicly available since 1994, it will likely be difficult to establish that publication of greenhouse gas emissions will *significantly* prejudice anyone’s competitive position. It is also difficult to understand how these data could assist in implementing a cap and trade system if the data were kept confidential.

While the Ministry of the Environment has not stated an intention to make the data collected available in a fashion similar to the data on the NPRI, the Regulation does provide a mechanism that would facilitate such publication. Section 20 of O. Reg. 452/09 provides that reports are to be submitted in a form provided by or approved by the Director. The Director is given authority to specify that the reports be submitted in electronic form. Submission of reports in a standardized electronic form would facilitate an online database similar to the NPRI. In fact, in the decision referred to above, the Ministry made the following intriguing statement: “Ontario will continue to work with the federal government and other provinces to harmonize greenhouse gas emissions reporting requirements and methods where feasible.” It would not take any great effort to add the greenhouse gases listed in O. Reg. 452/09 to the list of reportable substances under the NPRI. Only time will tell.

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Ed.: A version of this article appeared previously in Lang Michener’s Environment, Energy & Emissions Trading Brief.

U.S. to Curtail Carbon Leakage

Ed: When this article was being edited for inclusion in this spring issue, the Senate Environment and Public Works Committee had already held marathon hearings and heard from some 50 witnesses to discuss revised drafts of the Kerry-Boxer Bill. It was expected that the Bill would be combined with broader energy legislation for consideration by the full Senate early this year, but, with the election of Republican Senator Scott Brown, it was then expected that the focus would shift to a less ambitious energy bill. In any case, this article serves as an introduction to the substantive issues being considered, notwithstanding that there may be many turns and changes, and, if the more current predictions are accurate, an emasculation of key principles.



**Keith
Cameron**

In the fall of last year, the U.S. Senate released its version of an energy and climate change bill called the *Clean Energy Jobs and American Power Act*. This draft legislation, known as the “Kerry-Boxer Bill” (after its Democrat sponsors, Senators John Kerry and Barbara Boxer) creates a cap and trade regime to reduce greenhouse gasses (“GHGs”) and attempts to prevent “carbon leakage.”

Carbon leakage refers to an increase in foreign GHGs that is a result of domestic policy that pushes so-called “dirty businesses” off-shore.

Since current international agreements, such as the Kyoto Protocol, do not obligate such key countries as China, India, Mexico, South Korea and Brazil to reduce GHGs whatsoever, the U.S. seems to be attempting to prevent carbon leakage by potentially implementing carbon tariffs (border measures).

Effectively, a carbon tariff is a border tax that is slapped on imports from countries that do not adhere to consistent/equivalent GHG reduction measures. Carbon tariffs are to protect U.S. industries/jobs from competition by foreign states that do not face similar GHG restrictions.

Section 765 of the Kerry-Boxer Bill states that “[i]t is the sense of the Senate that this Act will contain a trade title that will include a *border measure* that is consistent with our international obligations and designed to work in conjunction with provisions that allocate allowances to energy-intensive and trade-exposed industries.” (Emphasis added).

This single provision in the Kerry-Boxer Bill is causing a rather large amount of consternation amongst major trading partners of the U.S. Raising such a barrier to trade will certainly be challenged at the World Trade Organization (“WTO”) under the General Agreement on Tariffs and Trade (“GATT”) and the North American Free Trade Agreement (“NAFTA”). However, this will not prevent retaliation measures from other countries. Indeed, emerging green industries, such as wind turbines and solar panels, need a vibrant and open economy to prosper.

Moreover, if such carbon tariffs are passed in the U.S., then Canada will be in a precarious position. Challenging carbon tariffs under the WTO and/or NAFTA is a potential long-term solution. However, winning such a case is not a guaranteed outcome, as the U.S. could claim that it can impose carbon tariffs (or subsidies) vis-à-vis Article XX of GATT and similarly under NAFTA provisions. In addition to challenging carbon tariffs under WTO and/or NAFTA, Canada could be forced to adopt a similar carbon tariff system to ensure that Canada would collect carbon tariff revenue that would otherwise have been diverted to the U.S. government. Taxing producers of GHGs, however, is not the simple answer to a complex global concern.

Effectively, a carbon tariff is a border tax that is slapped on imports from countries that do not adhere to consistent/equivalent GHG reduction measures.

The U.S. remains Canada’s number one trading partner and the U.S. imports more crude oil from Canada than any other country. Canada is an ally, and a stable and safe country to rely on for the importation of oil products. Indeed, Canada is said to have the world’s second largest known oil reserves and, therefore, can be relied on in the long-term by the U.S. Most of these oil reserves are located in the Alberta tar sands. Extracting and refining such a natural resource, however, is an energy-intensive process that releases a large amount of GHGs. A carbon tax of any kind (applied domestically or by the U.S.) on Canadian-produced crude would either curtail development of the oil sands or push the export of Canadian crude to other markets, such as Asia. Either way, it would force the U.S. to rely on other countries, such as Saudi Arabia, Iran, Russia and Venezuela to obtain enough crude to meet its needs. Relying on such foreign countries certainly does not enhance the energy security of the U.S.

If the Kerry-Boxer Bill were to ultimately impose carbon tariffs in a vain attempt to reduce global GHGs, then the Bill’s objective to reduce GHGs might be reached – albeit inadvertently. GHG emissions would certainly drop because global production of goods and services would also decline due to the drop in global trade. George Santayana once observed that “[t]hose who do not remember the past are condemned to repeat it.” In the 1930s, industrialized countries waged massive trade wars. In order to protect domestic industries and jobs in response to the Great Depression, tariffs were implemented and quotas were imposed. The result of such protectionist measures, however, was that other countries kept raising their trade barriers even further, creating a spiralling effect which stifled global trade and consequently deepened and prolonged the ongoing global economic depression. Has the U.S. been trying to create conditions for history to repeat itself?

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LAW NOTES

Employer to Deal with Domestic Discord; Perils of a Personal Services Business; Reporting of Greenhouse Gas Emissions; Varying Take-Over Bids: CSA Notice; Corporate Governance Changes Reconsidered; Revisiting the Apology



Paul
Carenza



David
Thring



Stephen
White



Joseph
D'Angelo



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Forooghian



Benjamin
Bathgate



Howard
Levitt



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 Employer to Deal with Domestic Discord

Picture a scenario where a co-worker casually confides that her husband is concerned about the possibility he will lose his job. She recounts an argument over money which led to his pushing her. She expresses concern as to where this could lead.

Is this a private chat or an issue for human resources?

When amendments to Ontario's *Occupational Health & Safety Act* on domestic violence in the workplace (also being considered in other provinces) become law later this year, employees' domestic problems will also become those of their employers.

Under the amendments, the colleague confided in must report the information to the employer, which is then obliged to inquire into the domestic situation of the co-worker.

Will the employer be obliged to give notice to all employees to be wary of the co-worker's husband? Must it contact the husband's employer? And what obligations will the husband's employer have? When do the police get called in? The answers will depend on the findings of a mandatory investigation that will be analyzed with ever-increasing exactitude by the authorities.

In addition, employers will be required to create a violence policy and program that instructs employees on violence. Workers are obligated to report incidents or threats of workplace violence. A complaint process and investigation procedure is proscribed.

So much for privacy legislation: The new amendments burden employers with unrealistic obligations to deal with domestic discord. Employers who become aware of domestic violence that

might expose a worker to injury in the workplace are now required to protect that worker.

For years, I have warned employers against probing into employees' lives. These amendments effectively legislate employers into the homes and bedrooms of employees, and will generate concomitant legal proceedings for invasion of privacy, discrimination and reprisal, if job action ensues.

Employers are already accountable for violent injuries in the workplace, whether from an unbalanced employee, a disgruntled former employee, or even a stranger. Workplace violence is addressed through a myriad of safety statutes that impose a general duty on employers to ensure the safety of all workers.

The amendments are an unnecessary duplication of existing laws and create risk of fines and imprisonment for non-compliance at a time when employers are struggling just to remain in business. While violence is unacceptable anywhere, the answer to eradicating it at work is not more legislation.

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Ed.: In a slightly different format and with a different title and headings, the above previously appeared in Howard's weekly column on the first page of the Working section of the National Post.

2 Perils of a Personal Services Business

A recent Canada Revenue Agency ("CRA") technical interpretation highlights the limitations imposed on a corporation that carries on a "personal services business" ("PSB").

A PSB is a business providing services where an individual who performs services on behalf of the corporation (sometimes

referred to as an “incorporated employee”), or a related person, holds 10% or more of the shares of any class of the corporation, and the incorporated employee would reasonably be regarded as an officer or employee of the person to whom the services are provided (the customer) but for the existence of the corporation.

A business will not constitute a PSB if it employs throughout the year more than five full-time employees, or if it only receives income from an associated corporation. A PSB is often used by consultants and other service providers to avoid being characterized as an employee of the customer.

Generally, a taxpayer carrying on a business may deduct reasonable expenses incurred to earn business income. However, a corporation that carries on a PSB is limited to deducting:

- the salary, wages or other remuneration paid in the year to the incorporated employee;
- the cost of any benefit or allowance provided to the incorporated employee; and
- selling and similar expenses that would have been deductible in computing the incorporated employee’s income, if he had been employed and had been required by a contract of employment to incur such expenses.

Further, a corporation that carries on a PSB is not eligible for tax at the preferential small-business rate. Essentially, the PSB rules are intended to equate the tax position of a PSB to that of an individual employee.

In the technical interpretation, the CRA commented on the situation where a corporation carrying on a PSB acquired a motor vehicle for use by its employee. Based on the rules applicable to employment benefits, the incorporated employee would have been required to include an amount in computing employment income in respect of the use of the “company car.” However, because the corporation carried on a PSB, the corporation was not eligible to deduct capital cost allowance in respect of the motor vehicle, resulting in a measure of double taxation. Proper tax planning could have avoided this result.

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Ed.: *The tax team at Lang Michener LLP consists of Peter Botz and Christine Man (in Vancouver); Paul Carenza, Kalle Soomer, Q.C., Arnold Englander, Cyndee Todgham Cherniak and Marni Whitaker (in Toronto); and Jennifer Ward (in Ottawa).*

3 Reporting of Greenhouse Gas Emissions

In December of last year, the Ontario Ministry of the Environment enacted its Greenhouse Gas Emissions Reporting Regulation (O. Reg. 452/09) under the *Environmental Protection Act*. Now effective, operators of facilities in specified industries in Ontario emitting 25,000 tonnes or more per year of carbon dioxide equivalent (“CO₂e”) will be required to report their emissions on an annual basis.

The Regulation specifies 26 relevant industries, including cement manufacturing, electricity generation, glass production, steel manufacturing, petroleum refining, pulp and paper manufacturing, and various other industrial chemical and materials production facilities.

The Regulation is accompanied by a technical guideline that outlines mandatory standard quantification methods. Best alternative quantification methods may be used temporarily for reporting 2010 emissions. Third-party verification in accordance with ISO 14064 and 14065 requirements will be required for 2011 emissions and later years.

The purpose of the Regulation is to support the implementation in Ontario of a cap and trade system for emissions trading (also known as carbon trading). Ontario has announced that it will continue to work with the Canadian federal government and other provinces to harmonize emissions reporting requirements. Ontario will also continue to work with the other provinces and U.S. states that are members of the Western Climate Initiative (“WCI”) to harmonize emissions reporting requirements.

On September 22, 2009 the U.S. Environmental Protection Agency (“EPA”) issued its Final Mandatory Reporting of Greenhouse Gases Rule. The rule is now in effect and requires reporting of greenhouse gas emissions by operators of facilities in the U.S. that emit 25,000 tonnes or more per year of emissions. The Ontario and EPA reporting regimes are similar but, unlike the EPA rule, the Ontario Regulation does not apply to fuel suppliers.

Ontario has also announced that while small emitters (facilities emitting between 10,000 and 25,000 tonnes per year) are not currently required to report under the Regulation, the Ministry will develop a program to encourage voluntary reporting in anticipation of inclusion of these smaller emitters in the future in emerging North America-wide requirements, with which Ontario will likely align.

The Regulation represents a further step towards implementation of a cap and trade system in Ontario. Last year, the

Ontario government introduced Bill 185, which received third reading on December 3, 2009. Bill 185 creates a statutory framework under which the Ministry of the Environment may create and implement a cap and trade system. Ontario's stated policy is that any such system will be harmonized to the requirements of a North America-wide system. In the U.S., in November, 2009, the Senate Committee on Environment and Public Works approved the Kerry-Boxer *Clean Energy Jobs and American Power Act*. That legislation is comprehensive and includes, among other things, provisions aimed at setting up an economy-wide cap and trade program in the U.S. for reducing greenhouse gas emissions. The U.S. legislation continues to face some obstacles in the U.S. Senate.

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Ed.: A version of this article appeared previously in Lang Michener's Environment, Energy & Emissions Trading Brief. For more background on the Kerry-Boxer Bill (and its likely fate), please refer to the article and headnote in this issue entitled "U.S. to Curtail Carbon Leakage."

4 Varying Take-Over Bids: CSA Notice

In December of last year, the Canadian Securities Administrators ("CSA") published CSA Staff Notice 62-305 setting out the CSA's view regarding the ability of an offeror to vary the terms of its outstanding take-over bid to make the bid less favourable to the target's security holders ("Negative Variations").

Negative Variations may include a reduction in the consideration offered under the bid, a change in the form of consideration offered (other than to offer additional consideration to that already offered), a reduction in the number of securities subject to the bid, or the addition of new conditions.

The rules governing take-over bids are designed to protect the *bona fide* interests of security holders while establishing a transparent, even-handed and predictable framework for the conduct of formal bids. An important underpinning of the bid regime is that offerors make offers they are prepared to honour, since the making of a take-over bid may affect the market price of an issuer's securities, creating a legitimate expectation among the issuer, its security holders and other market participants, that the bid will be completed at the specified price, provided that the conditions of the bid are satisfied.

The CSA advises that, in its view, the take-over bid rules do not contemplate the unilateral withdrawal by an offeror of a formal take-over bid or the reduction of the offer price or the introduction of new conditions, where the original terms and conditions of the bid have been satisfied or waived.

The CSA notes that where the terms and conditions of a bid have not been satisfied, an offeror is entitled to allow its bid to expire and not take up securities tendered under the bid. The offeror may then make a new bid on different terms. Where the terms and conditions of an offer have not been satisfied, or will not be satisfied by the expiry date of the offer, securities regulators will not object to the offeror varying the bid by reducing the offer price or adding new conditions, provided that such variations are not prejudicial to security holders.

Pursuant to National Policy 62-203 – *Take-Over Bids and Issuer Bids*, securities regulators may, depending on the circumstances, exercise their respective public interest mandates to cease-trade a take-over bid, require that the statutory deposit period following a bid variation be extended or require that an offeror commence a new bid with the varied conditions, to ensure that security holders are not prejudiced by the Negative Variation.

In determining whether to challenge a Negative Variation, securities regulators will take into account, among other things, whether sufficient procedural protections have been provided to security holders and other market participants affected by the Negative Variation and whether the Negative Variation is in response to the failure of a *bona fide* condition of the offer.

The procedural protections to be provided should include a period of extension to permit the issuer's board of directors sufficient time to consider the varied offer and to communicate its view to security holders. This will also have the effect of allowing other potential offerors to assess the revised offer and determine whether to participate in an auction for the issuer.

The CSA expects a notice of variation, which is required to be sent by the offeror to all security holders whose securities have not already been taken up, to fully disclose the events leading up to the Negative Variation. The CSA may request additional evidence and submissions in order for it to determine whether the Negative Variation is in fact being made due to the failure of a *bona fide* condition of the offer.

The CSA indicates that a lack of available financing will not constitute valid grounds for a Negative Variation, and securities regulators may request proof that financing was available to the offeror at the time the original bid was made.

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Ed.: This is only a summary of CSA Staff Notice 62-305 and should not be construed as legal or other advice. You may wish to contact a Lang Michener advisor directly for more information about CSA Staff Notice 62-305 and the Canadian take-over bid rules.

5 Corporate Governance Changes Reconsidered

On November 13, 2009, the Canadian Securities Administrators (“CSA”) published a status report on changes previously proposed to the corporate governance regime in Canada. The proposed regime was published by the CSA for comment in December 2008 and was intended to be more principles-based and broader than the current corporate governance guidelines and reporting requirements.

After receiving numerous comments noting that issuers are currently focused on business sustainability issues in a challenging economic climate and on the transition to International Financial Reporting Standards, the CSA indicated that it will not implement the proposals as originally published and will reconsider whether to recommend any changes at all. Any revised corporate governance regime will not be effective before the 2011 proxy season.

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Ed.: This note appeared previously in Lang Michener’s Securities/M&A Brief.

6 Revisiting the Apology

It was not long ago (2006) that we reported in *InBrief* that British Columbia was considering legislation relating to apologies. And, indeed, from our Toronto office, Joseph D’Angelo and Benjamin Bathgate subsequently contributed articles about Ontario’s *Apology Act* that came into force last year. Manitoba has similar legislation and through rules or amendments to other statutes, Nova Scotia, Newfoundland and Labrador and Saskatchewan now have similar provisions. In general, they describe the apology as an expression of sympathy or regret, a statement that one is sorry or other words or actions indicating contrition or commiseration.

In their article, D’Angelo and Bathgate explained further:

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. In the absence of apology legislation, an apology would be considered a key admission in the course of a legal dispute.

There have been a number of studies showing that a sincere, proper apology rendered at the right time has beneficial effects. For example, a study in 1994 showed that, in the case of medical malpractice suits, a significant percentage of patients said they would not have filed suits had they been given an explanation and apology.

Even prior to legislating in the area of “I’m sorry,” the apology was studied and used in the context of court-connected mediation – a process used once a lawsuit had been commenced, but early on, in the hopes the parties would reach a resolution before the matter went to trial for determination by a judge.

But as previously discussed in the context of mediation and likely having applicability in other situations as well, there is no certainty an apology will work. There are numerous dynamics at play which, together with the players and circumstances, do not make forecasts about the effectiveness of apologies highly reliable.

Indeed, if seen as a ploy to soften the other side, it will fail miserably. It may inflame passions, entrench the other side in the belief that he or she must protect against being manipulated or “used.” It should also be noted with considerable care, that even the heart-felt apology, delivered with utmost sincerity and without ulterior motives, may be perceived as insincere by the recipient and may not advance the resolution process. Sincerity may exist objectively, but if it is not perceived as such by the person who is to be or might be affected by it, then it has no value in aiding the resolution process. At the same time, it must be acknowledged that, in some circumstances, the feigned apology will be effective. More precisely, the maker of the apology who feigns the truth and sincerity of it, and who does it well, may be as effective as the one who delivers it honestly. As in so many instances, perception governs.

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Brief Life Bites

Moving Mountains; Least Meese; Burned

1 Moving Mountains

Fifty-three year old Ramchandra Das encountered tons of red tape when he asked for assistance from authorities in Bihar State, India. His request was for a roadway from the main highway to his home in a predominately farming village located on the other side of a rocky hill. Undeterred, he persisted and a tunnel now allows him to drive right to his home and to park his truck in the front yard. Ramchandra no longer fears that his vehicle will be stolen, and the villagers using the tunnel are most grateful to him. You see, 14 years ago when Ramchandra was 39 years old, he began to dig the tunnel by hand and by himself.

2 Least Meese

In the SC.C. L@wLetter, edited by **Eugene Meehan, Q.C.**, Christopher D.G. Pike sets the record straight on moose in Newfoundland and Labrador. On the Island, moose do not outnumber humans. Indeed, the human population outnumbers *Alces alces* by about four to one. But, every year, there are at least 700 moose-vehicle collisions with many resulting in human fatalities. The worst month for such collisions is July, tapering down in the fall and being the least in the month of March.

Endnote: *Although there is a lot of discussion about this on the Internet, and contrary to the unequivocal position of urbandictionary.com, the plural of "moose" is, indeed, "moose," although that plural form does not accord with the pattern of goose-geese or mouse-mice. But the word is said to originate with the Algonquin Indians and the plural form does fit with other pluralizations such as deer, mink and grouse.*

3 Burned

This may sound like torture, but it has markings of even more. In Surrey, B.C., a robber reaching through a drive-by window into the cash drawer of a fast food outlet was deterred when one of the employees threw a pot of hot oil at the grabbing hand. Police suspect that the robber will have permanent burn marks and that, together with the surveillance photos, this will eventually lead to an arrest and conviction.

4 Big Apple Goodness

In the winter issue, we spoke of goodness taken for granted on P.E.I. Now a story from the Big Apple with an international flavour. Mrs. Lettieri, from Pompeii Italy visiting New York City, took a cab to catch a train at Penn Station. Soon after, the cabbie, Mr. Asadujjaman, realized she had left her purse behind. Using an address found in the purse, he drove 50 miles to return it, but no one was home. He left his card and when Mrs. Lettieri called, he drove back to return the purse containing \$21,000. Mohammad Assadujjaman refused a reward.



Letters and Comments

1 In the *Lawyers Weekly*, commenting about 66-year old Beverley McLachlin's decade of service as Chief Justice of the Supreme Court, **Eugene Meehan, Q.C.** said: "Like Bertha Wilson [the first woman appointed to the Court], she lives her life like she has a bee chasing her."

2 In January of this year, architect **Patrick Murray, Sr.**, father of Patrick Murray (partner at the Ottawa office of Lang Michener LLP) passed away at age 76. Murray & Murray Architects & Planning Consultants are credited with designing a large number of buildings in Ottawa and across the globe. In the *Ottawa Citizen*, premier Dalton McGuinty was quoted of saying: "Pat was a larger-than-life character with a big heart...committed to his family and a true community builder."

3 Earlier this year, under the main heading of "People to Watch in 2010," the *Ottawa Citizen* did a feature article on our former colleague, **Yasir Naqvi** – "MPP for Ottawa Centre;...president of the Ontario Liberals; in line for a cabinet seat, and according to his colleagues – has what it takes to be premier." **Michael Flavell**, at the Ottawa office of Lang Michener LLP, was Yasir's mentor and is quoted as saying: "He's a firecracker. He overcomes obstacles by an extraordinary work ethic."

4 The topics covered in the winter issue of *In Brief* were extremely well received: There were many requests for the unabridged version of the articles by **Cyndee Todgham Cherniak** on "Preparing for Harmonized Sales Tax" and by **Keith Cameron** on "Quebec Language Law: Business View," and we were pleased to oblige. Cameron's article was also published in *ACC Newsstand* (a newsfeed service), and we were advised that the article was very well read. The LAW NOTE by **George Waggott** entitled "Consequences of Unfair Labour Practices" will be reproduced and appear in the *Labour Notes* newsletter, a CCH publication.

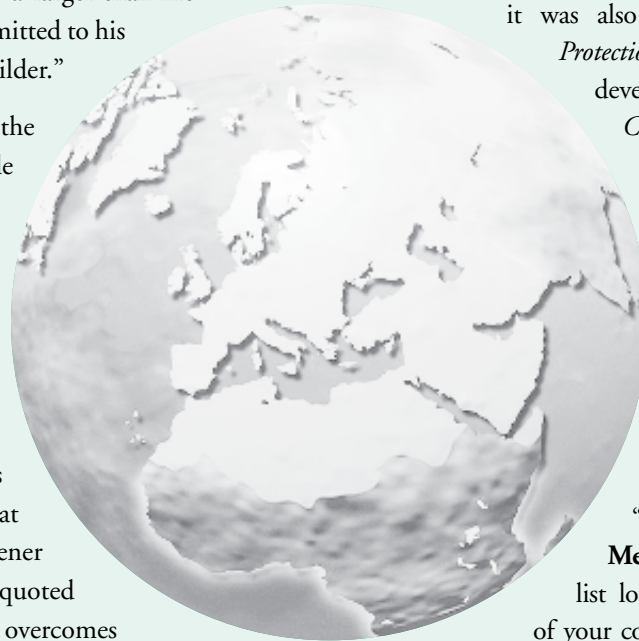
5 The article by **Edward Pundyk**, also in the winter *In Brief*, called "Employer Entitled to Reasonable Notice" was particularly popular and Ed obliged all those requesting the longer version of his article. Commenting on the novel-length case on which the article was based, one *In Brief* recipient wrote: "I know what you mean. When [the judgments starts] with a table of contents, you know you're in trouble. Almost 700 pages! Sounds like an epic!" Another reader wrote: "Yes, I actually read it. It wasn't *War and Peace*, but it almost took me as long to read!"

6 As for the article by **Karl E. Gustafson, Q.C.** entitled "Business Records: Destroy or Retain," it was also republished in *World Data Protection Report* (reporting on global developments in privacy law) and *Canadian Corporate Counsel*. The article by **Ryan Black** entitled "Trade-Marks in Search Engine Advertising," was republished in the February edition of *Canadian Corporate Counsel*.

7 And we received these kind and "memorable" words from a judicial officer: "Dear Editor, since **Eugene Meehan** put me on your mailing list long ago, I continue to be one of your constant readers. Thus I enjoyed again reading 'In the Blink of an Arctic Eye.'

However, if my unreliable memory serves me well this time, your introduction left out a vital ingredient, namely that at the time of the caribou hunt, Eugene was attired in his kilt. This may account for his rather abrupt, but dramatic, descriptive style, not to mention the thoughtful ending. Please convey my fond regards to Eugene... ."

Ed.: *Now, the kilt part has got to be a tall tale (about a short skirt) or a failed memory, and if not, then for certain, it explains a lot. But we are reminded of the perceptive words of another Scotsman (R. Service) when writing about a fellow countryman (S. McGee): "The Arctic trails have their secret tales that would make your blood run cold."*



Lang Michener, In Brief...

News

Lang Michener Welcomes Five New Partners

We are pleased to announce that **Daniel Dex** (securities), **Gary Fraser** (litigation), **Geoffrey Kubrick** (international trade), **Elisabeth Preston** (business) and **Amandeep Sandhu** (securities) have each been admitted to the partnership effective January 1, 2010. Each individual has demonstrated a strong commitment to excellence, leadership and client service.

Lang Michener Welcomes Three New Lawyers

The Vancouver office is pleased to announce that **Alistair Taylor** has joined the Litigation Group as an associate counsel, and **Lisa Fang** and **Erica Weiss** have returned to the firm as associates. Alistair practices in the area of litigation and mortgage foreclosures. Lisa was an articling student at Lang Michener and has returned to join the Venture Capital Group, and Erica Weiss, also a former Lang Michener articling student, has returned to join the Securities Group.

Lang Michener Lawyers Included in the 2010 Guide to the Leading 500 Lawyers in Canada

Three lawyers from the firm have been recognized as leading practitioners in the *2010 Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada*, an annual publication reporting on Canadian legal matters. **Michael Flavell, Q.C.** is listed as a Leading Lawyer in International Trade Regulation, **Donald MacOdrum** is listed under Intellectual Property and Intellectual Property Litigation, and **James Musgrove** is listed under Advertising & Marketing and Competition Law.

Four Lawyers Listed in *The International Who's Who of Business Lawyers – Mining 2010*

We are pleased to announce that **Barry Finlayson**, **Darrell Podowski**, **Bill Sheridan** and **Bernhard Zinkhofer** have been recognized by their peers as experts in *The International Who's Who of Business Lawyers 2010 – Mining 2010* edition. The Who's Who Legal website features over 9,000 of the world's leading private practice lawyers from over 100 national jurisdictions.

Stacey Handley Chosen by Business in Vancouver for a Forty Under 40 Award

We are pleased to announce that Vancouver partner, Stacey Handley has been recognized by Business in Vancouver as one of British Columbia's Forty Under 40 to watch. This honour recognizes Stacey's professional achievement, innovation and leadership in law her in addition to her community involvement. Stacey was also recognized in 2009 by *Lexpert* magazine as one of Canada's leading lawyers under 40.

Events

2010 CCCA National Spring Conference Presented by the Canadian Corporate Counsel Association

April 11–13, 2010
Montreal, QC

Lang Michener is a proud sponsor of the CCCA National Spring Conference, to be held April 11 to 13, 2010 at the Hyatt Regency in Montreal. The CCCA has served as the national professional forum and voice for in-house counsel since its establishment in 1988.

The theme of this year's conference is *Prosper In Your In-House Practice*. **Ravi Shukla** will be speaking in a session entitled "The Benefits and Risks of Outsourcing."

U.S./Canada Cross-Border Litigation Conference Presented by the New York State Bar Association, International Section

June 11–12, 2010
Ottawa, ON

Stephen J. Maddex, from Lang Michener's Ottawa office, specializes in U.S./Canada Cross-Border Litigation and will be chairing a major conference on Cross-Border Litigation sponsored by the New York State Bar Association International Section. The conference will feature speakers from New York and Ontario discussing fundamental aspects of litigation in their jurisdictions. Topics for discussion will include a comparison of the law relating to personal jurisdiction, discovery practice, pre-trial practice, and trial strategy. For more information regarding this event, please contact Stephen directly at smaddex@langmichener.ca.

Deals

Century Mining Corporation Completes C\$60.75 Million Debt and Equity Financings

On December 30, 2009, Century Mining Corporation (the “Company”) completed debt and equity financings totalling C\$60.75 million including a US\$33 million prepaid gold forward facility with Deutsche Bank AG, London Branch (“Deutsche Bank”) and a C\$17 million private placement.

The closing and funding of the financings will allow the Company to reopen the Lamaque mine (the “Mine”) situated in Val d’Or, Quebec, complete underground development to bring the Mine into full production and pay outstanding obligations. The balance will be used for general working capital purposes.

The recommissioning of the Mine, which was extensively reported in the media, was anxiously awaited by the Val d’Or community and by employees of the Mine.

The private placement consisted of an offering of an aggregate of 85 million units at C\$0.20 per unit. Each unit consists of one common share of the Company and one-half of one common share purchase warrant. Each whole warrant will entitle the holder to purchase one common share at a price of C\$0.30 for a period of 18 months. Kirkland Intertrade Corp. (“Kirkland”) subscribed for C\$15.75 million of the private placement along with two other subscribers.

The Company was represented by Lang Michener LLP (Toronto) with a team that included **William Sheridan, John Conway** and **Denno Chen** (Corporate Finance and Securities) and **Eric Friedman** and **Marnie Foster** (Banking and Restructuring).

In Brief

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Lang Michener publishes newsletters on current developments in specific areas of the law such as Competition and Marketing, Employment & Labour, Insurance, Intellectual Property, International Trade, Mergers & Acquisitions, Privacy, Real Estate, Securities and Supreme Court of Canada News.

In Brief offers general comments on legal developments of concern to business and individuals. The articles in *In Brief* are not intended to provide legal opinions and readers should, therefore, seek professional legal advice on the particular issues which concern them. We would be pleased to elaborate on any article and discuss how it might apply to specific matters or cases.

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