S.C.C. Cases of Interest to the Personal Injury Bar – the last 18 months[1]

by

Eugene Meehan, Q.C.[2]

for

Atlantic Provinces Trial Lawyers Association
Yin & Yang of Personal Injury Practice Conference
Saturday June 8, 2019, St. John's, Newfoundland

1. January 2018 - June 2019 inclusive.
2. *Supreme Advocacy*, Ottawa. emeehan@supremeadvocacy.ca

TABLE OF CONTENTS

Appeal Judgments

Oral Judgments

Appeals Heard, Judgment Reserved

Leaves to Appeal Granted

Appeal Judgments

1. Civil Liability: Prudence & Diligence Obligations; Exclusion Clauses

3091 5177 Québec inc. (Éconolodge Aéroport) v. Lombard General Insurance Co. of Canada, 2018 SCC 43 (37421) (37422) (Argued: January 10, 2018; Judgment rendered: October 19, 2018). Unanimous; 9:0.

A. *Supreme Advocacy* L@wletter Summary

The Court of Appeal erred in intervening and the judgment of the Court of Québec should be restored. The appeal of 3091 5177 Québec inc. against Axa in the first file (37421) is dismissed, and the appeal in the same file against its insurer, Lombard, as well as Promutuel's appeal against the same insurer in the second file (37422) is allowed. The finding by the courts below that Éconolodge is liable for the theft of the car insured by Axa does not warrant intervention by the S.C.C., so the appeal of 3091 5177 Québec inc. against Axa in file 37421 is dismissed with costs. The trial judge did not make any palpable and overriding error reviewable on appeal in finding keys were handed over solely for the purpose of snow removal, and this was insufficient to transfer custody and control to Éconolodge. Since the exclusion clause in Éconolodge's liability insurance policy is therefore inapplicable on the facts, the appeal of 3091 5177 Québec inc. against Lombard in file 37421 as well as Promutuel's appeal against the same insurer in file 37422 is allowed with costs throughout. The trial judge's decision ordering Lombard to pay damages, interest and the additional indemnity to 3091 5177 Québec inc. and Promutuel is restored.

B. Basically what happened

As para. 1 of the Court's judgment says, this case is about both:

- a hotel's civil liability for the theft of guests' cars
- exclusion clauses.

Yes, it's a Québec case, but Québec S.C.C. judges are writing in common law cases, and non-Québec S.C.C. judges writing reasons in Québec cases – I argued an Alberta construction deficiency claim appeal[1], which judgment was written by C.J. Wagner (as he now is).

The basics:

- Econolodge (insured by Lombard, now Northbridge) is a "park and fly" hotel near Dorval
- it's main purpose is to "provide travellers with accommodation before they leave for the airport and upon their return from a trip.[2]
- two guest cars get stolen from the hotel's parking lot

[1] *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23

[2] Para. 2.

- the guests' insurance companies (AXA, now Intact; & Promutuel) compensate, & both AXA and Promutuel sue Econolodge on a subrogation claim
- Promutuel also brings a direct action against Lombard
- in the AXA action Econolodge "impleaded it's insurer, Lombard in warranty".[3]

C. In the Courts below

Court of Québec

In the Court of Québec:

- re AXA, hotel liable for the car theft
- re Promutuel, default judgment
- the relationship between the hotel & guests was a "contract for services that included an obligation to look after the guests' interests with prudence and diligence"[4], and in "light of its business model"[5], they failed in this regard
- and re the exclusion clause:
  - the car thefts were covered by the hotel's policies
  - the exclusion clause did not apply, because the hotel "had neither custody nor real control or care of its guests' cars"[6]
  - guests leaving keys at the front desk so the parking lot could be cleared of snow did not have the effect of transferring custody to the hotel
  - the trial judge noting that "applying the exclusion clause in such a manner would produce absurd results"[7].

Court of Appeal of Québec

And in the Québec Court of Appeal:

- hotel's liability confirmed
- exclusion clause applies:
  - possession the keys (by the hotel) = custody

[3] *Ibid*.
[4] Para. 13.
[5] *Ibid*.
[6] Para. 14
[7] Ibid

- because the hotel had custody, the exclusion clause applies, so insurance coverage is "inapplicable"
- it would be "incongruous for the hotel… to have an obligation of prudence and diligence without having custody of its guests' vehicles"[8]

D. S.C.C. holding

The S.C.C. said there were two issues to decide:

1. re AXA, was Econolodge liable for the theft of the car because it didn't take reasonable steps to secure its parking lot
2. re both AXA & Promutuel, did the exclusion clause (in Econolodge's policy) excluding coverage for property in the care, custody or control of the insured apply.

Re the hotel's liability for the car theft:

- the hotel is liable for the AXA car
- liability for the Promutuel car is not disputed.

The following is important re insurance policy interpretation[9]:

- characterization of the relationship between the hotel and it's guests is a question of mixed fact and law
- the characterization is not a pure question of law, as one has to "consider the evidence of the parties' common intentions"
- as a mixed question the trial judge's characterization is "entitled to deference on appeal".

And re the exclusion clause:

- the person relying on the clause has the burden of proving it applies, ie applies on the facts of the case (*Ledcor v. Northbridge*)
- to succeed, the hotel's insurer Lombard has to establish the vehicles were in the hotel's care, custody or control
- and here Lombard says "custody of a vehicle is necessarily transferred by handing over the keys, which are needed to start it."[10]

[8] Para. 16
[9] Para. 18.
[10] Para. 28.

As to interpretation v. application, the S.C.C. says[11]:

- while custody is a legal concept, the determination of custody is "a highly factual question" that [quoting] "depends on the specific circumstances of each case"
- the applicability of the care, custody or control clause is therefore [quoting] "largely a question of fact"
- here, the issue is application (of the clause), not its interpretation
- it is true, *per Ledcor* that the interpretation of a standard form contract is a question of law subject to correctness review, where:
    - the interpretation is of precedential value
    - is not based on any meaningful factual matrix

  but this principle does not apply here:

    - there is no ambiguity in the clause that needs to be resolved through an interpretation process
    - rather, what's in issue here is the application of the clause to the facts
    - specifically, "whether the clause applies in a factual context in which guests handed over the keys to their vehicle at the hotel's front desk."[12]

And that being the case, the trial judge's finding of mixed fact & law re custody of the stolen vehicles is "not open to appellate review unless a palpable and overriding error"[13]. As a result, the C.A.'s intervention was "unwarranted", for three reasons:

1. the trial judge did indeed consider the handover of the keys, but found this "was not sufficient in itself to transfer custody" to the hotel[14]
2. the record here did not permit the C.A. to review the trial judge's finding on the reason why the guests handed in their keys
3. there is no contradiction or inconsistency in law between"
    - the trial judge's finding that the hotel had an obligation of prudence and diligence
    - her finding that the stolen cars were not in its care, custody or control.

[11] Paras. 30-31.
[12] Para. 31.
[13] Para. 32.
[14] Para. 33.

E. Why important

It's important for four reasons:

1. just because it's a "Québec case", don't think it doesn't apply outside of Québec
2. the S.C.C.'s affirmation of the trial judge re the hotel's liability
3. the S.C.C.'s rejection of the C.A. below, and affirmation re the exclusion clause – ie that it did not apply
4. the S.C.C. took time to point out "two additional considerations" why the trial judge's judgment "contained no error warranting appellate intervention as regards [the hotel's] liability insurance coverage"[15]:
    1) "… the care, custody or control exclusion coverage should not be applied in such a way that the coverage offered by the insurer becomes ineffective"[16]
    2) "…I agree with the trial judge that Lombard's argument leads to results that are incongruous, if not absurd"[17]. As the S.C.C. wrote: "In short, in the same year of coverage, the applicability of the exclusion clause would depend on the season or even on the amount of precipitation. Moreover, if we follow Lombard's line of reasoning, the insurance policy would cover the theft of a car during the winter if its owner remained at the hotel, but not the contemporaneous theft of the car next to it whose owner went abroad and handed over the keys at the front desk in case the parking lot needed to be cleared of snow. The purpose of highlighting the absurdity of this situation is not to [translation] "come up with a single solution applicable to every case", as the Court of Appeal suggested (para. 22). Rather, it is to emphasize the importance of considering all the relevant facts and not presumptively giving decisive weight to a particular fact without factoring in all the relevant circumstances."[18]

F. Key quote

"In her judgment, the trial judge properly distinguished Éconolodge's obligation of prudence and diligence from custody of the cars. The hotel operator's obligation to take reasonable steps to secure its parking lot — such as monitoring the lot or putting up fences, cameras or concrete blocks — did not ipso facto lead to a change in custody of the vehicles left in the lot. There was no inconsistency in the judge's findings in this regard. Éconolodge could very well have been merely holding a vehicle physically and been subject to an obligation of prudence and diligence

[15] Para. 52.
[16] Para. 53.
[17] Para. 55.
[18] *Ibid*.

in performing a service. In itself, this obligation does not imply a sufficient transfer of control and of responsibility for the preservation of the vehicle to result in a change in legal custody."[19]

And one other sweet quote, which every litigator at the S.C.C. likes to hear/see:

"with costs throughout".[20]

2. Civil Procedure/Class Actions: Jurisdiction

J.W., et al. v. A.G. Can., 2019 SCC 20 (37725) (Argued: October 10, 2018; Judgment rendered: April 12, 2019). Not unanimous; 5:2

A. *Supreme Advocacy* L@wletter Summary

The Applicant J.W. attended an Indian Residential School in Manitoba. While a student, a nun grabbed J.W.'s penis while he was in line for the shower. Following the establishment of the Independent Assessment Process ("IAP") created under the *Indian Residential Schools Settlement Agreement* ("IRSAA"), J.W. filed a claim in the context of the IAP, arguing the actions of the nun constituted compensable sexual abuse. J.W.'s claim was denied by a Hearing Adjudicator on the basis he had failed to establish the nun's act had a "sexual purpose", which the Adjudicator interpreted as a "technical requirement" for establishing sexual abuse under the IRSSA and the IAP. Subsequent attempts to have the decision reviewed by a second adjudicator and by two review adjudicators were unsuccessful, and the decision was upheld. Pursuant to the terms of the IRSSA, J.W. filed a Request for Direction before a Supervising Judge for the IRSSA in Manitoba. The Supervising Judge (from the Manitoba Court of Queen's Bench) partially granted the declaration sought and found the review adjudicators had failed to correct the error of the original Hearing Adjudicator — i.e., that J.W. needed to prove a "sexual purpose". The Supervising Judge ordered the claim be sent back to a first-level adjudicator. The C.A. allowed Canada's appeal, finding the Supervising Judge had exceeded his jurisdiction and had misinterpreted the terms of the IRSSA, and concluding there is no judicial review possible of the decisions of adjudicators pursuant to the IAP and the IRSSA; the original decision dismissing J.W.'s claim was therefore reinstated.

B. Basically what happened

The *Indian Residential Schools Settlement Agreement* is a negotiated settlement of individual and class actions re residential schools. I acted for the law firm with the greatest number of claims, in putting the deal together, and acted for that law firm when the Federal Government later took a reference-type appeal to the Sask. C.A.[21]

The Agreement:

- was approved by 9 provincial and territorial courts

[19] Para. 51.

[20] Para. 57.

[21] *Canada (Attorney General) v. Sparvier,* 2007 SKCA 37

- includes a procedure to settle individual claims through an adjudicative process called the *Independent Assessment Process*
- describes the harms compensable
- has a system of internal reviews, but no right of appeal to the courts
- however, supervising judges were entitled to hear "Requests for Directions" re ongoing administration and implementation.

Catergory "SL1.4" of the *Agreement* indicated the following was compensable:

> "Any touching of a student, including touching with an object, by an adult employee or other adult lawfully on the premises which exceeds recognized parental contract and violates the sexual integrity of the student."

When J.W. was a young boy at a residential school a nun touched his genitals over his clothing while standing in line for a shower, when he was wearing what he described as a "little apron".[22]

C. In the Courts Below

Is this compensable?

The Hearing Adjudicator: denied the claim; the "sexual" intent of the nun was an element that the claimant had to show, & J.W. was unable to do so.

After exhausting internal remedies, J.W. brought a Request for Directions to a Supervising Judge, Edmond J., who wrote:

- nothing in the plain language of SL1.4 says the sexual intent of the perpetrator is relevant
- "[c]learly… a child's sexual integrity can be violated without a perpetrator having any sexual intent whatsoever"[23]

then remitted J.W.'s claim for re-adjudication.

D. S.C.C. holding

The S.C.C. wrote:

- while there are compelling reasons for setting a high bar for judicial intervention (the *Agreement* was to be a "complete code", specialized training for adjudicators, levels of internal review, creation of an Oversight Committee, the absence of court appeals)[24]

[22] Para. 2.

[23] Para. 43.

[24] Para. 28.

- the parties "do have a right to the implementation of the terms of the settlement they bargained for. Judicial supervision plays a critical role in ensuring that the claimants receive the benefits that they were promised"[25]

Then held:

- J.W.'s claim is compensable
- failure to correct the Hearing Adjudication's interpretation would "unacceptably undermine the whole purpose of the Agreement"[26]
- the Reconsideration Adjudicator's decision allowing J.W.'s claim, plus interest, is reinstated.[27]

E. Why important

Courts have a continuing supervisory role re settlements.

F. Key quote

As noted above,

"Judicial supervision plays a critical role in ensuring that the claimants receive the benefits that they were promised".[28]

3. Civil Procedure/Defamation: Jurisdiction

Haaretz.com v. Goldhar, 2018 SCC 28 (37202) (Argued: November 29, 2018; Judgment rendered: June 6, 2018). Not unanimous; 6:3.

A. *Supreme Advocacy* L@wletter Summary

The Applicant Haaretz, Israel's oldest daily newspaper, published an article criticizing the management style and business practices of the Respondent Mitchell Goldhar. Mr. Goldhar was a Canadian businessman who owned Maccabi Tel Aviv Football Club, a soccer team based in Tel Aviv. The article was available in print and on the newspaper's Hebrew and English-language websites. Mr. Goldhar commenced a defamation action in Ontario against the newspaper, its former sports editor and the author of the article. Haaretz moved to stay the action, arguing that Ontario courts lack jurisdiction simpliciter or, alternatively, that Israel is a more appropriate forum. Ontario Superior Court of Justice: motion to stay action for lack of jurisdiction simpliciter or, alternatively, based on forum non conveniens dismissed. C.A.: appeal dismissed.

[25] Para. 31.
[26] Para. 54.
[27] Para. 55.
[28] Para. 31.

B. Basically what happened

Mr. Goldhar is a businessman in Ontario, who owns a professional soccer team in Israel; he maintains a residence in Israel and travels there every few months. Haaretz (includes corporate & individual defendants) publish Israel's oldest daily newspaper in English and Hebrew, in print and online, and publish an allegedly defamatory article re Mr. Goldhar's ownership and management of the soccer team.

The article:

- references his Canadian business
- was researched, written & edited in Israel, primarily in reliance on Israeli sources
- was published in print and electronically; not distributed in print form in Canada, but available electronically
- received by 200-300 people in Canada, and approximately 70,000 in Israel (according to the Motion Judge).

Mr. Goldhar sued for libel. Haaretz brought a motion to stay.

C. In the Courts below

Motion dismissal. Ontario has jurisdiction.

C.A. (majority), appeal dismissed.

D. S.C.C. holding

In sum, appeal allowed, stay granted.

But what the Court wrote is important re jurisdictional battles:

- jurisdiction *simpliciter* and *forum non conveniens* have distinct roles
- jurisdiction *simpliciter* analysis is meant to ensure a court has jurisdiction;[29] where a "real and substantial connection" exists between chosen forum and the subject matter of the litigation
- *forum non conveniens* analysis is to "guide courts in determining whether they should decline to exercise that jurisdiction in favour of a 'clearly more appropriate' forum[30]
- the importance of maintaining the distinction flows the different concerns underlying each, & the factors
- the real and substantial connection test at the jurisdiction *simpliciter* stage "prioritizes order, stability and predictability by relying on objective factors"[31]

[29] Emphasis in original, para. 27.

[30] *Ibid*.

- conversely the *forum non conveniens* analysis "emphasizes fairness and efficiency by adopting a case-by-case approach to identify whether an alternative jurisdiction may be 'clearly more appropriate'."[32]

The S.C.C. gave a summary on each element of the *forum non conveniens* analysis:

(1) Comparative Convenience and Expense for the Parties favours Israel;

(2) Comparative Convenience and Expense for the Witnesses heavily favours Israel;

(3) Loss of Legitimate Juridical Advantage, while favouring Ontario, should not weigh heavily in the analysis;

(4) Fairness favours Israel;

(5) Enforcement slightly favours Israel; and

(6) Applicable law, while favouring Ontario, should be given little weight.[33]

The S.C.C. held:

- Haaretz established that holding a trial in Israel would be "fairer and more efficient"[34]
- Israel is "clearly the more appropriate forum."[35]

E. Why important

Further clarification of jurisdiction issues *post-Van Breda*.[36]

The Court had previously[37] proposed a 'place of most substantial harm' test, but:

- "This would not be an appropriate case…"[38]
- "… the submissions on this issue provide an insufficient basis upon which to create such an exception".[39]

F. Key quote

"Once it is established that a court *has* jurisdiction, the *forum non conveniens* doctrine requires a court to determine whether it *should* exercise such jurisdiction. The purpose … is to temper any

---

[31] Para. 28.
[32] *Ibid*.
[33] Para. 96.
[34] Para. 97.
[35] *Ibid*.
[36] 2012 SCC 17.
[37] *Éditions Écosociété Inc. v. Banro Corp.* 2012 SCC 18.
[38] Para. 91.
[39] *Ibid*.

potential rigidity in the rules governing the assumption of jurisdiction and 'to assure fairness to the parties and the efficient resolution of the dispute'"[40]

4. Civil Procedure/Tobacco Litigation: Disclosure

British Columbia v. Philip Morris International, Inc., 2018 SCC 36 (37524) (Argued: January 17, 2018; Judgment rendered: July 13, 2018). Unanimous; 7:0.

A. *Supreme Advocacy* L@wletter Summary

Health databases constitute "health care records and documents of particular individual insured persons or . . . documents relating to the provision of health care benefits for particular individual insured persons" and are therefore not compellable. Neither their relevance to the pleadings in the Province's action nor their anonymization insulate them from the text of the statute, read in its entire context and grammatical and ordinary sense, in harmony with the Act's scheme and object. The concern of "trial fairness" is premature. Within the Act, the Legislature has provided a number of mechanisms through which trial fairness may be preserved.

B. Basically what happened

B.C. enacts (in 2000) the *Tobacco Damages and Health Care Costs Recovery Act*, the constitutionality of which is upheld: [2005] 2 S.C.R. 473. The *Act* creates a right of action allowing B.C. to:

- sue tobacco manufacturers
- to "recover the cost of health care benefits"
- related to "disease caused or contributed to by exposure to a tobacco product".

The Act sets out procedures governing the statutory action, one of which, s. 2(5)(b):

- governs the compellability of health care documents
- where B.C. has sued to recover health care costs "on an aggregate basis" (ie. a population of insured persons) as opposed to particular individuals
- "the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits for particular individual insured persons are not compellable".

But does s. 2(5)(b) bar the compellability of various databases collected by B.C. containing, as the S.C.C. says, "coded health care information"?[41]

[40] Paras. 31-32.

[41] Para. 3.

C. In the Courts below

Both B.C.S.C. & B.C.C.A. held the databases, once anonymized, fell outside the scope of s. 2(5)(b), & were therefore compellable.

D. S.C.C. holding

No. Not compellable. Neither:

- their relevance to the pleadings
- nor their anonymization

insulate them from the text of s. 2(5)(b), when:

- read in its entire context
- in its grammatical and ordinary sense
- in harmony with the *Act's* scheme and object.

E. Why important

Disclosure can be significantly limited by applicable provincial legislation.

F. Key quote

"… the concern of 'trial fairness' is, at best, premature. Within the *Act*, the legislature has provided a number of mechanisms through which trial fairness may be preserved. Specifically, s. 2(5)(b) by itself requires that any document relied upon by an expert witness be produced. …Additionally… s. 2(5)(b) permits a court, on application, to order discovery of a 'statistically meaningful sample' of any of the records and documents that are otherwise protected…"[42]

5. Class Actions: Litigate or Arbitrate

TELUS Communications Inc. v. Avraham Wellman, 2019 SCC 19 (37722) (Argued: November 6, 2018; Judgment rendered: April 4, 2018). Not unanimous; 5:4.

A. *Supreme Advocacy* L@wletter Summary

The action involves claims by consumer and business customers against TELUS Communications Inc. Mr. Wellman, the representative plaintiff claims that during the class period, TELUS overcharged customers by rounding up calls to the next minute without disclosing this practice. TELUS' contracts contained standard terms and conditions, including a mandatory arbitration clause. TELUS conceded that the effect of s. 7(2) of the Ontario *Consumer Protection Act 2002*, is that claims in respect of consumer contracts can proceed in court. It submits, however, that non-consumer claims, that is the claims of the business customer, are

[42] Paras. 34-35. The S.C.C. added (in para. 35) that no defendant has yet made such an application, and so no court has reason to consider what would be such a "statistically meaningful sample" of the otherwise protected documents.

governed by the mandatory arbitration clause and ought to have been stayed. The motions judge certified the class to include both consumers and non-consumers. It was determined that it would be unreasonable to separate the consumer and non-consumer claims and the motions judge declined to grant a partial stay. The issue on appeal was whether the motions judge erred in refusing to stay the non-consumer claims pursuant to s. 7(5) of the *Arbitration Act 1991*, which provides for a partial stay of court proceedings to be granted where an arbitration agreement deals with only some of the matters in respect of which the proceeding was commenced and it is reasonable to separate the matters dealt with in the agreement from the other matters. On appeal, it was concluded that the motions judge was correct in applying *Griffin v. Dell Canada Inc.*, 2010 ONCA 29, 98 O.R. (3d) 481 to determine whether a partial stay of proceedings should be granted under s. 7(5) of the *Arbitration Act* in a proposed class proceeding involving both consumer and business customer claims. The appeal of TELUS was therefore dismissed.

B. Basically what happened

A class action is filed in Ontario against Telus:

- on behalf of approximately 2 million residents
- who entered into cell service contracts, with an arbitration clause
- class includes both consumer and business customers
- alleges an undisclosed practice of "rounding up" calls to the next minute so customers are overcharged.

Does the arbitration clause "collide"[43] with the (Ontario) *Consumer Protection Act*?

C. In the Courts below

The Motions Judge dismissed Telus' motion for a stay, & certified the action. The C.A. dismissed the appeal.

D. S.C.C. holding

The *Consumer Protection Act* s. 7 invalidates the arbitration clause for consumers, but not business customers.

E. Why important

Clarifies who is in/out of consumer class actions (in Ontario), & validity of arbitration clauses for business customers.

F. Key quote

"…taking a purposive approach, a principal object of the s. 7 framework is to ensure parties to a valid arbitration agreement abide by their agreement; it is not to keep parties who either never agreed to or are not bound by an arbitration agreement out of court. The *Arbitration Act* has no

[43] S.C.C.'s word.

business interfering with these litigants' procedural or substantive rights, and it certainly has no business denying them the right to seek a remedy in court simply because they happen to be tangentially associated with others who did agree to and are bound by an arbitration agreement."[44]

6. Intellectual Property/Copyright/Internet: *Norwich* Orders; Costs

Rogers Communications Inc. v. Voltage Pictures, LLC, et al., 2018 SCC 38 (37679) (Argued: April 26, 2018; Judgment rendered: September 14, 2018). Unanimous; 9:0.

A. *Supreme Advocacy* L@wletter Summary

ISP's are entitled to be compensated for reasonable costs incurred to comply with *Norwich* orders (*Voltage Pictures* (2015)), but not every cost. Where costs should have been borne by an ISP in performing its statutory obligations under s. 41.26(1), these costs cannot be characterized as either reasonable or as arising from compliance with a *Norwich* order.

B. Basically what happened

Changes to the federal *Copyright Act* that came into force Jan. 2, 2015:

- when a copyright owner gives notice to an Internet Service Provider ("ISP") claiming infringement at a certain IP address, the ISP must forward that notice to that IP address
- the ISP is not obliged to disclose the identity of the IP address person
- to get that identity, a *Norwich*[45] order has to be applied for, outside the regime, compelling the ISP to disclose.

Question: who bears the ISP's "reasonable costs of compliance" with a *Norwich* order?

C. In the Courts below

The motion judge granted the *Norwich* order and allowed Rogers to recover costs of all steps necessary to comply. Fed. C.A.: Rogers' cost recovery limited to those that did not overlap with steps that formed part of Roger's implicit obligations under the statutory regime.

D. S.C.C. holding

In sum, as follows:

- an ISP can recover compliance costs re a *Norwich* order
- but not entitled to be compensated for every cost it incurs in complying
- recoverable costs must be reasonable and arise from complying with the order
- costs in performing statutory obligations are not recoverable.

[44] Para. 102.

[45] From a H.L. decision: [1974] A.C. 133.

E. Why important

Only important in this copyright regime; not relevant to costs generally. And the actual *quantum* remitted to the motion judge.

F. Key quote

"… Rogers undertakes an eight step manual process when it is ordered by a court to disclose the identity of one of its subscribers… I would not assume that they [costs] will always be 'negligible' as the Federal Court of Appeal anticipates."[46]

7. Labour/Employment Law: Employee v. Independent Contractor

Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec, 2019 SCC 28 (37813). (Argued: November 13, 2019; Judgment rendered: May 3, 2019). Not unanimous; 6:3.

A. *Supreme Advocacy* L@wletter Summary

There is a Sealing Order in this case. The Court file contains information that is not available for inspection by the public, in the context of a franchise dispute and employee v. independent contractor. "The application for leave to appeal...is granted with costs in the cause."

B. Basically what happened

Cleaning services in public buildings in the Québec region are governed by a statutory "Decree", or collective agreement, in turn governed by a Québec statute with regard to collective agreement. Modern Cleaning provides cleaning and maintenance services through a network of approx. 450 franchises, to whom Modern Cleaning assigns cleaning contracts for specific locations, using the franchises' own tools and equipment. Mr. Bourque signed a franchise agreement; his wife Ms. Fortin helps him runs the business. Is he covered by the collective agreement?

C. In the Courts below

Trial judge: No. C.A.: yes.

D. S.C.C. holding

Agreed with the C.A.: the trial judge "misapprehended the nature of the tripartite contractual relationship between Modern, its clients and its franchise…"[47]

E. Why important

Clarification of what's an employee, what's an independent contractor.

F. Key quote

"Determining who bears the business risk is, of course, a fact-specific, contextual inquiry. There may be other circumstances in which a franchisee could be said to bear sufficient risks so as to

[46] Paras. 55-56.

[47] Para. 21.

assume the business risk of his or her enterprise and thus be considered an independent contractor…When Modern's tripartite business model is properly brought into the analysis, it becomes clear, as the Court of Appeal held, that it was Modern who assumed the business risk and ability to make a profit. Mr. Bourque therefore was an artisan, making him an employee under the *Act*. Given that Mr. Bourque and Ms. Fortin are employees within the meaning in the *Act*, Modern is correspondingly a "professional employer"."[48]

8. Professions: Civility

Groia v. Law Society of Upper Canada, 2018 SCC 27 (37112) (Judgment rendered: June 4, 2018). Not unanimous; 6:3.

A. *Supreme Advocacy* L@wletter Summary

A lawyer's duty to act exists in concert with a series of professional obligations that both constrain and compel lawyers' behaviour; care must be taken to ensure that free expression, resolute advocacy and the right of an accused to make full answer and defence are "not sacrificed at the altar of civility." The Law Society Appeal Panel's finding of professional misconduct against Mr. Groia was not reasonable in the circumstances; standards of civility must be articulated with a reasonable degree of precision; an overly vague or open-ended test for incivility risks eroding resolute advocacy; prudent lawyers will steer clear of a blurry boundary to avoid a potential misconduct finding for advancing arguments that may rightly be critical of other justice system participants; a standard that is reasonably ascertainable gives lawyers a workable definition they can use to guide behaviour; it also guides law society disciplinary tribunals in determining whether behaviour amounts to professional misconduct.

B. Basically what happened

Counsel in a trial "characterized by a pattern of escalating acrimony", where a series of disputes "plagued the proceedings with… toxicity…"[49] On its own motion the Law Society charged counsel with professional misconduct.

C. In the Courts below

A three-member Law Society panel found professional misconduct; 2 month suspension & nearly $247K costs. Law Society Appeal Panel: also professional misconduct; 1 month suspension; $200K costs. Divisional Court upheld Appeal Panel. C.A. (by majority) dismissed counsel's further appeal.

D. S.C.C. holding

Appeal allowed. Appeal Panel's finding & penalty set aside. Costs to counsel in courts below and Law Society proceedings. No need to remit matter back to Law Society, as counsel "could not reasonably be found guilty of professional misconduct". Complaints dismissed.

---

[48] Paras. 57 & 59.

[49] Para. 12.

In sum:

- standards of civility must be articulated with a reasonable degree of precision
- an overly vague or open-ended test for incivility risks eroding resolute advocacy
- prudent lawyers will steer clear of a blurry boundary to avoid a potential misconduct finding for advancing arguments that may rightly be critical of other justice system participants
- a standard that is reasonably ascertainable gives lawyers a workable definition they can use to guide behaviour
- it also guides law society disciplinary tribunals in determining whether behaviour amounts to professional misconduct.

E. Why important

What is civil/uncivil conduct worthy of professional sanction?[50]

F. Key quote

"… trials are not – nor are they meant to be – tea parties".[51]

9. Torts 101: Negligence; Duty of Care; Foreseeability

Rankin (Rankin's Garage & Sales) v. J.J., 2018 SCC 19 (37323) (Judgment rendered: May 14, 2018). Not unanimous; 7:2.

A. *Supreme Advocacy* L@wletter Summary

Here the plaintiff did not provide sufficient evidence to support the establishment of a duty of care, so while the risk of theft was reasonably foreseeable, the evidence did not establish it was foreseeable someone could be injured by the stolen vehicle. There was no evidence to support the inference the stolen vehicle might be operated in an unsafe manner, causing injury, and when considering the security of the automobiles stored at the garage, there was no reason for someone in the position of the defendant garage owner to foresee the risk of injury. Businesses only owe a duty to someone who is injured following the theft of a vehicle when, in addition to theft, the unsafe operation of the stolen vehicle was reasonably foreseeable.

B. Basically what happened

As the S.C.C. says in its first para., "A vehicle is stolen from a commercial garage. The vehicle is crashed. Someone is injured. Does the business owe a duty of care to the injured party?" ie. Torts

[50] See also "Civility as a Strategy in Litigation". Email: emeehan@supremeadvocacy.ca for copy, including *Pig Rule no. 1*, & *Pig Rule no. 2*.

[51] Para. 3.

101. C (16) had stolen the car, unlocked behind the garage, keys in the ashtray. Drove to Walkerton to pick up J (15), crashed the car; J a "catastrophic brain injury".[52]

C. In the Courts below

At trial, yes, 37%. C.A: upheld.

D. S.C.C. holding

Appeal allowed, claim dismissed. The "case is easily resolved based on a straightforward application of existing tort law principles:"[53]

- risk of theft was reasonably foreseeable
- the evidence herein did not establish it was foreseeable someone could be injured by the stolen vehicle.[54]

The Court however went on to say:

"This is not to say that a duty of care will never exist when a car is stolen from a commercial establishment and involved in an accident. Another plaintiff may establish that circumstances were such that the business ought to have foreseen the risk of personal injury. However, on this record, I conclude that the courts below erred in holding that Rankin's Garage owed a duty of care to the plaintiff. I would allow the appeal and dismiss the claim against the appellant with costs in this Court and in the courts below."[55]

E. Why important

Confirmation of what we learned in first year Torts.

F. Key quote

"Under tort law, liability is only imposed when a defendant breaches a duty of care. The *Anns/Cooper* test ensures that a duty of care will only be recognized when it is fair and just to do so. As such, it is necessary to approach each step in the test with analytical rigour. While common sense can play a useful role in assessing reasonable foreseeability, it is not enough, on its own, to ground the recognition of a new duty of care in this case."[56]

---

[52] Para. 3-5.
[53] Para. 2.
[54] *Ibid*.
[55] Para. 67.
[56] Para. 66.

10. Workers' Comp: Independent Contractors

West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal), 2018 SCC 22 (37423) (Judgment rendered: May 18, 2018). Not unanimous; 6:3.

A. *Supreme Advocacy* L@wletter Summary

Workers' Comp has jurisdiction re a work incident (here, fatal) involving an employee of an independent contractor.

B. Basically what happened

A tree faller is killed by a rotting tree while working in a forest licence area, the licence held by West Fraser Mills. West Fraser is an "owner" *per* the B.C. *Workers Compensation Act*. The faller was employed by an independent contractor.

C. In the Courts below

The Workers Comp Board held West Fraser had failed to ensure a safe work environment, and imposed a $75K penalty. The Workers Comp Appeal Tribunal rejected West Fraser's arguments that:

- a penalty can only be levied against an employer, not an owner
- they were not the employer, only the owner,

though reduced the penalty by 30%.

B.C.S.C. & B.C.C.A., appeals dismissed.

D. S.C.C. holding

Appeal dismissed. Appeal Tribunal upheld, as not being patently unreasonable. As the S.C.C. wrote:

" It is true that the Tribunal in this case did not find an employment-like relationship between West Fraser Mills and the fatally injured faller, but, as discussed above, it did find a relationship between West Fraser Mills and the safety of the worksite — West Fraser Mills employed an individual whose job it was to monitor the worksite in a manner consistent with West Fraser Mills' duties under the Act. West Fraser Mills' relationship to the safety of the worksite was not solely that of an owner; West Fraser Mills was implicated in the fatality as an 'employer'."[57]

E. Why important

Clarification of potential defendants in a tort action, though limited to the workers' comp context?

[57] Para. 48.

F. Key quote

"It cannot be denied that the Tribunal understood the debate that it was tasked to resolve; it recognized the big picture and understood the implications of competing interpretations of s. 196(1). It understood and discussed the fundamental choice it faced — the choice between a narrow, textual approach and a broader, more contextual approach. Its decision is reasoned and presents a justiciable basis for review."[58]

11. Workers' Comp in Québec: Duty to Accommodate

Québec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron, 2018 SCC 3 (36605) (Judgment rendered: February 1, 2018). Unanimous; 7:0.

A. *Supreme Advocacy* L@wletter Summary

The duty to accommodate requires accommodation to the point that an employer is able to demonstrate "that it could not have done anything else reasonable or practical to avoid the negative impact on the individual" (*Moore v. British Columbia (Education))*, [2012] 3 S.C.R. 360, at para. 49. Since a core principle of the Québec *Charter* is the duty to accommodate, it follows that this duty applies when interpreting and applying the provisions of Québec's injured worker legislation. The objectives of Québec's injured worker scheme overlap with those of the Québec *Charter*. The injured worker scheme seeks "to facilitate the worker's reinstatement in his employment or an equivalent employment or, where that object is not attainable, to facilitate his access to suitable employment". Similarly, Québec's *Charter* seeks "to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship" (*Hydro-Québec*, at para. 14).

B. Basically what happened

A special educator at a centre for persons with intellectual disabilities hit his elbow on a door frame, causing tennis elbow.

C. In the Courts below

The Québec Workers Comp Board held the duty to accommodate in the Québec *Charter* does not apply to the workers comp regime. On J.R. the Superior Court set aside that decision and directed the case be reconsidered in accordance with the employer's duty to accommodate. C.A.: appeal dimissed.

D. S.C.C. holding

Appeal dismissed:

"This case is in classic reasonableness territory – the [workers comp board] is interpreting the scope and application of its home statute."

[58] Para. 49.

"In my respectful view, however, its conclusion that employers do not have a duty of reasonable accommodation under the scheme, does not survive a reasonableness review."[59]

E. Why important

Yes, a Québec case, and a workers' comp case, so to what extent does it apply outside of Québec? Before you think "not-at-all", Québec cases are now often written by "common law" judges (this one by Abella J.), and vice versa (eg. *Ledcor* by Wagner J. [as he then was]).

F. Key quote

"It may be that if the employer had considered its duty to accommodate in its search for suitable employment, it would have found other suitable positions for [the claimant] to occupy."[60]

Oral Judgments

1. Criminal Law: DUI (Boats); Hospital Records

R. v. Culotta, 2018 ONCA 665; 2018 SCC 57 (38213) (Judgment rendered: December 13, 2018). Not unanimous; 3:2.

A. *Supreme Advocacy* L@wletter Summary

Hospital records re blood samples for DUI admissible.

B. Basically what happened

Moldaver J.: "A majority of the Court would dismiss the appeal, substantially for the reasons of Justice Nordheimer. Justices Abella and Martin, in dissent, would allow the appeal, substantially for the reasons of Justice Pardu."

2. Torts: Fraud

DeJong PC v. DBDC Spadina Ltd, et al., 2019 SCC 30 (38051) (Judgment Rendered: May 14, 2019). Unanimous; 7:0.

A. *Supreme Advocacy* L@wletter Summary

Over the course of several years, Norma and Ronauld Walton allegedly perpetrated a complex multi-million dollar commercial real estate fraud. They convinced various parties to invest equally with them in equal-shareholder, specific-project corporations to acquire, hold, renovate and maintain commercial real estate properties in Toronto. Rather than investing significant funds of their own, the Waltons moved their investors' money in and out of numerous corporations through a clearing house. Dr. Stanley Bernstein, through DBDC Spadina Ltd. and the other Respondent corporations (the "DBDC parties"), and Christine DeJong, through the

[59] Para. 4.

[60] Para. 55.

Christine DeJong Professional Corporation ("DeJong PC"), invested in several projects with the Waltons. In relation to each project, they entered into a specific-project corporation for the particular property. None of the agreements related to the investments contemplated third-party investors, and none permitted the use of the investors' money for anything other than the specific project. The DBDC parties' funds were to be invested in the "Schedule B Companies", and the DeJongs invested in the "Schedule C Companies". Ms. Walton was the directing mind of all of the relevant investor companies. Late in the course of oppression proceedings launched by the DBDC parties, the DBDC parties alleged the DeJong PC had engaged in knowing participation and knowing receipt in the Waltons' fraud. Inter alia, Newbould J. dismissed the DBDC parties' claim the DeJong PC had knowingly participated in a fraudulent and dishonest breach of fiduciary duty. Inter alia, the C.A. allowed the DBDC parties' appeal with respect to knowing participation.

B. Basically what happened

Justice Brown: "'"We agree with Justice van Rensburg, dissenting, at the Court of Appeal that the respondents' claim for knowing assistance must fail, and we adopt her reasons as our own. In view of the statement of the majority at the Court of Appeal that this Court's decision in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, invited a "flexible" application of the criteria stated in *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662 for attributing individual wrongdoing to a corporation, we respectfully add this. What the Court directed in *Livent*, at para. 104, was that *even where those criteria are satisfied*, "courts retain the discretion to refrain from applying [corporate attribution] where, in the circumstances of the case, it would not be in the public interest to do so" (emphasis added). In other words, while the presence of public interest concerns may heighten the burden on the party seeking to have the actions of a directing mind attributed to a corporation, *Canadian Dredge* states *minimal* criteria that must always be met. The appeal is allowed, with costs throughout."

Appeals Heard, Judgment Reserved

1. Class Actions in Québec: Certification

L'Oratoire Saint-Joseph du Mont-Royal v. J. J., 2017 QCCA 1460 (37855) (Leave granted: March 29, 2018) (Appeal Heard: November 7, 2018 – Judgment rendered: June 7, 2019)

The Respondent J.J. attended the Notre-Dame-des-Neiges elementary school for four years, from 1951 to 1955, when he and his family were living in a dwelling owned by the Applicant and intervener La Province canadienne de la Congrégation de Sainte-Croix that was near the Applicant and intervener L'Oratoire Saint-Joseph du Mont-Royal. He alleged he was sexually assaulted by members of the Congrégation de Sainte-Croix during that time, both at the elementary school and at the Oratoire. The Respondent allegedly kept silent about the sexual assault until he saw a report in 2011 on the sexual assaults committed by members of the

Congrégation de Sainte-Croix that had been prepared by the public affairs show Enquête and broadcast on Radio Canada. Convinced hundreds of people had also been sexually assaulted by members of the Congrégation de Sainte-Croix, the Respondent asked a court to authorize a class action against the Applicants and interveners and to appoint him as representative plaintiff. Québec Superior Court: Re-amended motion for authorization to institute class action and to be appointed representative plaintiff dismissed. C.A.: appeal allowed; class action authorized and representative plaintiff appointed.

2. Civil Procedure in Québec: Actions Against Police

Kosoian v. Société de Transport de Montréal, 2017 QCCA 1919 (38012) (Leave granted: November 15, 2018) (Appeal Heard: April 16, 2019 – Judgment reserved)

Ms. Kosoian was arrested for refusing to hold the handrail while descending an escalator in the Montmorency subway station in Laval. Ms. Kosoian brought an action in damages against the Respondents in relation to the arrest. The Court of Québec dismissed the action. It found the Respondents had committed no fault. The majority of the Québec C.A. reached the same conclusion. Schrager J.A., dissenting, found the Respondents to be solidarily liable. But he also concluded Ms. Kosoian had partially contributed to her injury.

3. Civil Procedure/Torts: Jurisdiction

Nevsun Resources LTD v. Araya, 2017 BCCA 401 (37919) (Leave granted: June 14, 2018) (Appeal Heard: January 23, 2019 – Judgment reserved)

The Respondents were Eritrean refugees who sought to bring a representative claim against the Applicant, a publicly-held B.C. corporation. They alleged through a chain of subsidiaries, the Applicant entered into a commercial venture with Eritrea for the development of a gold, copper and zinc mine in Eritrea. The Applicant allegedly engaged the Eritrean military and military controlled corporations and was complicit in the use of forced labour at the mine, conscripted under Eritrea's National Service Program. The Respondents claim to have fallen victim to forced labour, slavery, torture, cruel, inhumane or degrading treatment and crimes against humanity. They brought claims of private law torts as well as breaches of peremptory principles of international law for damages at customary international law. The Applicant denied the Respondents were subjected to forced labour or mistreatment and argued the military and its personnel were not subject to the control, direction or supervision of the Applicant or of the mining company in which the Applicant has a 60% indirect interest. The B.C.S.C. granted the Applicant's motion to deny the proceeding status as a common law representative action but dismissed the Applicant's motions to stay, dismiss or strike aspects of the Respondents' claims on the basis either Eritrea is the forum conveniens, or that the claims are precluded by or have no reasonable chance of success due to the act of state doctrine or the inapplicability of customary international law. The court also held certain secondary evidence filed by the Respondents was admissible for the limited purpose of providing social and historical facts for context. The B.C.C.A. dismissed the appeal.

4. Class Actions: Certification

Pioneer Corporation, et al. v. Godfrey, 2017 BCCA 302 (37809) (Leave granted: June 7, 2018) (Appeal Heard: December 11, 2018 – Judgment reserved)

Neil Godfrey, a representative plaintiff, commenced a proposed class action alleging the Sony and Pioneer defendants participated in a global, criminal price-fixing cartel that overcharged British Columbians for optical disc drives and products containing such devices. He alleged a breach of s. 45 of the federal *Competition Act*, the tort of civil conspiracy, the unlawful means tort, unjust enrichment and waiver of tort. The proposed class was a hybrid class that consisted of "direct purchasers", who purchased a product manufactured or supplied by a defendant from that defendant, "indirect purchasers", who purchased a product manufactured or supplied by a defendant from a non-defendant, and "umbrella purchasers", who purchased from a non-defendant a product that was not manufactured or supplied by a defendant. B.C.S.C.: certified as class proceeding pursuant to B.C. *Class Proceedings Act*. B.C.C.A.: appeal dismissed.

5. Class Actions: Certification

Sony Corporation, et al. v. Godfrey, 2017 BCCA 302 (37810) (Leave granted: June 7, 2018) (Appeal Heard: December 11, 2018 – Judgment reserved)

Similar summary to that immediately above. The application for leave to appeal… is granted with costs in the cause. The appeal will be heard with *Pioneer Corporation, et al. v. Neil Godfrey*.

6. Constitutional Law: Division of Powers

Transport Desgagnés Inc. v. Wärtsilä Canada Inc., 2017 QCCA 1471 (37873) (Leave granted: July 19, 2018) (Appeal Heard: January 24, 2019 – Judgment reserved)

In 2006, Desgagnés purchased marine engine parts for one of its vessels from Wärtsilä Canada Inc. The parts were delivered and installed in 2007. The engine failed in 2009, engendering damages of $5,661,830.33 for Desgagnés. The contract limited Wärtsilä's liability in both scope and time. Desgagnés instituted proceedings against Wärtsilä for the recovery of its damages. The Superior Court of Québec ordered Wärtsilä to fully indemnify Desgagnés, ruling provincial law governed the dispute, and the contractual limitations of liability were rendered inapplicable by the *Québec Civil Code's* provisions on warranties. The majority of the Québec C.A. set aside the trial judgment, ruling Canadian maritime law exclusively governed the dispute, and the contractual limitations of liability were thus applicable.

7. Environmental Law: Downstream Pollution; Corporate Transfers

Resolute FP Canada Inc. v. R., 2017 ONCA 1007 (37985) (Leave granted: October 18, 2018) (Appeal Heard: March 28, 2019 – Judgment reserved)

In the 1960s, a pulp and paper operation owned and operated by the Dryden Paper Company Limited discharged mercury into the nearby river system, causing harm to the First Nations

downstream. In 1971, a waste disposal site was constructed. In 1976, Dryden Paper and Dryden Chemicals were amalgamated to form Reed Ltd., and, in 1977, the First Nations bands sued Reed, Dryden Paper and Dryden Chemicals for various damages resulting from the mercury waste contamination of the river (the "Grassy Narrows litigation"). In 1979, Reed was sold to Great Lakes Forest Products Limited. The Grassy Narrows litigation was settled with court approval in 1985. Great Lakes and Reed paid $11.75 million to the First Nations and released Ontario in respect of two previous indemnities. Ontario gave a new indemnity (the "1985 Indemnity", sometimes referred to as the "Ontario Indemnity"). It promised to indemnify Great Lakes, Reed and others against claims and proceedings arising from "any damage, loss, event or circumstances, caused or alleged to be caused by or with respect to…the discharge or escape or presence of any pollutant by Reed or its predecessors, including mercury or any other substance, from or in the plant or plants or lands or premises forming part of the Dryden assets sold by Reed Ltd. to Great Lakes under the Dryden Agreement". It was to "be binding upon and enure to the benefit of the respective successors and assigns of Ontario, Reed and Great Lakes". Thereafter, Reed's successor was dissolved, and Great Lakes, essentially, became Bowater, which became Abitibi Bowater, which became Resolute. In the interim, Weyerhaeuser purchased certain Dryden assets (including the waste disposal site, which could not be severed from the other assets in time to complete the sale) from Bowater in 1998. Bowater leased the waste disposal site back until the severance was completed, when it was reconveyed to Bowater. Eventually, the owner of the waste disposal site abandoned it with court approval and was discharged from any associated liability in 2011, under the Companies' Creditors Arrangements Act. On August 25, 2011, the Ontario Ministry of the Environment issued a Director's Order requiring, inter alia, Weyerhaeuser and Resolute, as prior owners of the site, to perform remedial work on the waste disposal site. Weyerhaeuser unsuccessfully sought to revoke or amend the Director's Order before the Environmental Review Tribunal. Weyerhaeuser and Resolute both appealed the result, and that appeal was ongoing when Weyerhaeuser commenced this action against Ontario, with Resolute as an intervener. All of the parties moved for summary judgment, asking whether the 1985 Indemnity covers the costs of complying with the Director's Order, and, if so, whether Weyerhaeuser and Resolute are entitled to its benefit. The motions judge granted Resolute leave to intervene, dismissed Ontario's motion for summary judgment, and granted Weyerhaeuser and Resolute's cross-motions for summary judgment. The C.A. set aside the motions judge's decision. It granted Ontario summary judgment against Resolute. As to Weyerhaeuser, it substituted a declaration that Bowater assigned the full benefit of the 1985 Indemnity to Weyerhaeuser under the 1998 Asset Purchase Agreement and directed a final adjudication by the court below on the issue of what rights, if any, Weyerhaeuser possessed as assignee of the 1985 Indemnity when the Director's Order was made in 2011.

8. Labour Law: Definition of "Work Place"

Canada Post Corporation v. Canadian Union of Postal Workers, 2017 FCA 153 (37787) (Leave granted: April 12, 2018) (Appeal Heard: December 10, 2018 – Judgment reserved)

An employee member of the local joint health and safety committee, represented by the Canadian Union of Postal Workers, filed a complaint re the Canada Post building in Burlington being inspected. The employee alleged the letter carrier routes should also be inspected. Following an investigation of the complaint, a Health and Safety Officer issued a direction citing four contraventions of the *Canada Labour Code*. One of them remains relevant: the Officer was of the opinion, by restricting its inspections to the physical building in Burlington, Canada Post had failed to ensure the workplace health and safety committee had inspected the entirety of the work place annually, thereby contravening s. 125(1)(z.12) of the Code. Canada Post appealed that decision to the Occupational Health and Safety Tribunal. The Appeals Officer varied the Health and Safety Officer's decision and rescinded the contravention of s. 125(1)(z.12), finding the inspection obligation did not "apply to any place where a letter carrier is engaged in work outside of the physical building". The "work place" included all points of call and lines of route, but control over the work place is required in order to fulfil the obligations imposed by s. 125(1)(z.12). Since the employer had no control over the points of call or the lines of route, it cannot comply with those obligations. The Union sought judicial review of the Appeals Officer's decision. The Federal Court found the Appeals Officer's decision was reasonable. The Union's appeal was allowed.

9. Pensions in Québec: Presumption of Life

Threlfall v. Carleton University, 2017 QCCA 1632 (37893) (Leave granted: July 26, 2018) (Appeal Heard: February 22, 2019 – Judgment reserved)

This Leave concerned Carleton University's legal entitlement to recover amounts paid to an absentee under a "life only" pension during a period in which he was presumed alive but in fact dead. In Québec, absentees are presumed alive for a period of seven years, following which any interested person can apply for a declaratory judgment of death. The presumption of life is however temporary and subject to rebuttal. In this case, death was determined some five years following the disappearance of the absentee, which served to set aside the presumption of life. The act of death recorded the absentee's true date of death as the day following his disappearance, and not the date upon which proof of death was established. Claiming restitution under the "reception of a thing not due" provisions of the Civil Code of Québec Carleton sought to recover the amounts it considered to have been paid in error to the absentee. It moved to institute proceedings against the Applicant, Ms. Threlfall, who acted as tutor to the absentee and subsequently as liquidator of his estate. The Superior Court of Québec found restitution was possible under the "reception of a thing not due" provisions of the Code, because the pension payments, though initially not made by mistake, became an error once the presumption of life had been rebutted. The conditions for ordering restitution were thus met. The C.A. confirmed the Superior Court's judgment in most respects.

10. Tax: Bank Document Disclosure

1068754 Alberta Ltd. v. Agence du revenu du Québec, 2018 QCCA 8 (37999) (Leave granted: July 26, 2018) (Appeal Heard: January 22, 2019 – Judgement reserved)

The Agence du revenu du Québec sought bank documents relating to DGGMC, a trust of which 1068754 Alberta Ltd. was the sole trustee. The documents in question were held by a branch of the National Bank of Canada located in Calgary. DGGMC was being audited under Quebec's *Taxation Act* because the Agence suspected it was required to pay tax in Québec. The Superior Court dismissed 1068754 Alberta Ltd.'s application to quash the demand for documents made by the Agence, finding it was not a seizure. Although the demand had to be communicated to the branch of account under the *Bank Act*, it was the bank as a whole, not the branch as a separate legal entity, that was notified. The C.A. dismissed 1068754 Alberta Ltd.'s appeal, holding the demand for documents was a seizure but did not have extraterritorial effect under the applicable provision of the *Bank Act*. Moreover, the Agence had not exceeded its jurisdiction.

11. Torts: Wrongful Imprisonment

Fleming v. Ontario, 2018 ONCA 225 (38087) (Leave granted: October 25, 2018) (Appeal Heard: March 21, 2019 – Judgment reserved)

Mr. Fleming was walking down Argyle Street in Caledonia, Ontario, adjacent to lands occupied by Indigenous protesters and known as Douglas Creek Estates. He was carrying a pole bearing Canadian flags. His intent was to join a march and watch a Canadian flag raising as a counter-protest to the occupation of Douglas Creek Estates. The OPP responded to the rally with an operational plan intended to permit peaceful protest but to maintain peace and order. When officers spotted Mr. Fleming walking alone, police vehicles were directed to approach. Two squad cars and a police transport vehicle rapidly approached and stopped on the shoulder of the road. Mr. Fleming retreated onto the disputed lands. Immediately, 8 to 10 occupiers reacted and began approaching. A police officer entered onto the disputed land, arrested Mr. Fleming to prevent a breach of the peace, and escorted him back towards Argyle Street. Officers ordered him to drop his flag but he refused. A struggle ensued. Mr. Fleming was overpowered. His flag was wrested away from him. He was handcuffed and transported from the scene. Mr. Fleming sued the police and claimed permanent injury. The trial judge awarded general damages, special damages, damages for wrongful imprisonment, false arrest and breach of right to pass, and damages for breach of s. 2(b). A majority of the C.A. set aside the trial judgment and ordered a new trial, restricted to determining whether excessive force was used during the arrest.

12. Wills & Estates in Québec: Discretionary Trusts

Yared Estate v. Karam, 2018 QCCA 320 (38089) (Leave granted: October 25, 2018) (Appeal Heard: March 19, 2019 – Judgment reserved)

The Respondent, Mr. Roger Karam and the late Mrs. Taky Yared were married on July 25, 1998 in Beirut, Lebanon. Four children were born of their marriage. In August 2011 Mrs. Yared

learned she had cancer, and the same year, the family moved to Montreal. In October 2011, a family trust was constituted and Mr. Karam named as both co-trustee along with his elder mother and sole "Electeur" of the trust which gave him discretionary power notably to name and replace the initial beneficiaries of the trust and to determine how the capital and revenue of the trust would be divided among the beneficiaries. On June 18, 2012, the family trust purchased a property that would serve as the family residence at the cost of $2,350,000.00. On June 12, 2014, Mrs. Yared left the residence and she served divorce proceedings upon Mr. Karam on July 2, 2014. She died on April 6, 2015 while still married to Mr. Karam. A few months before her death, in August 2014, Mrs. Yared executed a last Will and Testament before a Notary and appointed her brothers, the Applicants, M. Ramy Yared and M. Rody Yared as liquidators of her Estate. Further, she bequeathed her entire Estate in equal portion to four separate trusts, each of them to the benefit of one of her children. On March 30, 2016, Mr. Karam served proceedings before the Superior Court to demand the annulment of the Will and Testament of Mrs. Yared. On July 19, 2016, the Applicants, in their capacities as liquidators of the Estate served an application for a declaratory judgment to have the family residence declared as part of the family patrimony under the *Civil Code of Quebec*. Superior Court of Quebec: application for declaratory judgment granted in part; C.A.: appeal granted.

Leaves to Appeal Granted

1. Class Actions: Arbitration Clauses

Uber Technologies Inc. v. Heller, 2019 ONCA 1 (38534) (Appeal scheduled: November 6, 2019)

The Applicants, Uber Technologies Inc., Uber Canada Inc., Uber B.V., and Rasier Operations B.V. were part of a group of companies that have come to be known collectively and individually as Uber. Uber developed computer software applications for GPS enabled smartphones for transportation and restaurant delivery. Mr. Heller, a resident of Ontario, has been licensed to use the Uber driver app (UberEATS) to deliver food in Toronto since February 2016. He has never used the app to provide personal transportation services. In order to use the driver app, Mr. Heller had to meet certain criteria and accept Uber's licencing agreement. That agreement states it is governed by the law of the Netherlands. It includes an arbitration clause stating disputes connected to the agreement shall be resolved by arbitration in Amsterdam. Mr. Heller brought a proposed class action on behalf of Uber drivers alleging they were employees of Uber and entitled to benefits under Ontario's Employment Standards Act. The Ontario Superior Court of Justice granted a motion brought by Uber to stay Mr. Heller's action in favour of arbitration. The motion judge determined Mr. Heller was unable to demonstrate any exceptions under the Arbitration Act — including unconscionability — warranting a denial of Uber's stay motion. The C.A. allowed the appeal on the basis the arbitration clause amounted to an illegal contracting out of the ESA and was thus invalid. It determined it was for the court, not an

arbitrator, to determine whether a stay was warranted. The C.A. concluded the arbitration clause was unconscionable at common law and grossly unfair. "The application for leave to appeal...is granted with costs in the cause."

2. Class Actions: Video Lottery; Disgorgement of Profits

Atlantic Lottery Corporation Inc.-Société des loteries de l'Atlantique v. Babstock, 2018 NLCA 71 (38521) (Appeal scheduled: December 3, 2019)

The Atlantic Lottery Corporation ("ALC") is a corporation constituted by the governments of the four Atlantic Provinces to conduct lotteries and other gambling activities on behalf of the Crown. Mr. Babstock and Mr. Small brought an application for certification as representatives of a class action against ALC and several other third party suppliers to ALC. The proposed class action alleged harm by video lottery terminals which offered line games similar to slot machines. The seven causes of action included (amongst others) breach of contract, negligence, unjust enrichment, and waiver of tort. In two separate decisions, the Supreme Court of Newfoundland and Labrador determined it was not plain and obvious any of the seven causes of action would fail. The judge determined line games played on video lottery terminals ("VLTs") could be similar to "three card monte" (which is prohibited under the Criminal Code without exception). Accordingly, the judge certified the class action. A majority of the C.A. of Newfoundland and Labrador struck causes of action under the *Competition Act* and the *Statute of Anne*, 1710 (Gaming Act, 1710) 9 Anne cap. XIV. The majority concluded disgorgement is an uncertain area of law and it was not clear arguments on this basis were doomed to fail. The majority also determined line games on VLTs might be similar to "three card monte" and could have a chance of succeeding. In a dissenting opinion, Welsh J.A. would have allowed the appeal, set aside the certification order, and struck the claim in its entirety. "The applications for leave to appeal...are granted with costs in the cause."

3. Class Actions in Québec: Certification; Punitives

Volkswagen Group Canada Inc. v. Association québécoise de lutte contre la pollution atmosphérique, 2018 QCCA 1034 (38297) (Appeal scheduled: November 13, 2019)

In 2015, re automobile manufacturers Volkswagen Group Canada Inc. et al. and Audi Canada Inc. et al., it was alleged certain diesel models of their cars had been equipped with software allowing them to falsify the results of emissions tests. This scheme concerned models manufactured between 2009 and 2015. In addition to the class actions brought on behalf of owners and lessees of cars equipped with the software in the province of Québec, the Respondents, Association québécoise de lutte contre la pollution atmosphérique and André Bélisle, filed an application for authorization to institute a class action in which they sought compensation for all residents of the province of Québec for environmental consequences of the use of the software. The Superior Court granted the application for authorization to institute a class action in part, authorizing one for a claim for punitive damages. The C.A. dismissed a

motion for leave to appeal that decision. "The application for leave to appeal...is granted with costs in the cause."

4. Class Actions/Torts: Duty of Care

1688782 Ontario Inc. v. Maple Leaf Foods Inc., 2018 ONCA 407 (38187) (Leave Granted: February 7, 2019) (Appeal scheduled: October 15, 2019)

The case concerned a listeria outbreak in certain meat products supplied by Mr. Submarine Limited ("Mr. Sub") and produced by the Maple Leaf Respondents (collectively, "Maple Leaf") which led to a national recall in 2008. The Applicant, 1688782 Ontario Inc. ("782 Inc."), is the class representative of Mr. Sub franchisees who were affected by a product shortage for 6-8 weeks as a result of the recall. The franchisees were publicly associated with the contaminated products and claim reputational injury and economic losses as a result of Maple Leaf's negligence. There was no direct relationship between the franchisees and Maple Leaf, as the franchisees were supplied through a distributor. However, the franchisees were bound by an exclusive supply arrangement to purchase meat products through Maple Leaf, and Maple Leaf took steps during the recall to assist franchisees with product shortages and the recovery of contaminated meats. After certification of the class, Maple Leaf moved for summary judgment seeking dismissal of 782 Inc.'s claims to the effect Maple Leaf owed the franchisees a duty of care. For its part, 782 Inc. brought a cross-motion to have the duty of care questions decided summarily. The motions judge ruled largely in 782 Inc.'s favour. It concluded Maple Leaf owed a duty of care to the franchisees on the basis of a previously recognized duty of care category, being that of supplying a product fit for human consumption. It also made findings regarding proximity between the parties and reasonable foreseeability of the harm suffered. The C.A. allowed Maple Leaf's appeal, having found the circumstances of the cases relied upon by the motions judge for recognizing the existence of a duty of care were distinguishable from the facts before it. In conducting its own duty of care analysis, the C.A. found the scope of the duties arising under the relationship between the parties did not require Maple Leaf to take special care regarding 782 Inc.'s reputational interests. In so deciding, the C.A. held the duty to supply a product fit for human consumption — a duty ultimately aimed at protecting human health — is owed to the franchisees' customers, and not to the franchisees' themselves. From a policy perspective, the C.A. determined extending liability for reputational harm in the circumstances would deter manufacturers of products from recalling potentially defective products in a timely fashion. "The application for leave to appeal...is granted without costs."