Lexpert's Top 10 Business Decisions of 2015

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In a less than stellar year for business, only the decisions relating to privilege, certification and leave can be seen as decidedly positive in our Top Ten Cases of 2015 list. Canada's courts delivered body blows to several other issues

It was decidedly not a banner year for business in Canadian courts.

Just five of our 2015 Top 10 business law decisions can be regarded, even from a generous point of view, as pro-business. To be sure, the courts upheld the sanctity of solicitor-client privilege, gave substance to the efficiencies defence in competition law, tightened up the certification standard for class actions somewhat, upgraded the test for giving leave in securities class actions, took a broad approach to allowable communications between counsel and their experts and clarified the law on qualifying experts.

But only the decisions relating to privilege, certification and leave can be regarded as truly pro-business. The two decisions relating to expert evidence benefit anti-business parties as well and meet the pro-business designation only because they eliminate uncertainty by clarifying important and nagging questions.

By contrast, courts delivered body blows to business positions on some controversial and meaningful issues: the Supreme Court of Canada imputed a duty of good faith into contract law, creating a great deal of controversy and uncertainty in doing so; upheld the constitutionality of administrative monetary penalties; embedded the right to strike in the previously established Charter right to bargain collectively; and raised the burden on employers seeking to make out a constructive dismissal.

For its part, the Manitoba Court of Appeal extended Charter rights to the estate of deceased persons and privacy rights to the families of individuals directly affected by a breach. Taken collectively, these decisions have the potential for a far greater impact on business than the pro-business decisions.

Eight of our 10 judgments emanated from the Supreme Court of Canada, with one each from the Ontario Court of Appeal and the Manitoba Court of Appeal. Geographical representation was more diverse than it has ever been: Ontario, Québec and British Columbia provided two judgments each and one case came from each of Alberta, Manitoba, Nova Scotia and New Brunswick. (The total of 12 arises from the fact that one of our cases involved a trilogy.)

Perhaps the most difficult cases to exclude were *Tsilhqot'in Nation v. British Columbia*, in which the SCC allowed tort claims by First Nations based on Aboriginal title and rights to proceed to trial, and *Chevron Corp. v. Yaiguaje*, an important Ontario Court of Appeal decision both on the permeability of the corporate veil and the jurisdiction of Canadian courts over damage caused abroad.

Also narrowly missing the cut were several cases whose ultimate fate will be or will likely be determined by the SCC and could well receive recognition in future years. These include *Equustek Solutions Inc. v. Google Inc.* (BCCA), a watershed case on intellectual property rights in the Internet age and the first case anywhere in which a court has ordered a search engine to de-list offending websites; *Wilson v. Atomic Energy of Canada Limited* (FCA), which decided that federally regulated employers may indeed dismiss employees without cause; and *Nortel Networks Corporation (Re)* (OCJ), the $7.3-billion cross-border battle over the remains of the former corporate giant, which establishes a landmark and workable framework and analysis for distributing the proceeds of international insolvency and restructuring proceedings.

Sanofi-Aventis v. Apotex Inc., the SCC's first pronouncement on s. 8 damages under the Patented Medicines (Notice of Compliance) Regulations, also received serious consideration but didn't qualify largely because it didn't cut a wide enough swath in the business community, limited as it was to disputes between brand-name companies and generics in the pharmaceutical industry. Still, there's no doubting its importance to this major sector of the economy.

Picking the top case was equally arduous. It boiled down to choosing between two SCC decisions: *Bhasin v. Hrynew* and *Federation of Law Societies v. Canada*. Although *Federation* dealt with the core question of Parliament's right to intrude on solicitor-client privilege, it emerged in the narrow context of anti-money-laundering legislation. *Bhasin*, by contrast, affects all commercial contracts.

1. Bhasin v. Hrynew (SCC, Alta.)

Bhasin represents the first time that the SCC has recognized a legal duty to perform contractual obligations in good faith, honestly and with regard to the legitimate expectations of other parties. Its impact is undoubted, generating both attention and alarm.

"I've never had a reaction like this one," says Neil Finkelstein a partner at McCarthy Tétrault LLP in Toronto, who represented the successful appellant Harish Bhasin and who has argued some 28 appeals in the SCC over the course of his career. "It's a bread-and-butter case that has a very broad application to everyone who enters into a contract, so everyone, particularly general counsel and legal departments, wants to know what it means."

But more than one year after the decision was rendered, its precise impact is unclear. While the court described its ruling as an attempt to make Canadian contract law more settled, fairer and more closely aligned with the reasonable expectations of the parties, the disparate and sometimes tortuous commentary that followed on the decision's release suggests that the judgment falls short of its goals. No better evidence of that can be found than in the varying reactions to the case.

The origin of the duty, the court stated, could be found in a general "organizing principle" of good-faith performance. Although this "organizing principle" was not itself a duty, it did require parties to refrain from undermining other parties' interests by acting in bad faith. The duties of good faith that already existed in areas like franchise,

employment, insurance and real estate law were but examples of duties that arose from this principle.

Bhasin's twist was to leave open the possibility that new duties would emerge, the first one being the duty of honest contractual performance enunciated in the decision. The upshot is that the decision is open-ended: think, perhaps, *Donoghue v. Stevenson*, the seminal decision in the common law of negligence that engendered a continuing evolution of new duties of care as well as duties of care in new contexts.

So while *Bhasin* may provide certainty in the sense of putting an end once and for all to the debate about whether a principle of good faith exists, it creates uncertainty by failing to clearly establish the limits of that principle. Even with respect to the enunciated duty of honesty that falls under the principle, the court provides little guidance on what constitutes the "honesty" that good faith demands.

What is clear is that parties may not contract out of duties stemming from the organizing principle: they can, however, define or delimit them in a particular context so long as they maintain the minimum standard that a particular duty implies.

"Although the decision doesn't give any specifics about when the parties can try to limit the need to communicate honestly, I do think it will change the way contracts are drafted," says Eli Lederman of Lenczner Slaght Royce Smith Griffin LLP in Toronto, who with colleagues Jon Laxer and Constanza Pauchulo represented respondents Larry Hrynew and Heritage Education Funds Inc. "For example, lawyers might expand on absolute discretion by expressly stating that a right can be exercised for any reason at all or that no reason need be given for the exercise of a right."

However that may be from a solicitor's point of view, a review by Bradley Berg and Mike Maodus of Blake, Cassels & Graydon LLP in Toronto suggests that *Bhasin*'s impact, while sonorous, has not had a cataclysmic effect on the jurisprudence so far. "These findings indicate that, at least to date, *Bhasin* has made only an incremental change in the law," they write.

As of early October 2015, Berg and Maodus had uncovered 85 Canadian cases dealing with good faith, of which 49 came from Ontario. Just five of the Ontario cases found a "clear breach" of the *Bhasin* duty of good faith. Three of the cases, however, were decided primarily on the basis of the pre-existing good faith doctrines that had already populated employment and real estate law before *Bhasin.*

The two remaining cases, however, were direct applications of *Bhasin*. Still, Berg and Maodus question whether *Bhasin* actually changed the result. "Given their particular facts, even these two cases probably would have been decided the same way before *Bhasin,*" they conclude. "Nothing in the early application of *Bhasin* appears to be superseding established contractual interpretation principles. In fact, several … courts across the country have gone to some lengths to limit its application."

All of this doesn't make *Bhasin* any less important. While the impact may not have made its way to the jurisprudence, the definitive statement of a duty of good faith as applying to all contracts will eventually imbue commercial practice — if it hasn't done so already.

Counsel (CLIENT> LAW FIRM>LAWYERS)

Harish Bhasin, carrying on business as Bhasin & Associates> McCarthy Tétrault LLP> Neil Finkelstein, Brandon

Kain

Harish Bhasin, carrying on business as Bhasin & Associates> Davies Ward Phillips & Vineberg LLP> John McCamus

Harish Bhasin, carrying on business as Bhasin & Associates> Cavalluzzo Shilton McIntyre Cornish LLP> Stephen Moreau

Larry Hrynew and Heritage Education Funds Inc. (formerly known as Allianz Education Funds Inc., formerly known as Canadian American Financial Corp. (Canada) Limited> Lenczner Slaght Royce Smith Griffin LLP> Eli Lederman, Jon Laxer, Constanza Pauchulo

2. Canada (Attorney General) v. Federation of Law Societies of Canada (SCC, BC)

In ruling that certain regulations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* infringed on the independence of the Bar, the SCC re-affirmed the principle that lawyers act for clients and not as government enforcers.

"The decision, which protects clients' interests rather than lawyers' interests, gives clients confidence that their lawyers will not turn into state agents and write reports for the authorities on what clients are doing," says John Hunter of Hunter Litigation Chambers in Vancouver, who represented the Federation of Law Societies of Canada.

The impugned regulations gave the government power to examine lawyers' financial records to detect and investigate suspicious transfers. The regulations also required lawyers to report suspicious transactions.

Hunter's co-counsel, Roy Millen of Blake, Cassels & Graydon LLP in Vancouver, says the language used by the SCC in upholding the BCCA's ruling that lawyers should be exempt from these regulations, as they compromised the confidentiality that is at the heart of the solicitor-client relationship, is very significant. "The concept that the legislature can't turn lawyers into state agents is going to last a long time," he says.

Millen also believes the decision will have consequences for the business of law as it evolves. "The implications could well extend not only to dealing between lawyers and the state and lawyers and their clients, but also to law firm regulation and the relationship between law societies and lawyers in the context of the business models that lawyers and law firms might wish to adopt in the future," he says.

Counsel (CLIENT> LAW FIRM>LAWYERS)

Canada (Attorney General)> Justice Canada> Christoper Rupar, Jan Brongers

Federation of Law Societies of Canada> Hunter Litigation Chambers> John Hunter

Federation of Law Societies of Canada> Blake, Cassels & Graydon LLP> Roy Millen

Criminal Lawyers' Association (Ontario)> Stockwoods LLP> Michal Fairburn, Justin Safayeni

Canadian Civil Liberties Association> Osler, Hoskin & Harcourt LLP> Mahmud Jamal, David Ranking, Pierre-Alexander Henri

Law Society of British Columbia> McCarthy Tétrault LLP> Leonard Doust, Michael Feder

Canadian Bar Association> Lawson Lundell LLP> Craig Ferris, Laura Bevan

Advocates' Society> Stern Landsman Clark LLP> Paul Stern

Advocates' Society> Paliare Roland Rosenberg Rothstein LLP> Robert Centa

Barreau du Québec, Chambre des notaires du Québec> Lavery, de Billy> Raymond Doray, Loïc Berdnikoff

3. Guindon v. Canada (SCC, Fed. Ct., Qué.)

While the Supreme Court of Canada's recent decision in *Guindon v. Canada* upholding the constitutionality of administrative monetary penalties (AMPs) is not likely to end the controversy or the litigation surrounding them, it will undoubtedly intensify the business community's focus on regulatory compliance and due diligence.

In recent years, AMPs have become an increasingly common feature of sanctions available under Canadian business statutes. Now that the SCC has definitively categorized offences giving rise to AMPs as civil proceedings, prosecutors and regulators will continue to have a much easier time proving them.

"*Guindon* emphasizes that robust due diligence systems should be in place to support such a defence because the constitutional argument is no longer available," says Kenneth Jull of Baker & McKenzie LLP in Toronto, co-counsel for Julie Guindon with Adam Aptowitzer, Alexandra Tzannidakis and Arthur Drache of Drache Aptowitzer LLP in Ottawa.

In the high court, a 4–3 majority held that administrative monetary penalties do not offend constitutional rights because they are not criminal in nature and do not lead to the imposition of true penal consequences. The minority declined to deal with the argument, ruling that the constitutional argument should not even be considered because Julie Guindon, the lawyer who launched the appeal, failed to give proper notice to federal and provincial authorities.

"In a practical sense, the battleground has now shifted from arguments about the constitutionality of AMPs to a determination of the procedural rights available to litigants exposed to such penalties," Jull says. "Arguments in cases involving AMP sanctions will now focus on such things as disclosure rights, rights to an oral hearing and appeal rights."

Counsel (CLIENT> LAW FIRM>LAWYERS)

Julie Guindon> Drache Aptowitzer LLP> Adam Aptowitzer, Alexandra Tzannidakis, Arthur Drache

Julie Guindon> Baker & McKenzie LLP> Kenneth Jull

Her Majesty the Queen> Justice Canada> Gordon Bourgard, Eric Noble

Attorney General of Ontario> Ministry of Attorney General (ON)> Zachary Green

Attorney General of Quebec> Department of Justice (QC)> Abdou Thiaw

Chartered Professional Accountants Canada> Norton Rose Fulbright Canada LLP> Domenic Belley, Vincent Dionne

Canadian Constitution Foundation> McCarthy Tétrault LLP> Darryl Cruz, Brandon Kain, Kate Findlay

4. Saskatchewan Federation of Labour v. Saskatchewan; Mounted Police Association of Ontario v. Canada (Attorney General); Meredith v. Canada (Attorney General) (SCC)

For almost 30 years, the Supreme Court of Canada has been equivocating about the extent to which the constitutional rights to freedom of association and speech impact labour relations. Finally, the three cases known as the "Labour Trilogy" have enshrined in law the right to strike as a fundamental component of the right to bargain collectively.

The trilogy embraced the judgments in *Mounted Police Association of Ontario v. Canada*, *Meredith v. Canada* and *Saskatchewan Federation of Labour v. Saskatchewan*.

Both *Mounted Police* and *Meredith* involved the RCMP. In these cases, the government held that the unique bargaining scheme that the federal government had imposed on the RCMP violated s. 2(d) (freedom of association) of the Charter. In *Saskatchewan Federation of Labour,* the court went further: faced with essential services legislation, the court ruled that s. 2(d) protection included the right to strike as an "indispensable component" of the right to bargain collectively.

"The decisions in these cases turned the jurisprudence on its head," says John Craig of Fasken Martineau DuMoulin LLP in Toronto. "The majority's reasons in *Saskatchewan*, in particular, don't seem to reference legal principle so much as they reflect the political and social views of the judges."

But Chris Paliare of Paliare Roland Rosenberg Rothstein LLP in Toronto says the trilogy makes sense. "The very notion of collective bargaining implies that there is an imbalance between workers and employers," he says. "So unless you have an inherently anti-union bent, you have to accept that workers need the fundamental right to bargain collectively, to be protected from unfair labour practices and to take strike action in order to address that imbalance."

From a legislative perspective, statutory limits on collective bargaining will be subject to greater scrutiny and essential services legislation limiting the right to strike will need to go no further than necessary. From a dispute

resolution perspective, courts, labour relations boards and arbitrators will have to take the trilogy into account, which could result in narrowing interpretations of employer rights.

"The overarching effect of these decisions is to move labour relations in Canada further away from a question of economic relationships to one of constitutional rights," notes Michael Torrance of Toronto, writing in Norton Rose Fulbright Canada LLP's *Legal Update*. "Consequently, employers can likely expect more permissive treatment of unions and their membership wherever a linkage to freedom of association or freedom of expression can be found."

And while to many observers the trilogy sounds primarily in the public sector, the restraints put on governments seeking to inhibit strikes by categorizing certain sectors as essential services could see the private sector indirectly affected as strike action without government interference become a more appealing alternative. Similarly, private enterprise that outsources from the public sector could also face greater potential for strikes.

Counsel (CLIENT> LAW FIRM>LAWYERS)

Saskatchewan Federation of Labour (in its own right and on behalf of the unions and workers in the Province of Saskatchewan), Amalgamated Transit Union, Local 588, Canadian Office and Professional Employees' Union, Local 397, Canadian Union of Public Employees, Locals 7 and 4828, Communications, Energy and Paperworkers' Union of Canada and its Locals,> Gerrand Rath Johnson LLP> Rick Engel

Saskatchewan Federation of Labour (in its own right and on behalf of the unions and workers in the Province of Saskatchewan), Amalgamated Transit Union, Local 588, Canadian Office and Professional Employees' Union, Local 397, Canadian Union of Public Employees, Locals 7 and 4828, Communications, Energy and Paperworkers' Union of Canada and its Locals,> Victory Square Law Office LLP> Craig Bavis

Saskatchewan Federation of Labour (in its own right and on behalf of the unions and workers in the Province of Saskatchewan), Amalgamated Transit Union, Local 588, Canadian Office and Professional Employees' Union, Local 397, Canadian Union of Public Employees, Locals 7 and 4828, Communications, Energy and Paperworkers' Union of Canada and its Locals,> The W Law Group> Peter Barnacle

Her Majesty The Queen in Right of the Province of Saskatchewan> Ministry of Justice (SK)> Graeme Mitchell, Barbara Mysko, Katherine Roy

Attorney General of Ontario> Ministry of the Attorney General (ON)> Robert Charney, Sarah Wright

Attorney General of Quebec> Ministry of Justice (QC)> Caroline Renaud, Amélie Pelletier Desrosiers

Attorney General of British Columbia> Ministry of Justice (BC)> Keith Evans

Attorney General of Alberta> Department of Justice and Solicitor General> Roderick Wiltshire

Attorney General of Newfoundland and Labrador> Department of Justice and Public Safety> Chantelle MacDonald Newhook

Saskatchewan Union of Nurses> BainbridgeJodouinCheecham> Gary Bainbridge, Marcus Davies

SIEU-West> Plaxton Jensen> Drew Plaxton

United Nurses of Alberta, Alberta Federation of Labour> Chivers Carpenter> Ritu Khullar, Vanessa Cosco

Professional Institute of the Public Service of Canada> Goldblatt Partners LLP> Peter Engelmann, Colleen Bauman

Canadian Constitution Foundation> McCarthy Tétrault LLP> Darryl Cruz, Brandon Kain

Air Canada Pilots' Association> Nelligan, O'Brien Payne LLP> Steve Waller, Christopher Rootham

British Columbia Civil Liberties Association> Moore Edgar Lyster> Lindsay Lyster

Conseil de patronat du Québec> Norton Rose Fulbright Canada LLP> Louise Laplante, Nancy Ménard-Cheng, Sébastien Beauregard

Canadian Employers Council> Fasken Martineau Dumoulin LLP> John Craig, Christopher Pigott

Canadian Union of Postal Workers, International Association of Machinists and Aerospace Workers> Cavalluzzo Shilton McIntyre Cornish LLP> Paul Cavalluzzo, Adrienne Telford

The British Columbia Teachers' Federation, Hospital Employees' Union> Farris, Vaughan, Wills & Murphy LLP> Joseph Arvay, Catherine Boies Parker

Canadian Labour Congress> Goldblatt Partners LLP> Steven Barrett, Ethan Poskanzer

Public Service Alliance of Canada> Raven, Cameron, Ballantyne & Yazbeck LLP> Andrew Raven, Andrew Astritis

Alberta Union of Provincial Employees> Nugent Law Office> Patrick Nugent, Tamara Friesen

Confédération des syndicats nationaux> Stikeman Ellliott LLP> Éric Lévesque

Confédération des syndicats nationaux> Laroche Martin> Benoît Laurin

Regina Qu'Appelle Regional Health Authority, the Cypress Regional Health Authority, the Five Hills Regional Health Authority, the Heartland Regional Health Authority, the Sunrise Regional Health Authority, the Prince Albert Parkland Regional Health Authority and the Saskatoon Regional Health Authority.> Saskatoon Health Region> Evert van Olst

Regina Qu'Appelle Regional Health Authority, the Cypress Regional Health Authority, the Five Hills Regional Health Authority, the Heartland Regional Health Authority, the Sunrise Regional Health Authority, the Prince Albert Parkland Regional Health Authority and the Saskatoon Regional Health Authority.> MacPherson Leslie & Tyerman LLP> Leah Schatz

National Union of Public and General Employees> Champ & Associates> Paul Champ, Bijon Roy

Canada Post Corporation, Air Canada> Fasken Martineau Dumoulin LLP> Brian Burkett

Mounted Police Association of Ontario and British Columbia Mounted Police Professional Association, on their own

behalf and on behalf of all members and employees of the Royal Canadian Mounted Police> Laura Young Law Offices> Laura Young

Mounted Police Association of Ontario and British Columbia Mounted Police Professional Association, on their own behalf and on behalf of all members and employees of the Royal Canadian Mounted Police> Phillips Gill LLP> Patric Senson

Attorney General for Canada> Justice Canada> Peter Southey, Donnaree Nygard, Kathryn Hucal

Attorney General of Ontario> Attorney General (ON)> Robin Basu, Michael Dunn

Attorney General of British Columbia> Ministry of Justice (BC)> Jonathan Penner, Keith Evans, Karen Horsman

Her Majesty The Queen in Right of the Province of Saskatchewan> Ministry of Justice (SK)> Graeme Mitchell

Attorney General of Alberta> Department of Justice and Solicitor General> Roderick Wiltshire

British Columbia Civil Liberties Association> Moore Edgar Lyster> Lindsay Lyster

Mounted Police Members' Legal Fund> Fasken Martineau Dumoulin LLP> John Craig, Christopher Pigott

Canadian Labour Congress> Goldblatt Partners LLP> Steven Barrett, Ethan Poskanzer

Public Service Alliance of Canada> Raven, Cameron, Ballantyne & Yazbeck LLP> Andrew Raven, Andrew Astritis, Morgan Rowe

Confédération des syndicats nationaux> Stikeman Ellliott LLP> Éric Lévesque

Confédération des syndicats nationaux> Laroche Martin> Benoît Laurin

Association des membres de la Police Montée du Québec Inc.> Duggan Avocats> James Duggan, Alexander Duggan

Canadian Police Association> Paliare Roland Rosenberg Rothstein LLP> Ian Roland, Michael Fenrick

Canadian Civil Liberties Association> Bennett Jones LLP> Ranjan Agarwal, Ashley Paterson

Robert Meredith and Brian Roach (representing all members of the Royal Canadian Mounted Police)> Nelligan, O'Brien Payne LLP> Christopher Rootham, Alison McEwen

Attorney General for Canada> Justice Canada> Peter Southey, Donnaree Nygard, J. Sanderson Graham

Attorney General of Ontario> Attorney General (ON)> Robin Basu, Michael Dunn

Attorney General of British Columbia> Ministry of Justice (BC)> Karen Horsman, Jonathan Penner, Keith Evans

Attorney General for Saskatchewan> Ministry of Justice (SK)> Graeme Mitchell

Attorney General of Alberta> Department of Justice and Solicitor General> Roderick Wiltshire

Canadian Labour Congress> Goldblatt Partners LLP> Steven Barrett, Ethan Poskanzer

Professional Institute of the Public Service of Canada> Fay Faraday> Fay Faraday

Canadian Union of Public Employees, Local 675> Canadian Union of Public Employees, Local 675> Annick Desjardins

Public Service Alliance of Canada> Raven, Cameron, Ballantyne & Yazbeck LLP> Andrew Raven, Andrew Astritis, Morgan Rowe

Confédération des syndicats nationaux> Stikeman Ellliott LLP> Éric Lévesque

5. Tervita v. Commissioner of Competition (SCC, BC)

The Supreme Court of Canada’s decision in *Tervita Corporation v. Commissioner of Competition* is the first decision from the high court dealing with the efficiencies defence and the “prevention” of competition test. As such, it is one that will have significant implications for companies planning mergers.

The decision stemmed from a Competition Tribunal decision in May 2012 that ordered CCS Corporation (now Tervita), purchaser of a company that owned a proposed British Columbia landfill site, to divest itself of the site on grounds that the transaction would lead to a substantial prevention of competition in the market for the disposal of hazardous waste within BC. The Federal Court of Appeal upheld the decision.

One significant aspect of Tervita was that the landfill in question was not yet operational but was considered a poised entrant. The Bureau maintained that notwithstanding the relatively small $6-million purchase price, the merger would leave CCS as the only secure landfill operator in the region.

“The Commissioner’s theory of competitive harm was premised on the argument that the proposed merger would result in a substantial prevention of competition rather than the traditional argument that it would produce a substantial lessening of competition,” says Anita Banicevic of Davies Ward Phillips & Vineberg LLP in Toronto.

While the court cautioned against looking too far ahead in applying the prevention test and stated that the time frame to determine whether a merging party would enter the market “but for” the merger had to be discernible, it upheld the FCA’s conclusion that the merger would likely result in a substantial prevention of competition.

In dealing with the efficiencies defence, the court found that the Commissioner of Competition had not met the burden of quantifying the anti-competitive effect of the merger and had failed to prove any qualitative anti-competitive effects. Consequently, the efficiency gains proven by Tervita, albeit modest, were not offset in any way, allowing the company’s efficiencies defence to succeed.

“I would say that apart from the specific mixed outcome, the Bureau emerged a winner because the court materially

clarified the law, and that's part of the Bureau's objective in pursuing these cases," says Anthony Baldanza of Fasken Martineau DuMoulin LLP in Toronto. "The Bureau now knows that it has to quantify anti-competitive effects to meet the efficiencies defence, and I doubt that failing to do so will happen again."

Counsel (CLIENT> LAW FIRM>LAWYERS)

Tervita Corporation, Complete Environmental Inc., Babkirk Land Services Inc.> Torys LLP> John Laskin, Linda Plumpton, Dany Assaf, Crawford Smith

Commissioner of Competition> Justice Canada> Christopher Rupar, John Tyhurst, Jonathan Hood

6. Theratechnologies Inc. v. 121851 Canada Inc. (SCC, Qué.)

In this decision, the Supreme Court of Canada put some teeth into the standard that plaintiffs must meet to satisfy the leave threshold for filing a securities class action. The upshot is that business will be in a much better position to avoid undue exposure to dubious securities class actions.

The court ruled that the requirement for leave mandated by the governing statutes in most provinces was intended to be a "meaningful screening mechanism" intended to prevent "costly strike suits with little chance of success." Accordingly, plaintiffs had to show more than a mere possibility of success, as some courts had held; rather, the test required "a reasonable or realistic chance that the action will succeed." The test, therefore, necessitated a preliminary assessment of the merits of the claims based on a review of the evidence as well as the law.

"The fact that there is an arguable chance of success is no longer sufficient to obtain leave," says Pierre Lefebvre of Fasken Martineau DuMoulin LLP in Montréal, who with colleague Philippe Charest-Beaudry represented the defendant Theratechnologies. "There must be a determination of whether success is a reasonable prospect — and that changes the whole dimension of the leave test."

Counsel (CLIENT> LAW FIRM>LAWYERS)

Theratechnologies inc., Yves Rosconi, Paul Pommier> Fasken Martineau Dumoulin LLP> Pierre Lefebvre, Philippe Charest-Beaudry

121851 Canada inc.> Savonitto & Ass. inc.> Michael Savonitto, Vicky Berthiaume

Mouvement d'éducation et de défense des actionnaires> Dussault Gervais Thivierge> Éric Lemay

Mouvement d'éducation et de défense des actionnaires> Siskinds LLP> Dimitri Lascaris

7. Moore v. Getahun (OCA)

The Ontario Court of Appeal's decision in *Moore v. Getahun* came as a relief to the profession in the wake of a first-level decision that in no uncertain terms challenged longstanding practices regarding counsel's communication with experts.

"The common understanding had been that counsel may interact with experts to ensure that the experts understand their role, the difference between the way the court approaches scientific questions and how those questions might be approached from a purely scientific perspective, the court's process, and that they are not being asked to find facts but to draw conclusions on the basis of facts presented to them," says Domenic Crolla in Gowling Lafleur Henderson LLP's Ottawa office. "Counsel may also test the conclusions that the experts have drawn by way of understanding the four corners of their opinion."

The issue relating to expert evidence arose in *Moore v. Getahun* when it emerged at trial that one of the defendants' experts had changed his report in response to certain suggestions by counsel during a 90-minute telephone conversation.

In no uncertain language, Justice Janet Wilson concluded "that counsel's prior practice of reviewing draft reports should stop," that "discussions or meetings between counsel and an expert to review and shape a draft report are no longer acceptable," and that "the practice of discussing draft reports with counsel is improper and undermines both the purpose of Rule 53.03 as well as the expert's credibility and neutrality."

Justice Wilson's comments, which effectively condemned and prohibited established practices in the litigation Bar generally, caused an uproar among counsel throughout Canada. Ultimately, the appeal attracted intervention from the Criminal Lawyers' Association, the Ontario Trial Lawyers Association, The Holland Group (representing both sides of the medical malpractice Bar),
the Canadian Defence Lawyers Association, The Advocates' Society and the Canadian Institute of Chartered Business Valuators.

Despite the outrage at the initial decision, finding common ground was difficult on appeal.

"All of us had a different starting point, but eventually we realized that we had to hammer out something if we were going to get something good out of the court," says Paul Pape, who with colleague Joanna Nairn of Pape Barristers Professional Corporation in Toronto represented the defendant hospital and its doctors on appeal. "So we did, and got a great decision."

Indeed. The Ontario Court of Appeal unanimously ruled that there was no impropriety in reviewing draft reports with experts, and that such reports are immune from production unless there is a reasonable basis to suspect that counsel improperly influenced the expert.

Counsel (CLIENT> LAW FIRM>LAWYERS)

Blake Moore> Lenczner Slaght Royce Smith Griffin LLP> Thomas Curry, Jaan Lilles

Dr. Tajedin Getahun, The Scarborough Hospital – General Division, Dr. John Doe, Dr. Jack Doe> Pape Barristers Professional Corporation> Paul Pape, Joanna Nairn

Criminal Lawyers' Association> Henein Hutchinson LLP> Matthew Gourlay, Samuel Walker

Ontario Trial Lawyers Association> Thomson Rogers> Richard Halpern

Ontario Trial Lawyers Association> Oatley Vigmond Personal Injury Lawyers LLP> Brian Cameron

The Holland Group> McCarthy Tétrault LLP> William Black

The Holland Group> Morse Shannon LLP> Jerome Morse

The Holland Group> Borden Ladner Gervais LLP> John Morris

Canadian Defence Lawyers Association> Beard Winter LLP> John Olah

Canadian Defence Lawyers Association> Dutton Brock LLP> Stephen Libin

Canadian Institute of Chartered Business Valuators> Aird & Berlis LLP> Courtney Raphael

Advocates' Society> Paliare Roland Rosenberg Rothstein LLP> Linda Rothstein, Jean-Claude Killey

8. White Burgess Langille Inman v. Abbott and Haliburton Co. (SCC, NS)

On the heels of *Moore,* judicial guidance regarding expert evidence took another important step forward in *White Burgess.*

"The case provides helpful guidelines as to the duties owed by experts and when they would be seen not to be independent," says Alan D'Silva, a partner at Stikeman Elliott LLP in Toronto, who with his colleagues James Wilson and Aaron Kreaden represented White Burgess. "The court clarified that an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight of the evidence if admitted."

Despite clarifying the requirement of independence and impartiality, however, the court set a very low threshold for determining whether the requirements had been met. The test was not one of "apparent bias" in terms of whether a reasonable observer would question the expert's independence; rather, the inquiry was whether the relationship between the expert and the client or the expert's interest in the case otherwise made her unable or unwilling to carry out their duty to the court.

"The test will make it impossibly hard to knock out an expert," one veteran litigator told *Lexpert*.

But the low threshold also has salubrious practical implications for some segments of the business community.

“The Supreme Court’s practical approach to expert bias should be encouraging to defendants in product liability cases,” writes Christopher Horkins of Cassels Brock & Blackwell LLP in Toronto. “Where defendant manufacturers are large, multi-national entities and the risk of plaintiffs seizing on an apparent ‘connection’ between the expert and defendant are heightened, a more restrictive rule would potentially place an unreasonable limit on the number of available experts. Although the court retains its discretion to consider whether the nature and extent of any such connection warrants exclusion, the mere existence of a connection will not be enough to disqualify an expert.”

Counsel (CLIENT> LAW FIRM>LAWYERS)

White Burgess Langille Inman, carrying on business as WBLI Chartered Accountants, R. Brian Burgess> Stikeman Elliott LLP> Alan d'Silva, James Wilson, Aaron Kreaden

Abbott and Haliburton Company Limited, A.W. Allen & Son Limited, Berwick Building Supplies Limited, Bishop’s Falls Building Supplies Limited, Arthur Boudreau & Fils Ltée, Brennan Contractors& Supplies Ltd., F. J. Brideau & Fils Limitée, Cabot Building Supplies Company (1988) Limited, Robert Churchill Building Supplies Limited, CDL Holdings Limited, formerly Chester Dawe Limited, Fraser Supplies (1980) Ltd., R. D. Gillis Building Supplies Limited, Yvon Godin Ltd., Truro Wood Industries Limited/Home Care Properties Limited, Hann’s Hardware and Sporting Goods Limited, Harbour Breton Building Supplies Limited, Hillier’s Trades Limited, Hubcraft Building Supplies Limited, Lumbermart Limited, Maple Leaf Farm Supplies Limited, S.W. Mifflin Ltd., Nauss Brothers Limited, O’Leary Farmers’ Co-operative Ass’n. Ltd., Pellerin Building Supplies Inc., Pleasant Supplies Incorporated, J. I. Pritchett & Sons Limited, Centre Multi-Décor de Richibucto Ltée, U. J. Robichaud & Sons Woodworkers Limited, Quincaillerie Saint-Louis Ltée, R & J Swinamer’s Supplies Limited, 508686 N.B. INC. operating as T.N.T. Insulation and Building Supplies, Taylor Lumber and Building Supplies Limited, Two by Four Lumber Sales Ltd., Walbourne Enterprises Ltd., Western Bay Hardware Limited, White’s Construction Limited, D. J. Williams and Sons Limited and Woodland Building Supplies Limited> groupe Murphy group> Brian Murphy

Abbott and Haliburton Company Limited, A.W. Allen & Son Limited, Berwick Building Supplies Limited, Bishop’s Falls Building Supplies Limited, Arthur Boudreau & Fils Ltée, Brennan Contractors& Supplies Ltd., F. J. Brideau & Fils Limitée, Cabot Building Supplies Company (1988) Limited, Robert Churchill Building Supplies Limited, CDL Holdings Limited, formerly Chester Dawe Limited, Fraser Supplies (1980) Ltd., R. D. Gillis Building Supplies Limited, Yvon Godin Ltd., Truro Wood Industries Limited/Home Care Properties Limited, Hann’s Hardware and Sporting Goods Limited, Harbour Breton Building Supplies Limited, Hillier’s Trades Limited, Hubcraft Building Supplies Limited, Lumbermart Limited, Maple Leaf Farm Supplies Limited, S.W. Mifflin Ltd., Nauss Brothers Limited, O’Leary Farmers’ Co-operative Ass’n. Ltd., Pellerin Building Supplies Inc., Pleasant Supplies Incorporated, J. I. Pritchett & Sons Limited, Centre Multi-Décor de Richibucto Ltée, U. J. Robichaud & Sons Woodworkers Limited, Quincaillerie Saint-Louis Ltée, R & J Swinamer’s Supplies Limited, 508686 N.B. INC. operating as T.N.T. Insulation and Building Supplies, Taylor Lumber and Building Supplies Limited, Two by Four Lumber Sales Ltd., Walbourne Enterprises Ltd., Western Bay Hardware Limited, White’s Construction Limited, D. J. Williams and Sons Limited and Woodland Building Supplies Limited> Lenczner Slaght Royce Smith Griffin LLP> Jon Laxer

Attorney General of Canada> Justice Canada> Michael Morris

Criminal Lawyers Association (Ontario)> Henein Hutchinson LLP> Matthew Gourlay

9. Potter v. New Brunswick Legal Aid Services Commission (SCC, NB)

Potter v. New Brunswick is the Supreme Court's most comprehensive treatment of the law of constructive dismissal since its 1997 decision in *Farber v. Royal Trust Co.*

"The case dealt with a number of issues that had been outstanding for some time, including questions relating to the onus of demonstrating the constructive dismissal and the need for fairness and good faith in dealing with employees," says Eugene (Pete) Mockler of E.J. Mockler Professional Corporation in Fredericton, who acted as counsel to David Potter.

On the facts of the case, the court ruled that an administrative suspension, absent legitimate business reasons for it, can amount to a constructive dismissal. This can be so even if the suspension is with pay, so long as it alters an essential term of employment, including, in certain cases, the duty not to withhold work from employees in bad faith.

"The case suggests that there is a much heavier onus on employers to justify their conduct than there has been in the past," Mockler says.

Potter is also notable as the first case to apply *Bhasin v. Hrynew* in an employment law context.

Counsel (CLIENT> LAW FIRM>LAWYERS)

David M. Potter> E.J. Mockler Professional Corporation> Eugene Mockler

David M. Potter> Power Law> Perri Ravon

New Brunswick Legal Aid Services Commission, a statutory body corporate pursuant to a special act of the Province of New Brunswick> Stewart McKelvey> Clarence Bennett, Josie Marks

10. Grant v. Winnipeg Regional Health Authority et al. (Man. CA)

The proposition enunciated in this case is simple but important: Charter rights can in certain cases extend to the estates of deceased persons whose Charter rights were violated.

"The Manitoba Court of Appeal cleared up what had been the general misunderstanding that previous case law stood for the blanket proposition that no Charter claim could be advanced on behalf of a deceased person," says Murray Trachtenberg in Winnipeg, who represented the plaintiff, Esther Grant. "The court accepted the principle there must be a remedy available where the breach contributed to the death."

Grant v. Winnipeg, however, is also significant for its potential impact on the area of privacy law.

The court ruled that the tort of intrusion upon seclusion may allow family members who have been impacted by the breach of another member of the family's privacy rights to advance their own claims.

Counsel (CLIENT> LAW FIRM>LAWYERS)

Esther Joyce Grant (on her own behalf and in her capacity as administrator of the Estate of Brian Lloyd Sinclair)> Murray Trachtenberg> Murray Trachtenberg

Esther Joyce Grant (on her own behalf and in her capacity as administrator of the Estate of Brian Lloyd Sinclair)> Zbogar Advocate Professional Corporation> Vilko Zbogar

Winnipeg Regional Health Authority, Brock Wright, Heidi Graham, Susan Alcock, Cathy Janke, Jan Kozubal, Elizabeth Franklin, Wendy Krongold, Robert Malo, Hugo Torres-Cereceda, Honora Kearney, Val Hiebert, Todd Torfason, Lori Stevens, Jordan Loechner, Jane Doe and John Doe> Green & Dixon> Kelly Dickson

Lawyer(s):
Neil Finkelstein, Eli S. Lederman, John J.L. Hunter, Roy Millen, John D. R. Craig, Chris G. Paliare, Anita Banicevic, Domenic A. Crolla, Alan L.W. D'Silva, Paul J. Pape

Firm(s):
McCarthy Tétrault LLP, Lenczner Slaght Royce Smith Griffin LLP, Blake, Cassels & Graydon LLP, Fasken Martineau DuMoulin LLP, Paliare Roland Rosenberg Rothstein LLP, Davies Ward Phillips & Vineberg LLP, Gowling Lafleur Henderson LLP, Pape Barristers Professional Corporation, Stikeman Elliott LLP

Practice Area(s):
Labour Relations, Litigation - Corporate Commercial, Litigation - Intellectual Property, Litigation - Public Law, Litigation - Securities, Medical Negligence, Class Actions, Personal Injury, Employment Law

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