Top court’s 2009 track record: Fish ‘The Great Dissenter’

McLachlin, Binnie, Charron, LeBel, Rothstein led majorities

CRISTIN SCHMITZ  OTTAWA

Chief Justice Beverley McLachlin led the Supreme Court in many ways — more than one last year, reveals a Lawyers Weekly analysis of the Supreme Court’s jurisprudential output in 2009.

Not only did the chief justice write more majority opinions than anyone else last year — six — but she also did much of the court’s intellectual heavy lifting. She penned two judgments which revolutionized the law of defamation, and co-authored, with Justice Louise Charron, a landmark overhaul of the framework for the exclusion of evidence under s. 24(2) of the Charter.

One could argue that Justice Marie Deschamps went her own way most often.

Interesting patterns emerged when The Lawyers Weekly examined the quantitative and substantive written output of the nine judges in 2009, although it should be borne in mind this is merely a 12-month snapshot (see table on p. 27).

Looking at the opinions the individual judges wrote last year (as distinct from judgments they simply signed on to without comment) Chief Justice McLachlin and Justice Charron were the most solid majoritarian — in the sense that they did the least concurring and dissenting, both wrote a total of nine majority or unanimous opinions, and Justice Charron wrote more unanimous judgments than anyone else — five.

Justice Charron and Justice Morris Fish spoke most often for the court on criminal law — although Fish’s written output could be dubbed “The Great Dissenter” since he authored in addition nine dissents — more than twice as many as any of his colleagues. The judges who wrote the bulk of the common law for the nation last year — i.e. authored the largest total number of unanimous and majority opinions — were Chief Justice McLachlin (9) and Justices Louise Charron (9), Louis LeBel (9) Marshall Rothstein (9), and Ian Binnie (8).

Justices Rosalie Abella and Fish also each authored a total of seven unanimous or majority judgments — a substantial number — but they both wrote in addition an equal or greater number of concurrences and dissents.

One could argue that Justice Marie Deschamps went her own way most often. She wrote just four unanimous or majority judgments, and penned a total of nine concurrences and dissents.

The court’s newest member, Justice Thomas Cromwell, showed an individualistic streak in his writings too. He dissented in four of the six opinions he wrote last year, but perhaps little can be deduced from this since he only began sitting at the beginning of 2009.

Below is a thumbnail sketch of each judge’s written output in 2009 (with apologies for the unavoidable significant omissions):

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Letter to judge crossed the line, says Quebec Court of Appeal

LUI S MILLAN  MONTREAL

Lawyers can put pen to paper to criticize the legal system so long as it done with objectivity, moderation and dignity, ruled the Quebec Court of Appeal in an eye-opening judgment. This may prove to be the last chapter in a sorry saga that witnessed a judge being reprimanded by his peers and a defense lawyer suspended for 21 days.

But there are misgivings that the ruling may produce a chilling effect, prompting lawyers to think twice before voicing their concerns about the legal system for fear of being reprimanded by their law society.

“The ruling may lead to unease and possibly trigger a chilling effect because of the difficulties surrounding the appreciation over what constitutes criticism that is objective, moderate and dignified,” remarked Pierre Trudel, a law professor at the Université de Montréal. “By definition, a criticism is not objective. When criticizing, one does it beginning with prudence.”

The case harkens back to 2001 when Quebec lawyer Gilles Doré filed a complaint before the Canadian Judicial Council (CJC) over the attitude, conduct and behavior of Quebec Superior Court Justice Jean-Guy Boilard during a bail hearing. Justice Boilard, a distinguished criminal-law specialist, has been chastised for his tendency to use the bench unjustly to disparage counsel who appear before him.
NS Barristers’ Society forecasts future
Continuing legal education must address broader issues, says group

DONALIEE MOUTON  HALIFAX

The future will be significantly different for lawyers in Nova Scotia. The provincial barristers’ society has released a discussion paper exploring what lies ahead for lawyers for continuing professional development and how to competently meet the challenges of a brave new legal world.

“The issues facing lawyers individually and in firms go far beyond what has traditionally been included in continuing legal education,” Darrel Pink, executive director of the Nova Scotia Barristers’ Society, said in an interview.

Those issues were explored as part of the “Futures Project”, established in late 2008 to address questions surrounding long-term competence for the profession and to consider how the practice of law should adapt to reflect the changing times. The initiative also generated Nova Scotia’s first substantial research into public perceptions of the legal profession.

“This is the first time the society has undertaken this comprehensive a consultation,” said Pink.

Lawyers across the province as well as the public were asked for their input. The latter, interestingly, identified one key area for improvement. “The public told us they need more help in communicating with their clients,” said Pink.

The futures team identified key trends that are shaping the world of lawyering today. Those trends fall into four distinct categories: demographic, technology, justice and market.

Then there are the challenges for the profession — challenges that ‘affect lawyers’ ability to practise successfully and to feel good about what they do,” according to the Futures Project — Discussion Paper.

Causing angst for lawyers is a very disappointing issue. This includes polarization of legal services; conflict between law as a profession and law as a business; intergenerational conflict; and market changes.

“acted in a manner that was high handed, arbitrary, reckless, abusive, improper and inconsistent with the Honour of the Crown and the administration of justice,” said Pink.

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“We take the SCC’s opinion on the constitutionality of a national securities regulator,” said Pink.

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Legal Education Society of Alberta to re-examine its professional education guidelines for entry into practice and market. The government elected not to appeal that ruling and instead asked the courts to determine whether Canada’s polygamist law is constitutional.

Legal relief for Haiti
In the aftermath of Haiti’s devastating earthquake this month, the Canadian Bar Association (CBA) announced it would set up a website to link Canadian and permanent residents who wish to sponsor the immigration of Haitian family members with Canadian immigration lawyers willing to review the necessary applications and paperwork for free.

CBA president Kevin Carroll also wrote Immigration Minister Jason Kenney Jan. 13, urging the Canadian government to “take immediate steps to expedite the processing of immigration applications for those affected by the earthquake.”

Carroll asked the government as well to expand its humanitarian assistance program to bring here “on a priority basis” Haitians with ties to Canada. The CBA noted the government previously expedited the immigration applications of more than 400 victims of Typhoon Ketsana in the Philippines.

New rules coming to Alberta
The first major overhaul in three decades of the Alberta Rules of Court is slated to come on steam Nov. 1. The Alberta Law Reform Institute has been working on the mammoth task since 2001. The new rules, which are the product of widespread consultation, have not yet been unveiled but Alberta’s Justice Department is said to be nearly finished the final version, which will be posted on the website of Alberta’s Queen’s Printer. The new rules are designed to be clear and to assist people access a speedy, cost-efficient and fair civil justice system.

Alberta Justice is working with the Legal Education Society of Alberta to develop training materials, in consultation with court representatives.
**BCCA says criminal law does not apply to injection site**

**GARY OAKES VICTORIA**

A divided B.C. Court of Appeal has declared that a federal drug law does not apply to the safe injection site for addicts in Vancouver’s notorious Downtown Eastside because of the doctrine of interjurisdictional immunity.

Joseph Arway was the lead counsel for the PHS Community Services Society (PHS) which operates Vancouver’s Downtown Eastside Safe Injection Site (Insite).

He told *The Lawyers Weekly* that the majority judgment “was a triple whammy: the law violated a Charter right, that decision prompted the federal government to temporarily exempt Insite workers from prosecution for possession and trafficking of illegal narcotics under ss. 4(1) and 5(1) of the Controlled Drugs and Substances Act (CDSA).”

Joelee Bellemare, press secretary to Health Minister Leona Aylsham, told the national legal newspaper that while the government of Canada respects the court’s decision, it is disappointed with the outcome.

“The Government is reviewing the decision carefully,” she added. “Until this review is complete, it would be inappropriate to speculate on future action on the part of the Government of Canada.”

After a trial in B.C. Supreme Court, the sections in question were declared constitutionally invalid as being inconsistent with the Charter and dismissed PHS’s application for a declaration that the sections don’t apply to Insite by reason of the interjurisdictional immunity doctrine.

Justice Huddart said that because the CJC refused to remove the onus of proving the federal power to do so on the applicants, the federal government was entitled to remove any onus of proving the federal power to do so on the applicants.

Justice Huddart gave the second ground “that the inference of the crime power can be justified by the potential for harm to public health or safety.”

“By protecting certain provincial decision-making from federal interference, the decision brings about an incremental but significant shift in favour of provincial powers,” Dalziel added.

In concurrence for allowing PHS’s cross-appeal, Justice Anne Rowles said the evidence establishes that the application of the sections in question “would engage the s. 7 Charter interests of life, liberty and security of the person of the personal respondents in the PHS action and... would not accord with the principles of fundamental justice because of overbreadth.”

She doubted the accuracy of Canada’s claim that the operation of Insite is controversial in a policy sense. In this province, there is no longer any serious doubt that Insite is not against the law and the site can continue to operate.


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**The CJC decided not to reconsider the decision**

The CJC decided not to reconsider the decision to abandon the megatrial in order to arrive at a decision on the appeal of the Attorney General of Quebec to ask the Quebec Court of Appeal to reach its own decision on the appeal of the Attorney General of Quebec.

That decision prompted the Quebec Court of Appeal to reach its own decision on the appeal of the Attorney General of Quebec.

While upholding the rulings by the lower courts, the Quebec Court of Appeal found that the measures adopted were identified as being sufficiently important.

“The lawyer can certainly draft criticism toward the legal system and all those who are part of it, but he must do it with objectivity, moderation and dignity.”

Doré argued that the respondent failed to demonstrate the Charter breach was justifiable, but he must do it with objectivity, moderation and dignity. This step entails a proportionality test in which the courts are required to balance the interests of society with those of individuals or groups. Three elements must be satisfied, including that the measures adopted must be rationally connected to the objective, the measures adopted should cause minimal impairment to the right or freedom in question, and there must be proportionality between the effects of the measures limiting the right or freedom and the objective identified as being sufficiently important.

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David Scearce

Micheal Benoict

David Scearce is hoping for a 5:30 a.m. wake-up call soon. On Tuesday, Feb. 2 the Oscar nominations will be announced pre-dawn in Hollywood and in Vancouver where Scearce, 44, is a federal government lawyer by day, screenplay writer by night. His adaptation of A Single Man, the Christopher Isherwood novel about a gay college professor mourning the death of his long-time partner, is considered an early favourite for an Oscar nod in several categories, including adapted screenplay and best actor. Colin Firth, who plays the lead, won best actor at the Venice International Film Festival where the film had its world premiere in September to a standing ovation.

Nomination or not, Scearce is feeling pretty special. “It’s like winning the lottery,” he says of his work appearing in cinemas around the world. “There’s lots of screenplay-plays around. Fewer get made, and fewer have this success.”

Even more remarkable is that A Single Man is Scearce’s first finished screenplay. And it was written ten on spec. He casually knew Isherwood’s long-time partner who held the book’s literary rights and encouraged Scearce to tackle the story. Scearce did not set out to become a writer. In fact, he did not take a single literature course as an undergraduate at Wilfrid Laurier University. Instead, he studied business, intending to enter politics, a childhood dream since growing up in Burlington, Ont. And to be successful in politics, Scearce figured he should also be a lawyer.

But before he went to law school, he spent a year on Bay Street working for Lloyds Bank. A “spirit of adventure” drew him to Vancouver and the University of British Columbia’s law school. “I wanted change, but I also needed to find something I am good at.”

Upon graduation, Scearce articled with Fraser and Beatty in Vancouver, previously with McCarthy Tétrault LLP round out the new Cowtown team.

In Toronto, Don Jack has joined Heenan Blaikie LLP as a litigation. Jack is a civil litigator who focuses his practice on commercial disputes, professional liability, class actions, constitutional, competition and securities law and appellate advocacy. Deborah Salzberger has joined Blakes’ Competition and Antitrust and Foreign Investment Group as a partner. Salzberger has extensive experience advising clients on competition/antitrust and foreign investment issues in the contexts of mergers and acquisitions. She also provides competition law compliance advice for criminal cartel matters and reviewable transactions, tendering advertising and distribution issues.

Lawyer by day, screenwriter by night

DAVID SCEARCE

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David Scearce

Law School:

University of British Columbia

Call to the Bar:

1993

Career Highlights:

1992: Articed with Fraser & Beauty
1993: Joined Justice Canada, B.C. regional office
2005: Screenplay for A Single Man accepted for filming
Posner’s conversion on the road to regulation

You might call it the conversion on the road to Marshall Field’s. Judge Richard Posner, a founder of the Chicago-based law-and-economics movement, has become a Keynesian.

Heretofore a curmudgeonly jurist in the Justice Department’s lippy, moody, and, of the “Get a job!” school of social work — he’s lately testified in the religious sense, in The New Republic for last September, that “I became a Keynesian.” And though Judge Posner is notorious for pronouncements with intellectual shock-and-awe potential, this is his first turn to the leftist since he went hard right in the 1960s.

A man of great learning and accomplishment — he was a professor at the University of Chicago School of Law when President Reagan appointed him as a judge to the Seventh Circuit Court of Appeals, and he is a leading figure not just in the law-and-economics tsunami that has swept over law schools in the last thirty years, but is also the principal right-wing, “where’s the payoff?” critic in law-and-literature studies — Judge Posner grew up in a socialist milieu. His mother was a communist who supported the Rosenbergs.

But apparently he felt dismayed by the free-for-all of the 1960s, and his congenial grit took him the other way — to the contention that legislators should legislate, and judges should decide, always with an eye to what is most economically efficient. And mostly, with an eye to what is most ecologically efficient. And mostly, with an eye to what is most economically efficient.

In a famous essay from 1988, the left-leaning law-lit professor Robin West proposed an antidote, “literary woman,” capable of far-reaching empathy, partly because, contrary to Judge Posner’s law-lit views, she is morally educated by good literature. “Economic man is peculiarly incapable of the empathic knowledge quite common in the rest of us,” West writes, “that his neighbor’s broken leg hurts more than his own hangnail;... or that the pain an impoverished buyer might sustain when the law deprives him of the freedom to contract to purchase a television set on burdensome credit terms is less than the pain that a buyer would sustain in the future when he loses essentials such as food and clothing he would otherwise be able to purchase.”

Gleefully, Judge Posner has seized the opportunity to snap back. Most infamously, perhaps, he once suggested that mothers should sell their unwanted children rather than putting them up for adoption, as it was more efficient in terms of cost-benefit analysis. Then there was the time he wrote that black women were more overweight than their white counterparts because the paucity of eligible black males dissuaded the black women from the work of keeping fit: “the cost relative to the potential pay-off was too high.”

The judge was at pains, in other words, to show how hard-bitten law and econ could be. (Kevin O’Leary, you are older than old hat.) But now he’s telling us that maybe he went a little too far. Maybe the government really should intervene, regulate, and stimulate... and the rest of us should spend, spend, spend as Judge Richard Posner of Chicago circuit court of appeals

Casson, which created the libel defence of responsible communication on matters of public interest. If the media prints or broadcasts erroneous information or unproven allegations that damage someone’s reputation, a libel claim may be defeated if the journalists involved acted ethically and responsibly in reporting the news.

The defence, which shifts attention away from a journal’s motives and focuses on how it was reported, is being hailed as a significant boost for freedom of the press, and rightly so. As Chief Justice Beverley McLachlin noted in Grant, the law should protect individuals against “baseless attacks on reputation” but defamation actions or threats to sue “should not be a weapon by which the wealthy and privileged stifle the information and debate essential to a free society.”

The defence is only triggered if the news report under attack deals with “matters of public interest,” and the court’s view is what constitute the public interest have not received the attention they deserve.

First, the trial judge — this is matter for the judge, not the jury — must decide whether the article or broadcast as a whole deals with a subject of public interest, rather than examining the defamatory statement in isolation.

The Supreme Court, finding no single test in Canadian or American law, instructed the court on matters of public interest to the effect that the public interest is not synonymous with “mere curiosity or prurient interest” in the private lives of public figures or celebrities.

In other words, the court is not giving the media a green light to invade people’s privacy or to practice “gotcha” journalism. More importantly, the subject need not be one of national importance or of interest to a wide audience. It is sufficient that “some segment of the public” has “a genuine interest in knowing about the matter published.”

Stories about politics and government obviously fall within the definition, the court added, but this is only a starting point. “The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion, and morality.”

This broad definition is crucial...
Supreme Court judgments fell in 2009:

By comparison, the average number of judgments in the previous decade, fluctuating from a high of 144 judgments in 1999 to a low of 60 judgments in 1999 (the volume declined over both decades), the average number of as-of-right appeals was diminished and the court judged near-total control over its docket.

Another prominent Supreme Court agent, Eugene Meredian of Ottawa’s Lang Michener LLP, suggested the court would optimally issue 62 judgments for 2009. The average annual number of judgments from 2000 to 2009 was 79.

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to expanding press freedom, because the judges who heard the libel cases under appeal took a narrow view of what constitutes the public interest. In Quan, for instance, the Ottawa Citizen was sued for accusing an Ontario police officer of hindering the search for survivors of the 9-11 terror attacks on the World Trade Center. At trial the judge ruled the allegations were “certainly of public interest” but not “in the public interest to the extent that they needed to be heard.” While that conclusion was reached in assessing whether the traditional libel defence of qualified privilege applied, the Supreme Court made it clear this is too narrow an interpretation for the new responsible communication defence. “The Canadian public has a vital interest in knowing about the professional misdeeds of those who are entrusted by the state with protecting public safety,” Chief Justice McLachlin noted.

In Grant, the Toronto Star was sued over a story that accused a businessman of using political connections to win the right to develop a golf course on Crown land in Northern Ontario. The trial judge in that case found the story was of interest to only a limited audience of local residents and not to the wider public. Again, the Supreme Court was unequivocal: “Care must be taken by the judge... to characterize the subject matter accurately. Overly narrow characterization may inappropriately defeat the defence at the outset,” it cautioned. In this case, the story probed a developer’s ties to the political party in power, raising issues of government conduct that were “clearly in the public interest.”

With new trials ordered in both cases and the “public interest” test satisfied, it will be up to a jury to assess the quality of each newspaper’s reporting.

And in future, journalists, lawyers and judges alike will have a better sense of whether a news report is of sufficient public interest to be defensible in court.
A securities class action recently certified by the Ontario Superior Court of Justice highlights the perils of lawyers taking on directorships, draws attention to potential conflicts of interests and indirectly raises questions of privilege.

While a growing number of law firms across the country have, over the past five years, discouraged partners from becoming directors due to conflicts of interest and increased exposure to suits, the class action certification will likely lead to even more wariness.

“There certainly has been a chill over the last five years, and this certification may result in a further chill,” noted Wendy Berman, a partner in Heenan Blaikie’s Toronto office who practises commercial litigation with an emphasis on securities-related litigation. “It’s a difficult role, and law firms are starting to recognize that.”

In 
Allen v. Aspen Group Resources Corporation, [2009] O.J. No. 5213, Justice George Strathy certified a class action against Yukon oil-and-gas firm Aspen Group Resources Corporation that is seeking damages on behalf of shareholders as a result of alleged misrepresentations in a takeover bid circular. Among the defendants are WeirFoulds LLP, a prominent Toronto law firm that acted on behalf of Aspen and advised it in connection with the takeover bid of Calgary-based Endeavour Resources Inc., and Wayne Egan, one of its lawyers. A partner in WeirFoulds, Egan acted as legal counsel for Aspen from February 1995, has been a member of Aspen’s Board of Directors since 1996 and has served on the board’s compensation committee.

In a 43-page ruling that has captured the interest of the Canadian legal community, Justice Strathy found the plaintiff properly pleaded a cause of action pursuant to s. 131 of the Ontario Securities Act against Egan in his capacity as a director of Aspen. Judge Strathy also considered the “more difficult question” of whether Egan’s statutory liability as a director could engage the liability of the law firm.

One of the historical distinctions between competition law enforcement in Canada and the U.S. has been the much smaller role played in Canada by private litigation, as opposed to government-instituted enforcement.

Canadian law has for decades permitted plaintiffs to sue for damages caused by conduct violating the Competition Act’s criminal offences. However, it is only recently, with the advent of class action litigation, that private competition suits in Canada have been anything more than sporadic. Two recent decisions — one by the Ontario Superior Court of Justice and the other by the British Columbia Court of Appeal — may signal the advent of an even more receptive climate for private competition actions in Canada.

First, on Sept. 28, 2009, the Ontario Superior Court of Justice certified a class action on behalf of all persons in Canada (excluding the defendants) who had purchased either hydrogen peroxide, products containing hydrogen peroxide or products using hydrogen peroxide in Canada between Jan. 1, 1994 and Jan. 5, 2005 (Irving Paper Limited v. Atofina Chemicals Inc. et al., [2009] O.J. No. 4021). A month and a half later, on Nov. 12, 2009, the British Columbia Court of Appeal certified a class action on behalf of a class of direct and indirect purchasers of semiconductor memory chips (known as dynamic random access memory (DRAM)), overruling a lower court decision denying certification (Pro-Sys Consultants Ltd. v. Infineon Technologies AG, [2009] B.C.J. No. 2239).

Both decisions dealt with an issue that has been at the forefront of class action litigation under the Competition Act — whether “indirect purchasers”...
Why liability for inducing breach of contract needs reassessing

Dismissed employees frequently attempt to bolster their wrongful dismissal claims by pleading economic torts. One of these increasingly pleaded economic torts is the tort of inducing breach of contract (the “inducement tort”), which imposes liability on an employer who intentionally procures a breach of its rival’s employee’s valid employment contract.

The nub of liability underlying the inducement tort must be re-assessed: treating liability as turning on the breach of a complainant’s contractual rights, rather than on an inducer’s wrongdoing, leads to unnecessary and unfortunate blurring between “interference” and “inducement” cases.

Arguably, the very classification “tort” suggests that the inducement tort ought to be concerned with the inducer’s harmful conduct. However, many operate under the popular but mistaken belief that the inducement tort gave us a tort focused on a complainant’s contractual rights.

For example, in RBC Dominion Securities Inc. v. Mastec that the inducement tort should be viewed as penalizing the inducer’s conduct, rather than compensating the complainant for the breached contractual rights. This conduct-centred theory of liability is reinforced by the fact that dismissed employees seeking to increase their damages typically plead reliance on the inducing employer’s pre-contractual inducements (i.e. conduct), rather than that their contractual relations with the initial employers were interfered with.

RBC’s rival, Merrill Lynch, was found liable for $250,000 for having induced breaches of RBC’s employees’ contracts. RBC appears to validate the conduct-centred theory of liability, as the courts are beginning to recognize that the inducer acted with its own wrongful interference causing the breach.

Obviously, it is not automatically improper to poach rivals’ employees, but legitimate competition does not justify interference with existing valid contracts. Simply causing an interference with the employee’s contractual relation with his employer is insufficient to trigger liability under the inducement tort. There must be procurement and the actual breach of the employee’s contract.

More specifically, the inducement tort demands: (1) the knowledge of contract; (2) intention to procure the breach of contract; (3) actual breach of contract; and (4) damages. The inducement tort, however, is peculiarly apt to be confused with the tort of causing loss by unlawful means.

Unlike the inducement tort, the tort of causing loss by unlawful means doesn’t require the existence of a contract or its breach. Designed only to enforce basic standards of civilized behaviour in economic rivalry, it is concerned with the defendant’s own wrongful interference causing unlawful economic loss by “lawful means.” No intermediate party — as in the inducement tort — is necessary.

The tort of causing loss by unlawful means requires: (1) the defendant’s wrongful interference with the actions of a third party in which the plaintiff has an interest; (2) intention to cause loss to the plaintiff; (3) use by the defendant of unlawful means; and (4) damage in any form, for example, frustration of economic expectations.

Both torts have strict requirements of intent, but what the defendant intends is different in these two torts. In the tort of causing loss by unlawful means the defendant intends to cause loss, while in the inducement tort, to procure a breach of contract. Given the distinction between rationales of these torts, the courts should carefully distinguish between “inducement” of the breach and mere “interference” with contract cases.

The conduct-centred theory of liability clarifies the real nub for liability in the inducement tort. In concentrating on the complainant’s contractual rights, the courts ignore the inducer’s wrongdoing. But for the inducer’s wrongdoing, there could be no viable claim in the inducement tort.

In the absence of employers’ deliberate procurement causing breach of their rivals’ employees’ valid contracts, the liability should be discussed within the context of the tort of causing loss by unlawful means.
Trade associations face tough new competition rules

Recent landmark amendments to the federal Competition Act will have a significant impact on trade associations in Canada.

While there are no specific provisions of the Act dealing specifically with trade associations, some of the general provisions are particularly relevant to trade association activities, including those on criminal conspiracy, bid rigging, misleading advertising and abuse of dominance provisions — all of which have recently changed.

Criminal conspiracy rules

Significant new criminal conspiracy provisions will come into force in March. Under the new rules, it will be possible to establish price fixing, market allocation and output restriction agreements (three types of “hard core” cartel agreements) without establishing any adverse market effects.

The primary impact of these changes will be that, whereas formerly market power was a prerequisite to establish a criminal conspiracy (i.e., that a cartel agreement prevented or lessened competition unduly), the new law allows parties to an agreement with modest market shares may also be caught. As such, trade association members that engage in price fixing, market allocation or output restriction agreements (three types of “hard core” cartel agreements) without establishing any adverse market effects.

The decision, however, also underlines the challenge of determining when a lawyer, who through his or her law firm, acts as external corporate counsel to a corporation and who also sits on the corporation’s board, may well be acting in the ordinary course of the law firm’s business when he or she takes a seat at the boardroom table,” said Judge Strathy in a passage that will likely be scrutinized by law firms across the country.

According to Malcolm Ruby, the head of the national class action practice group at Gowling Lafleur Henderson LLP, the decision itself is not surprising, as failing to draw a distinction between facts in circulars attracts statutory liability for anyone involved.

It nevertheless is a “sobering” ruling for lawyers involved in “these kinds of transactions because it appears that the lawyer and the law firm appear to have legal responsibility for what is in the circular, which is really

something they prepare for their client. So it is a warning for any lawyer who sits on boards of directors, and does their legal work,” added Ruby.

The decision, however, also underlines the challenge of determining when a lawyer, who through his law firm acts as external corporate counsel and who sits on the corporation’s board, provides business as opposed to legal advice. While Ruby maintains that it is a factual determination, hinging on context and the kind of advice provided by the lawyer, Berman believes that Judge Strathy does not seem to make a huge distinction between the two. Indeed, Berman asserts that the decision seems to suggest that it is an “artificial distinction,” not unlike the dual roles played by in-house counsel who act as both business and legal advisors.

“The difficulty is — and this you see all the time — when does a lawyer take off his hat as the external legal advisor to the firm and when is he wearing his hat as a director, when occupying both roles?” said Berman. “That’s what this case brings to a head. It’s really artificial to say at one moment you are taking off one hat and putting on the other. So if you have a liability as a lawyer and you’re a partner in a law firm, your law firm is on the hook. That’s a change. Whether the claim will ultimately succeed because the test on certification is very low, who knows. But the door has been opened.”

The hazy lines between the two roles can potentially lead to the loss of lawyer-client privilege, warns Berman. She wonders if privilege can be protected if there is a blurring of the distinction between providing business and legal advice, or if such a distinction exists.

“This case does not open a Pandora’s box, but it will lead to some difficult determinations, and depending on how the law develops, this may lead to future problems,” said Berman.

The landscape of Canadian competition law has dramatically changed. The recent amendments are the most significant in 25 years — or even since Canada introduced competition law in 1889. The impacts on Canadian firms and trade associations will be significant.

Steve Szentesi is a Canadian competition law lawyer and consultant based in Vancouver. He works in association with Norton Stewart, Business Lawyers and is an owner of Competition Law Canada.

Lawyers’ business and legal roles often overlap

That a lawyer who, through his or her law firm, acts as external corporate counsel to a corporation and who also sits on the corporation’s board, may well be acting in the ordinary course of the law firm’s business when he or she takes a seat at the boardroom table,” said Judge Strathy in a passage that will likely be scrutinized by law firms across the country.

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Tips on tax-efficient exit strategies for businesses

Over the coming years, many of your business owner clients will face important decisions about how long to work, how much they need to retire and what will happen to their business.

One in four owners over the age of 60 of small and medium-sized businesses plans to exit their business within the next five years, according to an study from the Royal Bank of Canada. However, 77 percent of owners have made little or no progress putting a plan in place. The opportunity is clear — those who are well-prepared will have more options, better tax efficiencies and more positive outcomes.

Let’s start with those who do not plan ahead. An owner may enter an unsolicited offer to buy the business, and be forced to make a quick decision if the price is right. He may not have been thinking of selling, now or ever, but might also never see this number again.

If he sells, how much of the funds received will he be able to keep? Without any planning, in Ontario, with capital gains tax rates at effectively 23 percent, he will keep 77 percent of the proceeds beyond his investment. So if the business sells for $5 million and the owner’s investment is nil, he will end up with $3,840,000 after tax.

What strategies might this owner employ to reduce his tax hit? First, if the buyer is willing to buy shares rather than assets, then the business owner, and any other owners of shares of the business, can make use of their one-time $750,000 capital gains exemption.

However, with no pre-planning, it is entirely possible that the shares of the company will not qualify, as they would have to be held for at least two years and pass both the “active Canadian business assets” tests. These tests are met if at least 90 percent of the assets are used in an active business in Canada at the time of sale, and at least 50 percent have been so used during the past 24 months.

If the business is not already incorporated, this can be done just before the sale to take advantage of the capital gains exemption, which means the two-year holding period is not applicable.

The net tax saving from using the capital gains exemption in Ontario is $174,000 for each share sold.

Another strategy that can be employed without pre-planning is to make a charitable gift either to a registered charity or to one’s own charitable foundation in the year of the sale. The business owner’s tax burden will be reduced by the amount of the donation tax credit effectively 46 percent of the amount donated.

If the business owner invests in another Canadian business in the year of the sale or within 120 days after the year of sale, then some or possibly all of the capital gain may be deferred until the sale of the new business.

Finally, a strategy called a “safe income strip” can potentially convert part of the capital gain on a sale into a dividend that will be taxed only on distribution to the business owner. This distribution can be deferred — potentially until the death of the business owner, and life insurance can be used to reduce or fund taxes at death.

For those who do plan ahead, there are a number of benefits. For example, they can ensure that the shares of the business qualify for the capital gains exemption.

Perhaps the best tax savings strategy for a business that is expected to grow in value over time is an estate freeze. An estate freeze allows the business owner to share the growth of his business with others, usually family members. This allows for multiple use of the capital gains exemption and splitting income generated by the business with family members, within the framework of the income tax attribution rules.

The business owner could also set up an individual pension plan prior to the sale, which results in tax deductions for the corporation, tax-free growth for the assets in the plan and a lower capital gain on a sale.

If the business owner dies unexpectedly, the ability to plan ahead may be reduced and the tax payable upon a deemed disposition of his interest in the business is seriously minimized, and his heirs may be forced to sell the business.

With an estate freeze in place, a significant part of an otherwise deemed disposition of a business can likely be deferred until a suitable time, such as a planned sale. This avoids forcing the business owner’s family to face his capital gains liability on the full appreciation of the business at the time of his death.

Business owners who plan ahead with a team that includes legal and tax professionals and an investment advisor can employ numerous sophisticated tax strategies to achieve their personal objectives and maximize their wealth.

Murray Shapiro is Vice President, High Net Worth Planning Services with RBC Wealth Management Services.

Decisions lower the bar for certification of price-fixing class actions

Competition

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of cartelized products be part of the class of plaintiffs seeking damages from defendants. The sticking point is typically whether the “indirect purchasers” (i.e., purchasers that did not buy the cartelized product directly from the supplier but as a component of their own processed goods) can demonstrate on a class-wide basis that the overcharge paid by direct purchasers on the product was passed through to them. Without a credible methodology for demonstrating class-wide harm, damages to indirect purchasers would have to be established on an individual basis, thereby negating the justifications for proceeding by class action.

By allowing the class actions to proceed, both decisions also marked a significant departure from previous case law, in which courts had denied certification to indirect purchaser class actions because of the failure to establish a satisfactory methodology for calculating harm on a class-wide basis.

The leading decision on point was the Ontario Court of Appeal’s decision in Chadha v. Bayer, [2003] O.J. No. 27. Chadha involved a proposed class action on behalf of indirect purchasers of Congo Brazza bricks and paving stones used in home construction. The allegation was that the defendants’ conspiracy to fix the price of iron oxide pigment — used as an additive to both bricks and paving stones — resulted in overcharges not only to the manufacturers of these products, but also to the purchasers of the building approach to the products used in an active business in Canada at the time of sale, and at least 50 percent have been so used during the past 24 months.

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In both Irving Paper and Pro-Sys, the courts took a more lenient approach to the methodology needed at the certification stage to support the indirect plaintiffs’ proposed methodologies. For example, Justice Rady of the Ontario Court of Justice held that a judge at the certification hearing need only be satisfied that a credible methodology for calculating indirect purchaser damages may exist and that even “attempts to postulate such a methodology” are sufficient. Similarly, the B.C. Court of Appeal held that only a “minimum evidentiary basis” is necessary and that plaintiffs need only show that they have “a credible or plausible methodology” that, in theory, might be able to address class-wide issues.

If left undisturbed on appeal, Irving Paper and Pro-Sys will lower the bar in at least two key Canadian jurisdictions, and potentially across the country, for the certification of indirect purchaser, price-fixing class actions. The impact of this change could be magnified even further by the coming into force in March of a new “per se” conspiracy offence, which will eliminate the requirement to prove “ubiquitous and magnitude (lessening of competition)” in establishing criminal liability.

The combination of these two developments could significantly increase the risk in Canada for civil liability arising from competition law violations.

Mark Katz is a partner in the Competition & Foreign Investment Review Group of Davies Ward Phillips & Vineberg LLP in Toronto.
If your client gives you his business e-mail address to communicate with him about his personal legal matters, how sure are you that those e-mails are privileged and immune from disclosure? The answer, it seems, is "it depends."

The United States District Court for the District of Columbia recently weighed in on this issue in Convertino v. United States Department of Justice, et al., 2009 U.S. Dist. Lexis 115050. Convertino, an Assistant United States Attorney, brought a claim against the U.S. Department of Justice (DOJ), alleging it had wilfully and intentionally disclosed information about him in violation of the Privacy Act.

The information related to an investigation into allegations of prosecutorial misconduct made against Convertino, by, among others, the former First Assistant United States Attorney of the Eastern District of Michigan, Jonathan Tukel. Tukel had met with Convertino to discuss Convertino’s handling of cases, and had been involved in drafting allegations to the DOJ’s Office of Professional Responsibility. It must have been a messy affair, because Tukel retained private counsel, Cadwalader, Wickersham & Taft LLP, in anticipation of litigation.

From his DOJ-provided e-mail address, Tukel communicated with Cadwalader. No one else was copied on the e-mails, and Tukel took steps to delete them. However, apparently unknown to Tukel, the DOJ regularly accessed and saved e-mails sent from his account. Subsequently, when the action between Convertino and the DOJ went into the discovery phase, these e-mails became one of a number of production issues between the parties.

Tukel sought, and was granted, leave to intervene in the case for the purpose of asserting his attorney-client privilege. Tukel had to prove that he had taken reasonable steps to prevent disclosure of his privileged material. The court accepted that he had, noting that he had deleted his e-mails and sought leave to intervene in a timely way.

Tukel also had to establish that disclosure of these e-mails to the DOJ was inadvertent. He argued he had no intention to allow his employer to read the e-mails he was sending to his personal attorney through his DOJ-provided e-mail address.

Protecting privilege: how safe are your e-mails?

Attorney of the Eastern District of Michigan, Jonathan Tukel.

See PRIVILEGE Page 15

How to use competitive intelligence in litigation

Competitive intelligence can be broadly characterized as the act of “defining, gathering, analyzing and distributing intelligence about products, customers, competitors and any aspect of the environment needed to support executives and managers in making strategic decisions for an organization.”

For many lawyers, competitive intelligence, to the extent any thought has been given to the subject at all, is often viewed as nothing more than a marketing tool, one in which the lawyer attempts to discern key information about prospective or existing clients with the goal of using that intelligence to obtain new work. Like the proverbial articling interview, it is presumed that the firm that has an intimate understanding of a prospective client’s business stands a better chance of attracting a new or more comprehensive retainer from that client. In the marketing context, competitive intelligence is entirely directed at improving the firm’s bottom line by securing new work from the client.

While there can be no doubt that the use of competitive intelligence in this manner is entirely appropriate to the business of law, it is surprising that few, if any firms, appear to have seriously taken on the challenge of deploying competitive intelligence as a means of bettering the outcomes for their clients. That is particularly surprising considering that, in litigation at least, the object of every retainer is to resolve a client’s problem in the most cost effective and timely manner possible.

Even more surprising is the realization that, unlike other endeavors such as medicine, clients do not seem to have any
Clients need to know how intangibles will impact litigation

Who among us has not canvassed a colleague about a particular judge...?

much worse would the client be by going it alone?
Not only should clients be able to expect more of their litigators, but we should expect more of the e-mails. Perhaps the tide of disenfranchised clients could be stemmed as articles of faith, passed on from one generation of litigator to another and yet, such assertions here began occurring, wouldn’t do what their lawyers that neither the costs nor the outcome of litigation can be predicted.

Either the discerning client will insist on their lawyer obtaining better answers or, perhaps more likely, the client may elect to become self-represented.

A happy result for Tukel, no doubt, but one has to wonder at the reasoning. For example, in 2003, when the events at issue here began occurring, wouldn’t Tukel have known, or easily learned through an inquiry to the DOJ’s IT department, that e-mails reside on a server, and that back-ups are regularly made?

While it is possible that some companies still don’t have Internet policies to deal with accessing and archiving electronic information, most do. It is reasoned that e-mails as expectation of privacy could be affected by the content of that policy. But if an employee chooses to remain ignorant of the policy and then forms an expectation of privacy that is not in accordance with it, can the expectation be said to be reasonable?

Equally, it is reasonable that a policy that does not ban personal communications leads to an expectation of privacy, as opposed to one that permits such communications and affords them a clearly defined zone of privacy? In any event, haven’t the e-mail experts been telling us for years to watch what we say on e-mail. Lest we find it on the front page of the national newspaper?

There are lessons in Convertino for prudent counsel. Before communicating via a business e-mail address with a client about personal matters, read the employer’s e-mail policy — especially where either the employer or the client (or both) may become involved in litigation. A reliable personal e-mail account may be preferable.

If clients insist on communicating via business e-mail accounts, counsel should advise them on the potential loss of privilege. Counsel should also document what advice — but preferably not in an e-mail.

Caution needed when communicating via business e-mail addresses

Privilege
Continued From Page 14

provided e-mail account. The court, relying on an earlier New York case, In re Asia Global Crossings, Ltd., 322 B.R. 247 (S.D.N.Y. 2005), held that for documents sent by e-mail to be protected by attorney-client privilege, there had to be a subjective expectation of confidentiality that is objectively reasonable. Four factors determine reasonableness: (i) whether the corporation maintains a policy banning personal or other objectionable use of e-mail; (ii) whether the company monitors the use of the employee’s computer or e-mail; (iii) whether third parties have a right of access to the computer or e-mail; and (iv) whether the corporation notified the employee that the employee’s computer or e-mail may be monitored. The employee was aware of the use and monitoring policies.

The court found each case needs to be looked at on its own facts to determine if the party requesting protection of the privilege was reasonable in its actions. In Convertino, the court concluded Tukel’s expectation of privacy was reasonable. The DOJ’s e-mail policy did not ban personal use of company e-mail, and while the DOJ had access to personal e-mails, Tukel was unaware that it had access to personal e-mails. Tukel was unaware that it had access to personal e-mails. The DOJ had access to personal e-mails. The DOJ’s expectation of privacy was reasonable. The DOJ’s expectation of privacy was reasonable. The DOJ’s expectation of privacy was reasonable. The DOJ’s expectation of privacy was reasonable. The DOJ’s expectation of privacy was reasonable. Did we mention that the DOJ had access to personal e-mails?

Clients need to know how intangibles will impact litigation

Clients need to know how intangibles will impact litigation

The key is to move past the fiction that such factors do not impact on how cases are prosecuted and decided, in favour of a system that does not just accept that such intangibles bear on the outcome, but that by warehousing the information, the more meaningful assessment and evaluation can be provided to our clients. Ignoring that reality would be akin to believing that the falling tree only makes a sound if someone is there to hear it.

The information is there — isn’t it time it was leveraged?

Civil Litigation

Hiding under the concierge’s desk: why service rules need reform

A deficiency in Ontario’s Rules of Civil Procedure risks turning otherwise routine litigation into a protracted and expensive battle of wills, involving private investigators and ingenious process servers.

The rules have not kept pace with the emergence of high security apartment buildings, condominiums and gated communities that use security guards or concierges to restrict access to non-residents, including process servers. This has the effect of frustrating legitimate attempts to effect service. Currently, R. 16.03(5) of the Civil Procedure Rules provides as follows:

16.03(5) The concierge’s desk A concierge is not an “adult member of the same household” to whom service may be made at the place of residence. However, service will be deemed to have been made if the concierge acknowledges receipt of the documents or directs the server to forward them to the person to be served.

In this scenario, you retain a plaintiff against an Ontario defendant. The plaintiff obtains a judgment in Ontario. Having obtained an Ontario judgment recognizing the out-of-province decision, your next step is to serve the defendant with a notice of examination in aid of execution. The task, however, is far from routine.

The defendant, having lost his business to debts, “disappears” from the community. His business phone lines are disconnected. He no longer maintains a valid driver’s license or owns a car. Most importantly, his home is seized by the bank so there is no residential address. In fact, the defendant’s only link with the outside world is through social networking sites such as Facebook or LinkedIn.

In this scenario, you retain a private investigator who instructs the defendant to his mother’s home in a condominium complex. A process server is sent to the apartment to attempt to serve the defendant with the notice. The server, however, fails to gain entry into the building, turned away by a concierge who tells him the defendant is not a registered resident.

At this point, the litigator does not have many attractive options. The client faces considerable expense and delay before the defendant can be located outside the building and served.

The problem lies in the provisions of the rules relating to personal service. Currently, R. 16.03(5), which relates to alternatives to personal service on individuals, permits a person to be served by “leave[ing] a copy, in a sealed envelope addressed to the person, at the place of residence with anyone who appears to be an adult member of the same household,” provided a second copy is mailed to the person to be served on the same day.

However, R. 16.03(5) is infecund where the person to be served resides in a condominium complex. If the person is not a registered owner, occupant or tenant in the condominium complex, or if the person has instructed the concierge or security guard not to permit visitors to reach his or her residential unit, the process server will be turned away and personal service will become impossible.

If the person has instructed the concierge or security guard not to permit visitors to reach his or her residential unit, personal service will become impossible.

The provision relating to alternatives to personal service will not apply. Leaving the documents with a concierge is not acceptable under the rules because the concierge is not an “adult member of the same household.” A situation is thus created whereby the person to be served can “hide under the concierge’s desk” to avoid personal service of documents until such time as the limitation period has expired or the plaintiff has given up.

Two amendments are urgently needed. First, the “adult member of the same household” clause of R. 16.03(5)(a) must be expanded to encompass a concierge, security guard, superintendent or anyone else who controls access to the apartment of the person to be served. The formulation “any adult who appears to be in charge of controlling access to the place of residence” would achieve this result.

Second, service via social networking sites should be seriously considered. Defenders seeking to avoid service often neglect, or fail to, remove themselves from social networks such as Facebook or LinkedIn. Although they are “in hiding,” they continue to interact with the world on social networking sites. In such situations, service via Facebook has been approved by courts in Australia and New Zealand as a valid alternative to personal service. In a recent U.K. case, service via Twitter was permitted.

Canadian courts have admitted Facebook postings as substantive evidence. In light of the similarity in the objectives of service between Canada and other Commonwealth countries, and given Canadian courts’ willingness to admit Facebook evidence, there is no principled reason why Facebook service cannot become one of the alternatives to personal service available to a solicitor faced with an evasive litigant.

Avoidance of service is avoidance of justice. The rules need to evolve to respond to the changing forms of housing arrangements in contemporary society. Reform is urgently needed to stop the abuse and enable the justice system to function in a timely and efficient manner.

Patron locks horns with restaurant owner over falling moose head

A restaurant patron has launched a lawsuit against an eatery and its owner claiming that a 150-pound stuffed moose head dislodged from the wall and fell onto her head.

Raina Kumra charged the Manhattan restaurant, White Slab Palace, and its owner with negligence. A witness says Kumra was partying in the back room with a group of friends when the moose head, which had been mounted on the wall, came loose and hit her on the noggin. Exactly how the moose head became dislodged is in issue, as the witness claims he saw one of the partygoers tugging on a balloon tied to the moose head’s antlers shortly before it fell, according to the NY Daily News.

Kumra claims to have suffered a concussion, chronic neck pain, fatigue, dizzy spells and anxiety from moving medical bills. Her lawsuit states that the restaurant “had a duty to provide...an environment free from falling objects.”

“Talk about a striking décor. — Natalie Fraser

Ontario Heritage Act & Commentary

Ontario Heritage Act & Commentary is the only dedicated research source on these amendments. Municipal lawyer Eileen P.K. Costello, of Aird & Berlis LLP, gives you:

• Section-by-section analysis of the Act — Discover exactly how the Act has changed to provide enhanced powers to municipal councils and the Minister of Culture
• Overview of recent significant changes — Learn how the Act affects your role, whether you advise municipalities or act for owners of heritage properties
• Commentary on case law — Examine how the Ontario Municipal Board, the Conservation Review Board and courts have interpreted and applied the Act in respect of heritage properties from Ontario municipalities of all sizes
• Complete text of the Act — Quickly find sections, plus the rules of practice and procedure for hearings under the Act
• Table of concordance — Easily track legislative changes
• Appeal charts — Plan an effective appeal strategy
NEGLIGENCE – While a lawyer erred by failing to send appellant for independent legal advice, the failure did not cause appellant’s loss.

Appeal from the dismissal of appellant’s claims for breach of contract and negligence. The trial judge dismissed the cause due to a lack of causation. The Court of Appeal dismissed the appeal and held that the evidence supported the trial judge’s finding that the lawyer’s advice was not a proximate cause of the plaintiff’s loss.

CIVIL PROCEDURE

DISCOVERY – A defendant who had suffered a brain injury was not incompetent to testify at his examination for discovery. In 2003, the defendant suffered a brain injury caused by ingestion of alcohol and prescription medications. In 2006, he was examined by doctors to determine the extent of his injuries. The examination revealed that the defendant was capable of testifying under oath.

CONSTRUCTION LIENS

BREACH OF TRUST – The director of a company was liable to plaintiffs for the breach of trust by a company to two building material suppliers.

Action against defendant M for declarations that he was liable for the breach of trust by the company and that the individual defendants assented to the breach. The company was in default of trust and owed the plaintiffs sums for unpaid invoices. The Court of Appeal held that the individual defendants were liable for the breach of trust.

OTHER

The Digest contains brief summaries of recent decisions from Canadian courts, focusing on negligence and construction liens.
EVIDENCE (CRIMINAL)

HEARSAY – The trial judge did not err in admitting the victim’s ante-mortem statements or in the instructions to the jury.

Appeal from conviction for first degree murder and the legal character of the unlawful killing as the unlawful killing of accused. For several years she had sought to leave their marriage due to accused’s abusive nature and household clutter he amassed as a collection hobby. In December 2004, the wife abandoned their home while accused visited Turkey. She moved into a secure apartment and took precautions to ensure she could not be found by accused, due to fear of reprisal. On the evening of December 2004, the wife received a text from the latter indicating her reasons for leaving the marriage. Four days later the wife was shot to death in her vehicle. Police arrested accused within hours of the shooting. The trial judge, however, in instructing the jury, saw a man leave the scene, evidence of opportunity based on accused’s presence near the scene, evidence of motive, evidence of stalking or surveillance by accused, gunshot residue found on accused’s gloves and in his rented vehicle, and admissions made by accused upon arrest. Accused was convicted by judge and jury. On appeal, the husband argued the trial judge erred in instructing the jury on alleged errors made by the trial judge in the course of evidentiary and procedural rulings, and in instructions to the jury.

HELD: Appeal dismissed. The trial judge correctly applied the admissibility of the witness’s contemporaneous ante-mortem statements, or in the instructions given to the jury regarding use of those statements. The statements were offered to prove the wife’s state of mind about her relationship with accused and were material to the issue of motive.

The trial judge correctly instructed as to the use and frailties of precluding hearsay evidence. The judge made no instruction as to the use and frailties of ante-mortem statements, or in the instructions given to the jury regarding use of those statements. The statements were offered to prove the wife’s state of mind about her relationship with accused and were material to the issue of motive.

The prejudice in admitting the communication was the inadvertence of counsel that put the communication in the hands of husband and not a waiver or consent by wife. The辩方 did not, on any particular message as to the wife’s intentions. The relevance of the words was doubtful. The husband would be at liberty to bring to the attention of the court any non-compliance by the wife with the order or any attempts to change the Chinese school arrangement from what was contemplated by the order.

The prejudice in admitting the communication clearly outweighed its probative value.


EVIDENCE (CIVIL)

PRIVILEGE – The husband was not entitled to introduce into evidence an e-mail that had been inadvertently e-mailed to his counsel by the wife’s counsel.

Motion by the husband to permit an e-mail communication he received containing correspondence from the wife’s solicitor to be read and admitted by him to prove the issue of communications that occurred during counseling discussions around taking out an order following a motion in September 2009. On the motion, the court had been asked to determine residence arrangements for two children of the marriage. There had been considerable contention between the parties about the children’s attendance at Chinese school. The court order provided for regular attendance on Friday at 8:30 p.m. on his access weekend since they attended Chinese school that evening, and to pick them up every Thursday from 5 p.m. The e-mail was from wife’s solicitor to husband’s solicitor who inadvertently attached e-mail correspondence from wife’s counsel to husband. The husband was concerned that the words indicated the wife might have secret intentions of changing the children’s Chinese school arrangement. The judge did not err in dismissing the application as to the wife’s intentions. The relev-

The prejudice in admitting the communication was the inadvertence of counsel that put the communication in the hands of husband and not a waiver or consent by wife. The husband did not, on any particular message as to the wife’s intentions. The relevance of the words was doubtful. The husband would be at liberty to bring to the attention of the court any non-compliance by the wife with the order or any attempts to change the Chinese school arrangement from what was contemplated by the order.

The prejudice in admitting the communication clearly outweighed its probative value.
mining how appellate could pursue its statutory right of appeal.

Motion to stay the finding of incapacity made by an assessor and its confirmation by the Consent and Capacity Board. Appellant was 27 years of age and had suffered a traumatic brain injury in a motor vehicle accident. In 2006, he was declared to be incapable of managing his financial and legal affairs and the Public Guardian and Trustee for British Columbia became the committee of his estate. When appellant moved to Ontario in 2007, he retained counsel, a capacity assessment of appellant be completed. The assessor concluded that appellant was incapable of managing his property, and recommended that a capacity assessment by the Consent and Capacity Board on review, and the Ontario Public Guardian and Trustee became its statutory guardian of property. An appeal of the decision was dismissed. He then brought an action seeking money for the loss of income. The judge who dismissed his appeal, made threatening gestures to courtroom staff and engaged in conduct toward another judge that was tantamount to stalking.

HELD: Motion to stay appeal denied. Appellant sought the same relief he had sought on his dismissed appeal and his proper remedy was to appeal or seek leave to appeal to the proper appellate court. Appellant lacked the standing seeking money for the loss of income. Consequently, the Public Guardian and the assistant deputy attorney general were to arrange for counsel to appear before the court to assist in determining how an appellant could pursue his statutory right of appeal while safeguarding the integrity of the court process and the security of the judiciary and court staff.


NEGLIGENCE – The court appor- tioned liability between the Crown and a doctor for failing to timely diagnose an infant plaintiff with phenylketonuria.

Action for damages for negligence for failing to diagnose the patient with phenylketonuria (PKU). His first test was reported positive for PKU. A second test was performed when the child was two years old and also reported positive. A third test confirmed by the Consent and Capacity Board. He was 27 years of age and had suffered a traumatic brain injury in a motor vehicle accident. In 2006, he was declared to be incapable of managing his financial and legal affairs and the Public Guardian and Trustee for British Columbia became the committee of his estate. When appellant moved to Ontario in 2007, he retained counsel, a capacity assessment of appellant be completed. The assessor concluded that appellant was incapable of managing his property, and recommended that a capacity assessment by the Consent and Capacity Board on review, and the Ontario Public Guardian and Trustee became its statutory guardian of property. An appeal of the decision was dismissed. He then brought an action seeking money for the loss of income. The judge who dismissed his appeal, made threatening gestures to courtroom staff and engaged in conduct toward another judge that was tantamount to stalking.

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LIABILITY OF MUNICIPALITIES FOR INJURIES – Plaintiffs failed to prove a causal relationship between a townships's failure to put a “No Exit” sign or a checkerboard sign in a lane to injure plaintiff suffered when their car got stuck at the end of the lane.

Action for damages for injuries suffered by plaintiffs. Plaintiff J was driving her mother's vehicle. Her friend R was a passenger. They were travelling north on a road and proceeded onto a county road with no particular destination in mind, making a left hand turn onto a lane, continuing until they eventually hit a rock and got stuck. They were unable to restart the car and tried to retrace the path taken but ended up in the bush. Plaintiff R broke through some ice and lost her boots and socks. R also broke their windshield wipers. Plaintiff J and R were eventually noticed by a passerby who took them to the hospital. Both suffered from severe frostbite. J lost both legs and eight fingers and R lost several fingers and toes. Plaintiffs alleged that the defendant township was negligent because it failed to erect “No Exit” signs at the intersection of the lane and the county road on a checkerboard sign signalling the change in mind, making a left hand turn onto a lane, continuing until they eventually hit a rock and got stuck. They were unable to restart the car and tried to retrace the path taken but ended up in the bush. Plaintiff J broke through some ice and lost her boots and socks. R also broke their windshield wipers. Plaintiff J and R were eventually noticed by a passerby who took them to the hospital. Both suffered from severe frostbite. J lost both legs and eight fingers and R lost several fingers and toes. Plaintiffs alleged that the defendant township was negligent because it failed to erect “No Exit” signs at the intersection of the lane and the county road on a checkerboard sign signalling the change in mind, making a left hand turn onto a lane, continuing until they eventually hit a rock and got stuck. They were unable to restart the car and tried to retrace the path taken but ended up in the bush. Plaintiff J broke through some ice and lost her boots and socks. R also broke their windshield wipers. Plaintiff J and R were eventually noticed by a passerby who took them to the hospital. Both suffered from severe frostbite. J lost both legs and eight fingers and R lost several fingers and toes. Plaintiffs alleged that the defendant township was negligent because it failed to erect “No Exit” signs at the intersection of the lane and the county road on a checkerboard sign signalling the change in mind, making a left hand turn onto a lane, continuing until they eventually hit a rock and got stuck. They were unable to restart the car and tried to retrace the path taken but ended up in the bush. Plaintiff J broke through some ice and lost her boots and socks. R also broke their windshield wipers. Plaintiff J and R were eventually noticed by a passerby who took them to the hospital. Both suffered from severe frostbite. J lost both legs and eight fingers and R lost several fingers and toes. Plaintiffs alleged that the defendant township was negligent because it failed to erect “No Exit” signs at the intersection of the lane and the county road on a checkerboard sign signalling the change in mind, making a left hand turn onto a lane, continuing until they eventually hit a rock and got stuck. They were unable to restart the car and tried to retrace the path taken but ended up in the bush. Plaintiff J broke through some ice and lost her boots and socks. R also broke their windshield wipers. Plaintiff J and R were eventually noticed by a passerby who took them to the hospital. Both suffered from severe frostbite. J lost both legs and eight fingers and R lost several fingers and toes. Plaintiffs alleged that the defendant township was negligent because it failed to erect “No Exit” signs at the intersection of the lane and the county road on a checkerboard sign signalling the
Appeal from a decision concluding that an all-risk policy under which respondent condominium corporation was insured entitled it to the entire replacement cost for a standpipe system. The uncontroverted evidence established the standpipe system was either improperly designed or improperly installed. A flood, caused by a water hammer, resulted, causing an estimated $2 million in damages for which appellant insurer indemnified the corporation. After the flood, the corporation replaced the standpipe system at a cost of $600,000. Appellant denied coverage for that cost, citing an exclusion clause in the policy for losses associated with faulty workmanship, design, or defect. The court of appeal found no evidence for coverage of the system replacement cost. The judge allowed the action, noting the cause of the loss was the water hammer, not faulty workmanship, although the corporation had never mentioned the water hammer in its pleadings.

**HELD:** Appeal allowed. The judgment was set aside. The water hammer was not a fortuitous event, but was a regular occurrence that the standpipe system failed to withstand because it was improperly designed or installed. The exclusion clause in the policy applied. Further, there was no evidence to support the position that the entire system needed to be replaced.


**LABOUR RELATIONS**

RIGHT-OF-ACTION – Plaintiffs' action was stayed because it fell within the labour dispute arrangements in the collective agreement.

Motion by defendants for an order dismissing the statement of claim on the grounds that the plaintiff had never mentioned the water hammer in its pleadings.

**HELD:** Motion granted. The relief sought arose out of the same allegations of harassment and discrimination for injury that was not the subject of the previous disciplinary hearing and the subject matter of the grievance and human rights complaints. The real basis of the claim was that the employer and two of its employees, for whose actions it was vicariously liable, permitted working conditions to exist which related to working conditions and fell within the provisions of the labour dispute arrangements affected in the collective agreement and under the Police Services Act (Ont.). An action alleging that employment relations were such that they were a lack of an effective remedy which related to working conditions and fell within the provisions of the labour dispute arrangements affected in the collective agreement and under the Police Services Act (Ont.). The court retained residual jurisdiction over claims brought by plaintiffs in the action.

The court dismissed the claim of the plaintiff. The court held that the plaintiff had failed to provide a clear and fair remedy or where there was a lack of an effective remedy.

**Held:** Motion granted. The ruling was based on the fact that the plaintiff had failed to provide a clear and fair remedy or where there was a lack of an effective remedy.
The ups and downs of rating sites

Lawyer-rating websites are no longer a mere curiosity in Canada, but opinions throughout the legal community are divided on how big a role they should play in helping clients pick the best lawyer to represent them.

There are sites such as martindale.com (which is owned by LexisNexis, the publisher of The Lawyers Weekly), which features the Martindale-Hubbell Peer Review Ratings, which are compiled from evaluations by other lawyers, and lawyerratingz.com, which bases its rankings instead on feedback from clients.

While both kinds offer insight into a lawyer’s abilities, it’s a far from perfect science as sites are susceptible to gaming, both positive and negative.

Jordan Furlong, Ottawa-based senior consultant with Stem Legal, a partner with Edge International Consulting and a columnist for The Lawyers Weekly, says there is little stopping lawyers from recruiting their friends to post rave reviews about their skills and abilities on one or more websites. On the flipside, an “impossible-to-please” client could ruin a lawyer’s online reputation with an unfair review.

“Smart sites will have systems...”

See Ratings Page 24
INSURANCE DEFENCE LAWYER
LITIGATION: PERSONAL INJURY/INSURANCE

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Closing Date: February 12, 2010
Contact Information:
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123 Commerce Valley Drive East, Suite 700, Markham, Ontario L3T 7W8
Fax: 905-479-9241
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Defence Construction Canada (DCC) is a rapidly expanding Crown Corporation that delivers contracting, contract management and other infrastructure services to the Department of National Defence. Our Ottawa, ON Site Office is currently seeking:

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Teaching lawyers to be in the now

JOHN STARZYNSKI

The way we spend our days is the way we spend our lives—Annie Dillard

With the new year now here it is time to take stock of where you have been and where you want to go. A book can help you make the changes you want this year. Transforming Practices, Finding Joy and Satisfaction in the Legal Life by Steven Keeva, an editor for the American Bar Association's The Lawyers Magazine, shows lawyers how to find profound satisfaction, pleasure, and joy in his or her work,“according to its cover.

A study at Johns Hopkins in 1990 looked at the incidence of depression among members of 105 different occupations. Lawyers topped the list. The Canadian Bar Association's Legal Profession Assistance Conference tells us that lawyers have up to three times the incidence of substance abuse and mental health issues as the general population. At the Ontario Lawyers Assistance Program, we anecdotally see that these factors are very relevant to disciplinary complaints and claims experience. Suicide ideation and completion is on the rise in the profession. This is all bad news.

As lawyers, we need to deal with these life-threatening issues by going to the resources that give meaning to our lives: relationships, giving back to society, possessions a sense of spirituality, working productively and being in love.

Keeva's book talks about a number of strategies but focuses on two main approaches — mindfulness and meditation.

Mindfulness means being in the moment, in the here and now. It means knowing yourself physically, emotionally and spiritually, mapping out a balanced day, allowing yourself to spend time in meditation daily, and by asking yourself the question: How could I spend my days in a way that would make me feel excited about waking up in the morning?

Keeva tells a story about a client who calls his lawyer’s office to ask that the documents and tax implications of selling his business can be ready for him in a day.

The lawyer in charge of the legal work waits for the client to come into the office to talk. He advises that he does not just become a mechanical practitioner but needs to know why the work needs to be done. He listens, realizing that clients want more than just a legal fix and they come to you because they want to feel more whole and at peace. They want you to care about them. In talking to the client, he discovers that the client has had an offer for a long-standing family company, does not want to sell because he would like his kids to continue the family business but is in a cash crunch.

The talk is of the client as a person, businessperson, father and provider. The lawyer discusses other ways to deal with the capital challenges and the client leaves happy that he has not made a mistake. The lawyer does not get that piece of business, but the client is so happy that someone listened and helped that business is referred to the firm.

In the matrimonial realm, there is the client-lawyer discussion about the reason for legal work and how it will be handled.

A lawyer who inquires about the underlying reasons for litigation may find the motivation to be anger or revenge. Who wants to be a part of that when you are not looking at the big picture of trying to settle disputes at the minimum of collateral damage to spouses, children and the financial viability of a separated family? You are a counselor, trusted adviser, problem solver and peacemaker along with your role as advocate when that is necessary. As a lawyer, you are a healer.

I wrote an article a number of months ago in these pages about meditation. I will not repeat it here except to say that time spent focusing on the breath and clearing your mind will help you to perform your work more effectively. Spend at least five minutes a day cultivating inner stillness. Stop and be still when you need to perform your work more effectively.

See Mindfulness Page 26
Whether lawyers like it or not lawyer rating websites are becoming more ubiquitous

Effectively working with lawyers

MICHAEL RAPPAPORT  TORONTO

How do in-house counsel go about finding competent, conscientious, and efficient lawyers? They ask their lawyers to recommend counsel. When should you sue, when should you settle and when should you swallow your losses? At what point in a deal should you refer your matter to an outside legal team? For a wealth of wisdom on these issues, look no further than the classic book by Mark McCormack, The Terrible Truth About Lawyers: How Lawyers Really Work and How to Deal With Them Successfully.

McCormack was both a Yale University-trained lawyer and the chairman and president of IMG, an international management organization that handles the commercial affairs for sports figures and celebrities. Although McCormack died seven years ago and his book was published in 1997, his insights on how to work with lawyers effectively are as relevant today as they were two decades ago. If you don’t already have a well-thumbed, highlighted, dog-eared copy of his book, the following is a synopsis of his recommendations.

Retaining counsel

Ask and ye won’t be taken. “It is always to the client’s advantage to show sophistication by knowing the pertinent questions. Showing awareness up front is a great deterrent to being taken advantage of later on,” McCormack wrote.

(1) Give yourself the lawyer’s level of competency in a particular area of law, ask the following:

(2) If he or she has expertise in a particular matter;

(3) For specific examples. Remember: “You’re notshell- ing out good money for the privilege of being a guinea pig.”

When assessing an individual lawyer’s competency, be sure to evaluate the four key cornerstones of legal practice:

(1) Interviewing skills;

(2) Counseling skills;

(3) Negotiating skills; and

(4) Drafting skills.

On the matter of conscientiousness, McCormack stressed the importance of going through due diligence to make sure that the lawyers who represent you are ethical, hardworking and fair minded. “If your lawyer is obnoxious, obnoxious by association,” McCormack wrote.

When it comes to containing legal costs, keep these points in mind:

See Lawyers Page 26
Destressing your law office in these stressful times

DONALEE MOULTON  HALIFAX

A hectic year is behind us, the impact of the recession still with us, and the holidays just over. Is it any wonder lawyers and their staff are stressed? Law firms must create a culture and address key issues if they want professionals who are performing at their peak, and who will stick around.

Culture creation starts at the top. “Senior partners need to set the tone for the firm, and they need to walk the talk,” said Chris Hornberger, a partner with Halifax Global Inc., a management consulting firm based in Nova Scotia. “Senior people,” she added, “always send a message to junior staff either implicitly or explicitly.”

And junior staff always get that message. Indeed, said Jean Petrie, cardiovascular health and wellness coordinator with Creative Wellness Solutions Inc. in Tantallon, N.S., “[senior partners] cannot just pay lip service to this.”

Here’s why: The price tag is simply too high. “The costs associated with stress are substantial: about 20 percent of the payroll of a typical company goes toward work-related medical costs,” noted Morrison.

“Likewise,” she noted, “if the firm says it expects legal professionals to work 40 hours a week and then regularly gives them 60 hours worth of work, what is said will be forgotten in light of what is done and stress levels will rise.”

“Senior managers cannot expect employees to manage their workloads appropriately if they are behaving in a manner that suggests poor boundaries and work/life balance,” said Morrison.

“Senior managers are role models for the workforce,” she said. “They will serve as a stress barometer, said Petrie.

“They want to see what is expected. ‘Do lawyers know what these policies actually say?’ she said.”

“A lack of consistent, clear expectations of what people can actually do, said Hornberger.

“In some cases, she noted, these expectations will be entrenched in policy. For example, can lawyers work remotely if they have a child at home with a cold? Are the number and appropriate use of sick days spelled out in an HR manual?

“Senior managers cannot expect employees to manage their workloads appropriately if they are behaving in a manner that suggests poor boundaries and work/life balance,” said Morrison.

“One way to help avoid conflicting messages, and bring the organizational stress level down, is to give lawyers a voice. ‘Listen to the input of everyone... You don’t want to be guessing at this. You want to find out what the hell is bugging them,’ said Petrie.

“Encourage lawyers to speak up, she added, by making it comfortable for them to do so. ‘Survey employees to measure how they feel. Make sure responses are anonymous.’

“There are a host of other things firms can do to reduce stress levels. This includes recognizing the accomplishments of lawyers and staff, said Morrison.

“Other ways are to allow flexible work arrangements, and offer professional and personal training and workshops on such issues as stress management and career development,” she noted.

“Most firms are now planning to offer work/life benefits as part of their human resources strategy.”

“Having fun is also important — and can serve as a stress barrier, said Hornberger. ‘Do social things together, and pay attention when these activities start to fall by the wayside. That’s a general indication you have a problem.’”

Announcements

Foster Richmond LLP is a Calgary law firm practicing exclusively in the area of family and divorce law.

Foster Richmond LLP is pleased to announce the admission into the partnership of Aaron M. Vanin and Heather A. McGurk.

Aaron M. Vanin (403) 750-9631 avanin@frlaw.ca

Heather A. McGurk (403) 261-5343 hmcgurk@frlaw.ca

We are pleased to welcome Craig Logie as a Partner to the Baker & McKenzie Toronto Office.

Craig has a wide-ranging international trade law practice with a focus on the litigation and arbitration of large multi-jurisdictional disputes.

He is recognized as a leading practitioner in WTO/International Trade law by Chambers Global: The World’s Leading Lawyers for Business for his representation of major Canadian, U.S. and U.K. corporations before all levels of the courts, administrative tribunals and arbitral bodies on international commercial issues.

Please join us in welcoming Craig to our team!
In-house counsel can work well with outside lawyers

Find ways to make changes

Mindfulness

Continued From Page 23

to. Break the rhythm of work to relieve stress. Be mindful of the quality of your presence and how it affects other people. Are you keyed up, distracted, bored, over-energized or even bursting with energy? Make eye contact with others and be there when you greet other people. Try to be as present when you answer your phone as you were at call one. Ask yourself if your body and your mind are on speaking terms. When you find yourself being judgmental, try to quieten down.

Keeva talks about the fact that all this is not just pie in the sky. One of the largest law firms in Boston has gone on retreat to teach lawyers to have inner peace. The second resource listed was the International Alliance of Holistic Lawyers in Virginia; its website is: www.iahl.org. You might also look at Stephanie Allen West’s blog on contemplative law at http://westallen.typepad.com/ideallaw/2008/09/contemplative-lawyers-some-mindfulness-resources.html. Look at these resources to see another approach to law than just blindly churning out work.

Finally, there are three suggestions found on page 208 of Keeva’s book. Find a colleague with whom you can discuss ways to renew your love of practising law. Don’t let the idea that “It just isn’t done” stop you from trying. The fellowship will be incredibly rewarding.

Make a list of three things you feel helpless to change. Then, figure out how to change them.

Finally, take a senior member of the Bar to dinner and pick their brains for advice and wisdom.

The poet David Whyte has said — “Take the time if you find that you’ve promised yourself to things that are just too small.” Love yourself. You are worth it.

John Starzynski is the volunteer executive director of the Ontario Lawyers Assistance Program and a director of the Legal Profession Assistance Conference.
**NEWS**

**Charron led unanimous judgments, LeBel carried ball in Quebec**

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<td><strong>ABELLA</strong></td>
<td>She wrote mostly on administrative, criminal, and family law as well as the Charter’s guarantee of freedom of religion. Highlights included: her unanimous judgment in <em>Rick v. Brandensec</em>, which recognized a common law right to full and honest financial disclosure in matrimonial property cases; <em>A.C. v. Manitoba (Director of Child and Family Services)</em>, a majority ruling that children under 16 may make life and death decisions about their medical treatment if a court deems them capable of “mature, independent” judgment about their health; and <em>Bell Canada v. Bell Aliant</em>, a high-stakes unanimous decision about the CRTC’s exercise of its rate-setting powers.</td>
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<td><strong>BINNIE</strong></td>
<td>He wrote for the court on division of powers, criminal, labour and administrative law, including the majority decision in <em>Canada (Citizenship and Immigration) v. Khosa</em>, a key administrative law ruling that stresses curial deference to expert administrative decision-makers while elaborating on the Dunsmuir standards of review; and <em>Desbiens v. Wal-Mart</em> which balances management and labour rights under the Charter’s s. 2(d) guarantee of freedom of association. A vigorous dissent in <em>Lipson v. Canada</em> decried the majority’s broad view of the scope of the general anti-avoidance rule (GAAR) in the Income Tax Act.</td>
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<td><strong>DESCHAMPS</strong></td>
<td>She wrote a lot about procedure, both in civil (class actions) and criminal (joinder and severance of trials) cases. She wrote the majority judgment in <em>Greater Vancouver Transit Authority v. McLachlin</em>, which reviewed the “unwarranted” construction of trial judges’ broad discretion under the Charter’s s. 24(1) general remedy provision.</td>
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<td><strong>FISH</strong></td>
<td>He wrote more opinions, and more dissents, than anyone else: 19 opinions, including nine dissenters. More than any other judge, the former criminal law barrister concentrated on only one legal area: criminal law. Just two opinions were non-criminal. Important judgments of his included: the unanimous rulings in <em>R. v. Basi</em> on disclosure and in <em>R. v. Legare on the mens rea for Internet luring</em>; the majority ruling in <em>R. v. Khela</em> on Vetrone warnings; and his dissent in <em>R. v. Bjelland</em>, in which he and two others deployed the majority’s novel “unwarranted” construction of trial judge’s broad discretion under the Charter’s s. 24(1) general remedy provision.</td>
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<td><strong>LEBEL</strong></td>
<td>He wrote 15 opinions, including some on criminal law, and was the court’s workhorse in the area of Quebec law, including rendering a unanimous, if controversial, judgment in <em>Minority language rights in Nguyen v. Quebec</em>. He also authored the majority judgment in <em>Lipson v. Canada</em> on GAAR, the most important tax decision in decades.</td>
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<td><strong>MCLACHLIN</strong></td>
<td>True to form, the chief justice’s dozen opinions ventured into the constitutional, criminal and non-criminal spheres. She collaborated with colleagues to write joint reasons more often than any of the judges (she co-wrote three judgments with Justice Charron and two opinions with Justice Rothstein). In addition to the libel and Charter remedy landmarks she wrote or co-wrote, she penned the majority decision in <em>Hutterian Brethren</em> which held that Alberta can require members of a religious order to be photographed for their driver’s licences, notwithstanding their belief that the Bible bars them from having their photograph taken.</td>
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**2009 SCC written opinions by judge**

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<th>Judge</th>
<th>Unanimous</th>
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<th>Dissent</th>
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<td>Fish</td>
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<td>LeBel</td>
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<td>McLachlin</td>
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<td>Rothstein</td>
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*Joined court Dec. 22, 2008*
Nine conclusions emerged from barristers’ society’s futures team

When the futures team threw everything they learned into the mix, nine conclusions emerged. Among these: The need for education for lawyers to include more than substantive law and traditional “lawyering” skills. “Lawyers expressed the desire to learn how to manage the business of practising law, how to deal with new technology, and how to manage the knowledge that they have or acquire,” the 29-page discussion paper states.

“Lawyers also need to develop cultural competency, which means being sensitive to a wide range of cultural differences and awareness of their own cultural worldview,” it adds.

Another key conclusion unites both generational differences and the modern reality of practising law. This is the need for lawyers to engage technology and knowledge management. Technology, in particular, posed a real concern for the profession. “Lawyers told us about their fears about technology and the impact technology is having on them,” said Pink.

According to the report, “Competent lawyers leverage technology and other improve-ments to make them practise smarter and more efficiently. Younger lawyers generally better understand the value of technology and are not afraid to use it. However, many lawyers told us that they just don’t know how to best use it or that they don’t have time to research and discover what’s out there.”

“In today’s environment,” the report stresses, “it is becoming more difficult for lawyers to succeed without learning to embrace technology and making it work for them and their clients.”

The conclusions will likely come as no surprise to practising members of the profession, noted Pink.

What is noteworthy, he said, is the agreement around what those issues are. “What was surprising was the groundswell that this represented. There was strong consensus about the directions we have to go in.”

That direction is new, NSBS President Ron Creighton told lawyers in the current issue of the Society Record. “The Society intends to consider the term ‘Continuing Professional Development’ in the broadest context, with an emphasis not only on the need for a lawyer to be competent in substantive legal knowledge, but also in a variety of areas including ethics, practice management, client management, cultural issues, risk prevention, financial management and ‘personal’ management.”

The bar council has now voted to appoint another working group to translate the findings from the Futures Project into a concrete action plan. That plan will be ambitious — it’s intended to “meet the changing needs of lawyers, their clients and the public.”

“The finalization of a new CPD program,” said Creighton, “will impact every practising member of the Society and the future of the legal profession in Nova Scotia.”