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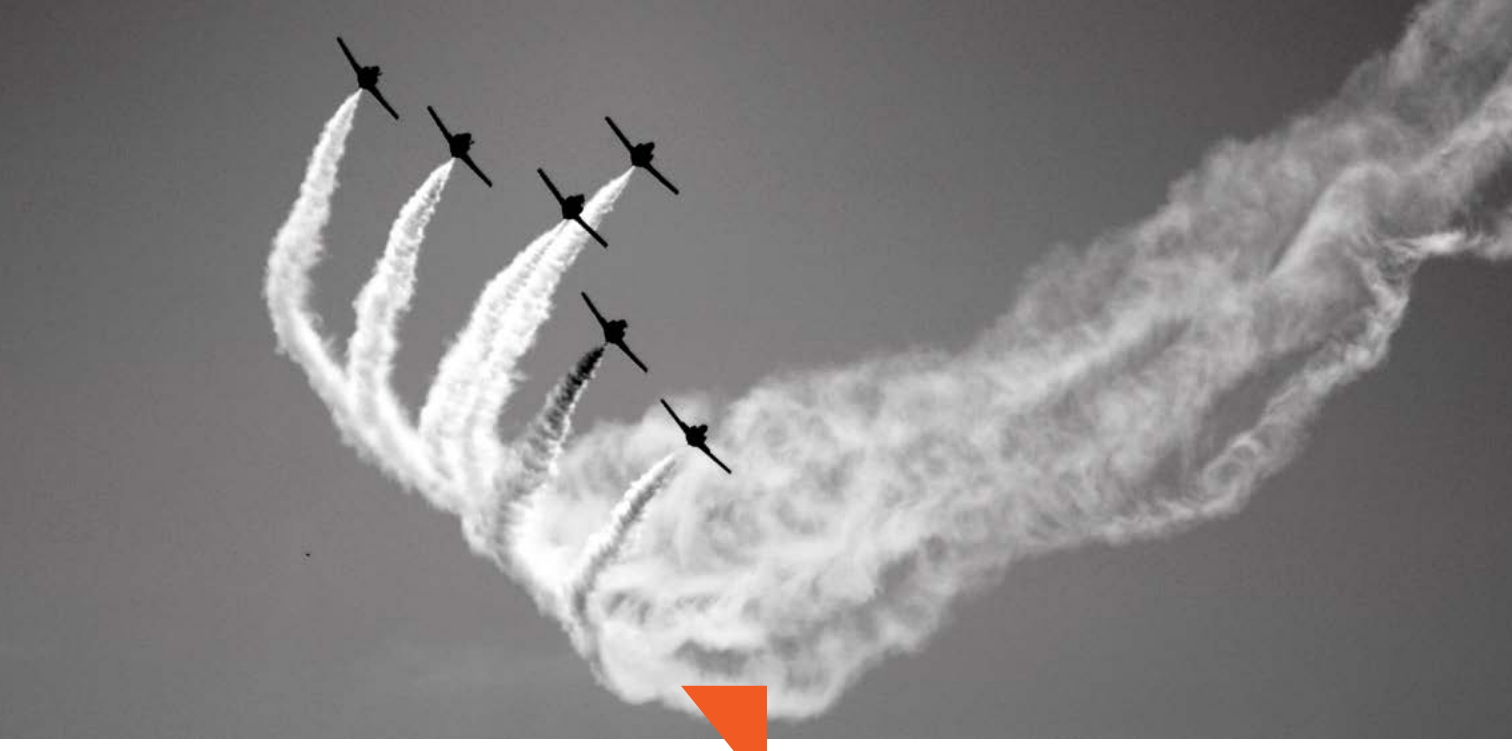

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Jean Cumming
Editor-in-Chief

Lexpert
Special Edition
CANADA'S LEADING LITIGATION LAWYERS

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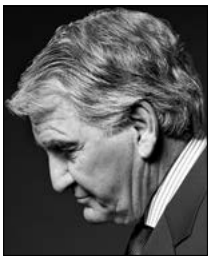

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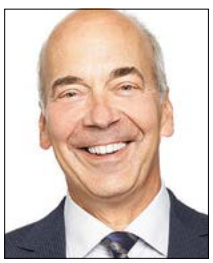

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Arbitration Advantages

ARBITRATION OFFERS A FLEXIBLE AND PRIVATE ALTERNATIVE TO A BUSY COURT SYSTEM BUT THE PARTIES MUST WANT TO REACH A SOLUTION TOGETHER IN ORDER FOR IT TO WORK WELL

By John Greenwood

Arbitration was supposed to be the answer to Canada's backed-up legal system. Instead of waiting years and paying exorbitant sums for a final judgment, parties could agree to go to arbitration where — so we were told — disputes could be dealt with in a fraction of the time. That was how it was supposed to work, and indeed, how it actually did work, according to proponents. But what's become clear in recent years is that some of the shine has come off, partly because arbitration has become a victim of its own success.

Faced with a court system that seems to be bursting at the seams, parties are highly motivated to explore alternatives such as arbitration — and many parties have agreed to by contract. This has brought many of the same bottlenecks to arbitration.

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And it wasn't just disputants. Legal professionals took the cue as well. Like the disputants, not all took the time to properly understand how arbitration works and how it could be made to benefit clients, says William Horton, a Toronto-based arbitrator and sole practitioner.

"We have a lot of litigators and, frankly, retired judges who move from litigation to arbitration but don't do anything differently," says Horton. "They don't try to find out how arbitration can be conducted. They are not curious about processes that parties might accept as fair, because their idea of fairness is so informed by court rules that they cannot imagine anything other than that being fair."

"IF PARTIES ARE ANTAGONISTIC AND CAN'T AGREE ON ANYTHING, GOING INTO ARBITRATION PROBABLY WON'T SOLVE MANY PROBLEMS."
NINA BOMBIER; LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP

The end result, he says, is arbitration is now struggling with many of the same issues around delays and costs as the courts.

Horton is hardly a voice in the wilderness. Nina Bombier, a Partner at Lenczner Slaght Royce Smith Griffin LLP in Toronto, agrees that arbitration has its share of problems, but she mostly blames human nature. "If parties are antagonistic and can't agree on anything, going into arbitration probably won't solve many problems," she argues. In other words, if disputants are determined to drag each other into the mud, there's nothing to stop them, whether they're facing an arbitrator or a judge.

One of the simplest ways to ensure arbitration doesn't become a quagmire is for parties to agree to work together. Once they've decided to launch the process, they must focus on the common goal of moving forward and not on the disagreement. Simply put, they must *want* to reach a solution, says Bombier. If they are willing to co-operate and work together to come up with a mutually agreed-upon process, then not only can they save time and money, they might also end up with a result that both are happy with, she says.

Much the same argument could be made for the court system. If both parties go in with the hope of getting a quick result at reasonable cost, that can be an achievable goal. Dominique Hussey, a Partner at Bennett Jones LLP in Toronto, specializes

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in intellectual property, where most significant cases are litigated in the Federal Court of Canada. Hussey says the Federal Court has made considerable strides in recent years in streamlining the litigation process and that's had an impact.

"With active case management and reasonably cooperative lawyers, a case can proceed from start to finish in about two years," she says. "In addition, if both parties are looking for a quick result in court, there are several procedural tools that can facilitate this, such as dispositive motions, or applications based on paper evidence rather than actions that lead to trials based on live witness evidence." Thanks to these efforts, arbitration is no longer an obvious choice for "a faster, less expensive result," she says.

Arbitration is commonly described as an adjudicative process that, like litigation, uses an adversarial approach and is overseen by a neutral party, an

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arbitrator or panel of arbitrators. Unlike litigation, arbitration is flexible. Parties agree on the structure of the process and on the choice of arbitrator. And unlike litigation, the vast majority of cases are private, off limits to the media and members of the public. There is no central registry where details such as transcripts and outcomes are recorded.

For that reason, it's difficult to know with any clarity how quickly arbitration has grown or whether most clients are satisfied with the results. "There's only anecdotal evidence about the number of disputes handled by arbitration," says Bradley Berg, Practice Group Leader for Litigation and Dispute Resolution at Blake, Cassels & Graydon LLP in Toronto. He estimates that at least a third of large commercial disputes go to arbitration. "It's a significant proportion," says Berg, who reckons about half his practice at Blakes is arbitration cases.

"THERE ARE MANY REASONS WHY PARTIES DON'T WANT THEIR BUSINESS DISPUTES AIRED IN A PUBLIC FORUM. IN A COMMERCIAL CONTEXT YOU CERTAINLY DON'T WANT TO SHOW THE WORLD IF YOU'RE RUNNING INTO SOME COMMERCIAL PROBLEMS, GIVE AWAY TRADE SECRETS OR SHOW YOUR FINANCIAL RESULTS."
CAROL HANSELL; HANSELL LLP

Indeed, privacy is one of the main reasons parties, especially businesses, favour arbitration. According to Horton, many clients are so focused on the privacy aspect that they neglect to design a process that takes advantage of the other benefits. Not surprisingly, these kinds of arbitrations often end with neither side happy.

Privacy is a good thing, says Carol Hansell, Senior Partner at Hansell LLP in Toronto. "There are many reasons why parties don't want their business disputes aired in a public forum. In a commercial context you certainly don't want to show the world if you're running into some commercial problems, give away trade secrets or show your financial results. From the parties' perspective it absolutely is a good thing [to keep this information out of the public spotlight] and that's why they often choose to arbitrate."

But because of the privacy, cases have no precedential value. They don't become part of the common law, allowing it to evolve and develop. Some observers argue this can be construed as a negative consequence, but at the same time they acknowledge it must be weighed against the needs of disputants, who could clearly suffer damage if

their intellectual property or other secrets were publicly disclosed.

Many disputes arise because of commercial agreements gone wrong. "The commercial agreements are often not public," says Hussey. "There is no inherent reason why the resolution of the dispute must be public. The value of certain forms of intellectual property — trade secrets, for example — can be compromised or destroyed by virtue of being publicized. Reputations can be compromised during litigation. Sustaining this kind of loss should not be a requirement for attaining justice."

Where parties are both seeking a quick, inexpensive result, arbitration offers an array of significant benefits, mostly around flexibility of process. Litigation often takes a long time partly because it is made up of a set of steps that must be completed. But in arbitration, parties design their own process. If they decide that certain steps are unnecessary, those steps can be removed.

"If they don't want discovery, they can agree they don't need it," explains Berg. "If they want an oral hearing, they can have an oral hearing. If they want a hearing in writing, because, say, they want to get it done in 30 days, they can do that too."

The important thing when it comes to designing the process is that parties choose counsel with a good understanding of arbitration and how best to take advantage. Not only can the process be customized, parties can also choose the arbitrator.

"Decision makers you select can have better expertise, so you know what you're getting a bit more than with judges on the Bench," says Bombier. Since arbitrators are chosen for their special expertise in industries or business practices, disputants don't face the same risk as they do with judges on the Bench that the decision maker has insufficient knowledge to make a good decision. On top of that, they are probably more interested in getting to a decision quickly because their interests are aligned with the parties, adds Bombier.

Newcomers to arbitration are sometimes put off by the finality of the process. This is another important difference compared to litigation. In the vast majority of cases, arbitration decisions can't be overturned. The process does not allow for appeals. This can be highly attractive for businesses operating in fast-paced industries that need to move forward quickly, but parties need to trust the process and accept decisions.

Canadian courts haven't always been so reluctant to revisit arbitration decisions, but over the last decade the courts, particularly the Supreme Court of Canada, have issued a series of decisions that essentially put a fence around arbitrator decisions.

"The courts will stand back and not interfere with decisions by an arbitrator unless there is a clear error of law," says Murray Clemens, a Part-

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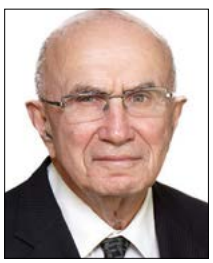

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PHOTO COURTESY OF ARBITRATION PLACE

"THE COURTS WILL STAND BACK AND NOT INTERFERE WITH DECISIONS BY AN ARBITRATOR UNLESS THERE IS A CLEAR ERROR OF LAW. PRACTICALLY SPEAKING, THAT REDUCES THE PROSPECTS FOR APPEAL SIGNIFICANTLY."
MURRAY CLEMENS; NATHANSON SCHACHTER & THOMPSON LLP

ner at Nathanson Schacter & Thompson LLP in Vancouver. "Practically speaking, that reduces the prospects for appeal significantly."

This can be a deterrent for some. A 2016 story in the trade publication *Today's General Counsel* quotes an opinion survey finding that 66 per cent of respondents "might not choose arbitration because of the difficulty of appealing." The article does not explain how large the survey sample was or whether respondents included only lawyers, but it does highlight a common concern about arbitration, which is that it's an all-or-nothing process. If one of the parties makes a mistake, there are few opportunities to correct it.

Still, on balance, most experienced parties will agree this is a good thing. The fact there are no appeals "can carve years off the final resolution of a dispute compared to the court system, years," explains Berg. "A lot of clients would rather lose than

be faced with something that goes on for six or ten years. They want a fair process and they want to get it done."

"That lets parties move on with their business," says Bombier. And even when arbitration fails to yield an ideal solution, she maintains it's often still an improvement over going to court.

Indeed, decisions made by arbitrators are also easier to enforce in many countries than court decisions. "You wouldn't have thought so," says Berg. "One of the most successful and widely international conventions is the New York Convention of 1958. It does one thing: Provides for the enforcement of international arbitration awards." So far more than 100 countries have signed on and new ones are added every year.

The bottom line is that arbitration is maturing. More companies are taking advantage of its benefits, the courts are more willing to accept arbitrators' decisions and the level of expertise available to disputants is rising. We are also seeing the emergence of organizations catering specifically to the needs of disputants, such as ADR Chambers in Toronto and Vancouver Arbitration Chambers, providing many of the same functions as the courts.

"We now have a pool of expertise," says Berg. "It's not just a few old guys who are famous and great but maybe 50 or 100 people who know arbitration and know the value you can give to your client."

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Taxing Questions

A RECENT LANDMARK TAX COURT DECISION CUTS TO THE HEART OF WHAT CONSTITUTES A FINANCIAL SERVICE AND POTENTIALLY IMPACTS EVERY CANADIAN BANK AND CREDIT UNION THAT ISSUES A CREDIT CARD UNDER ITS NAME

By Sandra Rubin

Is the credit card company Visa a financial service? In a landmark decision handed down over the summer, the Tax Court of Canada held that it is not.

Canadian Imperial Bank of Commerce v. Her Majesty the Queen, 2018 TCC 109, means at least one major bank will not be repaid $18 million in GST and HST the bank argues it wrongly paid Visa Canada on fees it paid the company in connection with the use of the popular credit card.

The ruling has the potential to impact every Canadian bank and credit union that issues a credit card under its name. It raises the question of how credit-card HST or GST is, or will be, passed along, whether through increased annual card fees, higher rates on unpaid credit card balances,

PHOTO: SHUTTERSTOCK

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"THIS ISSUE OF WHETHER SOMETHING IS A FINANCIAL SERVICE OR NOT HAS PLAGUED THE VAT [VALUE-ADDED TAX] JURISDICTIONS AROUND THE WORLD. THEY'VE HAD THE SAME PROBLEMS IN THE UK AND THE EUROPEAN COMMUNITY, WHERE THEY HAVE TO FIGURE OUT WHETHER SOMETHING IS A FINANCIAL SERVICE. IT'S BEEN A PROBLEM IN EVERY VAT OR GST JURISDICTION. THE INDUSTRY'S COMPLICATED AND WHEN YOU'RE TRYING TO BOX THINGS IN, SOMETIMES THE LINES AREN'T SO CLEAR."
AL MEGHJI; OSLER, HOSKIN & HARCOURT LLP

or small fee increases for all customers being just a few possibilities.

"There are a number of avenues they can take," says William Innes, a tax practitioner at Toronto-based Rueters LLP. "They're obviously going to take the ones that give them the least bad press and make them whole."

The decision itself cuts to the heart of what constitutes a financial service. It's critical because, under the *Excise Tax Act*, a financial service is exempt from paying GST and HST while a non-financial service — even if it involves providing services that are financial in nature — is *not*.

The decision affects not just CIBC but potentially all financial services such as banks, insurance companies and asset managers. Many millions of dollars turn on which category a credit card company falls into, with the potential to add as much as an extra 13 per cent on what the financial institution pays its card company.

The highly technical ruling, written by Tax Court Chief Justice Eugene Rossiter, is under appeal. You can bet every Canadian bank or credit union that issues a credit card and the credit card companies themselves are following developments very closely. There are 58 Schedule One and Two banks in Canada, as well as scores of credit unions and cooperatives and many, if not most, offer cred-

it cards under their name.

Al Meghji, a tax litigator at Osler, Hoskin & Harcourt LLP in Toronto, who argued the case for CIBC and will argue the appeal, declined to discuss the details, but said generally speaking, "the definition of financial services that the judge in this case considered is extremely important to the financial-services sector in general. It appears that the courts are still trying to determine a coherent and workable definition."

He points out that Canada is not alone in wres-

tling with this question. "This issue of whether something is a financial service or not has plagued the VAT [value-added tax] jurisdictions around the world. They've had the same problems in the UK and the European community, where they have to figure out whether something is a financial service. It's been a problem in every VAT or GST jurisdiction. The industry's complicated and when you're trying to box things in, sometimes the lines aren't so clear."

The same may be said of Canada's *Excise Tax Act*, which is enormously complex and detailed, and even contradictory. In defining a financial ser-

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"THE JUDGE SAID THERE IS SOME RISK HERE, BUT NOT ENOUGH TO BE 'AT RISK.' SO I IMAGINE, BUT I DON'T KNOW, THAT PART OF THE APPEAL WILL ARGUE HOW MUCH AT RISK YOU NEED TO BE AT TO BE AT RISK, BECAUSE THE [BANK] WON ON ALL OTHER ASPECTS. IF YOU TALK TO OTHER PRACTITIONERS, THEY'LL TELL YOU THAT'S THE VERY NOVEL, THE VERY INTERESTING ASPECT OF THIS CASE."
NATHALIE GOYETTE; PWC LAW LLP

vice, it sets a list of specific inclusions, another list of specific exclusions, and then a so-called "saving provision" that can turn an excluded entity into an included financial service based on risk.

Sometimes a company, as was the case with Visa, can fall into both inclusionary and exclusionary categories, leaving the question of whether its customers have to pay sales tax very much up in the air and depending on whether it meets the saving provision.

In deciding whether Visa should be in or out, Chief Justice Rossiter cited extensively from *Great-West Life Assurance Company v. The Queen*, 2015 TCC 225, in which the Federal Court of Appeal wrestled with a similar question involving a company called Emergis. It, not unlike Visa, he noted, was an intermediary that adjudicated and processed a financial institution's claims. The judge found "both highly analogous to one another in that they both provide services that facilitate payments between parties."

In administering health benefits for the insurer, Emergis offered a bundle of services, from maintaining a network to allow for the electronic submission of drug claims to creating end-of-day log files for Great-West.

In his 138-paragraph *CIBC* ruling, Chief Justice Rossiter pointed out that Visa similarly supplies a bundle of services: processing transactions; providing payment-management systems; licensing the Visa brand; and managing and promoting the card to the public.

The Court of Appeal held in *Great-West Life* that the answer to untangling a bundle lies in listing the array of services being supplied, then figur-

ing out which predominates.

Chief Justice Rossiter noted that in *Great-West Life,* the appeal court held that the services Emergis provided were administrative as the payment process "did not involve any independent decision making" and involved "principally providing an easier and more cost effective way" for Great-West Life to pay out its drug benefits.

In essence, he wrote, the appeal court found the decision whether to pay out came not from Emergis but from the financial institution itself. Emergis provided a computer system that allowed the decision regarding a drug benefit claim to be made in real time.

Building on that, he wrote that Visa's service bundle should be characterized as a payment platform and a system that facilitates payments on its platform.

"The value added service which Visa provides to CIBC is to relieve them of the need to keep track of and then individually pay merchants for the transactions paid for on credit by CIBC clients," he wrote. "Instead, Visa gives CIBC the ability to offer its clients the option of paying for goods and services on credit, while only needing to make one lump sum payment to Visa at the end of every day to settle the transactions."

At its most basic level, he said, "the benefit that Visa offered CIBC was cost saving and logistical simplification," which he held to be "quintessentially administrative in nature."

CIBC had argued that Visa should be considered a financial institution under the so-called "person at risk" clause, the saving provision that allows companies otherwise excluded from being treated as financial institutions to be included based on financial risk.

CIBC says Visa meets that definition because of the indemnification it provides to participants in its payment network, the corresponding exposure to potential settlement losses, and its ongoing exposure to potential foreign exchange losses.

Chief Justice Rossiter disagreed, saying it does not appear as though Visa was actually financially at risk as a result of the services it provided, at least not to the extent necessary to satisfy the provision.

He noted that "Visa Inc. itself seemed to value its own probability adjusted risk exposure as being extremely low, with its 2009 filing with the SEC valuing its potential exposure at less than $1 million dollars."

He added that although Visa's *theoretical* risk is high, "this extremely low valuation presumably takes into account the risk-management techniques which are employed" by the company.

He wrote that Visa's risk exposure is based on events "which have an extremely low probability of ever occurring," and concluded that "the purely hypothetical remote risks that Visa Canada is sub-

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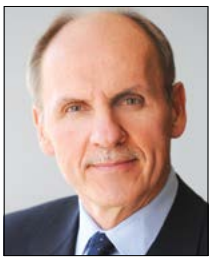

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ject to are insufficient for them to be considered a person at risk."

Nathalie Goyette, a Partner at PwC Law LLP in Montréal, says overall the ruling is a "serious, solid analysis" but added that the decision on the so-called saving provision "is quite novel. The question it raises is: how much at risk do you need to be to be considered 'at risk'?

"The judge said there is some risk here, but not enough to be 'at risk.' So I imagine, but I don't know, that part of the appeal will argue how much at risk you need to be at to be at risk, because the [bank] won on all other aspects. If you talk to other practitioners, they'll tell you that's the very novel, the very interesting aspect of this case."

Innes of Rueters says, "if the decision has any Achilles heel, that's probably it. The judge basically said the risk is illusionary. I don't know what the evidence was but, if the Court of Appeal is going to attack anything, I think it would be that. When

you're involved in transactions as complex as Visa is and CIBC is, it's often difficult to predict the limits of risk. To say that there is no effective risk assumed by Visa in this situation is a real leap of faith. You really have to have the evidence to bear that out, and possibly he does."

At the end of the day, the ruling is important for consumers, says Cheryl Gibson, a tax partner and former head of the Edmonton Tax Group at Dentons Canada LLP.

"Had CIBC been right, the consumer would have been better off. The one thing we know is any bank is ultimately going to transfer additional cost down to the consumer, one way or another.

"The government is going to be thrilled with this decision because this is a huge amount of money going into its coffers for GST [and HST]. The government would have been very unhappy to see this amount of money lost had it gone the other way, because these are very large dollars."

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PHOTO: SHUTTERSTOCK

A Matter of Civility

THE SUPREME COURT HAS BROUGHT AN END TO A LENGTHY CASE ON INCIVILITY, SENDING SEVERAL CLEAR MESSAGES TO THE LEGAL PROFESSION

By Paul McLaughlin

On June 1, 2018, the Supreme Court of Canada (SCC) brought a lengthy and expensive case on incivility involving the Law Society of Ontario (LSO) and prominent Toronto defence lawyer Joseph Groia, a Principal of Groia & Company Professional Corporation, to a final conclusion when it declared that previous findings of professional misconduct against him were "unreasonable."

Although the matter focused on Groia's behaviour in a criminal trial that took place in the early 2000s, the SCC's decision "was an important ruling for the profession," says Earl Cherniak of Lerners LLP in Toronto, who represented Groia. "That's something I almost never say about a ruling but, in this case, I believe it applies. I think the Bar in general is going to take significant heart and confidence from what [Justice

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"[THE SCC'S DECISION] WAS AN IMPORTANT RULING FOR THE PROFESSION … I THINK THE BAR IN GENERAL IS GOING TO TAKE SIGNIFICANT HEART AND CONFIDENCE FROM WHAT [JUSTICE MICHAEL MOLDAVER WROTE] AS TO HOW THEY ARE ABLE TO CONDUCT THEMSELVES."
EARL CHERNIAK; LERNERS LLP

Michael Moldaver wrote] as to how they are able to conduct themselves."

The key issue in this intriguing dispute focused on the often thin line between what constitutes a lawyer's duty of "resolute advocacy," as Justice Moldaver expressed it, and the need for civility in the profession, a ruling that has an impact on all litigators.

"It has sparked a lot of debate and discussion in the profession about civility," says Sarah Armstrong, Vice-chair of the Ontario Litigation Department and Chair of the Arbitration Practice Group at Fasken Martineau DuMoulin LLP in Toronto. "For me, the biggest positive is that it's really got people talking about [lawyers'] tactics and what crosses the line and what doesn't."

The allegations against Groia emerged from his defence of John Felderhof, a Vice President and Chief Geologist for Bre-X Minerals Ltd. of Calgary, a company that perpetrated one of the biggest gold-mining frauds in history. After the fraud was discovered in the late 1990s — Bre-X was found to have salted samples from a mine in Borneo that it had touted as one of the largest gold sources ever discovered — the Ontario Securities Commission (OSC) charged Felderhof, not with having participated in the scheme, but with insider trading and failing to have recognized warning signs that it was occurring. In 2007, after a trial that began in 2001, Felderhof was acquitted of all charges.

During the trial, which was rancorous to say

the least, Groia, who is known to be a zealous advocate, alleged prosecutorial misconduct, especially regarding issues of disclosure and admissibility of documents. He was often sarcastic in speaking about the OSC's prosecutors, whom he called "lazy," and he referred to the OSC as "the Government."

In 2009, the Law Society of Upper Canada (as the LSO was then known) initiated disciplinary proceedings against Groia, saying he had engaged in professional misconduct by acting uncivilly during the trial. He was found guilty of being rude and disruptive and ultimately fined $200,000 and assessed a one-month suspension. Groia appealed but the finding was upheld first in Divisional Court and then by the Ontario Court of Appeal.

When the SCC ultimately ruled in Groia's favour, it sent several clear messages to the profession. One was that a "multi-factorial, context-specific approach" to determining whether in-court behaviour crosses the line into professional misconduct on the basis of incivility "was appropriate." This wording, as well as the entire decision by the SCC, says Malcolm Mercer, a Partner in McCarthy Tétrault LLP's Litigation Group in Toronto and the new LSO Treasurer, provides "helpful guidance" to the profession. The SCC said that the question of what constitutes civility "is context specific. You have to look at what the lawyer said, the manner and frequency in which it was said and the presiding judge's reaction to it."

The SCC also said that when allegations in court are based on errors in law (such as Groia claiming prosecutorial misconduct), they do not constitute incivility when they are based on good faith. Of greater importance, perhaps to the legal governing bodies, the SCC affirmed that the law societies are the arbiters of what constitutes civility: "Their decisions respecting professional misconduct should be approached with deference."

Cherniak had argued that, "except in certain cases, the law society's jurisdiction should stop at the courtroom door except when the judge complains to the law society [which never happened in *Groia*] or finds the lawyer in contempt of court. I made that argument all the way up but no one bought it."

What the SCC did not do, however, was provide an ultimate definition of civility. Terrence O'Sullivan, Senior Counsel at Lax O'Sullivan Lisus Gottlieb LLP in Toronto, who represented

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The Advocates' Society at all levels of the *Groia* case, had hoped it would. "We argued for a broader standard of what constituted civil conduct and we urged the court to find a national standard, from which the national practising Bar could take guidance," he says. "But they chose not to do that."

The SCC did address the question to some degree. In its ruling, it noted that, "To achieve their purpose, it is essential that trials be conducted in a civilized manner. Trials marked by strife, belligerent behaviour, unwarranted personal attacks, and other forms of disruptive and discourteous conduct are antithetical to the peaceful and orderly resolution of disputes we strive to achieve."

However, most of the discussions within the profession, as Armstrong suggests, have likely focused on the question of zealous (or resolute) advocacy versus civility. Jeffrey Leon, a Certified Specialist in Civil Litigation at Bennett Jones LLP in Toronto, was part of The Advocates' Society process that led to the development of its Principles of Civility. "I believe you can be courageous, fearless and resolute and still be civil. I don't see them as being mutually exclusive," he says, adding that his view is that Groia, whom he knows and respects, was guilty of the charges.

"[THE *GROIA* DECISION] HAS SPARKED A LOT OF DEBATE AND DISCUSSION IN THE PROFESSION ABOUT CIVILITY. FOR ME, THE BIGGEST POSITIVE IS THAT IT'S REALLY GOT PEOPLE TALKING ABOUT [LAWYERS'] TACTICS AND WHAT CROSSES THE LINE AND WHAT DOESN'T."
SARAH ARMSTRONG; FASKEN MARTINEAU DUMOULIN LLP

Leon is concerned, however, that the SCC ruling might be seen by some lawyers as "a get-out-of-jail card to do whatever they want in the courtroom. [But] I don't think the courts will interpret it that way and I don't think that's what the Supreme Court intended."

The litigators who are most likely to take the SCC decision as permission to act very aggressively are those who might fall under the description of being a pit bull, the kind of lawyer whose main purpose seems to be to destroy opposing counsel and their clients. "I definitely think some litigators have the impression that they have to be pit bulls, and some clients say that's what they want [in a lawyer]," says Armstrong, "but my experience is that you don't have to be that way to be effective."

Although some senior lawyers agree that it might be unwise and unfair to generalize, they are concerned that some younger lawyers do not

behave as civilly as they should. Tom Curry, Managing Partner at Lenczner Slaght Royce Smith Griffin LLP in Toronto, who represented the LSO in the *Groia* case (and did not want to comment on it specifically), says that might be a contributing factor to "the perception that the civility discourse is diminishing. [It's] being replaced by a society that's perhaps too busy. I think as the profession has grown and with the rise of social media and other things, that that contributed to ... the disintegration of some of the rules [of conduct]." Curry himself is the recipient of the 2018 Catzman Award for Professionalism and Civility by The Advocates' Society.

Both Curry and Cherniak note that some young lawyers do not have access to the kind of support they had when they were starting out. "I have concerns that people coming up in the profession and doing litigation don't have the benefit of the kind of mentoring and experience I had when I was a young counsel," says Cherniak. "They haven't been exposed to mentoring, either in small firms or as sole practitioners and have no access to advice on how to conduct themselves or how to deal with people who are misconducting themselves."

Curry agrees that mentorship provides "opportunities for younger lawyers to observe other lawyers who have achieved the heights of their profession in terms of the quality of their work while also observing the highest standards of civility."

While the *Groia* case dealt with behaviour during a trial, most litigators' interactions with opposing counsel, of course, occur outside the courtroom and absent the presence of a judge. "It's in phone calls, written correspondence, examination, discovery," says Armstrong, who has experienced uncivil behaviour at times, although she says the majority of her communications have been professional and courteous. "When counsel conduct themselves [uncivilly in these situations], both parties tend to spend more money on distractions, like scheduling and other unimportant details, rather than on what we have a duty to focus on."

Groia's case took a considerable toll on the defence lawyer, who estimates he spent $2 million on legal fees and lost business combined as he pursued his defence (the SCC awarded him $500,000, from the LSO, toward his costs). He says he's "confident" that a law society "will never again try to prosecute a lawyer for courtroom conduct unless there has been a contempt finding or a judge asks them to do so by way of a complaint referral," a claim the LSO chose not to respond to.

It's impossible to know if the SCC's ruling will affect civility within the profession but to Cherniak, the SCC decision was a "great win for the profession and the public who will need representation by resolute lawyers in the future. They owe Joe a big debt of gratitude."

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Slowdown in Securities

PHOTO: SHUTTERSTOCK

IN THE WAKE OF THE SCC TRILOGY THAT LAID OUT A ROBUST INTERPRETATION OF THE LEAVE STANDARD, THERE'S BEEN A SLOWDOWN IN THE NUMBER OF CANADIAN SECURITIES CLASS ACTIONS

By Julius Melnitzer

There was no shortage of doubters after the Supreme Court of Canada (SCC) released its landmark 2015 trilogy setting the standard that plaintiffs must meet to satisfy the leave threshold for filing secondary market securities class actions.

"One plaintiff's lawyer I was facing called it nothing but a speed bump," says Matthew Milne-Smith of Davies Ward Phillips & Vineberg LLP in Toronto. "But it was a speed bump that wrecked his case."

From all appearances, the trilogy — *Canadian Imperial Bank of Commerce v. Green*, *Silver v. Imax Corporation* and *Trustees of the Millwright*

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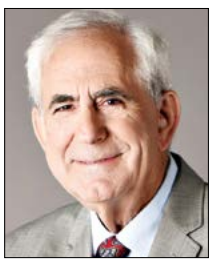

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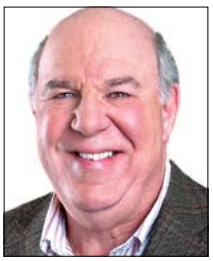

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"THE SCC BREATHED LIFE INTO THE IDEA THAT THE PLAINTIFFS MUST INTRODUCE SOME EVIDENCE TO SHOW THAT THEY CAN SUCCEED AND THAT THE COURT MUST DO A FULL ANALYSIS OF THAT EVIDENCE."
WENDY BERMAN; CASSELS BROCK & BLACKWELL LLP

Regional Council of Ontario Pension Trust Fund v. Celestica Inc. (reported as *CIBC v. Green*, 2015 SCC 60) — did more than that. By enunciating a robust interpretation of the leave standard throughout Canada and mandating a realistic review of the evidence and meaningful legal analysis that substantiated a reasonable chance of success for a plaintiff, the SCC put an end to many courts' tendency to rubber-stamp leave applications. "This meant that there was suddenly much more upside for defendants to fight leave vigorously," says Andrea Laing in Blake, Cassels & Graydon LLP's Toronto office.

Plaintiffs' lawyers took note. "It has become clear that leave is a real barrier, not a walk," says Michael Robb in Siskinds LLP's London, Ontario office. "So people became rightfully cautious and careful to build cases up properly, something which is an impediment to taking on smaller matters."

Indeed, according to NERA Economic Consulting's report, "Trends in Canadian Securities Class Actions: 2017 Update," the year saw only six new securities class actions filed, of which four related to the secondary market, bringing the average rate of filings from 2015 to 2017 "to about half that of the preceding seven years." This led NERA to conclude that the slower rate of filings was more than a "temporary lull," but rather the "new norm."

Still, the extent to which NERA got that right is not clear. While Canadian lawyers on both sides of the Bar generally acknowledge the recent slowdown and the impact of the trilogy, many cite other factors that could spark rejuvenation in the number of filings. They include a turnaround from the current bull markets to a bear scenario. "When markets are going up, even bad news has less of an impact on a company's stock price," Robb says. "So in a rising market, there tend to be fewer securities class actions."

Contrarily, however, there's been a revitalization of the genre in the US, where NERA reports that securities class actions saw record growth for the third year in a row. Indeed, the 432 class actions filed in 2017 represented an 89 per cent increase over the last two years, a growth rate not seen since the late 1990s. NERA's statistics indi-

cate that the record pace continued through the first six months of 2018.

Still, the statistics from the US bear cautious analysis. "The US and Canada have different statutory regimes and different jurisprudence, so even when there are consistent external factors, these factors can have inconsistent consequences on either side of the border," Milne-Smith says.

It is true that the proportion of Canadian statutory secondary market cases that originated with parallel filings in the US have risen steadily, constituting 48 per cent of filings between 2011 and 2017 compared to 37 per cent between 2006 and 2010. The fact that there were no such filings in Canada in 2017, therefore, bucks the trend, and undoubtedly contributed to the low number of filings in that year.

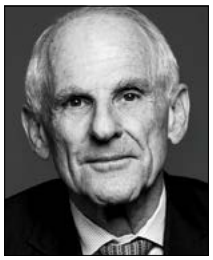
Nonetheless, the securities class action litigation risk for companies listed in Canada is substantially lower than for companies listed on major US exchanges — and the gap has widened over the last three years. "In short, while the much larger number of annual filings in the US is partly a function of the larger number of listed companies, it is also due to the substantially greater probability of a company being sued in the US," wrote the authors of NERA's 2017 Canadian report.

Finally, federal merger-objection filings — sometimes called "strike suits" — dominated in the US, growing for a record fifth straight year and representing some 46 per cent of filings. In contrast, strike suits have not fared well in Canada: in 2015, in *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, a Québec case that was a forerunner to the trilogy and featured a leave provision that corresponded to the Ontario legislation that was the subject of the trilogy, the SCC ruled that leave was intended to be a "meaningful screening mechanism" designed to prevent "costly strike suits with little chance of success."

There are other factors that make securities class actions less attractive in Canada as well. For example, the US is a no-cost regime; in Canada, only British Columbia is a no-cost regime while Québec caps costs. In the other provinces, unsuccessful parties on leave applications bear the costs. "Some companies have been very successful at mounting a massive defence to leave motions that requires a response involving huge resources of time and money," Robb says. "So, even in a good case, our assessment of the economics has to build in that risk."

Damages are also treated differently in the two jurisdictions. In Canada, if a stock price recovers, damages are erased; the US, however, has a "snapshot" approach that fixes damages at a certain time. "So whenever you see a stock drop in the US, you tend to see cases filed," Robb says. "We're more cautious here in Canada."

Finally, the U.S. Securities and Exchange Com-



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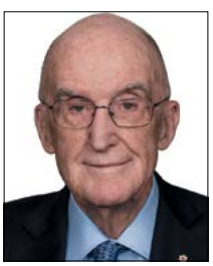

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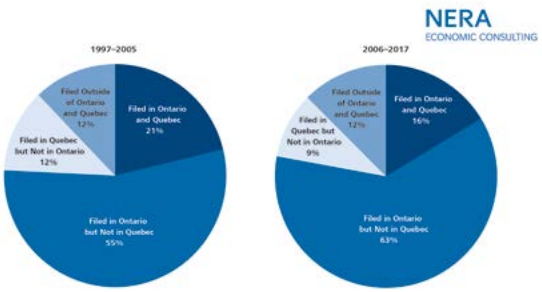
"WHAT CANADA IS EXPERIENCING SO FAR IS A LITTLE BIT OF A SLOW-DOWN. WE'LL HAVE TO WAIT AND SEE, ESPECIALLY BE-CAUSE IT TAKES FROM SIX TO 18 MONTHS FOR US ACTIONS TO SPUR COPYCAT CASES IN CANADA."
ANDREA LAING; BLAKE, CASSELS & GRAYDON LLP

mission governs a far larger population and is considerably more aggressive than its Canadian counterparts. "That's important because class counsel can piggyback their cases on regulatory investigation and findings," says Wendy Berman in Cassels Brock & Blackwell LLP's Toronto office. "In 2017, for example, the Canadian Securities Administrators took actions against only seven companies for disclosure violations."

The upshot is that securities class actions now give plaintiffs' lawyers much greater pause for thought than they did in the past. "The SCC breathed life

Distribution of Filings Across Provinces



into the idea that the plaintiffs must introduce some evidence to show that they can succeed and that the court must do a full analysis of that evidence," Berman says. "Plaintiffs' counsel now have to invest significantly at the outset of the case in terms of marshalling factual and expert evidence."

In other words, a fortified leave test has caused plaintiffs' lawyers, working on contingency, to look harder at their financial metrics. "We're seeing a more conservative approach from plaintiffs who have to invest resources up front in securities class actions," Laing says. "There are also other types of capital markets cases, such as the ones relating to the manipulation of financial benchmarks, that don't require leave and will divert resources available for securities class actions."

Robb, a plaintiffs' side counsel, agrees. "The leave mechanism has a definite impact even before we file, because the heightened standard means we have to do careful vetting and screening before we consider jumping into these things," he says. "There's no doubt that the jurisprudence on leave standards has impacted the way counsel and investors assess value."

For his part, Milne-Smith believes that plaintiffs' counsel have been on a learning curve. "What they've come to see is that what might appear to be a straightforward case of misrepresentation can turn out to be a complex case of business executives exercising their best judgment in trying circumstances," he says. "Sometimes they'll get it right and sometimes they'll get it wrong, but our courts have recognized that merely getting it wrong doesn't merit a multi-million-dollar class action based on tortious conduct."

All this having been said, Laing, for one, remains hesitant to anoint the current downturn in securities class actions as the new norm. "What Canada is experiencing so far is a little bit of a slowdown," she says. "We'll have to wait and see, especially because it takes from six to 18 months for US actions to spur copycat cases in Canada."

The statistics alone don't determine the issue — certainly not based on the sparse sample size that exists. The Ontario Court of Appeal's decision in *Yip v. HSBC Holdings plc*, 2018 ONCA 626, represented the only case decided in 2018 that involved a leave application. But even there, the decision was not based on the merits of the case but on the fact that the alleged misconduct occurred outside Canada.

According to NERA, of the 144 securities class actions filed since 1997, 25, or 17.4 per cent, had been denied leave or certification. Some 81 of these cases were statutory secondary market matters and 14 of these, or 17.3 per cent, have been denied leave or certification (10) or discontinued (four). Claims in 35 cases have been settled and 32 remain unresolved.

What the statistics don't tell us is how many of the leave applications were contested or how many were resolved on consent. Without this information in the context of an appropriate sample size, it's hard to know just what the 2017 statistics mean going forward.

The good news for the business community, however, is that the near-panic that transpired before the enactment of Ontario's secondary market liability regime in 2005 (the first in Canada) has proved to be unwarranted. "There was a perception for some period of time before and after the enactment of the legislation that securities class actions might be low-hanging fruit for plaintiffs' lawyers," Milne-Smith says. "Practice has proven that this is not in fact the case."

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Manipulating the Benchmark

PHOTO: SHUTTERSTOCK

CANADIAN PLAINTIFFS JOIN IN "COPYCAT" CASES AGAINST MAJOR FINANCIAL INSTITUTIONS CHARGED WITH MANIPULATING RATES

By Elizabeth Raymer

Last December, the law firm of Koskie Minsky LLP filed a proposed class proceeding with the Federal Court of Canada. The plaintiffs' statement of claim named around three dozen major banks and their affiliates and subsidiaries, alleging that they conspired to manipulate the price of supranational, sub-sovereign and agency (SSA) bonds.

It was the most recent salvo in a spate of class-action lawsuits — brought in Canada by a consortium of law firms on behalf of investors — that have charged major financial institutions in Canada and internationally with conspiring to manipulate benchmark rates: of the foreign ex-

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change (forex, or FX), gold, silver, and SSA bonds.

In June the Ontario Court of Appeal overturned a decision that had prevented class counsel from adding two more defendants to the list: TD Group and BMO. To date only the FX class action has been certified, and for settlement purposes only.

"There was a fair amount of press reporting over a period of time that indicated there were various investigations into conduct into certain financial institutions regarding benchmark products," says Daniel Bach, a litigation partner at Siskinds LLP in Toronto, one of the firms representing plaintiffs in the benchmark class actions, in explaining how the class actions originated. "We were contacted by various investors, and then we conducted a review of what was known to the market, to the public, and commenced litigation."

"YOU CAN PROBABLY SAY THAT THE REGULATORY ACTION IN THE OTHER COUNTRIES … IS WHAT SPARKED THE INTEREST IN BRINGING CLASS ACTIONS ON BEHALF OF INVESTORS IN THESE BENCHMARK CASES."
DAVID STERNS; SOTOS LLP

The benchmark controversies began with the Libor scandal in 2012, says David Sterns, a civil litigator and partner at Sotos LLP in Toronto, another firm in the consortium representing plaintiffs in the actions. The scandal originated with a series of fraudulent actions connected to the Libor (London Interbank Offered Rate), when it was discovered that banks were falsely inflating or deflating their rates in order to profit from trades.

"That attracted a lot of regulatory and class-action interest," says Sterns. "You can probably say that the regulatory action in the other countries ... is what sparked the interest in bringing class actions on behalf of investors in these benchmark cases."

The allegations against the banks in the benchmark class actions that are currently seeking certification in Canada allege something akin to price-fixing.

"They're all price-fixing cases, against major domestic and international banks," says Kirk Baert, a partner at Koskie Minsky LLP in Toronto, a firm in the consortium of firms representing plaintiffs. "They all relate to what I would call commodities: foreign exchange, gold, silver. And the common thread is the way they buy and sell these commodities is not on the up and up. They buy and sell in a way [that is] to the detriment of their customers."

At the heart of the cases is "the bid-ask spread manipulation, and the benchmark fixings," says Sterns. "The bid-ask spread ... allegation is that these banks would communicate with each other, and say, 'I've got a customer, I'm going to quote, what's everyone think?' In the FX world, we know that from pleas that have been agreed to by some the defendants," including in the United States.

"This was pervasive," he adds. "You had traders in a very small market, sharing information, disclosing confidential claims, agreeing on how wide the spread would be, and agreeing that a particular client of one bank would be quoted a certain amount, and other [banks] wouldn't compete with that. ... On a basic level, it's no different than two sellers getting together and deciding to raise prices."

Approximately twelve defendants have so far agreed to settle in the FX case, with about $110 million in settlements agreed to. In July, class counsel received approval of their plan of allocation and are about ready to start the claims process, Bach says.

"In a conspiracy class action, when you're suing a lot of people engaged in a conspiracy, typically the institution that settles first is giving some money [in settlement to plaintiffs], but primarily it is giving information about the conspiracy," Bach adds. What typically happens is that at one point, one party decides they want out of the conspiracy and comes to a law firm to provide information, he says. "That's often called an icebreaker settlement."

This helps a case develop in terms of what is understood of the underlying conduct, he adds. According to the filed statements of claim, this has included traders in "chat rooms" discussing benchmark manipulation with each other.

In the FX case, the non-settling defendants will have until early December to file their responding material in certification motions, says Baert, and the hearing will take place next June in front of Justice Paul Perell of Ontario's Superior Court of Justice.

"On the presumption they won't admit they're part of a conspiracy, it will all come down to whether they were part of the price-fixing groups," based on evidence, for example, provided by Bloomberg terminals that traders were allegedly using to fix pricing, he says.

The US case in the alleged forex/FX benchmark manipulation has settled largely with "the same body of defendants that we have settled with," says Bach. In the gold and silver benchmark cases, settlement has been reached in the US but not in Canada, nor have certification dates been scheduled.

"I would not be surprised to know that something was also happening in the UK and Australia," Bach adds. "It's a global alleged conspiracy

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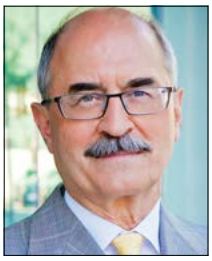

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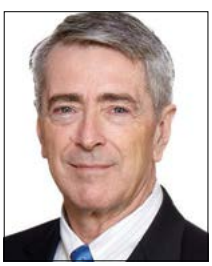

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for each of these three cases [forex, gold and silver benchmarks]; the harm is felt everywhere. ... If the alleged conspiracy is international, the market is international."

Andrea Laing, a litigation partner at Blake, Cassels & Graydon LLP in Toronto who acts for class action defendants, notes that these types of lawsuits are relatively new.

"They were sparked by certain regulatory investigations, starting in the 2012 timeframe in connection with Libor," she says. Since then, there have been a number of cases related to benchmarks, along with regulatory investigations into these activities, primarily in the UK and US. This regulatory activity has also sparked civil litigation in the form of class actions.

"In Canada, we're seeing copycat class actions when Canadian plaintiffs' lawyers ... have seen fit to pursue actions that that are premised on class action claims being brought in the US," Laing explains. "We've started to see a number of these cases in Canada over the last four years. It's an illustration of how Canada is affected by global regulatory and litigation trends; eventually we see some form of [that activity] here."

Enforcement activity in benchmark manipulation has been greater in the United States than in Canada, say counsel for the classes, with some complaining that the Competition Bureau's lack of enforcement has resulted in the class action bar picking up the torch on behalf of plaintiffs.

"I'd say we do no enforcement" in Canada, says Baert; compared to the United States and other jurisdictions, "our regulatory action is almost toothless. I'm not sure why our regulators couldn't have done exactly what we did when we accumulated information in the FX cases." In the US, he adds, "a much more viable threat" exists to financial institutions manipulating benchmarks from the federal government and its Securities and Exchange Commission.

But although there has not been "much overt enforcement activity in connection with benchmark issues in Canada," Laing says, she notes other responses including draft regulations. British Columbia, Ontario, Saskatchewan, New Brunswick, Prince Edward Island, and Yukon, along with Canada on the federal level, are engaged in trying to develop a common securities regulator through the Cooperative Capital Markets Regulatory System initiative. Ontario's *Capital Markets Act* and the federal *Capital Markets Stability Act* have already been drafted, though

PHOTO: SHUTTERSTOCK

they are not yet in force.

Both would make benchmark manipulation a specific offence, Laing adds.

There are two forms of benchmark that tend to be at issue in class action litigation: submission-based and transaction-based. Submission-based benchmarks are developed by individual market participants submitting figures at daily or regular intervals, which are used as inputs to develop a benchmark rate. The latter "is based on market activity; whatever the market price is at a certain point in time will become a benchmark. We've seen class actions premised on both ... forms in Canada," Laing explains.

"There have also been changes in policies, procedures and compliance mechanisms around the way various benchmarks are set," she says. Class-action lawsuits in benchmark cases may be "a trend right now, but I don't think we'll see endless benchmark class actions in Canada; the issues that provoked them have been addressed through these various mechanisms."

As well, since this is a new form of class action that has not been analyzed to any meaningful extent by Canada's courts, there are many questions about how this litigation will play out, Laing says. Benchmark cases are essentially a hybrid between securities class actions and competition class actions, she notes, and a benchmark is not itself a product, but an "input" that can affect how derivatives and financial products are priced.

"It is not like a conventional product, the pricing of which tends to be at issue in a competition class action, so novel defences and arguments arise."

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Big Suits
from the pages of Lexpert Magazine

PHOTO: SHUTTERSTOCK

Compiled by Elizabeth Raymer

LORRAINE (VILLE) V. 2646-8926 QUÉBEC INC.

DECISION DATE: JULY 6, 2018

The obligation to act within a reasonable time to challenge the validity of a municipal bylaw for disguised expropriation was at the heart of the debate in *Lorraine (Ville de) v. 2646-8926 Québec Inc.* Considering that disguised expropriation, insofar as it is carried out through a zoning bylaw, constitutes an abuse of power in the exercise of the regulatory power entrusted to the organization in this matter, the Supreme Court of Canada ruled that an application for the nullity of a bylaw in such a context must be brought within a reasonable time.

This obligation applies equally to an application for unenforceability and an application for

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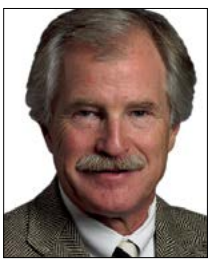

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a declaration of invalidity, which are both remedies that fall within the discretion of the Superior Court to remedy the abusive nature of the bylaw in question. In addition, the Supreme Court ruled that an owner who believes he is the victim of a disguised expropriation can still claim compensation for the loss in value of his property, even if the court rejects the challenge.

BACKGROUND OF THE CASE

In 1989, the numbered company 2646-8926 Québec Inc. ("Company") bought a wooded property in the city of Lorraine (the "City"). The majority shareholder planned to build a residential subdivision. In 1991, the City adopted a zoning bylaw and included more than half of the property in a conservation zone. The Company became aware of the new regulation 10 years later. The Company then asked the City to amend its bylaw because of the consequences of the bylaw on its right of property, but the City's response was negative. The Company then accused the City of disguised expropriation and went to court in 2007.

The Company asked for the bylaw to be overturned and for the City to pay an indemnity for expropriation. At trial, the judge said the two issues (overturning the bylaw and the indemnity for expropriation) should be decided separately. He rejected the request to overturn the bylaw, because it was made too late. The Court of Appeal disagreed with this and ruled in favour of the property owner. It said the trial judge should have thought about whether the bylaw constituted an abuse of power and intervened, even though the owner did not act within a reasonable time frame. The Court of Appeal sent the matter back to the lower court for a decision on the matter of compensation. The City appealed.

MATTER SIGNIFICANCE AND GUIDANCE

In this case, the 16-year period from the date on which the applicant was presumed to have had knowledge of the regulation, i.e., the date on which it came into force, was not considered to be a reasonable period. That said, the Supreme Court provided important guidance that more clearly defines the scope of the concept of disguised expropriation in Québec law.

On the one hand, the Supreme Court of Canada proposed a simpler definition than what it had proposed in the common-law decision *Canadian Pacific Railway v. Vancouver (City of)*, 2006 SCC 227. There, the Supreme Court decided that in order to constitute a disguised expropriation it was necessary for the public body to have acquired a beneficial interest in the property that is the subject of the disguised expropriation. In the Lorraine matter, it defines disguised expropriation under Québec law more simply: as a municipal

government restricting the enjoyment of the right of ownership of property to such an extent that its owner is de facto expropriated.

On the other hand, the Supreme Court confirmed that compensation for expropriation may be claimed even when an action for annulment or for declaration of inoperability is no longer possible.

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UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES, LOCAL 170 V. BRITISH COLUMBIA

DECISION DATE: JULY 3, 2018

On July 3, 2018, the Supreme Court of British Columbia released its review of *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 170 v. British Columbia (Information and Privacy Commissioner)*, 2018 BCSC 1080. The Court held that the decision of the Office of the Information and Privacy Commissioner ("OIPC") on Order F17-16, 2017 BCIPC 17 was unreasonable and remitted the matter back to the OIPC to assign another adjudicator to consider the issue again in a manner consistent with the Court's reasons.

BACKGROUND OF THE CASE

In late 2010, the Financial Institutions Commission ("FICOM") received an access to information request submitted by the Independent Contractors and Business Association ("ICBA"). FICOM released some, but not all, of the information requested by the ICBA, on the basis that disclosure of this information could harm the interests of a third party.

The dispute over the release of this information lasted more than six years, with a group of BC unions and union pension plans objecting to any release of their information. They argued that the disclosure of these records would cause them financial harm and pointed to the ICBA's past use of this information for the purpose of criticiz-

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ing pension plans, which could lead to unionized workers leaving to join non-union employers.

On April 10, 2017, the OIPC released a decision requiring FICOM to disclose the information requested by the ICBA. The adjudicator concluded there was not enough evidence to prove there was reasonable expectation of harm to the unions with the disclosure of this information. The union pension plans petitioned the courts to accept that ample evidence had been presented and that the plans were being held to too high a standard regarding required evidence.

DECISION

Under judicial review, the Court held that the OIPC's findings were unreasonable and that the petitioners had provided sufficient evidence to satisfy the "reasonable expectation of probable harm" standard that was provided by the Supreme Court of Canada.

Counsel for the petitioning unions and pension plans were **Lawson Lundell LLP**, with a team including Marko Vesely and Michelle S. Jones; **Arsenault Aaron Lawyers**, with a team including David Marc Aaron and Bennett M. Arsenault; and Derrill Thompson of **Main Street Law Group**.

Counsel for the Independent Contractors and Businesses Association was Robert W. Grant, QC, and Joana Thackeray of **Gall Legge Grant Zwack LLP**.

Counsel for the Office of the Information and Privacy Commissioner for British Columbia was Catherine J. Boies Parker, QC, and Kate Phipps of **Arvay Finlay LLP**.

Counsel for the Superintendent of Pensions was Sandra Wilkinson of the Ministry of Attorney General, Legal Services Branch.

DOW CHEMICAL CANADA ULC V. NOVA CHEMICALS CORPORATION

DECISION DATE: JUNE 20, 2018

On June 20, 2018, Justice Barbara Romaine of the Court of Queen's Bench of Alberta awarded US$1.06 billion to Dow Chemical Canada ULC and an affiliate ("Dow") in an action for breach of contract against NOVA Chemicals Corporation ("NOVA"). The dispute arose from the operation of an ethylene plant at Joffre, Alberta, jointly owned by Dow and NOVA.

BACKGROUND

The Alberta ethane-based petrochemical industry began in the 1970s. Dow and Dome Petroleum Limited proposed to construct and operate an ethylene plant, but the Alberta government decided instead to have a Crown corporation (now NOVA) construct the plant. That ethylene plant, known as E1, commenced operations at Joffre in

1978. In 1984, NOVA opened a second plant, E2, at Joffre and in 1994 Dow constructed its own ethylene plant at Fort Saskatchewan.

In 1997, NOVA and Union Carbide Canada Inc. ("UCC") entered into a joint venture to build a third ethylene plant, E3, at Joffre. Twelve project agreements set out the rights and obligations of the parties regarding the ownership, management, operation and use of E3, including the appointment of NOVA as operator. In August 1999, a merger between Dow and UCC was announced. Concerned about the merger's impact on the co-ownership of E3, NOVA's senior management formed a working group to consider options. The group produced a "wish list" that included "minimize ethylene to Dow" and "back Dow out of E3." In early 2001, E3 commenced commercial operations.

In 2006 Dow sued NOVA, alleging that NOVA had failed to run E3 at full rates and had taken for itself, by a non-contractual ethane allocation scheme, part of Dow's share of E3's ethylene production. NOVA counterclaimed, arguing that by the terms of one of the parties' agreements UCC (and therefore Dow) was prohibited from acquiring ethane in Western Canada for its own plant.

JUSTICE ROMAINE'S DECISION

Following a trial that took place over much of a year, Justice Romaine awarded Dow US$1.06 billion in damages.

NOVA's counterclaim was dismissed. In assessing Dow's claims, Justice Romaine found no justification in the parties' agreements for NOVA's ethane allocation scheme, by which NOVA had claimed a shortage of ethane, purported to ration ethane among E3 and its own two plants, and then allocated the total ethylene production among the three plants.

Noting that several witnesses had conceded that NOVA had always had enough ethane to run E3 at full capacity, she found that NOVA's conduct amounted to conversion and ruled that NOVA had failed to "act honestly and in good faith and in accordance with the provisions" of the agreements. She found that NOVA "ran E3, not to optimize production of Product, but to optimize NOVA's profit and ... the entire Joffre Site."

Although NOVA had argued that various mechanical difficulties had limited production, Justice Romaine disagreed. NOVA also argued that it had not acted with "gross negligence" or "wilful misconduct," but the judge found that NOVA's failure to run E3 to capacity and its conversion of Dow's E3 ethylene had been deliberate, or at best had shown an "utter disregard for harmful, foreseeable and avoidable consequences."

The decision is believed to be the largest award for damages in the history of Alberta.

Bennett Jones LLP acted as lead trial counsel

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Mr. Thornton, an IIC Director, was named "Lawyer of the Year" in the 2018 edition of *Best Lawyers in Canada*. Euromoney's *The Best of the Best* 2018 recognized him as one of the top five insolvency and restructuring lawyers in Canada, while *Chambers Global* ranks him as a Band 1 Leading Individual in Restructuring. He is described as "a leading light" and "one of the most innovative in the field."

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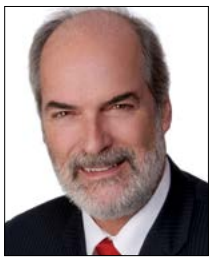
Mr. Torralbo's practice focuses on defending class actions, product liability, securities, banking, real estate and shareholder disputes. He leads some of the most complex national class actions in Canada and provides strategic counsel for leading international pharmaceutical companies, financial institutions, and manufacturers of pharmaceuticals, medical devices, chemicals and automotive parts.



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Mr. Tourangeau studied at Laval University and was admitted to the Bar in 1983. He is a partner at Gilbert Simard Tremblay in Montréal, practising general litigation with an emphasis on professional liability, insurance, construction and transportation law. He has been a mediator & arbitrator since 1996, and is a mediator for the Insurance Bureau of Canada and the Autorité des marchés financiers.

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Mr. Tupper's practice focuses on high-value complex corporate/commercial litigation in a number of areas, including construction, securities, insurance, environmental, and oil & gas. He appears before all levels of court in Alberta as well as in the Federal Court and the Federal Court of Appeal. In securities matters, he frequently appears before the Alberta Securities Commission.

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Mr. Valasek's international practice embraces both commercial and investor-state arbitration (including NAFTA Chapter 11), in sectors such as aerospace, construction, forestry, mining and energy. He also advises on cross-border litigation matters.

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Named "Canadian IP Litigator of the Year in 2017" by *Managing Intellectual Property,* Mr. Van Barr is one of Canada's leading intellectual property trial and appeal lawyers. He practises exclusively in IP litigation with emphasis on complex patent litigation and has considerable expertise in patent, PM(NOC), trademark, copyright and trade secret litigation.

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Mr. Veneziano is an expert trial lawyer, having conducted dozen of trials and arbitrations as lead counsel. His practice has a particular emphasis on commercial and civil litigation, professional liability, shareholder disputes, insurance coverage, securities, construction and real estate law. His clients range from corporations and physicians to stockbrokers and banks.

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Mr. Walwyn is known for his resourceful approach to litigating some of the most challenging business cases in Canada and the Caribbean. He is frequently consulted and appears as counsel on complex multi-jurisdiction litigation matters. He is a member of the Bars of Ontario, Anguilla, Antigua and Barbuda, Barbados, Belize, the British Virgin Islands, Dominica, Grenada and St. Kitts and Nevis.

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Mr. Warren carries on a civil dispute resolution practice with particular emphasis on corporate commercial disputes and professional liability defence. He appears regularly before the Alberta Courts and increasingly in arbitral settings, focusing on assisting his clients to effectively and efficiently resolve contentious issues.

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Mr. Watson is Adjunct Professor of Law at Toronto's Osgoode Hall Law School, and also teaches at the University of Notre Dame and l'Université de Moncton. He is a partner in the Toronto office of Gowling WLG, practising in the areas of corporate and commercial litigation, administrative and constitutional law, and employment and labour relations.

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Ms. Watt is a commercial litigator experienced in shareholder, contract and commercial disputes, rate-setting and tariff certification before the Copyright Board and copyright infringement and enforcement actions. She has appeared in all levels of court, including the Supreme Court of Canada. She heads the firm's Supreme Court of Canada Services Group and is a leading Supreme Court agent.

for Dow, with a team that included Blair Yorke Slader, QC, April Grosse, Russell Kruger, Desislava Docheva and Ciara Mackey, with assistance from Barry Crump and Scott Tallman of **Burnet, Duckworth & Palmer LLP**, and Randall Hofley, Kevin MacDonald and Micah Wood of **Blake, Cassels & Graydon LLP**.

NOVA was represented by William Kenny, QC, Sean Kelly and Fergus Schappert of **Miller Thomson LLP**, Colin Feasby and Tamara Prince of **Osler, Hoskin & Harcourt LLP**, and Mary Comeau and Bryan Walker of **Norton Rose Fulbright Canada LLP**.

STEPHANIE BENABU V. VIDÉOTRON S.E.N.C. ET AL.

DECISION DATE: MAY 14, 2018

LinkedIn, the well-known business networking and social media site, was named in a proposed class action in July 2016, along with several other Internet subscription service providers, streaming services and telecom companies. The proposed class action alleged that the manner in which the defendants marketed subscriptions for service contracts violated certain provisions of Québec's *Consumer Protection Act* (Act).

Specifically, the plaintiff took issue with the manner in which the defendants marketed discounted trial period subscription offers, contending that the practice was illegal under s. 230(c) of the Act. Section 230(c) prohibits merchants to require from consumers to whom they have provided services or goods free of charge (or at a reduced price) for a fixed period to send a notice at the end of the fixed period indicating that they do not wish to receive the services or goods at the regular price.

Other defendants, namely Netflix Inc., Spotify Canada Inc., Audible Inc., Match.com LLC, and Affinitas GMBH (owner of EliteSingles), settled the claims prior to the class action authorization (certification) hearing, paid damages, and amended their practices to no longer offer free trials to consumers in the province.

The authorization hearing was argued before the Honourable Justice Stéphane Sansfaçon of Québec's Superior Court (Class Action Division), who dismissed the proposed class action. The Court held that the defendants had committed no fault under the law in offering free trial periods or discounted pricing during promotions, and then charging consumers the regular price for the services after expiration of the promotions.

Class counsel has announced plans to appeal the decision to the Court of Appeal of Québec.

This case raises significant issues relating to application of s. 230(c) of Québec's *Consumer Protection Act*, which has not yet been subject to any judicial interpretation.

The class plaintiff was represented by Joey Zukran of **LPC Avocat Inc.**

Vidéotron LLP was represented by Patrick Ouellet and Érika Normand-Couture of **Woods LLP**.

Bell Canada was represented by Vincent de l'Étoile of **Langlois Lawyers LLP**.

Apple Inc. was represented by Kristian Brabander and Amanda Gravel of **McCarthy Tétrault LLP**.

Rogers Communications Inc., Rogers Media Inc. and Shomi Partnership were represented by Pierre Y. Lefebvre and Annie Gallant of **Langlois Lawyers LLP**.

LinkedIn Ireland was represented by Nick Rodrigo of **Davies Ward Phillips & Vineberg LLP**.

Google Inc. was represented by **Borden Ladner Gervais LLP**, with a team composed of François Grondin, Éloïse Gratton and Patrick Plante.

Sirius XM Canada Inc. was represented by Frédéric Paré and Patrick Desalliers of **Stikeman Elliott LLP**.

SFC LITIGATION TRUST (TRUSTEE OF) V. CHAN

DECISION DATE: MARCH 14, 2018

On March 14, 2018, the Honourable Justice Michael Penny of the Ontario Superior Court of Justice released a decision granting a US$2.6 billion judgment to the SFC Litigation Trust for fraud and breach of fiduciary duty in its action against Allen Chan, former CEO of Sino-Forest Corporation.

BACKGROUND

Sino-Forest was a publicly traded company listed on the Toronto Stock Exchange with a market capitalization of approximately $6 billion at its peak. Its principal businesses included the ownership and management of forest plantations, the buying and selling of standing timber, wood logs and wood products, and the complementary manufacturing of downstream wood products.

Between the 2003 and 2010 financial year ends, Sino-Forest's revenue grew from $265.7 million to $1.9 billion, and its assets grew from $418 million to $5.7 billion. Between August 2004 and October 2010, Sino-Forest used its apparent success to raise approximately $3 billion through debt and equity financing.

On June 2, 2011, a short seller, Muddy Waters Research, published a report describing Sino-Forest as a "multibillion dollar Ponzi scheme ... accompanied by substantial theft." Among other things, the report alleged that Sino-Forest did not hold the full amount of timber assets that it reported, that it overstated its revenue, and that it had engaged in undisclosed related-party transactions.

The same day that the Muddy Waters report was released, Sino-Forest's Board appointed an In-

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Mr. Williams is considered to be one of Ontario's most respected civil litigators. A specialist in civil litigation, his practice is focused on personal injury, medical malpractice, class action and complex commercial litigation matters. Inducted into the American College of Trial Lawyers, his career has brought him before the Trial Division, the Court of Appeal and the Supreme Court of Canada.

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Mr. Williams' practice focuses on all aspects of taxpayer representation. He has appeared before the Tax Court of Canada, the Federal Court of Canada, the Federal Court of Appeal, the Ontario Superior Court and the Supreme Court of Canada on a wide range of issues.

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Mr. Wilson is a prominent Canadian IP litigator. He has led several precedent-setting trademark and trade secrets (breach of confidence) actions, and regularly acts in copyright, patent, design and other IP matters at trial and on appeal. His practice encompasses a wide range of industries, from retail and consumer products to electronics, IT, wine, beer and spirits, and manufacturing.

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Mr. Wisner's practice focuses on international arbitration and cross-border business litigation. Many of his clients are involved in the mining and energy sectors and carry on business in emerging markets. He has frequently lectured on Mining Law and ADR.

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Ms. Woodin, co-head of the Class Actions practice, is a skilled litigator who specializes in the defence of class actions and complex multi-party litigation. She works with clients to manage cross-border litigation and litigation occurring in regulated areas. She defends clients in cases involving consumer products, automotive parts, medical devices, and environmental contamination, among other areas.

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Mr. Woods is senior partner with 40+ years of experience in the fields of litigation and arbitration. Considered to be one of the best lawyers in Québec and Canada, he has pleaded before all federal, Québec and Ontario provincial tribunals, and the SCC. During his career, he has also acted as an arbitrator, either as president or as a member of a panel, both ad hoc and under the rules of the ICC.

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Mr. Woods has a broad corporate-commercial practice, which includes litigation arising from securities transactions and shareholder activism matters, commercial disputes and construction claims. He has appeared before courts and commissions across Canada and in domestic and international arbitrations. He brings extensive legal knowledge and a practical, common-sense approach to legal problems.

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Ms. Wright acts in a broad range of complex civil, regulatory and cross-border litigation. She has extensive experience dealing with financial and securities regulators across the country. She currently represents a client in one of Canada's leading insider trading cases. She has completed the Directors Education Program at the Rotman School of Management and has the ICD.D professional designation.

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Mr. Yorke-Slader is a partner in Bennett Jones' litigation department. An ACTL and IATL fellow, he is a leading practitioner in high-stakes corporate and commercial litigation with an active trial and appellate business and energy litigation practice. He also has significant arbitration experience as counsel and as an arbitrator.

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Mr. Zarnett's litigation practice has included high-profile business cases including the litigation over the proposed privatization of BCE, the Asset-Backed Commercial Paper litigation, Indalex priority dispute and Nortel asset allocation dispute. He appears before the SCC, FCC, all levels of court in Ontario and many administrative tribunals.

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Mr. Zych, a partner in the Restructuring and Insolvency group, focuses on restructurings under the CCAA and the CBCA, including public matters such as Concordia, Connacher Oil, Lightstream Resources, Quicksilver Resources Canada, Tervita, Nelson Education, U. S. Steel Canada, Yellow Media and Nortel.

dependent Committee to investigate the allegations contained in the report. In turn, the Independent Committee retained professional firms to assist with the investigation. After eight months of investigation, the Independent Committee released its final report on January 31, 2012, disclosing that the issues it examined "proved very difficult to definitively resolve."

The Ontario Securities Commission (OSC) also commenced an investigation into Sino-Forest. On August 26, 2011, the OSC issued an order containing allegations including that Chan, the CEO of the company, and certain other directors and officers "appear to be engaging or participating in acts, practices or a course of conduct related to its securities which it and/or they know or reasonably ought to know perpetuate a fraud." Among other things, the order cease-traded Sino-Forest's securities and required Chan and other members of management to resign.

In March 2012, Sino-Forest filed for protection under the *Companies' Creditors Arrangement Act*. The resulting plan of arrangement by the court transferred certain of Sino-Forest's litigation rights to a Litigation Trust to pursue for the benefit of Sino-Forest's creditors.

On March 31, 2014, the SFC Litigation Trust commenced an action against Chan alleging fraud and breach of fiduciary duty.

TRIAL AND JUDGMENT

The trial was held in March, April and May 2017, with closing arguments taking place over a week in July 2017. Three weeks of the trial were held in Hong Kong, with Justice Michael Penny of Ontario's Superior Court of Justice sitting as commissioner to take the evidence of witnesses who resided in Hong Kong and mainland China.

Justice Penny released his decision finding in favour of the SFC Litigation Trust on March 14, 2018. He found Chan secretly controlled many of Sino-Forest's counterparties (i.e., its suppliers and customers) through a complex network of relationships with third parties.

Justice Penny found that Sino-Forest's primary business model under which it claimed to buy and sell forestry plantations within China was a fraud, and that "Sino-Forest lacked the requisite documentation to find the standing timber assets, much less prove that it had any ownership interest in them." He also found Chan defrauded Sino-Forest by causing it to fund deposits and advance payments to entities Chan secretly controlled.

Penny held that Chan was liable for US$2.6 billion in damages for fraud and breach of fiduciary duty, as well as punitive damages of $5 million. Damages recovered from Chan will go to the beneficiaries of the SFC Litigation Trust, being the creditors of the now defunct Sino-Forest.

On April 7, Chan served and filed a notice of appeal of Justice Penny's decision. The appeal is pending.

Bennett Jones LLP was counsel to Sino-Forest Corporation and the SFC Litigation Trust, with a team including Robert Staley, Alan Gardner, Jonathan Bell, Preet Bell, Jason Berall and William Bortolin.

Allen Chan was represented by **Rueters LLP**, with a team including Robert Rueter, Sara Erskine, Malik Martin and David Barbaree.

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