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DECEMBER 2019

CANADA'S LEADING LITIGATION LAWYERS

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Jean Cumming
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NEW WAYS OF RESOLUTION

In this *Lexpert/ROB Special Edition on Leading Litigation Lawyers,* we endeavour to keep you up to date on trends and issues in litigation and dispute resolution more generally. You as a client, however, may be more focused on how to get through the conflict successfully, rather than the methods and techniques your lawyers employ. Fair enough, and if that is the case for you, we invite you to go straight to the short biographies of Lexpert-ranked lawyers in this edition, and contact them as needed.

However, you might take a second look at the articles. In class actions, technology, and mediation/arbitration particularly, so much is changing that absent a degree of current awareness it would be difficult to know what questions to ask your litigation lawyer.

The ranked lawyers noted here are themselves keeping up to date, even future-oriented. Rather than fixate on the end-of-an-era aspect to change, they are embracing new methods of dispute resolution and even Artificial Intelligence in certain situations (it is perhaps hardly surprising that AI has come to Tax Litigation given the depth of data involved).

Litigation lawyers at their best are also highly skilled at effective negotiation and settlement where warranted. That may be the best reason of all for you to contact them.

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DECEMBER 2019
Special Edition on Litigation

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LEXPERT
SPECIAL EDITION
Canada's Leading Litigation Lawyers

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THE ADR INSTITUTE OF CANADA HAS DRAFTED A FRAMEWORK FOR MEDIATION-ARBITRATION (MED-ARB) PROCESSES AND IS CREATING A DESIGNATION FOR MED-ARB PRACTITIONERS

By Elizabeth Raymer

The Med-Arb Option

Last July, the ADR Institute of Canada announced it had drafted a framework for mediation-arbitration (Med-Arb) processes and is creating a designation for Med-Arb practitioners, the first in Canada and believed to be the first in the world. The new framework and requirements for Med-Arb designation was expected to be revealed at ADRIC's annual conference in Victoria in November.

Med-Arb — a hybrid approach to dispute resolution that begins with mediation and, if that does not result in a settlement, sees the mediator assume the role of arbitrator and moves to a binding decision — has largely been used in family law cases, but in the past several years there has been an uptick in its use in business disputes as well.

"Over the last two years, I've done maybe 12 to 15 Med-Arb cases, compared to only a half-dozen in

LEXPERT-RANKED LAWYERS

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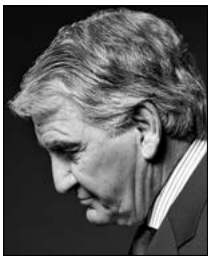

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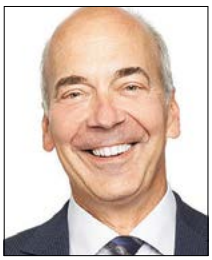

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"OVER THE LAST TWO YEARS, I'VE DONE MAYBE 12 TO 15 MED-ARB CASES, COMPARED TO ONLY A HALF-DOZEN IN THE PRECEDING 18 YEARS."

COLM BRANNIGAN
Brannigan ADR

the preceding 18 years," says Colm Brannigan, a chartered mediator and arbitrator at Brannigan ADR in Brampton, Ont.

That change has been driven by a number of factors, he says, "including lawyers who are really innovative" in looking for the best process for the best outcome for their clients. Med-Arb "allows the parties to really craft it, and maximize the potential for dispute resolution," he says, including avoiding the cost of full-blown litigation.

One characteristic of Med-Arb is that "it dramatically increases the clout of the mediator," says Linda Rothstein, a litigation partner in Paliare

Roland Rosenberg Rothstein LLP in Toronto.

"As it is often explained, it gives the mediator/arbitrator a 'hammer,'" she says. "Either the parties accept his or her recommended settlement or they will likely be worse off because the same person who is telling them they should settle will adjudicate the dispute. It increases the likelihood of settlement at mediation."

Lauren Tomasich, a litigation partner at Osler, Hoskin & Harcourt LLP in Toronto and the key contact and lead for the firm's Commercial Arbitration group, says she believes Med-Arb is a concept that's not particularly well understood.

"Some practitioners are a bit hesitant to use it," she says, for fear that disclosures that may have been made during mediation, such as potential offers, will be seen by those ultimately making the final decision, as the mediator becomes the arbitrator.

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But the more flexible approach, and arbitrators who may press settlement opportunities or procedures to narrow the issue, "help parties reach the best decisions," Tomasich says, adding that she sees Med-Arb as offering an advantage on the whole. All parties engaged in the process "have the objective to resolve clients' disputes in an efficient and effective manner."

Med-Arb can help in a situation where there are several smaller disputes, or a few key issues, which may be hived off in advance or need a merits-based consideration, says Tomasich. "Working with one individual who's both the mediator and arbitrator, and knows all the issues" can be helpful, and Med-Arb can also provide a decision

"[MED-ARB] DRAMATICALLY INCREASES THE CLOUT OF THE MEDIATOR. AS IT IS OFTEN EXPLAINED, IT GIVES THE MEDIATOR/ ARBITRATOR A 'HAMMER.'"

LINDA ROTHSTEIN
Paliare Roland Rosenberg Rothstein LLP

in a shorter timeframe.

"The mediator is up to speed on the facts, and for an arbitration hearing [where] evidence needs to be adduced, you can plan everything in advance," she says. "You have a decision-maker who's up to speed, and you have agreement as to how to move things forward regarding evidence and consideration on the merits. You can structure the process."

In a large construction dispute, for example, involving significant numbers of issues and much money at stake, "you could potentially figure out what might be hived off, [and] at the same time get the decision-maker up to scratch in making a decision in arbitration."

In a case where a compromise can't be achieved, moving straight to a determination is best, says Tomasich. "With a number of issues at play, and if speed is important, then I think Med-Arb could make sense."

In the business sphere, construction, condominium and commercial disputes are all well-suited to Med-Arb, Brannigan says. "Those are areas where you have a lot of cases that would be significant financially, but not necessarily enough for full-blown litigation."

It has also become common to use arbitration in shareholder disputes, Brannigan says. In many such disputes, it makes sense for clients to combine the process, which holds out the opportu-

nity for parties to sort the dispute out, he adds.

In general, Brannigan believes that Med-Arb benefits ongoing, supplier and fixed relationships. "It's almost impossible to continue a relationship at the end of a litigation process."

Some counsel have expressed concern that the person who does the mediation should not be the arbitrator. "It's far too intimate a relationship, in mediation," to have the same person then arbitrate the matter, says litigator James Woods of Woods LLP in Montréal.

"The mediator's goal is to get the two sides to agree, and the mediator uses all sorts of strategies to get the parties together; that requires a lot of disclosure, sometimes made on the basis that it won't be disclosed to the other side," he says. "But if you've already disclosed it to the mediator," it will still be in that person's mind during arbitration.

"That person has too much baggage to act as an independent arbitrator, to decide on evidence in arbitration as opposed to what was said in mediation; there'll always be an overlay," says Woods.

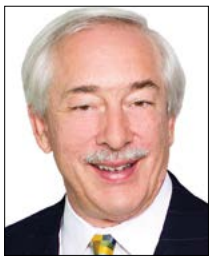
In the few times he has used Med-Arb, however, he says it has been successful for his clients.

Lawyers rightly are concerned with due process, and mixing information that is provided during mediation with evidence presented during arbitration, says Brannigan. "That can cause concern. But ... if I've gone forward [with Med-Arb] and the bulk of the dispute resolves in the mediation phase, it never goes beyond that." If it does, the mediator can work to structure the process efficiently, he says, but the parties and their lawyers must be prepared to get involved in the design.

Each situation is different and can involve different options, Brannigan notes. The first Med-Arb model is to hire a mediator-arbitrator who is the same person; the second is to hire two different people, which may be somewhat more costly but has the advantage, if desired, of separating the mediator and arbitrator functions.

The third is the opt-out model, developed in Australia, where one person acts as mediator, then as arbitrator, unless one party objects; for example, if a party believes the mediator has shown bias. In this model, even the mediator may opt out of the arbitration; but an arbitrator would already have been selected as a backup. "You've designed all that at the front end.

"I started in the 'more disadvantages than advantages' camp," Brannigan says, "but over the years I've seen that it shouldn't be used in every case, but should be looked at as an option. Pick an arbitrator who has the knowledge and experience to do this. There is lots of potential. The costs of



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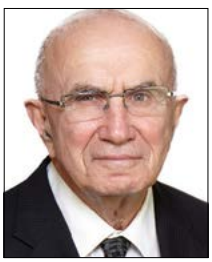

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going through full mediation and full arbitration, or litigation in court, are disproportionate to the potential gain."

Arbitration when it's well-designed can be very effective, Brannigan says, but the two processes — mediation and arbitration — when put together are even better: "effective, positive and encouraging people in their arbitration."

Seventy to 80 per cent of cases settle in the mediation phase of Med-Arb, he says, and the process can be achieved in six months as opposed to potentially years of litigation in court. "Almost anywhere you can mediate or arbitrate ... you put together a process that's more efficient, with less human cost and a speedier process. Most people are looking for a commonsense resolution to a dispute."

"YOU HAVE A DECISION-MAKER WHO'S UP TO SPEED, AND YOU HAVE AGREEMENT AS TO HOW TO MOVE THINGS FORWARD REGARDING EVIDENCE AND CONSIDERATION ON THE MERITS. YOU CAN STRUCTURE THE PROCESS."

LAUREN TOMASICH
Osler, Hoskin & Harcourt LLP

If rules are put in place to govern Med-Arb, "you might even see more of it, because people have a ready-made process they can use going forward," says Tomasich.

"It's an interesting initiative, and quite novel; in circumstances where I've seen Med-Arb used, it's been rather ad hoc, and has come about as a dispute has progressed," she says. But if there was an established body of rules and individuals who were formally recognized as skilled in mediation and/or arbitration, "I could see this [Med-Arb] then being proposed up front: an effective result for the client, [done] as cost-effectively as possible. The more options you have, the more strategic you can be in the dispute resolution process."

Describing herself as a proponent of arbitration, Tomasich says she has seen judges on the Commercial List bring in individuals prior to hearing a case and tell hem how they think things should be done.

"I actually think I've gotten to a better resolution based on the initiative of judges," she says. "To the extent we can be as strategic and flexible as possible, it's [simply] a question of identifying when [Med-Arb is] appropriate."

Business involves taking risks. Your choice of litigation and dispute resolution lawyers should not.

Dentons' dispute resolution lawyers employ the most appropriate tools and strategies for each stage of the litigation process and each unique situation. Whether through the timely use of innovative alternative dispute resolution techniques, or skillful and persuasive advocacy in the courtroom, you can count on our lawyers to maximize successful outcomes for our clients no matter where they do—or want to do—business.

Contact **Gordon Tarnowsky, Q.C.** and **Matthew Fleming** to learn more about our national team.

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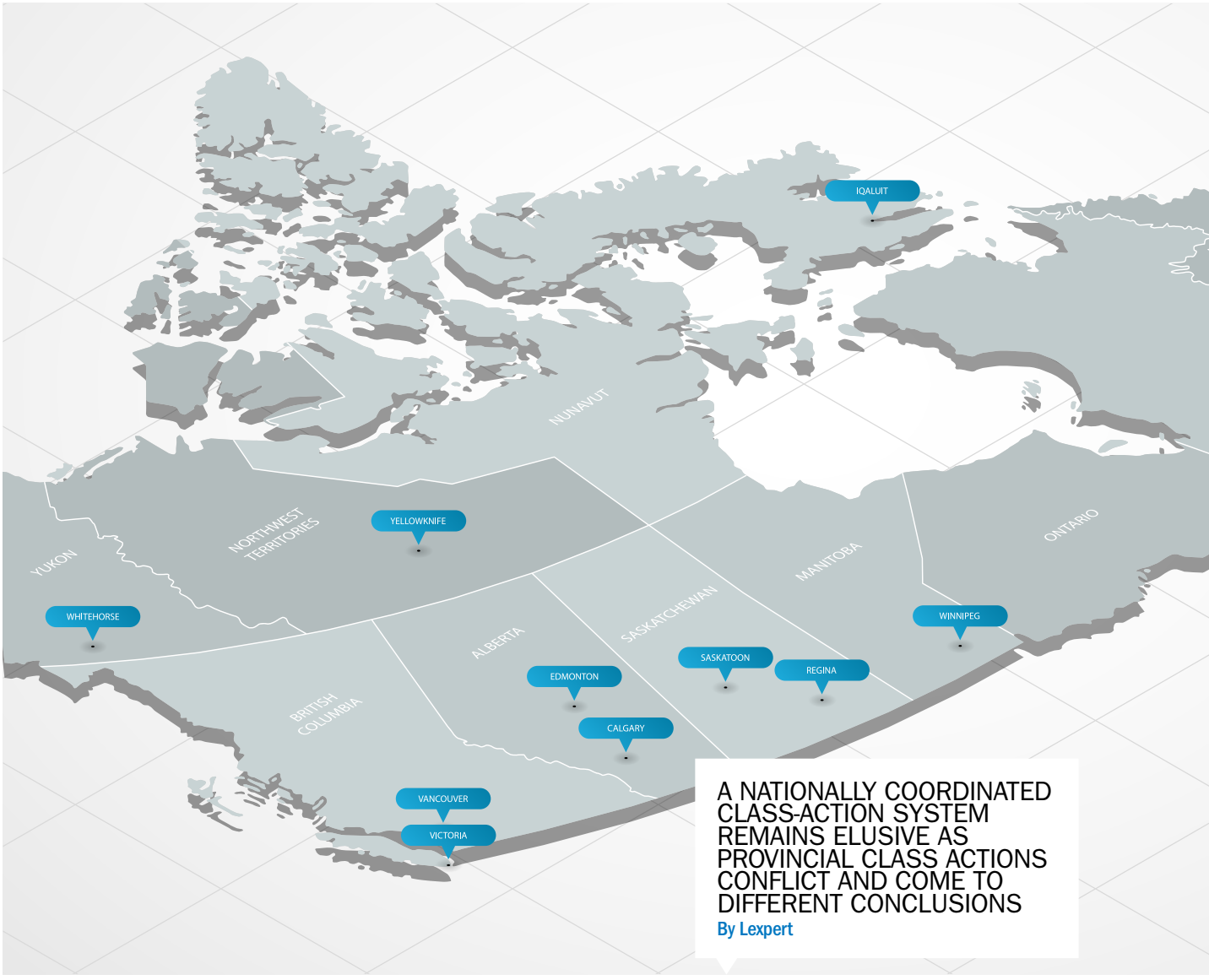

A NATIONALLY COORDINATED CLASS-ACTION SYSTEM REMAINS ELUSIVE AS PROVINCIAL CLASS ACTIONS CONFLICT AND COME TO DIFFERENT CONCLUSIONS

By Lexpert

Class Division

As lawyers Robert Carson, Olivia Dixon and Jessica Harding wrote in Osler, Hoskin & Harcourt LLP's "US Guide to Class Actions in Canada": "Most class actions in Canada are litigated in provincial courts, and there are differences among the provincial approaches, particularly regarding the class certification procedure, the opt-in or opt-out mechanisms and the potential for adverse costs awards."

Predicting which provincial jurisdiction is more sympathetic for plaintiffs — or defendants — has been going on since Canadian class-action litigation was brought into force. It is too close to call. And really beside the point. For critics of the system, the fact that these actions can go on relatively independently puts pressures on litigants and slows down the course of justice.

In early September, the Law Commission of Ontario's (LCO) *Final Report, Class Actions: Objectives, Experiences and Reforms* is the first independent, evidence-based and comprehensive review of class actions in Ontario since the enactment of the *Class Proceedings Act* (CPA) in 1992. Included in its recommendations was that there be "New provisions to better manage carriage hear-

PHOTO: SHUTTERSTOCK

ings and multijurisdictional class actions."

Sounds sensible enough. In the view of John Campion of Gardiner Roberts LLP, "Cross-border provincial class-action litigation, like interprovince free trade, is a much-desired goal. It is possible to design a system to meet all local distinctions without doing injustice. The blockage is self-interest but the benefits are huge for business and citizens variously seeking justice, compensation and exoneration."

According to law firm Lenczner Slaght's "Class Actions in Canada 2019," "While certain provinces including Ontario have a disproportionate share of class actions in Canada, class actions legislation exists across the country. National classes that include residents from across Canada are

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"AS MATTERS NOW STAND, MULTIJURISDICTIONAL CLASS ACTIONS ARE INEFFICIENT AND LEAD TO DELAY AND SUBOPTIMAL OUTCOMES. CAUTION SHOULD BE HAD HOWEVER TO EXPECT TOO MUCH FROM A SUBSTANTIVE LAW PERSPECTIVE GIVEN THE LIMITS ON PROVINCIAL JURISDICTION."

CRAWFORD SMITH
Lax O'Sullivan Lisus Gottlieb LLP

possible and often advanced. However, it is also common for plaintiff's counsel to advance parallel claims in different courts across the country. This can give rise to coordination problems."

And yet the achievement of a nationally coordinated class-action system eludes us.

Says Katherine Kay of Stikeman Elliott LLP in Toronto, "there seems to be no solution to it" as yet, even though "there is a protocol from the CBA." Cases move forward in more than one province that overlap substantially.

The CBA Protocol to which Kay is referring was described by the Canadian Bar Association in the 2011 "Class Actions: Baby Steps Towards National Coordination" by Colin Stevenson: The CBA "created the National Class Action database in 2007 in an attempt to deal with issues arising from multijurisdictional class actions. Initially this was a two-year pilot project by the Civil Litigation Section based on a recommendation by the Uniform Law Conference of Canada's working group on multijurisdictional class actions. It has now been extended indefinitely.

"The concept was that counsel initiating a class action anywhere in the country would register their pleadings on a CBA regulated national database. The database would allow counsel involved in class actions, and the public, to more easily determine whether the issues to be litigated

were already before a court, whether in another province or the same one.

"Counsel could then determine how best to coordinate potentially overlapping actions. The database would, in theory, also allow members of the public to determine more readily in which jurisdiction their interests were being looked after and reduce confusion about where an individual could file for compensation, whether in a settlement or otherwise.

"Although the database contemplates plaintiffs will file pleadings and the certification motion, there has not been universal acceptance of this requirement, notwithstanding practice directions requiring these steps to be taken in BC, Alberta, Ontario, Québec, Saskatchewan, Yukon, Newfoundland and the Federal Court. This lack of compliance has yet to be addressed by the Task Force."

In 2018, the CBA re-affirmed its Protocol, in summary urging courts to follow the coordination steps in it (see www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2018/Class-Action-Judicial-Protocols-(1)/18-03-A.pdf).

Not surprisingly, the American experience with class actions is longer and has more of a federal angle. Lawyers Margaret Zwisler, Christopher Yates, William Sherman, William Rawson and William Rinner of Latham & Watkins LLP explain: "After many years of growth in the use of the class action device in both federal and state courts, the US Congress and US Supreme Court have both acted to attempt to limit class actions, and additional bills are pending before the US Congress that would impose further limitations.

"In 2005, the US Congress passed the Class Action Fairness Act, 28 U.S.C. § 1332(d) (CAFA). CAFA expands federal jurisdiction over class actions, to reduce inconsistency among class actions litigated in the individual states, and provides for greater scrutiny of class action settlements and the payment of attorneys' fees.

"In addition, recent decisions of the US Supreme Court have addressed the requirements for class certification. For example, in *Wal-Mart Stores, Inc. v Dukes* (131 S. Ct. 2541 (2011)), the Supreme Court overturned a grant of certification to a nationwide class of 1.5 million female Wal-Mart employees because the class failed to show that the suit involved common issues where there was no single discriminatory policy, but rather numerous independent decisions."

According to the Lenczner Slaght LLP report: "Importantly, there is no Canadian analog to the American multidistrict litigation system, which allows US Federal Courts to

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coordinate and case manage a variety of proceedings from across the country relating to the same subject matter. In addition to allowing for coordination of class actions, the American MDL system can also allow for case management of large numbers of individual cases in parallel. By allowing plaintiff's counsel to advance large numbers of similar cases in parallel, challenging or complex cases that would not be cost effective in isolation, particularly mass torts cases, become economically feasible.

"In Canada, because there is no equivalent to the MDL system, it is much rarer for plaintiff's counsel to bring large numbers of individual cases in mass torts situations. Rather, such cases are typically brought as class actions; a failure to obtain certification often results in the end of the proceeding."

Kay and her colleagues aren't commenting on the effectiveness of the Protocol in the US system one way or another. But she and others are saying maybe it is time for more coordination among

"THE CURRENT SYSTEM MAY NOT BE PERFECT, BUT A NATIONAL REGIME TO MANAGE CLASS ACTIONS MIGHT JUST ADD ANOTHER LAYER OF BUREAUCRACY TO THE MANAGEMENT OF CLASS ACTIONS."

SONIA BJORKQUIST
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class actions in various jurisdictions.

Even if plaintiffs' counsel select a jurisdiction on which to focus, there is a fair amount of randomness and unpredictability to the process. Moreover, class actions in Canada often follow upon US actions.

According to Kirk Baert of Koskie Minsky LLP in Toronto, "Various committees across the country have discussed this problem numerous times. No changes have ever been made that have accomplished anything. The same problems occur again and again. The US does not have the same problem. Most American class actions of any size or complexity are litigated in their federal courts where their jurisdiction is nationwide. Most Canadian class actions are litigated in the provincial superior courts, which do not have nationwide jurisdiction."

Where is the harm in not having a nationwide program? Luis Sarabia of Davies Ward Phillips & Vineberg LLP in Toronto says: "Dealing with class actions on a province-by-province basis is

expensive, inconvenient and inefficient for both Plaintiffs and Defendants alike. It would be far better to have a national approach to these types of legal proceedings. Unfortunately, our Constitution arguably does not allow for the creation of a mandatory, nationwide process like the process that exists in the United States.

"The only way to deal with this in a comprehensive and predictable manner is to have all of the provinces voluntarily enter into an agreement for the conduct of these types of proceedings. An example of a similar effort is the emerging agreement among some provinces for the creation of a national securities regulator. The difficulty has proven to be getting all the provinces on side with a common approach. Unfortunately, there does not seem to be an adequate solution in sight at this time."

Most class actions settle. And they do so with practical cooperation among provincial actors and with a view to what is occurring in the US and other jurisdictions. After all, the issues are largely the same throughout. As the Lenczner Slaght report sets out: "While common issues trials are becoming more common in Canada, most class actions still settle at some stage of the proceedings. Because the representative plaintiff is advancing claims on behalf of an entire class of persons, the representative plaintiff has no power on his or her own to compromise those claims. Rather, any settlement agreement reached must be approved by the Court hearing the proceeding."

Crawford Smith of Lax O'Sullivan Lisus Gottlieb LLP in Toronto offers this comment: "I agree with the Law Commission of Ontario's final report on Class Actions that improvements need to be made. As matters now stand, multijurisdictional class actions are inefficient and lead to delay and suboptimal outcomes. Caution should be had however to expect too much from a substantive law perspective given the limits on provincial jurisdiction."

Would a reformed Canadian system start with a nod to the US regime? Smith says: "I generally agree with the LCO that the CPA should be amended to reflect the Uniform Law Conference of Canada's *Uniform Class Proceedings Act* 2006, and to harmonize with Alberta, BC and Saskatchewan multijurisdictional class-action legislation."

But he cautions that training needs to come with that: "There will also need to be considerable judicial training as the expertise with these types of cases varies widely across the country."

Sonia Bjorkquist of Osler, Hoskin & Harcourt LLP in Toronto puts forward by email ex-

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"VARIOUS COMMITTEES ACROSS THE COUNTRY HAVE DISCUSSED THIS PROBLEM NUMEROUS TIMES. NO CHANGES HAVE EVER BEEN MADE THAT HAVE ACCOMPLISHED ANYTHING. THE SAME PROBLEMS OCCUR AGAIN AND AGAIN."

KIRK BAERT
Koskie Minsky LLP

amples of ways in which the Canadian system has adapted and cautions that adopting a US-like system might potentially add a layer of bureaucracy: "As the class-action landscape in Canada has matured, the Canadian courts have adapted reasonably well to the challenges of managing multijurisdictional class actions:

- Courts are using the tools available to manage national class actions and avoid overlap with other provinces. These include:
  – Joint settlement approval hearings like in *Endean* (three judges heard settlement together).
  – Judicial protocols from the Canadian Bar Association that facilitate court-to-court communications. The 2018 revised protocol promotes greater coordination of class-action proceedings.
- Superior courts in the provinces have been vigilant about preventing forum shopping — for example in *BCE Inc. v. Gillis*, the Nova Scotia Court of Appeal permanently stayed a class action when a similar class action had already been litigated in Saskatchewan.
- The current system may not be perfect, but a national regime to manage class actions might just add another layer of bureaucracy to the management of class actions.
- A truly national system could not ignore the division of powers and the provinces' legislative authority over many matters affecting class actions. If it's not sufficiently nuanced, a national system could actually complicate issues where separate class actions are necessary and appropriate, in light of differences in legislation.
- The US MDL system is far from perfect as well, and now it is overburdened.
  – It does not have a screening mechanism for weeding out unmeritorious cases (though there is of course the screening mechanism of certification).
  – It has morphed from a pretrial management process to a platform for national settlements, with the unintended consequence of encouraging plaintiff firms to advance unmeritorious claims."

In other words, to be continued, but cautiously.

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ARTIFICIAL INTELLIGENCE IS PREVALENT IN TAX ANALYSIS AND PLANNING BUT WILL IT COME TO LAW?

By Lexpert

AI in Tax Law

Revenue Canada acknowledges it is using Artificial Intelligence: "Artificial intelligence (AI) technologies offer promise for improving how the Government of Canada serves Canadians. As we explore the use of AI in government programs and services, we are ensuring it is governed by clear values, ethics, and laws" (www.canada.ca/en/government/system/digital-government/modern-emerging-technologies/responsible-use-ai.html).

What's more, Revenue Canada has a mission statement and four guiding principles with respect to the use of AI: "The Government of Canada has released the Strategic Plan for Information Management (IM) and Information Technology (IT) 2017 to 2021, an update to the inaugural Government of Canada Information Technology Strategic Plan 2016-2020, published in June 2016 ....

"It creates a framework and sets direction for the GC to become an open and service-oriented organization that provides programs and services to citizens and businesses in simple, modern and effective ways that are optimized for digital and available anytime, anywhere and from any device.

"Consistent with the GC's first Strategic Plan, the following 4 strategic goals

PHOTO: SHUTTERSTOCK

frame the direction for the GC: service, value, security and agility.

"Four strategic areas of action will achieve these goals over the next four years and beyond. Each area of focus — Service, Manage, Secure, and Community — details specific actions and activities that are underway or that represent new enterprise directions.

- Service focuses on building and evolving IM-IT foundational elements, including processes, practices and infrastructure, to enable implementation of current capabilities, technologies and solutions.
- Manage addresses how the management and governance of IM-IT across government ensure that IM-IT investments take advantage of economies of scale, demonstrate value and are sustainable.
- Security focuses on safeguarding sensitive government data and ensuring that Canadians who access online services can trust the government with their personal information.
- Community focuses on building a high-performing IM-IT workforce that has the skills and mindset needed to work effectively in an open digital environment and ensuring that public service employees have a modern workplace, professional development and the IM-IT tools they need to do their jobs."

If Revenue Canada is using AI, what about taxpayers, especially corporate taxpayers? Let's start with an academic premise: The abstract for academic Blazej Kuzniacki's "The Marriage of Artificial Intelligence and Tax Law: Past, Present, and Future," (available at SSRN: https://ssrn.com/abstract=3323867) goes as follows:

"According to recent research's prediction, global GDP could be up to 14% higher in 2030 as a result of various artificial intelligence (AI) applications, which is the equivalent of an additional $15.7 trillion. It makes AI oriented sectors the

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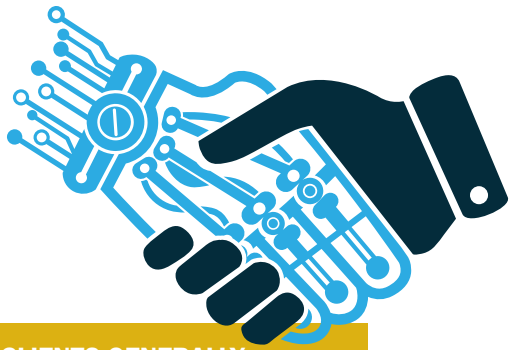
biggest commercial opportunity in the currently supersonic fast changing economy. This contribution, perhaps surprisingly, does not aim to propose how to tax profits generated by AI industries. The author rather takes an attempt to depict a potential of AI technologies to be applied to tax law. Let us see if AI can be happily married with tax law in order to get the best of both worlds."

Arguably, Tax Law is one of the areas most susceptible to AI solutions. This may owe to the availability of AI solutions in Tax administration



"CLIENTS GENERALLY DON'T COME TO US TO DETERMINE WHAT THE RIGHT ANSWER IS, THEY COME TO US TO FIGURE OUT HOW TO GET TO THE ANSWER THEY WANT. THAT INVOLVES A WHOLE HOST OF SKILLS INCLUDING UNDERSTANDING THE POLICY AND INTENT OF THE LEGISLATION, UNDERSTANDING DIFFERENT WAYS TO ACHIEVE DIFFERENT RESULTS, AND A WHOLE LOT OF LATERAL THINKING."

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and management itself. As Deloitte LLP's website says: "To manage the changing tax landscape, alongside the increased use of analytics, tax authorities and tax advisors are starting to explore the possibilities for deploying sophisticated data analytics and Artificial Intelligence (AI) in tax to facilitate compliance and assist professionals and their clients with commonly encountered questions. While data analytics has received a lot of attention, Artificial Intelligence in tax is a relatively new phenomenon."

Not everyone is jumping on this bandwagon. Kuzniacki wrote on January 25, 2019: "All of the features that are indispensable to lawyers ... have until recently also appeared to be extremely resis-

tant to AI. That is to say, the complexity, uncertainty and dynamic nature of legal reasoning have presented significant barriers to the development of commercial AI applications. On the supply side, moreover, developing an AI program applicable to law is very time consuming and extremely expensive. On the demand side, the cost-effectiveness of a stand-alone computer equipped with the traditional applications for the legal professions (e.g. statutory and case law databases, commentaries to laws and cases) far exceed the potential gains of investing in the development of an AI program capable of applying the law."

Kuzniacki addressed the "Present and the Future: Hopefully just Augmenting but Never Replacing of Tax Lawyers" accordingly: "In September 2013, Frey and Osborne from the University of Oxford published the results of their research on the probability of computerisation (i.e. job automation by means of computer-controlled equipment) in 702 detailed occupations in the US, including legal professionals (lawyers). To estimate probability they used a novel methodology using a Gaussian process classifier, which appears in many contexts such as statistics, probability theory and machine learning. Pivotal to the current study is their finding that lawyers are generally not fully computerisable, or, so to say, they belong to the group of least-computerisable occupations with a probability of only 3.5 per cent of being more or less replaced by automatized computer systems.

"By comparison, tax examiners and collectors, and revenue agents were classified as fully computerisable with 93 per cent probability, which is more than for taxi drivers (89 per cent) or parking lot attendants (87 per cent). Recreational therapists, in turn, were classified as the least-computerisable occupation.

"More specifically, Frey and Osborne observed that occupations that involve complex perception, creative intelligence tasks, and social intelligence tasks (i.e. cognitive non-routine tasks) are likely to be supplemented rather than substituted by AI "over the next decade or two." Their research confirms current ideas that AI is best suited to play a complementary role in tasks performed by lawyers."

In other words, other tax professionals are likely to use AI — or be replaced. How then could lawyers avoid the prospect? We turn to Canadian lawyers to ask them for their view on the capacity of AI to interpret, let alone analyze, Tax Law.

According to Robert Kreklewetz of Millar Kreklewetz LLP in Toronto: "The potential constraints of AI appear to be its linear thinking and blindly following past precedents in conducting its analysis and generating its predictions. While

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it might be able to identify the relevant past cases, really good tax lawyers are sought after for their non-linear (lateral) thinking and their ability to argue for results which might even be at odds with past precedents.

"Clients generally don't come to us to determine what the right answer is, they come to us to figure out how to get to the answer they want. That involves a whole host of skills including understanding the policy and intent of the legislation, understanding different ways to achieve different results, and a whole lot of lateral thinking. I'm not sure the AI, as we presently understand it, can replicate or predict that."

His partner, John Bassindale, meanwhile says, "I wonder what real application this AI has to complex high-end tax litigation. I expect AI's reliance on past cases means it would be unable to make an accurate prediction where no prior case law exists (as is often the case in high-end tax litigation). While I can understand why the Department of Justice might want to use this AI to evaluate their high volume of simpler tax cases, I wonder how they are using these predictions? For example, if the software predicts the Department of Justice will lose a case, do they settle that case 100 per cent in favour of the taxpayer, or do they try to settle the case for 70 per cent or 80 per cent?"

"WHETHER THERE WILL SOON COME A DAY WHEN SOME TAX APPEALS ARE DECIDED PRIMARILY BY FEEDING A SUMMARY OF THE CASE INTO AN AI IS HARD TO SAY, BUT KNOWING THAT THE TAX ADMINISTRATION IS ALIVE TO THESE NEW TOOLS HAS UPPED THE STAKES FOR STAYING ON TOP OF THE DEVELOPING TECHNOLOGY."

MARK TONKOVICH
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Blake, Cassels & Graydon LLP's Mark Tonkovich adds context to this discussion: "Media reports last year indicated that a segment of the Department of Justice's tax personnel was taking part in an AI pilot project: using predictive software to help analyze tax cases. It's not clear how the government is using the new software — to supplement traditional case law research, screen new tax appeals, improve efficiencies in settlement negotiations, decide what facts to focus on in court, or for some other purpose. But as today's software continues to grow in sophistication and

expands to cover more hotly disputed tax issues, we can expect both the public and the private sectors to increase their use of the new technology.

"Whether there will soon come a day when some tax appeals are decided primarily by feeding a summary of the case into an AI is hard to say, but knowing that the tax administration is alive to these new tools has upped the stakes for staying on top of the developing technology."

David Chodikoff, a partner and national leader within the tax litigation and customs disputes resolution group at Miller Thomson LLP in Toronto, discussed AI in Tax Law on *Canadian Lawyer*'s website: "In today's competitive legal landscape, clients are demanding bulletproof advice at a reasonable cost. Firms that adopt AI-backed legal research software are taking proactive measures to ensure that clients walk away knowing they've received the highest quality legal advice without paying exorbitant fees.

"'At the end of the day, clients care about results and costs,' says Chodikoff. 'Clients want excellence of service, problem solving at the highest level, and cost efficiencies. In addition to the obvious time-saving benefit, AI-based legal research tools offer lawyers a quick way to access data-backed support for their professional hunches.

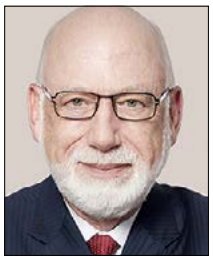
"'Artificial intelligence adds a dimension to your thinking,' says Chodikoff. 'The analysis identifies insights that you might not have thought of and may lead you to a case that adds to your approach to a particular issue. That's invaluable — you can't put a price on that.'

"The AI tool that Chodikoff mentions is Tax Foresight, a joint effort between Blue J Legal and Thomson Reuters. The software applies AI to all relevant past judicial decisions in an effort to help lawyers and other tax professionals determine the strength of their position on issues like real estate, taxable benefits, carrying on business, worker classification, and many others. The software also has an advanced search function that finds cases by specific factors, rather than by keyword or boolean searches.

"'With Tax Foresight, you can find a case that helps with an argument and you never know if that's going to be the winning argument before a court,' says Chodikoff.

"On top of making lawyers more efficient, Chodikoff says that Tax Foresight is comprehensive and acts as 'additional blanket coverage' by considering every relevant case in the selected area of tax law.

"'Prior to the availability of Tax Foresight and the rapid analysis of information that it enables, I'd either conduct my own research or rely on the assistance of an associate or student of law to conduct that research.'"



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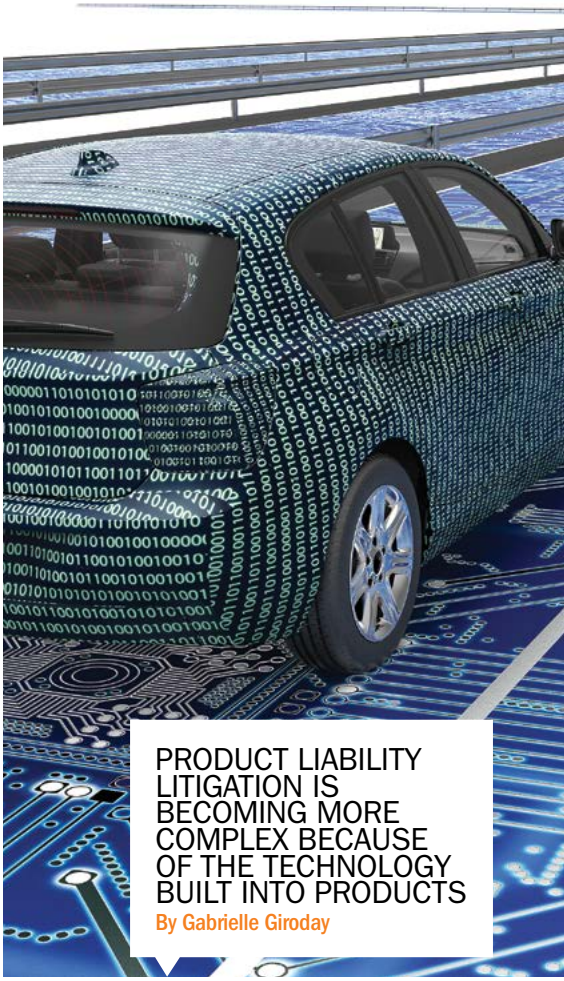

PRODUCT LIABILITY LITIGATION IS BECOMING MORE COMPLEX BECAUSE OF THE TECHNOLOGY BUILT INTO PRODUCTS

By Gabrielle Giroday

Liability for Connected Devices

Lawyers who are involved in product liability litigation say more cases relating to connected devices may emerge.

Product liability litigation usually involves parties such as product designers, suppliers, manufacturers, wholesalers, distributors, retailers, and end users and their insurers. These parties can become involved in civil proceedings due to a product's alleged defects.

Glenn Zakaib, National Co-chair of the Class Actions Group at Borden Ladner Gervais LLP in Toronto, says litigation related to connected devices is a "potential area [of growth in litigation] for the future.

PHOTO: SHUTTERSTOCK

"It's existing now, but it's not really picked up as yet and it's coming more in the future." He adds that lawyers whose practice intersects with product liability may have to become familiar with different areas when it comes to the use of connected devices.

"We're now looking at issues about potential regulation of connected devices, whether something, if you're going over a network, is it regulated by the [Canadian Radio-television and Telecommunications Commission] in Canada? Are there regulatory schemes that are now going to require greater cyber-security with these connected devices?"

Zakaib points to California, for example, where, by 2020, manufacturers of internet-connected

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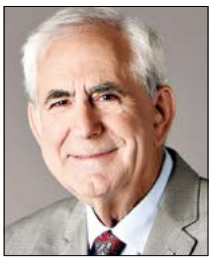

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devices are required to ensure the device has "reasonable" security features.

Michael Peerless, a Partner at McKenzie Lake Lawyers LLP in London, Ont., says product liability litigation that relates to the "internet of things" is almost certainly to be expected. Peerless points to emerging technologies such as autonomous vehicles and drones.

"Vehicles are probably one of the main product liability areas in litigation in North America, in one way or another, because they are so ubiquitous," he says. "Autonomous vehicles, at least at the beginning — even to the extent that they're safer than human-driven vehicles — they're going to seem new enough that they're going to spawn litigation any time there's an injury or a product problem."

Peerless says anyone working in the business of connected devices is going "to have to be very careful with anything to do with safety," and he

"[LITIGATION RELATED TO CONNECTED DEVICES EXISTS] BUT IT'S NOT REALLY PICKED UP AS YET AND IT'S COMING MORE IN THE FUTURE."

GLENN ZAKAIB
Borden Ladner Gervais LLP

notes that connectivity issues may also spawn product liability litigation.

This could extend to more traditional areas, such as vehicles, and less traditional areas, such as children's toys.

"Things like even non-autonomous vehicles that are internet-enabled probably have some vulnerability to hackers," he says. "There's already litigation in the United States in several different areas involving cars that have some kind of vulnerability to hacking."

Michael Eizenga, Co-chair of the Class Actions Practice at Bennett Jones LLP in Toronto, says lawyers need to give careful advice.

"The bottom line is that companies have to do what they continue to do, which is not only comply with all regulatory requirements, but they also have to make sure they meet an appropriate common-law standard of care as well," says Eizenga.

Zakaib says one of the main issues that com-

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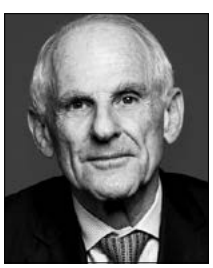

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panies need to consider is, if their product is hacked or if information gathered by the product is shared, whether that could potentially infringe upon privacy rights.

"If you have a vehicle and it has a vehicle identification number and somehow that's identified with a particular piece of connected information, do you run the risk of exposing that personal information when you collect that data if you don't take it and make it more generic so you can't identify the individual or the product from which it's coming?" he says. For example, in the case of the hack of a product, there could be a class proceeding, he says.

The issue of general causation "basically would be is a product in and of itself vulnerable to an attack? And if it is, is it vulnerable to an attack

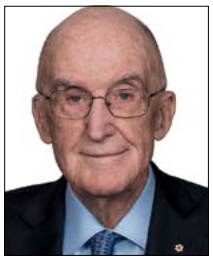
"VEHICLES ARE PROBABLY ONE OF THE MAIN PRODUCT LIABILITY AREAS IN LITIGATION IN NORTH AMERICA, IN ONE WAY OR ANOTHER, BECAUSE THEY ARE SO UBIQUITOUS."

MICHAEL PEERLESS
McKenzie Lake Lawyers LLP

across the board and does that require either a forced recall of that product or some kind of enhancement to the product security? What risks does that create? If the product is susceptible to being hacked, can that hacking manipulate the product in a way that could be harmful?" he says.

Zakaib adds that, in general, product liability litigation is becoming even more complex because of the technology built into products.

"It becomes very costly for plaintiff's counsel to take on an individual product's claim. The products themselves are far more technologically advanced," he says. "There is a lot of computer technology that goes into products these days, which means more complex analysis. Experts are expensive, you have to hire more experts, you've got to deal with so many issues."



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DECISIONS OF SIGNIFICANCE
Compiled by Aidan Macnab

Big Suits

REFERENCE RE ENVIRONMENTAL MANAGEMENT ACT (BRITISH COLUMBIA)

DECISION DATE: MAY 24, 2019

The British Columbia Court of Appeal decided unanimously that amendments proposed by British Columbia to the *Environmental Management Act* (BC) that would have required

PHOTO: SHUTTERSTOCK

the Trans Mountain Expansion Project (TMX Project) to obtain a permit from the BC government were unconstitutional. The Court's decision will have important implications for all provincial regulation of any works and undertakings, such as pipelines or railways, which cross provincial boundaries. It also has an important impact on Canada's energy industry and is at the centre of one of the most signifi-

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Mr. Nathanson is one of Canada's top trial and appellate litigators. He recently achieved notable success defending Hong Leong Oei in respect of a claim brought by Concord Pacific in excess of $350M. He has assembled a team of highly skilled litigators, including James MacInnis, Kevin Loo, Karen Carteri and Peter Senkpiel. This talented group makes NST one of Canada's top litigation boutiques.

cant political issues in Canada.

The Court held that the purpose and effect of the proposed amendment was to regulate interprovincial undertakings like the TMX Project. As a result, it was outside BC's constitutional authority. The Court found that the TMX Project is "not only a 'British Columbia project'" but one that "affects the country as a whole and falls to be regulated taking into account the interests of the country as a whole."

British Columbia's Attorney General has filed an appeal of the decision to the Supreme Court of Canada.

The proposed amendments sought to regulate the possession of "heavy oil" in British Columbia, including the type of heavy crude and diluted bitumen that will be transported through the TMX Project. The amendments applied only to persons who possessed more heavy oil in the province than they had between 2013 and 2017. It prohibited such possession unless the person obtained a permit from a provincial official. Using the permit, the official could place a variety of conditions on the person's possession of heavy oil.

As a result, the Court reasoned that "it is simply not practical — or appropriate in terms of constitutional law — for different laws and regulations to apply to an interprovincial pipeline (or railway or communications infrastructure) every time it crosses a border." The Constitution gives the federal Parliament authority over interprovincial undertakings so that "a single regulator [may] consider interests and concerns beyond those of the individual province(s)."

The interested persons, Consortium of Energy Producers (Suncor et al.), were represented by **Blake, Cassels & Graydon LLP**, with a team

comprised of William Kaplan, QC, Cathy Beagan Flood, Ben Rogers, Peter Keohane, Joanne Lysyk, Laura Cundari and Christopher DiMatteo.

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KARRAS V. SOCIÉTÉ DES LOTERIES DU QUÉBEC

DECISION DATE: MAY 9, 2019

In *Karras v. Société des loteries du Québec*, the Court of Appeal of Québec dismissed an application for authorization to institute a class action against Loto-Québec. In its decision, the appellate court reviewed the principles governing authorization of a class action and confirmed that the authorization judge, in exercising his role as a filter, must dismiss any action that has no reasonable chance of success in light of the evidence tendered.

The plaintiff had been buying lottery tickets for over 20 years when she sought authorization to institute an action in damages against Loto-Québec on the grounds that it failed to disclose

to lottery ticket buyers the actual odds of winning a jackpot.

The plaintiff also alleged that Loto-Québec was making false representations since its advertising suggested the existence of a life of luxury while failing to disclose the actual odds of winning the lottery.

The plaintiff claimed that Loto-Québec violated various provisions of the *Civil Code of Québec* (CCQ) and the *Consumer Protection Act* (CPA), which provide that merchants have a duty to inform consumers about important facts likely to influence their decision about whether or not to purchase a product.

As a result, the plaintiff sought damages equal to the profits Loto-Québec generated on lottery ticket sales over the previous three years, as well as $150 million in punitive damages.

In a unanimous decision, the Court of Appeal upheld the trial judgment and dismissed the action in its entirety. The Court pointed out that the evidence filed by Loto-Québec clearly showed that it provides lottery ticket buyers, on its website for example, with all relevant information regarding the odds of winning for each type of product available. The Court added that the information on the odds of winning can be lengthy and that it would be unreasonable to reproduce the information on the back of every ticket. The Court also found that the information on the back of the lottery tickets was in all respects compliant with the applicable regulations.

The Court found that Loto-Québec's advertising contained no false or misleading representations. According to the Court, the mere fact that their ads convey an appearance of happiness does not violate the provisions of the law prohibiting false or misleading representations. According to the Court, Loto-Québec is not required to reproduce on each of its ads the statistics on the odds of winning.

The Court also issued certain comments regarding the plaintiff's role and her ability to represent the interests of all class members. The Court mentioned that, during her examination on discovery, the plaintiff acknowledged that she believed her chances of winning were around one in five million (in reality, her chances were one in 14 million). According to the Court, the important fact for the consumer is the low likelihood of winning rather than the specific mathematical statistics. The Court added that the plaintiff had no individual claim since consumers are required to inform themselves and that she failed to do so even though the relevant information was fully available. The Court added that the representative had not shown any interest in the issues raised in this matter until the attorney ad litem suggested she act as a representative.

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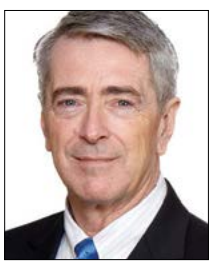

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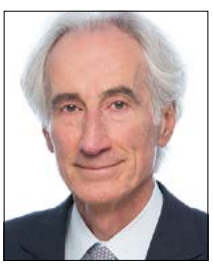

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Lastly, the Court found that the alleged causal connection was, at the very least, problematic in this case and that the very existence of the proposed class seemed vague. In light of such circumstances, the Court of Appeal dismissed the motion for authorization to institute a class action.

The Court of Appeal's decision confirms that it is possible to have a class action dismissed at the authorization stage when the defendant files evidence in the Court record (with its authorization) to establish that the key allegations of the motion are false and are nothing more than mere assumptions, opinions or inferences of facts that the Court should not assume to be true at the authorization stage.

Loto-Québec was represented before the Court of Appeal by Olivier Kott and Dominic Dupoy of **Norton Rose Fulbright Canada LLP**. Loto-Québec's in-house lawyers were Dominic Gourgues, Director, Legal Affairs and Regulatory Compliance, and Erika De Almeida.

Karim Renno and Benjamin Dionne of **Renno & Vathilakis** represented the appellant.

KAPLAN V. CASINO RAMA SERVICES INC.

DECISION DATE: MAY 6, 2019

Justice Edward Belobaba of the Ontario Superior Court of Justice dismissed a motion to certify a privacy class action arising out of a cyberattack on Casino Rama that included allegations of breach of privacy, breach of contract and negligence. This was the first contested certification hearing relating to a cyberattack against an Ontario company.

The plaintiffs have filed notices of appeal of the decision with the Ontario Divisional Court and the Ontario Court of Appeal.

The proposed class proceeding related to a criminal cyberattack in 2016 in which an anonymous hacker accessed Casino Rama's computer system and stole data relating to customers, employees and suppliers. When ransom demands proved futile, the hacker posted the stolen data on the internet. Casino Rama and the Ontario Lottery and Gaming Corporation promptly responded to the cyberattack by, among other things, notifying all appropriate authorities and implementing a broad notice program for patrons and employees, including offers of free credit monitoring services in appropriate circumstances. By the time of the certification motion, there was no evidence that anyone had experienced any compensable financial or psychological loss as a result of the cyberattack.

The Court held that "[t]he fact that there are no provable losses and that the primary culprit,

the hacker, is not sued as a defendant makes for a very convoluted class action. Class counsel find themselves trying to force square (breach of privacy) pegs into round (tort and contract) holes." Justice Belobaba held that the proposed class action ultimately "collapse[d] in its entirety" under the common issues certification criterion. In so finding, he stated: "I agree with the defendants that on the evidence before the Court the scope and content of the personal information that was stolen by the hacker varies so widely for each person that any assessment of the plaintiffs' claims quickly devolves into individual inquiries. Any common issues are completely overwhelmed by these individual investigations, such that commonality is not established and a class action cannot be justified as the preferable procedure."

The plaintiffs were represented by Theodore P. Charney and Tina Q. Yang of **Charney Lawyers** and David Robins of **Strosberg Sasso Sutts LLP.**

The defendants, CHC Casinos Canada Limited, the Ontario Lottery and Gaming Corporation, Casino Rama Services Inc., and Penn National Gaming, Inc., were represented by **Blake, Cassels & Graydon LLP**, with a team led by Cathy Beagan Flood and Nicole Henderson, and including Anne Glover, Wendy Mee, John Tuzyk, Bryson Stokes, Jessica Lam and Christopher DiMatteo.

HUGHES V. LIQUOR CONTROL BOARD OF ONTARIO

DECISION DATE: APRIL 17, 2019

On December 12, 2014, an action captioned *David Hughes and 631992 Ontario Inc. v. Liquor Control Board of Ontario, Brewers Retail Inc., Labatt Breweries of Canada LP, Molson Coors Canada and Sleeman Breweries Ltd.*, No. CV-14-518059-00CP was commenced in Ontario.

Brewers Retail Inc. (operating as the Beer Store) and its then shareholders, as well as the Liquor Control Board of Ontario (LCBO), were named as defendants in the action. The plaintiffs (a beer consumer and the restaurant he owns) alleged Brewers Retail Inc. and the LCBO improperly entered into an agreement to fix prices and allocate markets for the sale and distribution of beer in Ontario to the detriment of licensees and consumers.

The plaintiffs further alleged that Brewers Retail Inc. and its brewer shareholders were unjustly enriched for breach of the Uniform Price Rule of the *Liquor Control Act*. The plaintiffs sought to have the claim certified as a class action on behalf of all Ontario beer consumers and licensees and, among other things, dam-

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Mr. Rosenberg has appeared before all levels of court, administrative tribunals and government agencies. As a third-party neutral, he has conducted several mediations and facilitations and has acted as an arbitrator and as mediator in dozens of civil litigation disputes. He was appointed by the Ontario Superior Court of Justice as a pre-trial settlement officer and undertook pre-trial conferences.

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ages in the amount of $1.4 billion.

Brewers Retail Inc. operates according to the rules established by the Government of Ontario for the regulation, sale and distribution of beer in the province. Prices are independently set by each brewer and are approved by the LCBO, the Crown agency empowered by provincial legislation to control virtually every aspect of the sale and delivery of liquor in Ontario. As such, all the defendants believed the claim was without merit.

Motions for summary judgment were heard in the Ontario Superior Court of Justice. On March 15, 2018, the plaintiffs' motion for summary judgment was dismissed. The defendants' motions for summary judgment were granted, and the action was entirely dismissed.

The plaintiffs appealed the dismissal order and, along with the Law Foundation of Ontario, sought leave to appeal the order to pay costs to the defendants of approximately $2.4 million in total. On April 17, 2019, the Court of Appeal for Ontario dismissed the appeal and upheld the summary dismissal of the proposed class action.

The Court of Appeal agreed with the motion judge that, pursuant to the regulated conduct defence, the plaintiffs' various competition law claims were without merit — even before the province enacted retroactive legislation that expressly authorized the LCBO and Brewers Retail Inc. to specifically enter into the 2000 framework that was the basis for the plaintiff's claim.

In finding that the regulated conduct defence applied, the Court of Appeal rejected the plaintiffs' argument that the regulated conduct defence is not available to defend civil claims under s. 36 of the *Competition Act*. The Court of Appeal agreed with the motion judge and defendants that if the regulated conduct defence is available as a defence to a prosecution under s. 45(1) of the *Competition Act*, the defendant's conduct is not contrary to the criminal conspiracy provisions and therefore cannot form the basis for a civil claim under s. 36.

With respect to the plaintiffs' unjust enrichment claim against the Beer Store and the brewers, the motion judge had agreed with the defendants that the law always permitted the charging of different beer prices between licensees and retail home consumers, which was a complete answer to that claim. To the extent there was any doubt about that, the legislature clarified the law in 2015 through a valid declaratory amendment to the *Liquor Control Act*.

The Court of Appeal upheld the motion judge's decision, finding that the 2015 legislative amendments were valid, had retroactive effect and removed any doubt that different prices for beer could be charged to licensees, as long as prices within each channel were uni-

form across the province.

The Court of Appeal also denied leave to appeal the summary judgment costs award. The Court reiterated that leave to appeal costs awards should be granted sparingly and only in obvious cases where there are strong grounds that the judge erred in exercising his or her discretion. The Court held that the motion judge did not fail to consider any relevant factor, that a reasonable litigant would expect the defendants to devote significant resources to respond to a $2-billion claim alleging a criminal conspiracy, and that this was therefore not a case that warranted granting leave to appeal.

Bennett Jones LLP was counsel to Brewers Retail Inc., with a team including Michael Eizenga, Randal Hughes, Ranjan Agarwal, Preet Bell and Ilan Ishai.

Siskinds LLP was counsel to the plaintiffs, with a team that included Linda Visser, Tyler Planeta and Paul Bates (**Bates Barristers**).

Stockwoods LLP was counsel to the Law Foundation of Ontario, with a team including Aaron Dantowitz and Justin Safayeni.

Counsel to the Liquor Control Board of Ontario was **Davies Ward Phillips & Vineberg LLP**, with a team including Kent E. Thomson, Matthew Milne-Smith, Michael H. Lubetsky, John Bodrug and Anthony M. C. Alexander.

Blake, Cassels & Graydon LLP was counsel to Labatt Brewing Company Limited, with a team that included Jeff Galway, Catherine Beagan Flood and Nicole Henderson.

Counsel to Molson Coors Canada and Molson Canada 2005 was **McCarthy Tétrault LLP**, with a team including Paul Steep, Adam Ship and Katherine Booth.

Counsel for the intervenor Attorney General of Ontario was Michael S. Dunn and Ravi Amarnath.

DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS V. TELUS COMMUNICATIONS INC. AND DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS V. BELL CANADA

DECISION DATE: APRIL 12, 2019

Two recent Court of Québec decisions found newly enacted provisions of the Québec *Consumer Protection Act* to be constitutionally inapplicable and inoperative for telecommunications services providers facing charges of penal offences.

On June 30, 2010, *An Act to amend the Consumer Protection Act and other legislative provisions*, S.Q. 2009, c. 51, added numerous new provisions to Québec's *Consumer Protection Act* (CPA). In the wake of these provisions com-

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ing into force, Québec's *Office de la protection du consommateur* instituted hundreds of penal infractions against Telus Communications Inc. and Bell Canada, claiming that their terms and conditions of service were contrary to several sections of the CPA. Any person who purportedly contravenes the CPA can be prosecuted under its penal provisions.

Sections 11.2 and 11.3 of the CPA respectively prohibit certain contractual stipulations pertaining to the unilateral modification or cancellation of a contract, while s. 13 prohibits imposing charges, penalties or damages upon the non-performance of an obligation. Sections 214.1 to 214.11 dictate that a "contract involving sequential performance for a service provided at a distance" must contain and establish various limitations in the performance of any such contract.

The defendants, relying on ss. 91 and 92 of the *Constitution Act, 1867* and Parliament's exclusive jurisdiction over telecommunications, challenged the CPA provisions in dispute at trial as being *ultra vires* of the provincial legislature as intended to regulate telecommunications service providers. In the alternative, the defendants sought that the CPA provisions in dispute be declared inapplicable and inoperative through the application of the doctrines of interjurisdictional immunity and federal paramountcy.

Given the importance of the issues in dispute and the specificities of these penal prosecutions, the Court found that it would be inadvisable to interpret the provisions of the CPA at issue without first ensuring that they apply to the defendants from a constitutional standpoint. Under ss. 92(10)(a) and 91(29) of the *Constitution Act, 1867*, Parliament has exclusive jurisdiction over telecommunications. The *Telecommunications Act* offers the main legislative framework applicable to telecommunications undertakings, in addition to the broad regulatory and adjudicative jurisdictions it extends to the CRTC in relation, *inter alia*, to the conditions of the provision of telecommunications services.

Conversely, the CPA seeks to restore contractual equilibrium between merchants and consumers by prohibiting certain commercial practices considered deceptive and regulating certain aspects of their contractual relations. Historically, telecommunications contracts were specifically excluded from the ambit of the CPA, as the Supreme Court of Canada ruled in *Alberta Government Telephones v. Canada* (C.R.T.C.), [1989] 2 S.C.R. 225 and in *Téléphone Guèvremont v. Québec (Régie des télécommunications)*, [1994] 1 S.C.R. 878 that such contracts were outside a provincial legislature's purview.

The Court came to the conclusion that the CPA provisions in dispute, while broadly draft-

ed, were enacted for the intent and purpose of regulating the telecommunications industry, and dictate the conditions for the commercialization of telecommunications for Québec to enact its own contractual standards and requirements for such services. As a result, the Court found that the National Assembly was directly regulating the content of federal jurisdiction over telecommunications with the CPA provisions in dispute.

Unlike a Superior Court, the Court of Québec has only a subject-matter and no inherent jurisdiction; it thus lacks jurisdiction to declare that a legislative provision is invalid by virtue of s. 52 of the *Constitution Act, 1982*.

In that context, the Court of Québec considered it unnecessary to rule on the validity of the CPA provisions in dispute, having regard to their pith and substance to determine if they were *ultra vires* of the provincial legislature, and exercised judicial restraint in that regard. However, the Court may rule on the constitutionality of a legislative provision in the course of exercising its jurisdiction over a penal matter.

Applying the interjurisdictional immunity doctrine, the Court found that the CPA provisions are intruding on the core of Parliament's jurisdiction over telecommunications, which includes the conditions for the commercialization of telecommunications services. The Court concluded that the CPA provisions were constitutionally inapplicable in relation to the offences. As for the federal paramountcy doctrine, the Court found that the CPA provisions were frustrating the purpose of the federal legislative scheme and the national telecommunications policy, notably by regulating rates, the provision of services and the conditions of commercialization of telecommunications services.

As a result, the Court concluded that the CPA provisions were constitutionally inoperative in relation to the offences, and it acquitted the defendants of all charges against them.

On May 10, 2019, the Director of Criminal and Penal Prosecutions and the Attorney General of Québec filed an appeal of the judgments.

Telus Communications Inc. was represented by Yves Martineau and Marjorie Bouchard of **Stikeman Elliott LLP**, and Mathieu Quenneville and Samuel Bachand of **Prévost Fortin D'Aoust LLP** (on constitutional questions), with the assistance of in-house counsel Delbie Desharnais.

Bell Canada was represented by Vincent de l'Étoile of **Langlois Lawyers LLP**, with the assistance of in-house counsel Mélissa Beaudry.

The Director of Criminal and Penal Prosecutions was represented by Simon Lajoie.

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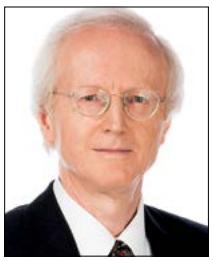

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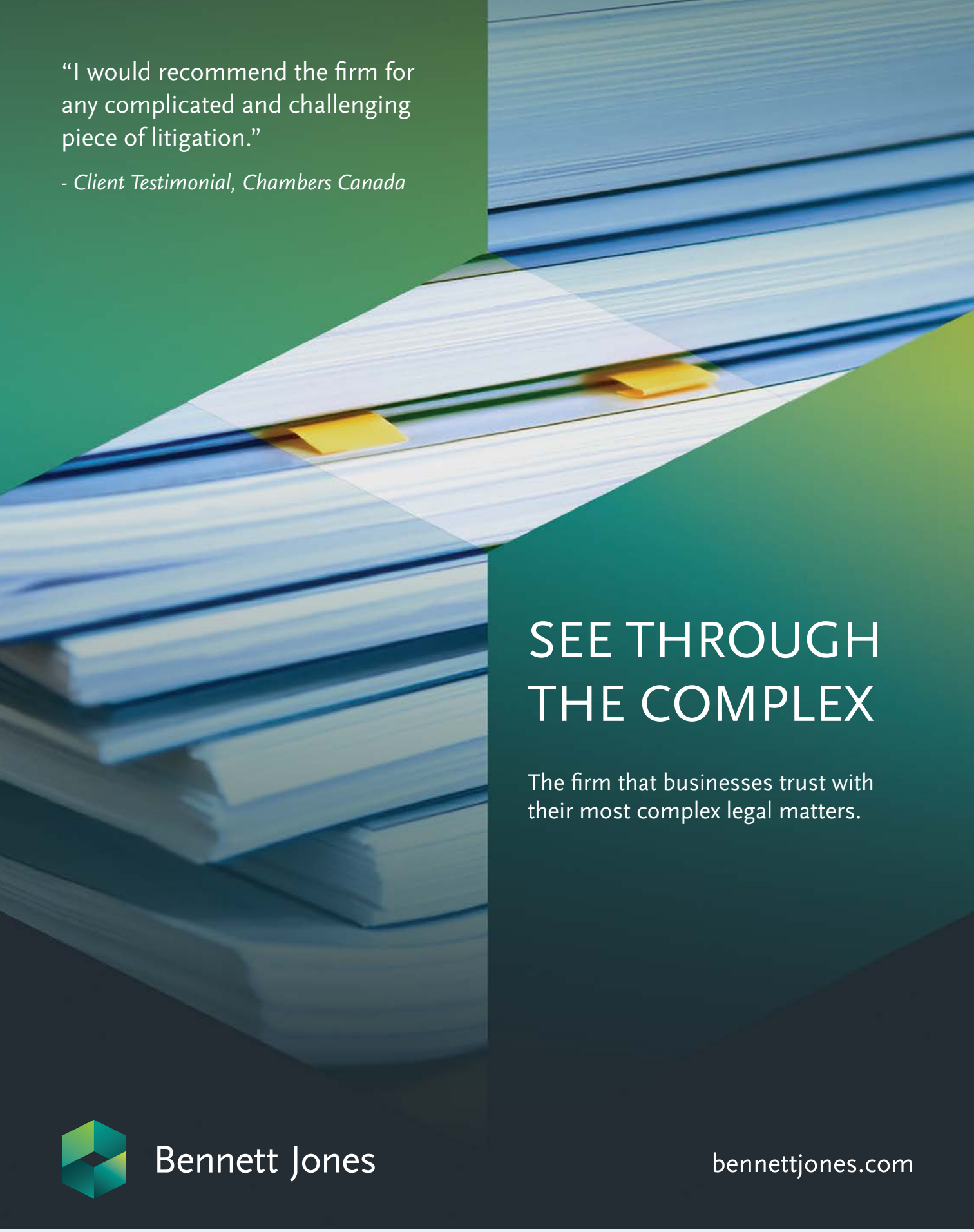

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