Supreme Court of Canada Review

Key Cases of Particular Interest to the Personal Injury Bar
2015 to July 22, 2016

by

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for

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1. INTRODUCTION

The range of issues in this annual report include:

- experts
- contempt
- SABS
- insurance
- motions to strike
- jurisdiction (*forum non conveniens*)
- disclosure
- solicitor-client privilege.

For ease of reference I've also added in – as a heading – what the main issue(s) the cases deal with.

And for ease of reading each case, I've used the following sub-headings:

- Case
- Date of judgment
- Citation
- Basic facts
- Judgments below
- Held in S.C.C.
- Brief summary
- Quote(s)

Where there's something particularly important in a case, I've added a further sub-heading, "Important".

The S.C.C. cases summarized include all of 2015 and 2016 to date, being July 22, 2016.

If you'd like a copy of

- any judgment
- any/all facta, email me at *emeehan@supremeadvocacy.ca*

No charge. Happy to do so as a courtesy.

2. RECENT S.C.C. DECISIONS – JUDGMENTS RELEASED

a. Experts

Case: *White Burgess v. Abbott & Haliburton*

Date of Judgment: April 30, 2015

Citation: [2015] 2 S.C.R. 182

Basic facts: professional negligence action by shareholders against the former auditors of their company. They start the action after retaining a different accounting firm, who reveal problems with the auditors' prior work. Central allegation: failure to apply GAAP causes financial loss. Auditors bring a SJ motion. Shareholders retain a forensic accounting partner of the new accounting firm (from a different office), who prepares an opinion and affidavit. Auditors apply to strike (on basis, *inter alia*: action would come down to a battle of competing opinions; if opinion not accepted, new accounting firm could be held liable, and partner personally so, so partner's personal financial interest in outcome of litigation a COI). SJ not yet heard on merits.

Judgments below: First instance; opinion and affidavit struck. C.A. (2:1); opinion & affidavit back in.

Held in S.C.C.: appeal dismissed. (9:0)

Brief summary:

- expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance; a proposed witness who is unable or unwilling to comply with this duty is not qualified
- judges must still take concerns about the expert's independence and impartiality into account in weighing evidence at the gatekeeping stage
- at this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a "sliding scale" where a basic level must first be achieved in order to meet the admissibility threshold
- and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence.

Quote

- "Expert opinion evidence can be a key element in the search for truth, but it may also pose special dangers. To guard against them, the court over the last 20 years or so has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role" (*per* Cromwell J., para.1)

- "The unmistakable overall trend of the jurisprudence … has been to tighten the admissibility requirements and to enhance the judge's gatekeeping role." (*per* Cromwell J., para. 20).

Important

The S.C.C. set out its "delineation of the analytical framework" (noting they're making "minor adjustments" to *Abbey*) as follows:

- Step 1: proponent of the evidence to establish the threshold requirements of admissibility (*per Mohan* – relevance, necessity, absence of an exclusionary rule, properly qualified expert); where opinion based on novel/contested science or science used for a novel purpose, the reliability of the underlying science for that purpose; relevance at the threshold stage refers to "logical relevance"; necessity is retained as a threshold requirement.
- Step 2: called the "second discretionary gatekeeping step"; judge is to balance the potential risks and benefits of admitting the evidence, to decide whether the potential benefits justify the risk. (paras. 22-25).

With regard to impartiality, independence, & absence of bias, the Court had the following to say:

- "The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand".
- "It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation."
- "It must be unbiased in the sense that it does not unfairly favour one party's position over another". (para. 32).

While the Court described the "acid test" as "whether the expert's opinion would not change regardless of which party retained him or her", the Court went on to say:

- "Experts are generally retained, instructed and paid by one of the adversaries"
- "These facts alone do not undermine the expert's independence, impartiality and freedom from bias". (para. 32).

They also pointed out that there are two main questions.

1. Should the elements of the expert's duty (duty to the court) go to admissibility (rather than simply weight)?
2. If so, is there a threshold admissibility requirement in relation to independence and impartiality? (para. 33)

The answer is yes to both, and "[o]nce that threshold is met, remaining concerns about the expert's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role." (para. 34)

And last, in a seeming sitting-on-the fence yet practical position, the Court said "an expert's lack of independence and impartiality goes to...admissibility…in addition to…weight to be given…if admitted." (para.45).

b. <u>Contempt</u>

Case: *Carey v. Laiken*

Date of Judgment: April 16, 2015

Citation: [2015] 2 S.C.R. 79

Basic facts: Lawyer the object of contempt proceeding for allegedly breaching terms of an injunction (a *Mareva* injunction, that enjoined any person with knowledge of the order from "disposing of, or otherwise dealing with" any assets of various parties, including the lawyer's client).

Judgments below: Initially found in contempt at first instance, but reversed when matter came back for consideration of appropriate penalty. C.A.: set aside second decision; lawyer held in contempt.

S.C.C. held: appeal dismissed. (7:0)

Brief summary:

- To commit contempt, do you have to intend to interfere with the administration of justice – no. Is the lawyer guilty of contempt – yes. Was it open to the judge at first instance to reverse her initial finding of contempt – no.
- Civil contempt has three elements to be established beyond a reasonable doubt: the order alleged to have been breached "must state clearly and unequivocally what should and should not be done"; the party alleged to have breached the order must have had actual knowledge; the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.

Quote:

"The contempt power is discretionary and courts have consistently discouraged its routine use to obtain compliance with court orders…If contempt is found too easily, 'a court's

outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect'." (*per* Cromwell J., para. 36)

c. SABS

Case: *Zurich v. Chubb*[1]

Date of Judgment: April 17, 2015

Citation: [2015] 2 S.C.R. 134

Basic facts: Deals with the 'pay first dispute later' SABS Ontario protocol. Car gets rented, insured by Zurich. Additional insurance (Chubb) offered but specifically declined. MVA. Renter submits a SABS claim to Chubb. Chubb declines to pay. Zurich ultimately starts to pay, and both insurers submit their dispute to arbitration.

Judgments below: Arbitrator decides Chubb not an "insurer" for the purposes of priority dispute statutory regime, because no "sufficient nexus". On appeal (to Superior Court of Justice), Chubb is an insurer. On further appeal (C.A., 2:1), Chubb not an insurer.

S.C.C. held: appeal allowed, oral, from the bench, no reasons. (7:0)

Quote:

No quote (from S.C.C.) – because no reasons. Reference was made to reasons of dissenting judge in C.A., so here's a quote from Juriansz J.A.:

"I would simply apply the established 'nexus' test… and find that it is established on the facts of this case". (paras. 31 & 41)

d. Solicitor-Client Privilege

Case: *CRA v. Thompson*

Date of Judgment: June 3, 2016

Citation: 2016 SCC 21

Basic facts: CRA sent Mr. Thompson (a lawyer in Alberta) a requirement pursuant to s. 231.2(1) of the *Income Tax Act* requesting documents with regard to personal finances and current accounts receivable. Mr. Thompson gave CRA some material, but objected to accounts receivable details, including client names.

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[1] I argued this one. Came in second. Trying to be as objective as I possibly can in this summary – even though the S.C.C. did get it wrong (you're right, I am a sore loser) – the S.C.C. is not right because they're always right, they're always right because they're always last.

Judgments below: First instance; client names cannot be shielded from disclosure to CRA. Fed. C.A.: in some rare instances, records sought may contain privileged information; clients whose names are in fact privileged to be given opportunity to assert and defend the privilege; Mr. Thompson may assert the privilege on their behalf.

S.C.C. held: appeal allowed, solely to set aside Fed. C.A. disposition; CRA's compliance order application dismissed. (7:0)

Brief summary:

- The companion case (a Québec appeal) *A.G. Can. v. Chambre des notaires du Québec*, 2016 SCC 20 holds that CRA's requirement is "constitutionally invalid", as a breach of s. 8 of the *Charter*.
- CRA's request for Mr. Thompson's documents is consequently "foreclosed".

Quote:

"the … request that Mr. Thompson be compelled to disclose the documents he has been withholding must be rejected. The information contained in those documents is presumptively privileged, and its disclosure cannot be required unless a court first determines whether solicitor-client privilege actually applies" (*per* Wagner & Gascon JJ. para. 41)

e. <u>Torts/Workers' Comp: Standard of Review; Causation</u>

Case: *B.C. (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*

Date of Judgment: June 24, 2016

Citation: 2016 SCC 25

Basic facts: Seven technicians at a hospital lab were diagnosed with breast cancer. Each applied for workers' comp as an occupational disease. Statutorily (in B.C.) the employment must be of "causative significance" in the development of the illness.

Judgments below: Workers' claims denied by Claims Officer. Workers' Compensation Appeal Board overturned, holding the cancers were occupational diseases. The hospital applied for reconsideration; original decision upheld. Hospital's J.R. of original decision and reconsideration allowed. B.C.C.A. dismissed the appeal.

S.C.C. held: workers' appeal allowed. (6:1, 1 dissenting in part)

Brief summary:

- In light of the applicable standard, the tribunal finding of a causal link between the workers' breast cancers and their employment is not to be "upset".

- Applicable standard of review – curial deference, absent a finding of fact or law that's patently unreasonable.
- The tribunal's conclusion that the cancers were occupational diseases caused by their employment was a finding on a question of fact, and that finding is entitled to deference unless patently unreasonable – being, quoting (from a prior case), "the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact" – patent unreasonableness is <u>not</u> established where the reviewing court considers the evidence merely to be insufficient.
- "Simply put, this standard precludes curial re-weighing of evidence, or rejecting the inferences drawn by the fact-finder from that evidence, or substituting the reviewing court's preferred inferences for those drawn by the fact-finder" (*per* Brown J., para. 30)
- As to causation:
    - The applicable Act here provides that on appeals from the Board the tribunal has <u>exclusive</u> jurisdiction to decide <u>all</u> questions of fact – and the tribunal may choose to draw from the expert evidence put before it (here, evidence of historical exposures, and a statistically significant cluster of breast cancer cases among lab workers) – "the decision remains the Tribunal's to make" (*per* Brown J., para. 37)
    - The presence or absence of opinion evidence from an expert positing/refuting a causal link is not determinative of causation (*Snell*, pp. 330 & 335)
    - "It is open to a trier of fact to consider, as this Tribunal considered, other evidence in determining where it supported an inference that the workers' breast cancers were caused by their employment" (*per* Brown J., para. 38)
    - Particularly important: causation can be inferred – even in the face of inconclusive or contrary expert evidence – from other evidence, including merely circumstantial evidence.

f. <u>Class Actions: Third Party Claims; Jurisdiction</u>

Case: *Trillium Motor World Ltd. v. General Motors of Canada Limited*

Date of Judgment: July 15, 2016

Citation (of C.A. below): [2014] ONCA 497

Basic facts: Following a government bailout (of the Canadian automotive sector), 200 plus Canadian GM dealerships were closed, with GM offering compensation to each dealer pursuant to Wind-Down Agreements. 207 who had been closed started a class action in Ontario, alleging GM forced them to sign (the Agreements), & that *Cassells Brock* was negligent in failing to provide appropriate legal advice. *Cassells Brock* third partied 150

law firms across the country, seeking contribution and indemnity from law firms who gave individual dealers independent legal advice. 83 non-Ontario law firms challenged Ontario's jurisdiction, including 32 based in Québec.

Judgments below: the challenge was dismissed by the motions Judge; the Ont. C.A. dismissed the appeal.

Held in S.C.C.: the appeal is dismissed (6:1)

Brief Summary:

- a Canadian court can, if sufficient connection, assume jurisdiction over a tort claim – even if the underlying facts involve another jurisdiction
- of the four "presumptive connecting factors" that help in making the jurisdiction decision, the 4th one, that jurisdiction can be assumed if a contract connected with the dispute was made in the province where the tort claim was brought:
    - this factor promotes certainly by premising the determination of when a contract will be "made" in a given jurisdiction on the traditional rules of contract formation
    - all that's required is a connection between the claim and a contract made in the province where jurisdiction is sought to be assumed – and a "connection" does not necessarily require an alleged tortfeasor be a party to the contract
    - flexibility in applying this fourth factor does not amount to "jurisdictional overreach"
- allowing the Québec third party claims to proceed in Ontario along with the other firms is a more efficient and effective solution, and expert evidence on the law (contract or negligence claims) would be required no matter where the trial takes place.

3. RECENT S.C.C. DECISIONS – APPEAL HEARD, JUDGMENT RESERVED

a. Insurance

Case: *Ledcor v. Station Lands*[2]

Date Appeal Heard: March 30, 2016

Citation (of C.A. below): [2015] ABCA 121

[2] I argued this one, for Ledcor. Ms. Stacey Boothman (in-house counsel to Ledcor) was co-counsel. Dennis Picco Q.C. (*Dentons*, Edmonton) was counsel for the co-Appellant Station Lands.

Brief summary: The two Applicants were the construction manager and owners, respectively, of a building constructed in Edmonton, Alberta. Near the end of construction, the Applicants contracted out with a contractor to have debris cleaned from the exterior of the building, including the windows. While cleaning, the contractor scratched and damaged the windows, requiring their replacement at considerable cost. When the Applicants claimed on their insurance policies, their claims were denied on the basis of a clause excluding coverage for "the cost of making good faulty workmanship, construction materials or design unless physical damage not otherwise excluded by this policy results, in which event this policy shall insure such resulting damage". The Court of Queen's Bench of Alberta held the damage to the windows not covered by the exclusion clause and was covered by the insurance policy. It did so on the basis factors determining the reasonable expectations of the parties weighed in favour of the Applicants' interpretation. It also found the clause ambiguous and applied the *contra proferentem* rule. The C.A. allowed the insurers' appeal and granted a declaration the damage to the windows was not covered. [3]

Facta: If you'd like copies of any/all facta filed, email me.

b. <u>Motions to Strike</u>

Case: *Ernst v. Alberta (Energy Resources Conservation Board)*

Date Appeal Heard: January 12, 2016

Citation (of C.A. below): [2014] ABCA 285

Brief summary: The Applicant owned land near Rosebud, Alberta. She brought an action against: i) EnCana Corporation for damage to her water well and the Rosebud aquifer allegedly caused by its construction, drilling, hydraulic fracturing and other activities in the area; ii) Alberta Environment and Sustainable Resource Development, claiming it owed her a duty to protect her water supply and had failed to address her complaints about EnCana; and iii) the Respondent regulator, for "negligent administration of a regulatory regime" related to her claims against EnCana. She brought a further claim for damages against the regulator under s. 24(1) of the *Charter* for alleged breaches of her s. 2(b) *Charter* rights. She alleged from November 2005 to March 2007, the Board's Compliance Branch refused to accept further communications from her through the usual channels for public communication until she agreed to raise her concerns only with the Board and not publicly through the media or through communications with other citizens. She submits the Respondent infringed her s. 2(b) *Charter* rights both by restricting her communication with it and by using those restrictions to punish her for past public criticisms and prevent her making future public criticisms of the Respondent. The Respondent brought an application

[3] Summary from weekly S.C.C. Newsletter of *Supreme Advocacy LLP*.

to strike paragraphs from the Statement of Claim or grant summary judgment in its favour. The Court of Queen's Bench of Alberta granted the application and struck out the Applicant's negligence and *Charter* claims. While the Court held the *Charter* claims were not doomed to fail and did disclose a cause of action, it held the courts were precluded from considering the claims by the statutory immunity provision in the *Energy Resources Conservation Act*. The C.A. dismissed the appeal. [4]

Facta: If you'd like copies of any/all facta filed, email me.

c. Disclosure

Case: *Royal Bank of Canada v. Trang*

Date Appeal Heard: April 27, 2016

Citation (of C.A. below): [2014] ONCA 883

Brief summary: The Applicant, Royal Bank of Canada ("RBC"), had a judgment against the Respondents, Phat and Phuong Trang. The Trangs owned a property mortgaged to the Respondent, Bank of Nova Scotia ("Scotiabank"). The Sheriff refused to sell the property without a mortgage discharge statement. RBC sought to obtain this statement by examining the Trangs but they did not appear, and Scotiabank said PIPEDA precluded it from disclosing the statement. RBC then brought a motion to compel Scotiabank to produce the statement. The motion judge found he was bound by *Citi Cards Canada Inc. v. Pleasance*, 2011 ONCA 3, 103 O.R. (3d) 241 and dismissed the motion. The Ontario C.A. quashed RBC's appeal because the motion judge's order was interlocutory, finding RBC should seek to examine a Scotiabank representative and obtain the statement by motion under Rule 60.18(6)(a) of the Ontario Rules of Civil Procedure. Scotiabank appeared voluntarily on the examination, however, and not by court order issued under Rule 60.18(6)(a). It maintained PIPEDA prevented disclosure of the discharge statement. RBC brought another motion to compel production by Scotiabank, however the motion was not brought under Rule 60.18(6) (a), contrary to the instructions of the C.A. The majority of the C.A. dismissed RBC's appeal.[5]

Facta: If you'd like copies of any/all facta filed, email me.

4. RECENT S.C.C. DECISIONS – LEAVES TO APPEAL GRANTED, APPEAL NOT YET HEARD

a. Proving a Psychological Injury

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[4] Summary from weekly S.C.C. Newsletter of *Supreme Advocacy LLP*.
[5] Summary from weekly S.C.C. Newsletter of *Supreme Advocacy LLP*.

Case: *Saadati v. Moorhead*

Date Leave to Appeal Granted: May 5, 2016

Date Appeal to be Heard: January 16, 2017

Citation (of C.A. below): [2015] BCCA 393

Brief summary: Between 2003 and 2009, Mr. Saadati was involved in five MVA's, sustaining various injuries. He was declared mentally incompetent in 2010. This litigation arose out of the second accident whereby Mr. Saadati's tractor-truck was hit by a Hummer driven by the Respondent Mr. Moorhead. Mr. Saadati started this action after the third accident. He sought non-pecuniary damages and past wage loss. The Respondents admitted liability for the accident, but opposed the claim for damages. The evidence at trial focused on the injuries suffered in the second accident and the effect the third accident had on those injuries. Mr. Saadati was unavailable to testify at trial. The trial judge rejected Mr. Saadati's claim for a physical injury arising from the accident. The trial judge also found Mr. Saadati had not established a psychological injury, based on the evidence of his expert psychiatrist. The trial judge, however, found the testimony of Mr. Saadati's family and friends had established a psychological injury. B.C.S.C.: action allowed in part, $100,000 awarded in non-pecuniary damages. B.C.C.A.: appeal from award of damages allowed. [6]

Facta: If you'd like copies of any/all facta filed, email me.

b. <u>Right to a Jury Trial</u>

Case: *R. v. Peers*

Date Leave to Appeal Granted: May 26, 2016

Date Appeal to be Heard: February 14, 2017

Citation (of C.A. below): [2015] ABCA 407

Brief summary: Jeremy Peers was charged with thirty-three offences under s. 194 of the *Alberta Securities Act*, including unregistered trading in securities, non-compliance with prospectus disclosure obligations, misrepresentation, and fraudulent use of investor funds. Robert Peers faced one count of investor fraud. Section 194 provided that a person who found guilty of an offence can be held liable to a fine of not more than $5M, or imprisonment not more than 5 years less a day, or both. Summary proceedings were commenced by way of Information brought in Provincial Court and Jeremy Peers sought a determination that 11 (f) of the *Charter* was engaged. He asked the court to quash the Information or stay the proceedings. The provincial court judge held the Applicant was

[6] Summary from weekly S.C.C. Newsletter of *Supreme Advocacy LLP*.

entitled to trial by a jury and transferred the proceeding to the Court of Queen's Bench. That Court allowed the appeal and transferred the matter back to the Provincial Court. C.A. appeal dismissed. [7]

Case: *R. v. Aitkens*

Date Leave to Appeal Granted: May 26, 2016

Date Appeal to be Heard: February 14, 2017

Citation (of C.A. below): [2015] ABCA 407

Brief summary: Similar summary to that immediately above.

Facta: If you'd like copies of any/all facta filed, email me.

c. Insurance (in Québec): Criminal Exclusion Clauses

Case: *Desjardins Sécurité financière, compagnie d'assurance-vie v. Émond*

Date Leave to Appeal Granted: June 30, 2016

Date Appeal to be Heard: TBD

Citation (of C.A. below): [2016] QCCA 161

Brief summary: The Applicant issued an accident insurance contract in the name of the late Sébastien Foisy, which provided, inter alia, for the payment of $56,000 if he died as a result of an accident. The estate of the late Sébastien Foisy, namely his legal heirs, was the beneficiary of payment. The day after the insurance contract was issued, Sébastien Foisy was intercepted by police riding his motorcycle alone at a speed exceeding the speed limit. After a high speed chase over about 20 kilometres in residential and rural areas, which ultimately ended with his death. During the chase, the police officer lost control of his vehicle in the same place where Sébastien Foisy himself already lost control of his motorcycle. The police car left the road and hit him, who was then cared for by paramedics, who took him to the hospital, where he died less than an hour later. The accident insurance contract contained an exclusion clause stating that there was no entitlement to payment under the contract [translation] "if the accident occurs while the insured is participating in any indictable offence or any act related thereto". The Applicant relied on that clause to support its refusal to pay. Court of Québec: action allowed. C.A.: appeal dismissed. [8]

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[7] Summary from weekly S.C.C. Newsletter of *Supreme Advocacy LLP*.
[8] Summary from weekly S.C.C. Newsletter of *Supreme Advocacy LLP*.