

Take Five

February 2010

BRITISH COLUMBIA EDITION



Due to Games-related court closures in February, there will be no March issue of the BC edition of *Take Five*...back again in April!

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OnPoint Legal Research
t. 604-879-4280
www.onpointlaw.com



Who is OnPoint?

OnPoint is not a “temp” agency. We are a law firm of on-call lawyers actively involved in our clients’ files, albeit on a fractional basis. We have two divisions: legal research and on-call associates.

Legal Research Division: For over 10 years, our research division has completed research and writing projects for lawyers in the private and public sectors, from case summaries to complex memoranda and facta. Many of our clients consider using our services as equivalent to relying upon work completed by in-house associates, and add a measure of profit accordingly when billing their own clients.

“OnPoint has always performed in a timely, effective and professional manner and has done excellent work at a reasonable price. We do not hesitate to use their services.”

Larry Kahn, QC and Marvin Lithwick, Kahn Zack Ehrlich Lithwick

On-Call Associates Division: Our on-call associates division responds to the need to control costs while effectively managing workload variances. Our litigators are available for a range of services, from background assistance and file management to court appearances and locums. Whether we are engaged for a set period of time, a particular file or a specific project, our clients benefit from having access to temporary assistance from outstanding lawyers without the overhead associated with employing full-time associates.

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Rose Keith, Rose Keith Law Corporation

“OnPoint is a great resource for my practice.”
Karen Nordlinger, QC, Karen Nordlinger & Associates

In an underlying foreclosure proceeding, the respondent bank, which held a registered first charge against the appellants' property, applied for order nisi of foreclosure. The applicant, who was not named in the foreclosure proceeding, claimed a beneficial interest in the property on the grounds that the down payment, mortgage payments, property taxes and other expenses on the property were paid from a business in which he was a 50 percent owner. Following the granting of the order nisi, the applicant applied for leave to appeal that order as well as an order dismissing his motion to cancel the subject mortgage, stay the foreclosure proceedings, and rescind the mortgage. Leave to appeal was denied. The applicant then applied to discharge or vary the orders dismissing his applications for leave to appeal the two orders, indigent status, and a stay of proceedings.

Royal Bank of Canada v. Keremelevski, 2010 BCCA 7

Area of Law: Practice on Appeal
Under Appeal: Madam Justice Levine



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Held: Application dismissed.

In reviewing an order of a single justice denying leave to appeal, the Court must ask whether the judge was wrong in law, wrong in principle, or misconceived the facts. The applicant argued that the chambers judge did not properly consider the facts or the documentary evidence. The Court held that the chambers judge gave careful regard to the applicant's arguments and evidence. The Court was unable to identify any instance in which the chambers judge erred in law, was wrong in principle or had misconceived the facts. The application to vary or review the order was dismissed.

de Rooy v. Bergstrom, 2010 BCCA 5

Areas of Law: Family; Child Support

Under Appeal: Mr. Justice Groves

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The parties had three children from a common-law relationship which ended in 1992. An order was made in Supreme Court, by consent, ordering the appellant to pay interim child support in the amount of \$600 month. Shortly thereafter, in 1995, the parties entered into a comprehensive separation agreement which contained an escalation clause allowing the appellant to defer child support payments until his income increased. At that time, the Child Support Guidelines had not yet come into force. As of 2000, the appellant's income had increased and he began making child support payments in the amount of \$600. In 2007, the respondent filed the separation agreement in the Supreme Court and sought to have child support arrears fixed pursuant to the separation agreement or, alternatively, to have the interim order varied based on the Child Support Guidelines. The chambers judge considered the issue of child support on the basis of the interim order only. He varied the interim order and calculated arrears pursuant to the Child Support Guidelines retroactive to January 1, 2000.

Held: Appeal Dismissed

In considering the appellant's argument that the chambers judge had no jurisdiction to vary an interim order for child support, the Court found that the chambers judge did not "vary" the order but rather made a new and final order for child support. The Court rejected the appellant's argument that the interim order had been terminated by the separation agreement. The Court further held that it was open to the chambers judge to make a finding as to when the respondent gave effective notice that she was seeking child support and to exercise his discretion to extend the retroactive award back more than three years from the date of giving formal notice. The Court further found that it was not inequitable to require the appellant to pay child support in accordance with the Child Support Guidelines. The Court allowed the appeal only to the extent that the retroactive award in relation to the eldest child was set aside on the grounds that he was no longer a child.



Romanchych v. Vallianatos, 2010 BCCA 20

Areas of Law: Personal Injury; Motor Vehicle; Damages
Under Appeal: Madam Justice MacKenzie

The appellant appealed a damage award for loss of future earning capacity resulting from injuries the respondent sustained in a motor vehicle accident. The respondent had suffered neck and shoulder injuries with associated headaches and her doctor was of the opinion that her symptoms would become chronic. At the time of the accident, the respondent was a university student and worked part-time through a co-op program as a laboratory technician performing chemical extractions. She switched jobs to

eliminate her long commute and because the job aggravated her symptoms. The respondent's new position was as a team leader in quality control. The trial judge considered case law which stood for the proposition that a hypothetical possibility of income loss will be taken into consideration as long as it is a real and substantial

possibility. The trial judge concluded that a loss of future earning capacity had been proven by the respondent and that there was a real and substantial possibility she would experience an income shortfall during the rest of her working career. The award was fixed at \$80,000.



Held: Appeal dismissed.

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The appellant argued that the trial judge failed to consider the extent of any real and substantial possibilities of actual income loss and to attribute them weight according to their relative likelihood. The Court found that the judge was only required to take the possibilities into account when assessing damages for future earning capacity. It was not necessary for the trial judge to set out each and every possibility and assign a weight to it. The Court noted authorities setting out the capital asset approach: namely, loss of earning capacity as a capital asset requiring compensation. The respondent was entitled to some compensation for her impairment because some occupations would no longer be open to her and it was impossible to say that the impairment would not ultimately harm her income earning capacity. While the trial judge could have provided more clear reasons in regards to her assessment of damages, the Court held that there was no overriding or palpable error.

Larc Developments Ltd. v. Levelton Engineering Ltd., 2010 BCCA 18

Areas of Law: Civil Practice and Procedure; Arbitration
Under Appeal: Mr. Justice Cullen

The appellants were defending against claims arising out of the construction of leaky condominiums and had initiated third party proceedings against the respondent. Counsel for the respondent entered an appearance and by way of a letter demanded particulars in order to draft a statement of defence. Counsel further noted that there was a provision in the contract between the appellants and the respondent requiring disputes between the parties to be dealt with by way of mediation and arbitration before proceeding to litigation. On this basis, the respondent brought an application for a stay of proceeding in favour of arbitration. While the appellants argued that the respondent had taken a step in the proceedings and thus was no longer entitled to a stay of proceedings, the chambers judge ordered a stay.

Held: Appeal allowed

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The Court found that the respondent had made a demand for particulars and, in British Columbia, a demand for particulars amounted to a step in the proceedings, which consequently barred the respondent from obtaining a stay of proceedings. Its effect was not negated by the respondent demonstrating an intention to seek a stay of proceedings in favour of arbitration. The Court held that a party should not be entitled to benefit from the litigation process, in this case by obtaining particulars pursuant to the Rules of Court, while maintaining the option to reject that process in favour of arbitration. The chambers judge had erred in focusing his inquiry on whether the respondent had conveyed any willingness to participate in the litigation process. The appeal was allowed.





McLachlan v. Trident Foreshore Lands Ltd., 2010 BCCA 37

Area of Law: Practice on Appeal

Under Appeal: Mr. Justice Pitfield

The respondent yacht club incorporated the respondent company wherein all members of the club were also shareholders of the company. The appellant, a long-standing member of the club, was involved in a series of corporate governance disputes with the club and company which culminated

in litigation. The appellant was ultimately expelled from membership. He then filed a petition seeking to quash his expulsion and order his reinstatement. The appellant was successful on the basis that he had not been afforded a fair hearing. Further proceedings followed, one of which resulted in the dismissal of the appellant's

claim for relief under the "oppression section" of the Business Corporations Act. The chambers judge concluded that the relief sought could not be granted under the provisions of the Act. The appellant appealed and sought an extension of time to file a factum and appeal books.

Held: Application dismissed.

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The Court noted that, on an application for extension of time, consideration must be given to whether the extension would prejudice the respondent and whether the appeal has merit or some possibility of success. The Court did not find the delay of six or seven months to be inordinate and rejected the respondents' submission that the application for an extension of time should be refused on that basis. In reviewing the material and previous decisions in the related proceedings, the Court held that there was no possibility that a division of the Court could or would grant any of the relief sought by the appellant. The Court was of the view that it would not be in the interests of justice to grant an extension of time to file material and the application was dismissed.