

Take Five

December 2009

*Happy New Year from
All of Us at OnPoint*

Inside this issue:

This month we have summarized what we consider to be the five most interesting cases from the BCCA in November.

We highlight cases from the following areas of law: family law (p.3), and civil procedure (pp.4, 5, 6 and 7).

But first, a brief OnPoint update on page 2...



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We are pleased to report that our first annual research course, "*From Problems to Solutions*" was held in November at the Sutton Hotel and was a smashing success. Thanks to Ellen Vandergrift and Doug Morrison of OnPoint, and Susan Caird of the B.C. Courthouse Library for sharing their research expertise and countless research tips.

Missed the course and want to get 6 CPD credits next year? Send us an **email** and we will notify you next year when the date for the 2010 course has been set.



Ontario Case Summaries are Coming...

In January, we will begin offering two different versions of *Take Five*: the original BC edition and the new Ontario edition. Both editions are complimentary.

Like the BC edition, the Ontario edition will summarize what we feel are the five most interesting cases from the Court of Appeal each month, however, they will be from the Court of Appeal of Ontario.

Please **email** us to let us know if you would like to sign up to receive this monthly e-newsletter.

PinPoint Contest Winners Update

Thank you to all the entrants of our last two photo contests. Once again, we were overwhelmed by the number of responses we received and the detail in which the answers were given. Our winners will each receive a \$100 gift certificate to the restaurant of his or her choice.

Congratulations to **Chris Elsner** of DIAND Legal Services who correctly identified the building in the October edition of *Take Five* as The Turning Torso in Malmo, Sweden.

Congratulations also to **Alana Campbell** of Cardinal Law who correctly named the building in the November edition of *Take Five* as the US Library of Congress in Washington, D.C.

Turpin v. Clark, 2009 BCCA 530

Areas of Law: Family Law; Spousal Support

Judge Under Appeal: Mr. Justice Pearlman



The parties were married in 1985, separated in 2004 and divorced in 2005. By consent, the divorce order incorporated terms of a final settlement agreement between the parties for equal division of family assets, child support and decreasing spousal support over a fixed period. Two years after the divorce order, the respondent wife applied successfully to vary the spousal support provisions in the settlement agreement to increase the amount in accordance with the Spousal Support Advisory Guidelines

(SSAG). The chambers judge varied the divorce order by increasing both spousal and child support. The spousal support provisions in the consent order were rescinded and replaced with an amount consistent with the range provided for by the SSAG. The order also increased child support for the parties' two children. The appellant husband appealed, submitting that the chambers judge had erred in finding that the respondent had met the jurisdictional threshold of a material change of circumstances for a variation of spousal support pursuant to s. 17(4.1) of the Divorce Act. Further, he asserted that even

if this jurisdictional threshold was met, the respondent had not met the higher threshold required for variation of a final support agreement. The appellant also disputed the increase in child support for the eldest child because of the appellant's refusal to disclose the adult child's income or capacity to contribute to her own support pursuant to the terms of the consent order.

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Held:

Appeal allowed

The Court noted that the chambers judge had determined that there were new circumstances that the parties had not contemplated or foreseen at the time the agreement was made, including complications arising from the respondent's surgeries and her inability to find employment, both of which impeded her ability to become self sufficient. The Court upheld the chambers judge's finding that these factors constituted a material change in circumstances and further met the higher threshold required for variation of a final agreement pursuant to the second stage of the *Miglin* test, where the agreement became patently unfair as a result of the changed and unanticipated circumstances. However, in the case at Bar, the agreement was clear that "under no circumstances" would spousal support be increased. The Court concluded that the chambers judge had erred by not giving sufficient deference to the agreement by varying the spousal support provision to the extent that he did. While the Court maintained the step-down provisions of the initial award, the appellate court did extend the duration of the support. Further, the Court found that, in the absence of evidence to show that the parties' adult child had the ability to contribute to her own support, she would be entitled to an increase in support by reason of the increase in his Guidelines income.

0690860 Manitoba Ltd. v. Country West Construction Ltd., 2009 BCCA 535

Areas of Law: Civil Procedure; Delay or Failure to Prosecute
Judge Under Appeal: Madam Justice Koenigsberg

The appellant was a subcontractor that had supplied and installed structural steel to a school. The appellant made a claim for the balance owing on the work performed against the general contractor, the school district and the insurance company as the surety on a labour and material payment bond. The appellant commenced the action in July 2004 and, other than an application to move the proceedings to a different registry, took no steps to advance its claim until January 2008. Shortly thereafter, the general contractor brought a motion for the action to be dismissed for want of prosecution, pursuant to Rule 2(7) of the Rules of Court. In spite of the fact that no motions had been brought by the school district and the insurance company for dismissal of the action as against them, the chambers judge treated this as a technical irregularity and, noting that the parties had made submissions, made three separate orders that the action be dismissed against all three defendants. While the appellant conceded that there was inordinate and inexcusable delay in prosecuting its claims, it sought to set aside the orders with respect to dismissal of the claim against the general contractor and the the insurance company.

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Held:

Appeals allowed

The Court found that the evidence given by the general contractor in support of its assertion that the appellant's delay caused specific prejudice contained defects and shortcomings. Further, it found that the chambers judge did not give sufficient weight to the evidence tendered to counter the general contractor's assertions. The Court concluded that the chambers judge had erred in finding that there was evidence of specific prejudice to the general contractor. The Court further found that the chambers judge erred in failing to consider the effect of the non-expiry of the limitation period in determining the balance of justice. The Court allowed the appeal of the order as against the general contractor for want of prosecution. As the insurance company relied on the evidence tendered by the general contractor, the Court found that the same result should apply to the separate order dismissing the action as against the insurance company.

Did you know?

OnPoint research lawyers complete a variety of projects for other lawyers, from case summaries and memoranda, to argument briefs and facta.

All of our research lawyers have years of experience as litigators at major downtown firms, and many of them have completed a clerkship in B.C. or Alberta.

The respondents brought an action for rescission of an agreement to sell shares in the capital stock of a corporation. The respondents alleged that the defendants, who were not parties to the appeal, had induced the respondents to enter into the agreement by way of a misrepresentation they had made. The appellants, who were not parties to the agreement, had some of the transferred shares registered in their names. The appellants argued that rescission was not an available remedy against them as non-parties, that they had not been given notice of the alleged misrepresentation and that they were bona fide purchasers of the shares. The respondents asserted that the appellants would not be prejudiced by rescission since they did not give value for and had no beneficial interest in the shares. The judge adjourned the appellants' summary judgment application to give the respondents the opportunity to conduct discoveries and cross-examine the appellants. The appellants appealed. The respondents then sought a declaration that the appellants' notice of appeal was a nullity or alternatively, an order that the appeal be dismissed on the basis that leave to appeal, which had not been sought, was required.



Synex Pharmaceutical Inc. v. Lee, 2009 BCCA 473

Areas of Law: Practice on Appeal

Judge Under Appeal: Mr. Justice Cullen

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The Court noted that the appellants had conceded that leave to appeal was required and that they did not oppose the respondents' application for a declaration that the notice of appeal was a nullity. The appellants, however, argued that, as a single justice in chambers, the Court had no jurisdiction to dismiss the appeal on the merits. The Court found that there was authority supporting the appellants' position that a single justice has no power to quash or dismiss an appeal on the merits. The Court found that that it could not invoke s. 10(2) or s. 28(a) of the Court of Appeal Act to dismiss the appeal as abandoned, as the appellants' actions contradicted any suggestion that they had intentions of abandoning the appeal. Accordingly, the Court declared that the notice of appeal was a nullity.

Forest Glen Wood Products Ltd. v. BC (Minister of Forests), 2009 BCCA 492

Areas of Law: Civil Practice and Procedure; Striking Out Proceedings

The appellant held a timber sale licence that gave it the right to harvest Crown timber in return for payment of stumpage as calculated in the Forest Act and the Interior Appraisal Manual. The respondent Province issued a stumpage advisory notice setting out a stumpage rate, but approximately one month later issued a higher, reappraised stumpage fee, as a result of a mathematical error in calculating the initial rate. The appellant claimed that it had paid the increased stumpage rate and commenced an action against the respondent Province for breach of contract, negligence, negligent misrepresentation,

and restitution for overpayment of stumpage. The appellant's claims against the respondent Province for breach of contract, negligence and restitution were struck out pursuant to Rule 19(24) of the Rules of Court.

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**Held:**

Appeal dismissed.

The Court found that the stumpage provisions of the Forest Act, including the appeal provisions, provided a comprehensive scheme with respect to the determination of stumpage. The Court was of the view that each of the appellant's claims could be addressed within the scope and application of the statutory provisions regarding stumpage rates. The Court further held that the appellant's timber sale licence did not contain any contractual obligations regarding the determination of stumpage nor was there any common law duty of care in that regard. Therefore, the appellant did not have any common law remedies available. The Court agreed with the chamber judge's determination that the appellant had no reasonable cause of action for breach of contract, negligence or restitution, and dismissed the appeal.

Transpacific Petroleum Corp. v. Sea Dragon Energy Inc., 2009 BCCA 538

Areas of Law: Practice on Appeal

The appellants applied to vary the orders of the chambers judge dismissing their applications for extensions of time to appeal from two orders, one which stayed an action commenced by the appellants in 2008, and the other which dismissed an application for an injunction against one of the respondents. The chambers judge had found that the appellants required leave to appeal from the two orders and that neither applications for leave to appeal nor applications to extend the time for bringing applications for leave to appeal had been filed. Accordingly, the chambers judge ruled that until the requisite applications for leave to appeal were dealt with, there were no appeals for which extensions of time could be granted. However, the chambers judge further ruled that she would not grant the appellants extensions of time to file notices of appeal.

HELD: Appeal dismissed.

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ENTIRE JUDGMENT](#)

The Court found that the chambers judge had correctly concluded that she could not extend the time to bring appeals for which leave was required and had not been sought. The Court noted that the appellants did not form an intention to appeal within the 30-day period for bringing an appeal or an application for leave to appeal. The Court held that the chambers judge had applied the correct law and principles and did not misconceive the facts. The Court would not interfere with the chambers judge's finding that it would not be in the interests of justice to grant the appellants extensions of time to bring the appeals.





Sarah Picciotto



Ellen Vandergrift



Doug Morrison

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.

“The lawyers at OnPoint are of such high quality that I can give them important portions of my files and be assured that they will be handled with skill and proficiency.”

Rose Keith, Rose Keith Law Corporation

“OnPoint is a great resource for my practice.”

Karen Nordlinger, QC, Karen Nordlinger & Associates