LS-Case Notes 2018-22
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LawSource Case Notes — June 25, 2018

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Transfers of property by taxpayers to charitable foundation were gifts

Civil practice and procedure - Costs

Estate's costs should be limited to actual partial indemnity costs it incurred

Plaintiffs, two of four shareholders in holding company that owned commercial property, brought action against defendants for their share of rental income. One defendant held back part of plaintiffs' entitlement because of claim to part of their funds by estate of former property manager. Defendants' motion to add estate as necessary party to action was dismissed on basis that estate's claim was statute barred. Appeal by estate was allowed and it was added as party. Estate was awarded its costs of appeal. Parties made submissions on costs of motion below. Estate and defendants entitled to their costs of motion. Main focus of appeal and motion was whether estate was entitled to be added as party to underlying action, issue that it successfully appealed. Estate's costs should be limited to actual partial indemnity costs it incurred. Defendants were also entitled to their costs of motion on partial indemnity basis. Plaintiffs ordered to pay estate and defendants their costs of

motion, fixed in amount of $10,000 payable to estate and $8,000 payable to defendants, both amounts inclusive of disbursements and HST.

Civil practice and procedure—Costs—Costs of particular proceedings—Interlocutory proceedings—Motions and applications

Abrahamovitz v. Berens, 2018 ONCA 512, 2018 CarswellOnt 8645 (Ont. C.A.)

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Civil practice and procedure - Costs

General principles on offer to settle were applicable

Plaintiff B was injured in motor vehicle accident, in 2007. B made claim for mild traumatic brain injury, in addition to other damages. B was presented with offer to settle claim before trial, for $150,000. B rejected offer, and offered to settle claim for $970,000. Matter proceeded to trial, where B was awarded $77,750 in damages. B claimed that he should receive costs of trial. D claimed that he should receive costs from date of offer to settle. Costs submissions made by both parties. Costs awarded to D from date of offer to settle. D's offer was reasonable, given B's condition and issues with B's credibility. B had counsel, and notwithstanding any limitations of B could have been advised of risks of trial. D was represented by provincial insurer, but insurer did not use superior financial position against B. It was not proven by B that effects of accident led to major financial losses that B sustained. Offer could have reasonably been accepted by B. General principles on offer to settle were applicable.

Civil practice and procedure—Costs—Offers to settle or payment into court—Offers to settle—General principles

Barta v. DaSilva, 2017 BCSC 410, 2017 CarswellBC 664, [2017] B.C.W.L.D. 2162, 277 A.C.W.S. (3d) 261 (B.C. S.C.)

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Civil practice and procedure - Costs

Unfair to punish respondents in costs without affording them opportunity to fully respond to allegations

Applicants, deceased farm owner's common law spouse K and corporations, claimed property interests in farm, animals, farm equipment, and farm vehicles based on ownership, beneficial interest or leasehold interest. K brought application against estate and B, deceased's son from prior relationship ("respondents"), to enforce her property interests. Application judge found that balance of convenience favoured K continuing to operate farming business on interim basis, and restrained B from removing livestock, poultry, and livestock trailer from farm. Parties made submissions on costs. No order as to costs. It was not appropriate in circumstances to take into account alleged disposal of farm animals by respondents. While substantial indemnity costs may be awarded where there has been reprehensible, scandalous, or outrageous conduct by one of parties, conduct attracting such award is usually due to conduct of proceeding itself. If respondents committed conversion of applicants' property or another wrongful act, applicants had remedy in claim for damages. It would be unfair to punish respondents in costs without affording them opportunity to fully respond to allegations. Success on applicants' motion for interim injunction was divided relatively equally with respect to time spent. Parties ordered to bear their own costs of motion.

Civil practice and procedure—Costs—Particular orders as to costs—"No order as to costs"

HARRINGTON et al v. LANE et al, 2018 ONSC 3280, 2018 CarswellOnt 8430 (Ont. S.C.J.)

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Civil practice and procedure - Costs

Work undertaken for unsuccessful summary judgment motions was used for short trial

Property owner hired contractor to perform restoration work. Contractor brought action against owner for payment for extras. Owner brought third party claim for contribution and indemnity against engineering firm he had hired. Action was allowed and third party claim was dismissed. Owner agreed to pay third party its costs of $26,729.47. Contractor sought costs of action from owner in amount of $74,331.58, inclusive. Contractor awarded costs of $60,291.35, inclusive. Pursuant to R. 49.10(1) of Rules of Civil Procedure, contractor was entitled to partial indemnity scale to date of its offer to settle, and on substantial indemnity scale thereafter. Although action involved claim of $109,451.35, facts were somewhat detailed and number of procedural steps were required. Action was vigorously defended. Motions for summary judgment were unsuccessful, but work that was undertaken for those motions was used for short trial. Hourly rate charged for contractor's senior counsel was too high given nature of claim, and fees claimed were reduced to reflect more suitable partial indemnity rates for case. Amount of time expended for case was not excessive. Counsel fees were fixed in total amount of $48,835, plus HST of $6,348.55. Disbursements were fixed at $4,520.18, plus HST of $587.62. Costs payable by owner to contractor were fixed in total amount of $60,291.35, inclusive of fees, disbursements, and HST.

Civil practice and procedure—Costs—Scale and quantum of costs—Quantum of costs—Miscellaneous

Conterra Restoration Ltd. v. Irving Moishe Kirsch, 2017 ONSC 5114, 2017 CarswellOnt 13340, 284 A.C.W.S. (3d) 39 (Ont. S.C.J.)

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Civil practice and procedure - Discovery

Party could not re-litigate nature of claim including circumstances surrounding fire

Fire broke out in premises rented by IH from brother EH. IH had valid policy of tenant's insurance with insurer E Co.. EH commenced action against IH for damages for negligence. IH consented to judgment in amount of $167,393.67 plus interest and costs. EH's insurer paid damages. EH commenced action against insurer E Co. alleging accident was covered under tenant's policy of insurance. E Co. denied coverage based on exclusion related to use, operation or ownership of automobile. E Co.'s motion for further and better affidavit of documents was dismissed on grounds that it was too late for E Co. to seek information about fire. EH filed motion for summary judgment. E Co. brought motion to examine EH and IH for discovery. Motion dismissed. EH had no evidence to provide related to use, operation or ownership exclusion. IH had relevant evidence to offer but it was not open to E Co. to contest findings of liability or damages upon which earlier judgment was based. E Co. could not re-litigate nature of claim including circumstances surrounding fire. E Co. was not entitled to examine EH or IH.

Civil practice and procedure—Discovery—Examination for discovery—Procuring attendance of person to be examined—Application for order for examination—Order

Horsefield v. Economical Mutual Insurance Co., 2017 ONSC 2080, 2017 CarswellOnt 4806, 278 A.C.W.S. (3d) 42, [2017] I.L.R. I-5966 (Ont. S.C.J.)

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Civil practice and procedure - Disposition without trial

Issues raised by plaintiff in his statement of claim had been litigated

Plaintiff was Canadian taxpayer. In his statement of claim, plaintiff alleged wrongdoing in manner in which he was treated by defendants relative to assessments for income tax and GST under Income Tax Act and Excise Tax Act. Defendants had brought motion to strike out his statement of claim without leave to amend on grounds that it was scandalous, frivolous or vexatious and was abuse of process within meaning of R. 221 of Federal Court Rules. Motion was granted and in his order, Prothonotary reviewed history of litigation undertaken by plaintiff before Ontario Court of Justice, Superior Court of Justice of Ontario, Court of Appeal for Ontario, Tax Court of Canada, Federal Court of Appeal and Supreme Court of Canada. Proceedings in Ontario Courts were related to conviction of plaintiff upon charges of filing false and misleading tax returns and proceedings before Tax Court and on appeal to Federal Court of Appeal related to assessments for payment of GST. Plaintiff appealed from order of Prothonotary. Appeal dismissed. Prothonotary made no error in granting motion. Prothonotary did not err in his appreciation of facts nor in his application of law, did not err in finding that issues raised by plaintiff in his statement of claim or claim had been litigated, and made no "palpable and overriding error". There was no support for plaintiff's allegation of bias.

Civil practice and procedure—Disposition without trial—Stay or dismissal of action—Grounds—Action frivolous, vexatious or abuse of process—Miscellaneous

Lee v. Canada, 2018 FC 504, 2018 CarswellNat 2562, 2018 CF 504, 2018 CarswellNat 2700 (F.C.)

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Civil practice and procedure - Practice on appeal

In final attempt to delay matter, father withdrew as litigation guardian and abandoned appeal

After plaintiff son was declared incapable of managing his affairs, plaintiff parents brought action on his behalf against defendant doctors, health care facilities and authorities, school board, and government employees. Application by applicant defendants to dismiss claim for want of prosecution was granted while father's cross-application to revisit earlier application have state-funded counsel appointed to act for son was dismissed. Parents appealed from dismissal of claims. Father's application for appointment of new litigation guardian and state-funded counsel was dismissed and, despite being granted liberty to renew application at appeal hearing, he applied to vary or discharge that order. On day of appeal hearing, father requested adjournment to prepare for review of that order. Father was granted opportunity to re-argue application without need of having to meet more onerous test for varying order but he refused on basis that he had right to have 30 days to prepare for review. Parents withdrew from appeal and left courtroom. Appeal dismissed as abandoned. There was no merit in adjournment request as, one month earlier, he had been granted leave to re-apply for state-funded counsel at time of appeal hearing which gave him month to prepare. Parents failed to comply with court's rules governing appeal process by refusing to participate in hearing of appeal and refusing to make submissions on renewed application for state-funded counsel. In final attempt to delay matter, father withdrew as litigation guardian and abandoned appeal.

Civil practice and procedure—Practice on appeal—Abandonment of appeal

Sahyoun (Committee of) v. Ho, 2017 BCCA 96, 2017 CarswellBC 659, [2017] B.C.W.L.D. 2398, [2017] B.C.W.L.D. 2402, [2017] B.C.W.L.D. 2401, [2017] B.C.W.L.D. 2396, [2017] B.C.W.L.D. 2400, [2017] B.C.W.L.D. 2403, 277 A.C.W.S. (3d) 236 (B.C. C.A.)

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Civil practice and procedure - Summary judgment

Dispute remained as to whether there were any breaches of obligations by insurer under policy

Action arose from fire loss which occurred during overnight hours in commercial rental property of which moving party, insured, was landlord. Insured sought to enforce indemnity under commercial property insurance policy issued to it by insurance company or insurer. Coverage was not in issue. Insurer, however, contested amount paid for cleanup and had paid out $420,704.55 including loss of rental income in amount of $36,000. Insured brought motion for summary judgment. Motion dismissed. There was genuine issues requiring trial which could not be determined on evidence before Court. There was significant amount of confusion and miscommunication on part of both parties as regards to use of Servicemaster, or who preferred service provider for insurer was. There was clearly misunderstanding and lack of communication on parts of both parties. While insured was referring to Servicemaster Toronto, insurer was referring to Servicemaster Newmarket. There remained significant dispute as regards whether there was breach of policy provisions on part of insured by failing or refusing to provide access to agent of insurer to inspect property for purposes of control report, whether anyone from insured realized that Servicemaster that they retained and Servicemaster that attended insured's premises were different entities, or whether there was error on part of Servicemaster as regards reasons for attendance at property as maintained by insured. There remained dispute as to whether there were any breaches of its obligation under policy on part of insurer.

Civil practice and procedure—Summary judgment—Requirement to show no triable issue

2129152 Ontario Inc. v. Aviva Insurance Company of Canada, 2017 ONSC 4713, 2017 CarswellOnt 13034, 283 A.C.W.S. (3d) 516, 71 C.C.L.I. (5th) 301 (Ont. S.C.J.)

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Construction law - Contracts

Apparent contradiction was product of motion judge's error in mixing up evidence of parties

Plaintiffs (client) entered into construction management contract with defendants (contractor) for which contractor agreed to manage construction of improvements at client's new law office. Following completion of work, client commenced action to recover alleged overpayment of $9,322.29 and for damages pursuant to penalty clause for construction delays. Client moved for summary judgment however motion and action were dismissed. Contractor provided account reconciliation that set out extra work requested that largely accounted for discrepancy and after extra work was taken into account, there remained only small overpayment of $677.7. Client however, claimed full $9,322.29 on basis that items referenced in reconciliation were not extras, as they had been included in original contract and further argued that he had not approved any extras in writing, as required by contract. Motion judge rejected overpayment submission finding client had requested work, received exactly what he asked for and paid for what he received. Also, motion judge did not accept penalty clause applied to work that was not intended to be done by completion date and fact that there was delay in installation of feature wall was immaterial. Client appealed. Appeal allowed. Motion judge erred in his assessment of client's evidence, by finding there was no overpayment and that penalty clause for delay did not apply to construction of feature wall. Motion judge stated there were several examples of over-reaching in client's affidavit but listed only one that he said was most glaring even though client claimed it was contractor's principal who drafted penalty clause, he later contradicted himself on cross-examination by stating he amended penalty clause after discussion with principal. However, apparent contradiction was product of motion judge's error in mixing up client and contractor's principal's evidence on cross-examination. Motion judge faulted client for not disclosing fifth invoice from contractor which he thought to be material to question of whether contractor had been paid in excess of amount it had invoiced. However, contractor conceded that there was no fifth invoice and motion judge erred not only in

finding there was, but in drawing adverse inference against client for not producing it. Motion judge's strong, but unsupported findings against client's credibility influenced his assessment of all issues before him and were supported by motion judge's inexplicable outright dismissal of client's overpayment claim, despite contractor's concession that there had been small overpayment that was recoverable by client.

Construction law—Contracts—Building contracts—Terms of contract—Express terms—Time for completion

2395446 Ontario Inc. v. King's and Queen's Custom Homes Inc., 2017 ONCA 782, 2017 CarswellOnt 15732, 284 A.C.W.S. (3d) 83, 72 C.L.R. (4th) 196 (Ont. C.A.)

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Construction law - Contracts

Absence of incontrovertible factual foundation made summary judgment impossible

Payment of contractors and subcontractors. Unit price contract. Subcontractor provided labour, materials, services, tools and equipment for light rail transit construction project. Subcontract provided for payment on unit rate basis. Subcontractor claimed original unit rates became inapplicable and that contractor agreed to reprice work on force account basis. Subcontractor alleged invoices were paid on that basis until contractor realized project was over budget. Subcontractor commenced action for payment of remaining amounts owed on force account basis. Subcontractor was not successful in bringing motion for summary judgment. Subcontractor appealed. Appeal dismissed. Chambers judge could not have granted summary judgment on record before him. Absence of incontrovertible factual foundation made it impossible for chambers judge to conclude that strength of subcontractor's case exceeded that of contractor's by margin that law required to justify resolution of dispute without a trial or at all.

Construction law—Contracts—Payment of contractors and subcontractors—Unit price contract

Whissell Contracting Ltd. v. Calgary (City), 2018 ABCA 204, 2018 CarswellAlta 1032, [2018] A.W.L.D. 2302 (Alta. C.A.)

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Contracts - Performance or breach

There was no breach of contract in failure to come to new agreement

Jockey club and fraternal organization made agreement with defendant city, in 1965. Jockey club was predecessor in agreement to plaintiff equestrian society. Plaintiffs stated that agreement created charitable trust, requiring city to maintain horse racing track. Plaintiffs claimed horse racing was to take place at site in perpetuity. City claimed transfer of subject land was gift, which did not create trust. Defendant regional district came to own some of subject land. Agreement made as to land use in 2000 by district, city and society was made renewable every 5 years. In 2004, city and district that 2000 agreement would not be renewed. Society claimed that both 1965 and 2000 agreements were violated by city and district. Society sought both specific performance and declaratory relief, from city and district. Society brought action against both defendants. Action dismissed. Relief sought by society was not consistent with enforcement of obligations. Subsequent agreements replaced original 1965 agreement. 2000 agreement in particular contained whole agreement clause. District did not negotiate in bad faith. There was no performance of obligation that was violated. Subject of plaintiffs' bad faith claim was agreement that was eventually agreed upon in 2000. There was insufficient evidence as to fair market value, of portion of lot that was sold. Society did not meet burden to prove that land was sold for less than fair market value. Agreement was not guaranteed to go past 5-year term, but had to be renegotiated. There was no breach of contract in failure to come to new agreement.

Contracts—Performance or breach—Breach—Miscellaneous

Okanagan Equestrian Society v. North Okanagan (Regional District), 2018 BCSC 800, 2018 CarswellBC 1203 (B.C. S.C.)

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Criminal law - Defences

While trial judge erred by stepping into shoes of counsel, no miscarriage of justice occurred

Accused was charged and convicted with sexual assault. Trial judge found that because accused took position that case was about consent, accused could not argue honest but mistaken belief. Accused's appealed from conviction was dismissed. Accused appealed with Supreme Court of Canada. Appeal was dismissed. Trial judge's conduct in intervening in manner in which he did, by stepping into shoes of counsel, raised serious concerns. . However, no miscarriage of justice was shown.

Criminal law—Defences—Consent—Availability of defence

R. v. Colling, 2018 SCC 23, 2018 CSC 23, 2018 CarswellAlta 1008, 2018 CarswellAlta 1009, 146 W.C.B. (2d) 140, [2018] A.W.L.D. 2335, [2018] A.W.L.D. 2316 (S.C.C.)

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Criminal law - Fraudulent transactions relating to contracts and trade

Finding that documents allegedly lost by police never existed was supported by evidence

Accused was bookkeeper for complainant, non-profit organization, from April 2007 to January 2010 and had daily control of its finances. New bookkeeper discovered that numerous cheques had been issued to individuals associated with complainant, but were never received. Accused admitted that she prepared 270 cheques, made payable to herself, for total of $204,000, but claimed that cheques were issued to reimburse herself for purchases she made for complainant using her own money. Accused claimed that two files of expense records at complainant's office documented her expenditures, but no timely application for disclosure of third party documents was made. Trial judge refused to hear defence application at start of trial for stay of proceedings, based on alleged failure by police to adequately investigate and preserve documents. Accused was convicted of fraud over $5,000. While trial judge acknowledged that police investigation was less than perfect, he found that accused was not deprived of fair trial. Accused appealed conviction, alleging that crucial documents were not available to her to defend herself. Appeal dismissed. Trial judge's analysis contained no errors. Evidence against accused was overwhelming. Trial judge's finding that documents allegedly lost by police never, in fact, existed was well-supported on evidence. His reasons comprehensively reviewed evidence and explained why accused's contentions failed to raise reasonable doubt as to her guilt. It could not be found that trial judge's decision to postpone hearing of stay application prejudiced accused; nor did he err in failing to stay proceedings when he did deal with application. Trial judge convincingly explained why this was not case in which stay was appropriate. Accused had shown no error in judgment below.

Criminal law—Fraudulent transactions relating to contracts and trade—Fraud—Elements

R. v. Dunkers, 2017 BCCA 120, 2017 CarswellBC 668, [2017] B.C.W.L.D. 2313, [2017] B.C.W.L.D. 2299, 137 W.C.B. (2d) 561 (B.C. C.A.)

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Criminal law - Pre-trial procedures

Accused not advised of immigration consequences of guilty plea

Accused was immigrant with permanent resident status. Accused sold cocaine to undercover police officer. Accused pleaded guilty to trafficking cocaine and was sentenced to nine months' incarceration. Accused learned that, due to conviction and sentence, he would be removed from Canada without right to appeal removal order. Accused applied for extension of time, appealed his conviction, and applied for leave to appeal from sentence. Appeal was dismissed and application for leave to appeal sentence was granted. Trial counsel had not advised accused of immigration consequences of his guilty plea or of attracting sentence of six months or more. Court of Appeal ruled that accused could not succeed on basis of unintended collateral consequences of his guilty plea as he did not establish that such lack of information about immigration consequences would have made difference to his decision to plead guilty. Accused appealed. Appeal dismissed. Correct framework to apply where accused wants to withdraw guilty plea is subjective framework, not modified objective framework. Accused who seeks to withdraw guilty plea must demonstrate prejudice by filing affidavit establishing reasonable possibility that he or she would have either (1) pleaded differently, or (2) pleaded guilty, but with different conditions. Accused's plea was uninformed, but he failed to establish he suffered prejudice giving rise to miscarriage of justice. Accused could not show there was reasonable possibility that if he had been informed of consequence, he would have either pleaded differently, or pleaded guilty with different conditions.. Accused's affidavit did not depose what he would have done differently if he had been informed of immigration consequences so he did not meet his burden. Accused's sentencing was outstanding and Crown had conceded that sentence of six months less a day would be appropriate in light of accused's deportation risk.

Criminal law—Pre-trial procedures—Pleas—Guilty plea—Miscellaneous

R. v. Wong, 2018 SCC 25, 2018 CSC 25, 2018 CarswellBC 1284, 2018 CarswellBC 1285, 146 W.C.B. (2d) 333 (S.C.C.)

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Evidence - Documentary evidence

Whether settlement privilege applied remained contextual, fact-specific analysis

Creditor W Corp. registered general security agreement against debtor's assets to secure its claim for professional services allegedly rendered. Debtor's bankruptcy proposal was approved and was performed. W Corp. commenced action against debtor and motion to annul debtor's proposal. Motion judge required debtor and trustee of debtor's proposal to disclose to W Corp. all documents and communications that set out any and all terms of debtor's settlement with creditor Z. Debtor appealed. Appeal dismissed. Motion judge erred in stating as general proposition that settlement privilege should not apply to Companies' Creditors Arrangement Act and Bankruptcy and Insolvency Act proposals. Motion judge cited no authority for this blanket statement and it ran contrary to long-standing and well-established common law principles relating to settlement privilege. Whether or not settlement privilege applied in any given case remained contextual, fact-specific analysis requiring that certain conditions be met. Although motion judge may have gone farther regarding scope and applicability of settlement privilege than required to dispose of production motion he nevertheless went on to consider outcome if settlement privilege did apply. Motion judge determined that countervailing interests to public interest in settlement privilege included W Corp.'s allegations of impropriety on part of debtor and their potential effect on integrity of proposal process.

Evidence—Documentary evidence—Privilege as to documents—Miscellaneous

Emery Silfurtun Inc., Re, 2018 ONCA 485, 2018 CarswellOnt 8639 (Ont. C.A.)

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Evidence - Opinion

To be admissible affidavit to be revised to answer questions for which it might be proffered

Following complaint Registrar cancelled G's personalized licence plate GRABHER which was G's surname and first issued in 1990. G sought declaration that cancellation unjustifiably infringed his rights under ss. 2(b) and 15 of Charter of Rights and Freedoms; and, that ss. 5(c)(iv) and 8 of Personalized Number Plates Regulations infringed freedom of expression rights and are of no force or effect. Registrar filed affidavit of "expert in representations of gendered violence across media platforms" in support of contention that plate offensive and potentially harmful. G moved to strike affidavit. Motion granted in part. To be admissible affidavit to be revised to answer questions for which it might be proffered: how did social and cultural context affect interpretation of word on government-issued plate; had context of word changed over time; had change affected how expression interpreted; what was impact of word on licence plate. Report was logically relevant and necessary to assess impact of plate considering existing social and cultural context. Deficiencies in complying with procedural rules were rectified and did not warrant exclusion of expert evidence. Expert clearly qualified to provide opinion evidence in proposed field of expertise. Impugned conclusions were not legal conclusions. To admit report without revision would complicate and lengthen trial.

Evidence—Opinion—Experts—Admissibility—Miscellaneous

Grabher v. Nova Scotia (Registrar of Motor Vehicles), 2018 NSSC 87, 2018 CarswellNS 274, 292 A.C.W.S. (3d) 338 (N.S. S.C.)

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Family law - Support

Given state of record and lack of evidence court could only make consent orders

Mother lived in Manitoba and father lived in Ontario. Mother applied to vary child support under Inter-Jurisdictional Support Orders Act, 2002. Application granted in part. Mother sought to vary order directly under s. 32 of Act instead of first obtaining provisional order. Given state of record and lack of evidence, court could only make consent orders. Insofar as any remaining issue of contested nature was concerned, hearing was required. Final order was made terminating father's obligation to pay child support for older child. Temporary order was made for father to pay child support of $1,084 per month for younger child based on income of $126,250 per year plus 70 percent of all reasonable special and extraordinary expenses given mother's income of $53,622 per year.

Family law—Support—Child support under federal and provincial guidelines—Variation or termination of award—General principles

Kernstead v. Young, 2017 ONSC 1872, 2017 CarswellOnt 4355, [2017] W.D.F.L. 2458, 277 A.C.W.S. (3d) 806 (Ont. S.C.J.)

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Immigration and citizenship - Constitutional issues

Associational activities protected by s. 2(d) of Charter do not envision family as constitutionally protected unit

Applicant was Italian citizen and permanent resident in Canada. Immigration Division (ID) issued removal order against applicant resulting from conviction for break and enter but stay of removal granted by Immigration Appeal Division (IAD) on conditions. Applicant was convicted of robbery and IAD dismissed his appeal and lifted stay. At IAD applicant argued that s.68(4) of Immigration and Refugee Protection Act was unconstitutional but IAD held that it lacked jurisdiction to rule on the constitutionality of s.68(4). Applicant applied for judicial review. Application dismissed. Associational activities protected by s.2(d) of Charter do not envision the family as constitutionally protected unit. While international law instruments signed and ratified by Canada can inform constitutional interpretation, they cannot supplant Charter and domestic law. International law cannot effectively "read in" provision into the Charter respecting the family. Three of five questions certified. Question whether s. 7 of Charter engaged where deprivation of right to liberty and security of person of permanent resident arises from their uprooting from Canada, and not from possible persecution or torture in the country of nationality certified. Question whether criteria to depart from binding jurisprudence met in present case certified in keeping with principle of comity. Question relating to prematurity issues under s.12 of Charter certified as unclear whether distinction between admissibility and deportation. Question relating to consequences of deportation as it relates to psychological, social, and linguistic impacts too broad and did not transcend interests of parties. Question whether family is "association" under s. 2(d) of Charter, and deportation could infringe right to associate with family too broad to be certified.

Immigration and citizenship—Constitutional issues—Charter of Rights and Freedoms—Visitors and immigrants—Exclusion and removal

Moretto v. Canada (Citizenship and Immigration), 2018 FC 71, 2018 CarswellNat 133, 2018 CF 71, 2018 CarswellNat 385, 291 A.C.W.S. (3d) 831 (F.C.)

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Insurance - Automobile insurance

Misrepresentation did not affect plaintiff's ability to claim under policy

Misrepresentation. Plaintiff was named as primary driver and sole insured under policy. Plaintiff purchased truck for boyfriend in her name and insured truck under policy, listing boyfriend as co-insured and primary driver of truck. As part of application, boyfriend provided identification card, which both plaintiff and insurer mistook as driver's license. Boyfriend's driver's license was suspended. Issue arose as to whether boyfriend's misrepresentation invalidated plaintiff's insurance coverage as co-insured under policy. Plaintiff's claim in respect of truck was not invalidated, nor her right to recover indemnity forfeited under Insurance Act because she did not knowingly misrepresent or fail to disclose any required fact when she submitted application. Plaintiff was innocent co-insured. Misrepresentations did not affect plaintiff's ability to claim under policy because statute and insurance contract did not contain express language indicating that policy would be void against innocent co-insured if another co-insured made material misrepresentations. Plaintiff did not breach statutory condition as she had reasonable basis to believe that boyfriend was legally qualified to drive.

Insurance—Automobile insurance—Insurable interest

Haraba v. Wawanesa Mutual Insurance Co., 2017 ABQB 190, 2017 CarswellAlta 460, [2017] A.W.L.D. 1726, [2017] A.J. No. 274, 277 A.C.W.S. (3d) 623, 49 Alta. L.R. (6th) 84, 66 C.C.L.I. (5th) 303, [2017] 8 W.W.R. 201, [2017] I.L.R. I-5960 (Alta. Q.B.)

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Pensions - Federal and provincial pension plans

Being markedly restricted or not fit to work were insufficient to ground finding of incapacity

Applicant was victim of armed assault and was diagnosed with Post-Traumatic Stress Disorder (PTSD). Applicant was granted disability benefits under Canada Pension Plan retroactive to date five years after incident, two years before her application. Applicant sought additional benefits retroactive to date of incident on basis of incapacity. General Division-Income Security Section concluded that applicant was not incapacitated despite her psychiatric condition because she was capable of forming and expressing intention to make application earlier than she did. Appeal Division of Social Security Tribunal dismissed applicant's application for leave to appeal. Applicant brought application for judicial review. Application dismissed. Appeal Division's conclusion that appeal had no reasonable chance of success was reasonable. General Division was entitled to give weight to declaration of incapacity filed by family physician. General Division could conclude that being markedly restricted or not fit to work were insufficient to ground finding of incapacity. General Division's capacity determination had to be based on evidence and not on equitable considerations. Being disabled did not equate to being incapable to form or express intention to make application. Lack of knowledge about entitlement to disability pension did not fall within scope of incapacity.

Pensions—Federal and provincial pension plans—Federal pension plans—Canada Pension Plan benefits—Disability pension—Miscellaneous

O'Rourke v. Canada (Attorney General), 2018 FC 498, 2018 CarswellNat 2451, 2018 CF 498, 2018 CarswellNat 2731, 292 A.C.W.S. (3d) 429 (F.C.)

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Public law - Social programs

Applicant's arguments raised disagreements with application of settled principles to facts of her case

Judicial review. Social Security Tribunal-General Division (SST-GD) found that applicant was not entitled to receive employment insurance (EI) benefits as she left her employment without just cause because there were reasonable alternatives open to her before resigning. Social Security Tribunal-Appeal Division (SST-AD) dismissed applicant's appeal because SST-GD did not fail to observe natural justice and did not err in fact or law. Applicant brought application for judicial review. Application dismissed. Decision of SST-AD was reasonable because it was not open to it to intervene in light of s. 58 of Department of Employment and Social Development Act. Applicant's arguments, that she had just cause to leave employment due to systemic sex-based harassment or had reasonable assurance of other employment, sought to have her case re-decided on merits, which was not role of court. As applicant's arguments raised disagreement with application of settled principles to facts of her case, it was reasonable for SST-AD to dismiss her appeal.

Public law—Social programs—Employment insurance—Entitlement to benefits—Disqualification and disentitlement

Cameron v. Canada (Attorney General), 2018 FCA 100, 2018 CarswellNat 2712 (F.C.A.)

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Real property - Interests in real property

Restrictive covenant did not grant dominant tenement any access to parking area

Neighbour owned property adjacent to two property owners' adjacent properties . Restrictive covenant relating to parking was registered against owners' properties . Neighbour essentially had benefit of easement and right-of-way whose area could only be reduced for development purposes if greater area was set aside for parking elsewhere . Owners wished to develop their properties in manner that would reduce easement and right-of-way . Owners unsuccessfully brought petition for declaration that provisions of restrictive covenant were invalid and unenforceable at law . Owners appealed. Appeal allowed in part. Restrictive covenant was valid restriction on use of land but judge's finding that covenant referred only to surface parking was overturned. Covenant restricted land use as little as possible if it was interpreted as allowing parking to be supplied anywhere on property, including above or below ground. Nothing in restrictive covenant or associated agreements gave holder of dominant tenement easement over servient tenement for purpose of parking vehicles. Restrictive covenant did not grant dominant tenement any access to parking area of servient tenement.

Real property—Interests in real property—Restrictive covenants—Determination of validity

1530 Foster Street Ltd. v. Newmark Projects Ltd., 2018 BCCA 198, 2018 CarswellBC 1244 (B.C. C.A.)

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Remedies - Damages

Plaintiff still able to enjoy family and everyday life despite chronic myofascial pain

Plaintiff brought action against defendants with respect to three separate motor vehicle accidents. Action allowed. Plaintiff, now 44 years old, suffered from chronic myofascial pain arising from soft tissue injuries to neck, shoulders and low back, caused by combination of three accidents. Plaintiff endured significant pain symptoms and headaches after each accident, which were severe enough to prevent her from working at all for some months after first and third accidents. Plaintiff continued to experience variable levels of pain and psychological and cognitive symptoms, all of which had improved and were likely intermittent but now chronic. Pain affected plaintiff's intimate relationship with husband and some activities with children. Plaintiff had low moments and feeling of anxiety in response to pain and fatigue. Plaintiff was still able to enjoy her family and everyday life and take pride in her work. Plaintiff would be awarded $85,000 for non-pecuniary damages.

Remedies—Damages—Damages in tort—Personal injury—Principles relating to non-pecuniary loss—Multiple factors considered

Dhillon v. Singer, 2017 BCSC 414, 2017 CarswellBC 676, [2017] B.C.W.L.D. 2496, [2017] B.C.W.L.D. 2513, [2017] B.C.W.L.D. 2505, [2017] B.C.W.L.D. 2511, [2017] B.C.W.L.D. 2506, [2017] B.C.W.L.D. 2501, [2017] B.C.W.L.D. 2508, [2017] B.C.W.L.D. 2509, 277 A.C.W.S. (3d) 443 (B.C. S.C.)

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Remedies - Damages

Not possible to find plaintiff acted unreasonably in not attending specific counselling program

Plaintiff brought action against defendants for injuries and loss resulting from motor vehicle collision that occurred in 2007 when she was passenger in vehicle driven by her father. Defendant was convicted of two counts of dangerous driving and liability was admitted by third party insurer. At time of accident, plaintiff was 16 years of age and attended high school with fine arts focus. She had no physical or mental health issues before collision. Defendant was driving far in excess of speed

limit at time of accident and lost control of his vehicle. Vehicle in which plaintiff was travelling caught fire and she was pulled out of window by persons attending at scene. Plaintiff suffered extensive injuries including mild traumatic brain injury, right hand injury, multiple fractures, chronic pain and PTSD. Plaintiff commenced action for damages and issue arose as to whether plaintiff mitigated damages. Plaintiff did not fail to mitigate damages. With respect to her physical injuries, plaintiff had already undergone several surgeries and intensive period of treatment rehabilitation following accident, including learning to walk again and regain use of hand. Although she had considerable pain from her injuries, she persevered to finish high school and enrol in university. She worked full time in university in order to support herself. In circumstances where evidence supported that plaintiff was mitigating her loss by working and returning to school, she was experiencing PTSD symptoms that included avoiding thinking or talking about accident, she did not have benefit of parental guidance regarding psychological counselling which was recommended, and she did not have funds to obtain such counselling. Viewed objectively, it was not possible to find that plaintiff acted unreasonably in not attending specific counselling program recommended in 2011. She did attend counselling in 2015 with counsellor her father recommended and found it not helpful. It was acknowledged that this counsellor did not have expertise in cognitive behavioural therapy, which was type of therapy needed for PTSD symptoms. It was not recommended that she attend counselling again until 2016. Same considerations that led her to avoid counselling were significant factor in her not participating in conditioning exercises recommended. Plaintiff had been intensely involved in medical interventions, surgeries, and rehabilitation programs following accident and wanted sense of normalcy in her life. In not asking for help she was reacting in manner typical to that of young people in similar situations.

Remedies—Damages—Valuation of damages—Duty to mitigate—Miscellaneous

Ellis (Litigation guardian of) v. Duong, 2017 BCSC 459, 2017 CarswellBC 750, [2017] B.C.W.L.D. 2650, [2017] B.C.W.L.D. 2642, [2017] B.C.W.L.D. 2643, [2017] B.C.W.L.D. 2639, 278 A.C.W.S. (3d) 69 (B.C. S.C.)

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Tax - Income tax

Disclosure of redacted information would have concrete deleterious effect on public interest in completing audits

Minister of National Revenue audited taxpayer's personal income tax returns. Taxpayer brought applications for judicial review to set aside requirements to produce documents and information. Taxpayer requested all material relied on to issue requirements. Minister served redacted certified record signed by Canada Revenue Agency (CRA) auditor. Minister brought applications under s. 37 of Canada Evidence Act, ancillary to judicial review applications, for orders prohibiting disclosure of redacted information on ground of public interest privilege. Applications granted. Redacted information was not to be disclosed. Minister was not seeking to establish class privilege over all communications between CRA auditors and technical specialists. Disclosure of redacted information would have concrete deleterious effect on public interest in completing audits. Revealing CRA's internal technical discussions and strategic discussion could endanger successful audit of taxpayer's file. Factors weighed disproportionally in favour of upholding public interest in protection of information related to ongoing audits. Audit was ongoing administrative procedure that was not being done for improper purpose, redacted information could not affect outcome of judicial review applications, disclosure of redacted information could affect outcome of audit, would prejudice ongoing audit operations and would harm public's perception in administration of justice, and there had not been prior publication of information. Taxpayer's request was not fishing expedition, but this was only factor that favoured disclosure of redacted information.

Tax—Income tax—Administration and enforcement—Audits—Requirement to provide documents or information

Canada (Attorney General) v. Chad, 2018 FC 556, 2018 CarswellNat 2657 (F.C.)

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Tax - Income tax

Company's life insurance premium deductions denied on basis loans were personal loans of principal shareholders

Company took out first loan, life insurance policy was taken out as financing condition, and final payment on first loan was made in 2013. Second loan was taken out and another life insurance policy was acquired as lending condition. Loan was more in nature of credit facility that could be drawn down as required and there was outstanding balance on second loan as of 2012. Company submitted deductions for life insurance expenses for taxation years 2013 to 2015. Minister denied company's life insurance premium deductions on basis that loans were personal loans of principal shareholders. Company appealed. Appeal dismissed. There were several concerns pertaining to first loan, one of which was that it was indicated that balance outstanding was to be repaid in 2013 and company's year end took place after that repayment date, which suggested that for 2014 and 2015 taxation years, balance owed to lender was nil. Difficulty with second loan was that shareholder indicated that credit facility was never fully drawn down, which suggested that company only borrowed what was required from time to time and that credit facility was paid back on rolling basis. There was also no evidence of any indebtedness for 2013 to 2015 taxation years - In this case, minimum evidence requirement was not met by company.

Tax—Income tax—Business and property income—Expenses—Life insurance premiums

Emjo Holdings Ltd. v. The Queen, 2018 TCC 97, 2018 CarswellNat 2452, 292 A.C.W.S. (3d) 431 (T.C.C. [Informal Procedure])

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Tax - Income tax

Activities carried out in connection with airline venture not constituting source of income

Taxpayer accountant was one of founders and shareholders of company established to provide services as regional airline. Company retained professionals, including plaintiffs, to provide services for developing airline business before declaring bankruptcy. Plaintiffs' action against company led to judgment finding taxpayer and other defendants liable to pay damages. Taxpayer's appeal was dismissed. Taxpayer claimed deduction for his payment of damages to plaintiffs and of legal expenses for litigation. Minister reassessed taxpayer under Income Tax Act on basis that that expenses were personal in nature. Taxpayer appealed. Appeal dismissed. It was clear that taxpayer never had intention to carry out regional airline activities personally or as member of group of investors and promoters and never did so. Activities carried out by taxpayer in connection with airline venture did not constitute source of income to him. Even if airline activities were to constitute source of income for taxpayer, it disappeared when company declared bankruptcy and its holding company was dissolved. In year in which taxpayer made payment, he had no source of income coming from airline's activities and was not carrying out any business other than his accounting one. There was no nexus between expenses claimed as deductions and business he was actually carrying on in that year. Expenses made when taxpayer was ordered to pay damages were not made for purpose of gaining or producing income as required by s. 18(1)(a) of Act.

Tax—Income tax—Business and property income—Expenses—Purpose of gaining or producing income

Nandlal v. The Queen, 2017 TCC 162, 2017 CarswellNat 4239, 282 A.C.W.S. (3d) 659, 2017 D.T.C. 1100, [2018] 2 C.T.C. 2041, 2017 CCI 162, 2017 CarswellNat 8946 (T.C.C. [Informal Procedure])

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Tax - Income tax

Transfers of property by taxpayers to charitable foundation were gifts

Taxpayers participated in program, requiring investment, largely funded by unit loan, in limited partnership units (LP unit), and transfer of money to charitable foundation, largely funded by charitable foundation loan, to obtain charitable donation tax credit and deductions in respect of program loans (unit loan and charitable foundation loan together). Minister of National Revenue reassessed taxpayers, denying charitable donation tax credit. Taxpayers appealed. Appeals allowed. Taxpayers' transfer of property to charitable foundation was not gratuitous, so transfer was not gift under common law. Taxpayers received benefit because of charitable foundation loans, which were not commercially reasonable debt instruments. Transfers of property by taxpayers to charitable foundation were gifts for purposes of s. 118.1 of Income Tax Act because of s. 248(30) of Act. Benefit associated with charitable foundation loans to taxpayers did not exceed 80 per cent threshold, so they were gifts for purposes of Act. Eligible amount of charitable gifts was nil. Arrangements to repay principal and interest owed under program loans were not bona fide arrangements as contemplated by s. 143.2(7) of Act. Principal amount of each program loans was limited-recourse amount for purposes of s. 143.2(6.1) of Act. Charitable foundation loans related to gifts since loans funded 98 per cent of gifts. Unit loans were not related to gifts. Eligible amount of gifts by taxpayers to charitable foundation was reduced by principal amount of their charitable foundation loans. Amount of advantage in respect of gifts made by taxpayers to charitable foundation was greater than amount of those gifts so eligible amount of gift made by each taxpayer to charitable foundation was nil.

Tax—Income tax—Tax credits—Charitable donations—Eligible amount of gift

Cassan v. The Queen, 2017 TCC 174, 2017 CarswellNat 4351, [2018] 1 C.T.C. 2001, 2017 D.T.C. 1105 (T.C.C. [General Procedure])

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