

Take Five

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This month we have summarized what we consider to be the top five cases from the Ontario CA in March.

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OnPoint Legal Research
t. 1-888-894-4280
www.onpointlaw.com

In Memory



It is with profound sadness that I share the news of the passing of our colleague and friend, Doug Morrison. Over the past five years that Doug worked with us, I enjoyed many discussions with him about challenging legal issues, sailing, art and baking. Doug was an inspiration to all of us at the firm. He was a brilliant man who loved the practice of law and was always willing to share the wisdom of his years of experience with our more junior lawyers. He was a compassionate family man who gave generously to his community. I will miss his keen wit and infectious enthusiasm. Our deepest condolences to Doug's family and friends.

- Sarah Picciotto

Who is OnPoint?

We are a firm of legal research lawyers. For over 10 years, we have completed research and writing projects for lawyers in the private and public sectors across Canada. 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.

Who We Are:

Our research lawyers are well versed with both traditional research sources and the latest in research technology. They are academics -- many completed a clerkship in B.C. or Alberta. In addition, they have all had the benefit of obtaining essential practice experience as lawyers with major downtown law firms.

What We Do:

Our research lawyers possess diverse legal backgrounds, enabling us to handle projects of any size on any issue. We work closely with our clients to ensure that we have a thorough understanding of the scope of the project, the specific issues involved, and the perimeters of the desired end product. We complete a variety of projects for our clients, from case summaries to complex memoranda and facta. Click [here](#) for more information.



Essex Condominium Corporation No. 89 v. Glengarda Residences Ltd., 2010 ONCA 167

Area of Law: Condominium Law

Under Appeal: Justice Quinn

Section 52(2) of the now repealed *Condominium Act* required the developer of a condominium to disclose to prospective purchasers a number of items including the operational budget for the condominium's first year of operation. Subsection 52(5) permitted unit owners or the condominium corporation to sue the developer if such disclosure contained material misstatements or omitted material statements. In order to succeed in an action under subsection (5), the owners or the condominium corporation had to have relied upon the material misstatements or omitted material statements and incurred losses as a result. The condominium corporation respondent brought an action against the appellant developer, alleging that the disclosure did not indicate that the heating, ventilation and air conditioning ("HVAC") unit on the premises was leased, and that an option to purchase the unit at the end of eight years would entail a payment of \$32,400. The developer had, prior to turning the building over to the condominium corporation, owned the HVAC unit but sold it to a bank, who then leased it back to the condominium corporation. The sale and lease back did not occur until 2001, over two years after the disclosure to prospective purchasers. As such, the disclosure to prospective purchasers contained only an estimate of the lease costs, though this was listed under the heading, "maintenance and repairs." At the time of disclosure, the HVAC unit had not even been acquired, as construction of the condominium had not begun. The trial judge held that the disclosure to prospective purchasers contained omissions of material statements because it did not accurately indicate that the HVAC unit would be leased rather than owned. He awarded the respondents the full lease cost for the HVAC unit with the exception of the costs associated with first year of the lease.

Held: Appeal allowed

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A five-member panel of the Court was convened to determine whether or not the Court's previous holding in *Wellington Corp. No. 61 v. Marilyn Drive Holdings Ltd.*, [1998] 37 O.R. (3rd) 1 ought to be revisited on the basis that the language in subsection (5) required actual reliance by unit owners in order for a successful action. The *Wellington* decision set out the test for an action brought by a condominium corporation pursuant to subsection (5), and held that actual reliance on the misstatement or omission by the corporation was not a requisite element, but that the corporation's ability to discharge its statutory obligations to manage the property was impaired by the misstatement or omission, and losses were incurred as a result. The Court agreed with this interpretation of the *Act*, and declined to revise the law as set out in the *Wellington*. However, the Court found that omission of information about the leased HVAC unit was not material and therefore did not give rise to a cause of action pursuant to subsection (5).

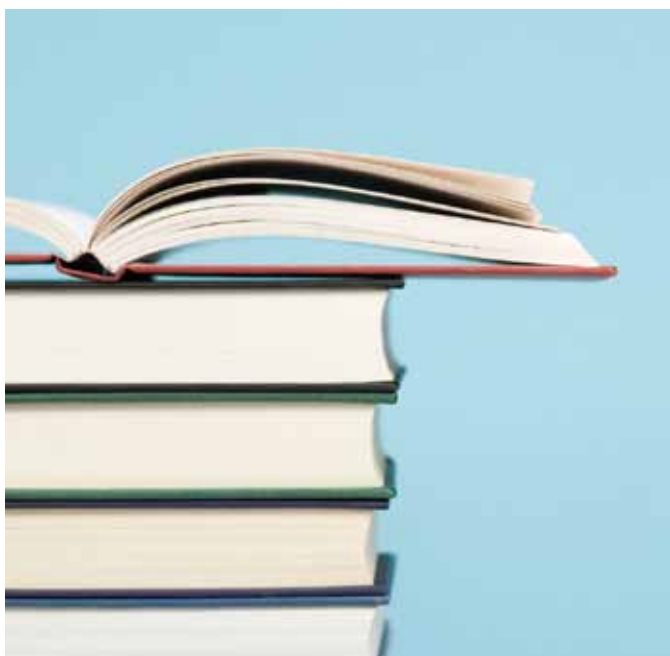
Taber v. Paris Boutique & Bridal Inc. (Paris Boutique), 2010 ONCA 157

Areas of Law: Civil Procedure; Duress

Under Appeal: Justice Mulligan

The plaintiff commercial landlord, not a party to the appeal, sent a demand letter to the appellant tenants seeking arrears in rent. The appellant tenants met with the plaintiff's lawyer, the respondent in this appeal. The lawyer required the appellants to sign minutes of settlement and a promissory note as a condition to being allowed to repossess the leased premises. The plaintiff brought an action to enforce the minutes of settlement. The appellants counterclaimed and began an action against the lawyer as a third-party. The lawyer brought a motion under Rule 21 of the Rules of Civil Procedure to strike the action against her. The motions judge granted the Rule 21 motion.

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**Held: Appeal dismissed**

The Court concluded that the motions judge properly granted the motion to strike because there was no reasonable cause of action against the respondent lawyer. The appellants asserted that they were subject to duress in signing the minutes of settlement, and therefore the minutes ought to be set aside. The Court agreed with the motions judge that the lawyer did not subject the appellants to any duress and was acting in her capacity as a lawyer to advance the position of her client. The Court held that economic duress can vitiate an agreement, but that two conditions are required for this remedy to be available: first, the pressure must be regarded by the law as illegitimate, and the pressure must amount to a "coercion of the will" of the party claiming to have been subject to duress. The only alleged pressure faced by the appellants was that they would not be allowed re-entry unless they signed the minutes of settlement and promissory note. This conduct was considered to be insufficient to amount to duress; therefore no cause of action had been made out.

This appeal concerns property in the Muskoka region that had been in the parties' family for over a century. Two sisters, Flora and Mercy, inherited the property in the 1950's and retired there within the next decade. Their brother, Duke, had an injury that kept him from working in his trade as a carpenter, so the sisters agreed with Duke that he would build two houses on the property, one for the sisters and one for himself and his wife, Fanny. Flora and Mercy paid for the construction. On the understanding that Duke would maintain the property and drive the sisters to town when required, Duke and Fanny paid no rent or taxes, and Flora and Mercy also paid Duke a small monthly stipend. Duke died in 1983, after which Fanny remained in the house. By 1986, one of Fanny's sons, Hubert, had moved in with her on a more or less permanent basis. After Duke died, Flora and Mercy transferred the property to Duke and Fanny's two sons, Charles and Warren, preserving a life interest for themselves. Charles and Warren agreed with Flora and Mercy that Fanny would stay on the property until her death. In 2006, Fanny's ill health caused her to move west to live with a daughter. She died in 2008, naming Hubert as the sole beneficiary and executor of her estate. Hubert continued to spend summers on the property, to the objection of Charles and Warren. On



MacKinnon Estate v. MacKinnon, 2010 ONCA 170

Areas of Law: Property, Estates, Possessory Title
Under Appeal: Justice Wood

the basis of a number of handwritten notes, Hubert applied for a declaration that either he or Fanny's estate owned the property by way of possessory title. In the alternative, Hubert made a claim for unjust enrichment on the grounds that either he or his father, Duke, had made improvements to the property that had not been compensated. The applications judge denied the possessory title claim, but allowed the claim for unjust enrichment.

Held: Appeal dismissed on all grounds [CLICK HERE TO ACCESS THE ENTIRE JUDGMENT](#)

The appeal and cross-appeal were denied. Hubert's appeal as to possessory title was denied by the Court, but on a different basis than held by the applications judge. The Court asked for submissions by the parties in relation to whether Duke and Fanny had been licensees of the property in question rather than tenants at will. As licensees, Duke and Fanny would not have an interest in land, but possession on the basis of permission from the actual owners, Flora and Mercy. The applications judge did not consider this distinction, instead grounding his denial of Hubert's claim on the basis that possessory title requires the applicant to demonstrate the effective exclusion of actual owners from the property at stake, pursuant to s.5(7) of the *Real Property Limitations Act*. The Court concluded that s.5 of the *Act* did not apply on the facts because occupation alone is insufficient to establish tenancy at will, especially when there are "special circumstances" such as those presented in this case. Special circumstances include where possession is granted out of love and affection, gratitude or goodwill, and will often be present where possession is granted to family members. The Court determined that the intentions of the parties and the surrounding circumstances did not indicate that Duke and Fanny had been given a right of possession in respect of the land. The Court also stressed that public policy considerations strongly favored strict adherence to enforcing the evidentiary burden required to establish possessory title pursuant to s. 5(7) of the *Act*.

Finlay v. Paassen, 2010 ONCA 204

Area of Law: Civil Procedure

Under Appeal: Justice Ramsay

The appellant sued the respondent for injuries sustained in a car accident. Pleadings and discoveries were concluded in a timely fashion, but appellant's counsel did not set the matter down for trial in accordance with the timeframe set out in the Rules of Civil Procedure. As a result, the registrar issued a notice that the matter would be dismissed for delay unless the action was set down for trial within 90 days, pursuant to Rule 48.14. Due to a mistake at the office of the registrar, the notice was never sent to appellant's counsel. The matter was dismissed for delay 90 days later, unbeknownst to the

appellant's counsel. A motion to set aside the registrar's order was not made for nearly two years. The motions judge refused to overturn the registrar's

order on account of the two-year delay between counsel learning of the order and bringing a motion to overturn it.

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Held: Appeal allowed

The Court disagreed with the appellant's argument that the registrar's failure to deliver the status notice meant that the registrar had no jurisdiction to make an order dismissing the action. However, the Court found that the motions judge failed to apply the four-factor test the Court previously endorsed, and instead applied too rigid a test. The four factors, which are to be considered contextually and weighed, are: an explanation of the delay; inadvertence in missing the deadline; whether the motion was brought promptly, and finally, whether allowing the motion would prejudice the defendant. In applying and weighing these four factors, the Court concluded that the order ought to be overturned and the action reinstated. Of particular concern to the Court was the fact that the respondents had not adduced any evidence indicating that a reinstatement of the action would have a prejudicial effect.

Sunview Doors Limited v. Pappas, 2010 ONCA 198

Area of Law: Construction

Under Appeal: Justices Jennings, Kiteley and Low, sitting as the Divisional Court

The plaintiff respondent manufactures sliding patio doors and supplied products to the defendant corporation. The defendant corporation did not pay the plaintiff for a number of orders and subsequently went out of business. The plaintiff brought an action for breach of contract and a claim for a statutory trust pursuant to s. 8(1) of the Construction Lien Act (the "Act"). The breach of contract claim was allowed at trial, but the trial judge refused the claim for a statutory trust, relying on a previous decision of a panel of Court of Appeal justices sitting as the Divisional Court, *Central Supply Co. 1972 Ltd. v. Modern Tile Supply Co.* (2001), 55 O.R. (3d) 783 (Div. Ct.). The *Central Supply* decision held that the claimant must intend the materials to be sold for a known and identified improvement, imposing the same requirements on trust claimants as lien claimants. The trial judge made a factual finding that the plaintiff did not know where the doors supplied to the defendant were being installed. The Divisional Court allowed the plaintiff's appeal and imposed a statutory trust. The Divisional Court distinguished the facts from those in *Central Supply*, finding that the patio doors were custom ordered for specific projects, and that, but for the defendants failure to disclose information to the plaintiffs when requested, the plaintiffs would have known for what projects the products were being used.

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ENTIRE JUDGMENT](#)





Held: Appeal allowed

A five-member panel of the Court was convened to determine whether *Central Supply* was correctly decided. The Court determined that the language of s. 8(1) of the *Act* did not require specific knowledge on the part of the claimant about what project would be completed with the supplies. The Court discussed the purpose of the *Act* and focused on two available remedies: liens and statutory trusts. Both are available to the same class of claimants, but the requirements differ, with liens attaching specifically to improved property and trusts attaching to money paid by the customer to a contractor for an improvement made with materials from a claimant supplier. The Court set out the four requirements for a supplier seeking to obtain payment pursuant to a statutory trust: they must be claiming from a contractor or subcontractor; they must have supplied materials to the projects on which the contractor was working; the contractor received or was owed monies on account of its contract price for those projects; and the contractor owed the supplier money for those materials. If these elements are satisfied, as they were in this case, the contractor bears the burden to show that payments were made to proper beneficiaries of the trust. The Court found that the plaintiff's construction of custom products for the defendant and the plaintiff's request for customer information from the defendant were sufficient to link the supplied products with the project for which the materials were used. As a result, a claimant for a statutory trust pursuant to the *Act* need not know of the specific project for which materials are provided, overturning the decision in *Central Supply*.

All of our research lawyers have years of experience as litigators at major downtown firms, and many of them have completed a clerkship prior to commencing their articles.