

# Take Five

ONTARIO EDITION

January 2010

Welcome to OnPoint Legal Research's  
Ontario Edition of Take Five



We admit that a cow has little to do with legal research. However, due to popular demand, farm animals have made frequent appearances on the cover of the BC edition of *Take Five*. Besides, photos of law books can get a bit dull...

## What is *Take Five*?

After years of creating the B.C. version of *Take Five*, a newsletter that summarizes what we feel are each month's five most interesting cases from the BCCA, we decided it was time to expand our horizons by creating an Ontario version that features cases from the Ontario Court of Appeal. Please **email us** if you would like to receive this complimentary monthly newsletter.

## Inside this Issue:

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

**Who is OnPoint Legal Research? See p.2**



OnPoint Legal Research  
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## Who is OnPoint Legal Research?

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, 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**

### **Who We Are:**

Our research lawyers are well versed with both traditional research sources and the latest in research technology. They are academics -- all graduated near the top of their law classes, and 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. Click [here](#) for more information.

### **How to Contact Us:**

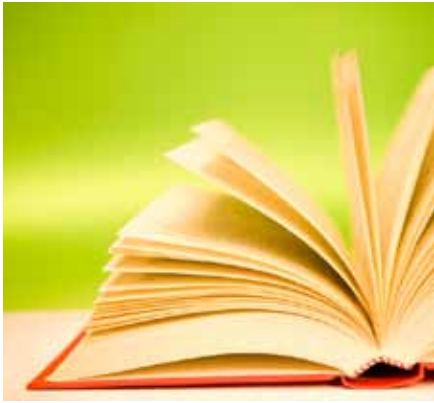
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**Rose Keith, Rose Keith Law Corporation**

*"OnPoint is a great resource for my practice."*

**Karen Nordlinger, QC, Karen Nordlinger & Associates**



## *Dubuc v. 1663066 Ontario Inc. (Laurier Optical)*, 2009 ONCA 914

Areas of Law: Civil Procedure; Discontinuance of an Action      Under Appeal: Justice Ratushny

The appellants commenced an action against the respondents for defamation. The respondents and their solicitors had sent letters to the appellants, optometrists, with a “cc” notation indicating that the letters were being sent to the College of Opticians of Ontario and the College of Optometrists of Ontario, the colleges governing the appellants. The appellants were of the view that the letters were defamatory because they contained allegations of unethical and unprofessional conduct. When they learned that the letters had not actually been copied to the colleges as they had thought, they realized that their action was without merit because no publication had occurred. The appellants brought a motion to dismiss their own action. As both parties wanted to end the litigation, the motions judge determined that the only issue was that of costs. She found that the appellants were moving to discontinue, rather than dismiss, their action. She then applied the presumptive cost rule established in Rule 23.05(a) of the Rules of Civil Procedure which entitles defendants to their costs in a discontinued action.

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### Held: Appeal Dismissed

The appellants argued that the motions judge erred in characterizing their motion as one for discontinuance rather than for dismissal and by applying the presumptive cost rule. The Court found that a plaintiff cannot move to dismiss its own action and must instead discontinue the action. Although the Rules are not a complete code of procedure, where they have expressly set out a method of proceeding, it is not open to a party to ignore that method and choose another. The Court confirmed that a motion for dismissal is limited to opposing parties in litigation and cannot be used by a plaintiff as an end run around the presumptive cost rule applicable to discontinued actions.

## *Brien v. Niagara Motors Limited*, 2009 ONCA 887

Areas of Law: Employment; Wrongful Dismissal      Under Appeal: Justice Lafreniere

The appellant was dismissed from her employment with the respondent after being accused of misconduct. The trial judge allowed the claim for wrongful dismissal and included in her award “Wallace” damages, an extension of the notice period to which the appellant was entitled due to the manner in which she had been dismissed. After the trial, but before the reasons for decision were released by the trial judge, the Supreme Court of Canada released its decision in *Honda Canada Inc. v. Keays*, changing the law with respect to compensatory damages for bad faith conduct on wrongful dismissal. The *Keays* decision requires that where damages are awarded due to the bad faith of a terminating employer, the actual damages of the dismissed employee are the appropriate measure of damages rather than arbitrarily adding time to the notice period.

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### Held:

Appeal allowed

The Court held that the award of Wallace damages could not be sustained in the face of the decision in *Keays*. The Court determined that, while the wrongful allegations of misconduct against the appellant in her termination could have led to an award of damages for mental distress as defined in *Keays*, the appellant's damages were not of the nature or scope to qualify. Further, the appellant had not substantiated her claim for damages for mental distress by seeking professional or therapeutic assistance.

*OnPoint lawyers have access to all of the leading electronic research sources; we are able to complete research for lawyers in B.C., Alberta, Ontario, and across Canada.*

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.

One of our research lawyers has been a litigator for over 30 years. His remarkable level of experience with a wide range of areas of law, in combination with his extraordinary research skills, make him an outstanding asset to any file.

The appellant appealed the summary dismissal of her action in the Superior Court of Justice. The appellant was involuntarily detained pursuant to the *Mental Health Act* on October 6, 2005, and was released the following day. On March 12, 2008, she issued a claim alleging unlawful detention and breaches of various Charter rights against the respondents, including the Toronto Police Service Board and the Scarborough General Hospital. The motions judge determined that the appellant knew of her claim by October 7, 2005, and as such the limitation period began to run on that date. The respondents were successful in their motion for summary dismissal on the basis



## *Alexis v. Darnley*, 2009 ONCA 847

Areas of Law: Limitations; Charter Litigation  
Under Appeal: Justice O'Marra

that the two-year limitation period set out in the *Limitations Act* had expired by the time the claim was brought. The appellant also submitted that claims made under s.24 of the Charter are insulated from the *Limitations Act*. Further, she argued that this issue was not appropriate for disposal of on a motion for summary judgment.

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### Held: Appeal dismissed on all grounds

The Court agreed with the motions judge that the appellant's discovery of her claim occurred on or about October 7, 2005. The Court also addressed the appellant's contention that because discoverability issues are factually driven, a trial was required. The Court found that the material facts in relation to the discoverability were not in dispute; discoverability was not a genuine issue for trial and summary judgment was appropriate.

The appellant relied on jurisprudence from before the introduction of the new *Limitations Act* to support her argument that claims against the government were not subject to the statute of limitations. The Court disagreed, and confirmed that claims against public actors brought by individuals for remedies under s. 24(1) of the *Charter* must comply with the *Limitations Act*.

## *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916

Area of Law: Employment

Under Appeal: Justice Bellegem

The respondent sold homes for the appellant for 18 years. The relationship terminated in 2005 when the appellant restructured its sales force and the parties could not agree to the respondent's role. At the outset of their relationship, the respondent and appellant executed a contract stipulating the terms of the initial arrangement and providing a 30-day notice period for termination by either party. The trial judge found that the contract had expired once the respondent sold the homes outlined in the initial agreement and that the respondent

was an employee of the appellant entitled to pay in lieu of reasonable notice of her termination.

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### Held: Appeal dismissed

The main issue on appeal was whether the respondent was a contractor or an employee of the appellant. The appellants argued that the respondent was a "dependant contractor" of the appellant, an intermediate category between employee and independent contractor. The Court agreed that such an intermediate category exists, but upheld the trial judge's determination that the respondent was an employee. The Court offered guidance regarding the category of dependant contractor, finding it to be a "carve-out" of the non-employment category rather than a subset of the employment category. For this reason, the analysis of the status of a worker begins with a determination of whether he is a contractor or an employee. Only if he is a contractor does the analysis proceed to whether he is dependant or independent. The two hallmarks of dependant contractors are exclusivity or near-exclusivity, and economic dependence.

The determination of the status of a work relationship is a fact-based analysis; as such, a trial judge's conclusions are to be afforded significant deference.

## *Berendsen v. Ontario*, 2009 ONCA 845

Areas of Law: Negligence; Foreseeability of Harm      Under Appeal: Judge Seppi

The respondent plaintiffs were awarded damages as a result of the appellant provincial government's placement of waste asphalt and concrete on the respondents' farmland in the 1960's. The respondents acquired the property in 1981 to continue the dairy farming operation that had been in place. Shortly after the respondent's acquisition of the property, their cows began to suffer serious health problems and produce less milk. This was subsequently discovered to be due to the unpalatability of the water drawn from wells on the property. Despite the proven safety of the water for human consumption, it was unfit for the cattle. The trial judge concluded that the placement of waste asphalt and concrete caused contamination giving rise to the unpalatability of the water, and consequently the cows' reduced milk production. The appellant conceded that it owed a duty of care to the respondents and that the respondents incurred damages. However, they argued that the trial judge erred in assessing causation and in finding that the appellant had breached the standard of care.

Held: Appeal allowed

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The appellate court overruled the trial judge's finding of liability on the basis that a breach of the standard of care could not be sustained on the evidence. The court noted that the applicable legal test for a breach of standard of care is the creation of an unreasonable risk of harm. The Court concluded that foreseeability of harm is the critical element and that it must be assessed at the time of the conduct giving rise to the action, not on hindsight. The Court held that the trial judge did not cite any evidence for the finding that harm was foreseeable at the time the appellant deposited the waste on the respondents' property. Lacking an evidentiary basis for this finding constituted an error of law. In addition, the Court expressed concern as to the trial judge's evaluation of causation, but was unwilling to set the decision aside on that ground alone.

