

# Take Five

ONTARIO EDITION

June 2010

*Due to popular demand, we welcome back our animal of the month...*



OnPoint Legal Research  
t. 1-888-894-4280  
[www.onpointlaw.com](http://www.onpointlaw.com)

## **Inside this Issue:**

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

### ***Featured Areas of Law:***

- Contracts; Conflict of Law- p.3
- Secured Transactions- p.4
- Contracts; Duty to Mitigate- p.6
- Costs- p.7
- Employment; Remedies- p.8

## Who is OnPoint Legal Research?

**W**e 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.

*“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 -- 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.

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

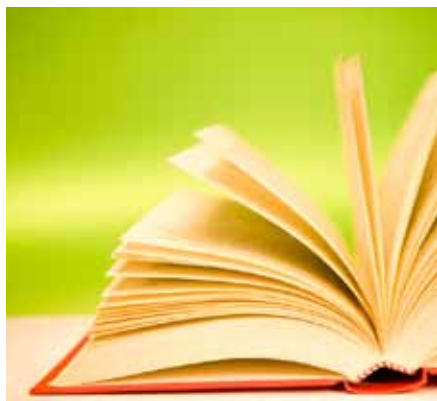
t. 1.888.894.4280  
e. [info@onpointlaw.com](mailto:info@onpointlaw.com)  
w. [www.onpointlaw.com](http://www.onpointlaw.com)

*“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 Corp**

*“I have come to rely on OnPoint’s expertise and I fully intend to maintain and build upon my association with them as my firm continues to grow.”*

**Ken Kramer, KMK Law Corp**



## *Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONCA 351

Areas of Law: Contracts; Conflict of Laws

Under Appeal: Justice Gautier

The appellant provided a helicopter engine to the respondents pursuant to a bailment agreement. The helicopter in which the engine was installed crashed, killing the pilot and a passenger and destroying the helicopter. The bailment agreement had a forum selection clause indicating that all actions arising from the agreement were to be heard in Arizona. The respondent commenced an action in Ontario against the appellant seeking damages and the motions judge denied the appellant's motion to enforce the forum selection clause by staying the action.

[CLICK HERE TO ACCESS THE ENTIRE JUDGMENT.](#)

### Held: Appeal Allowed

The Court reviewed Supreme Court jurisprudence governing the enforceability of forum selection clauses in commercial agreements and concluded that the analysis of whether to enforce such a clause is separate and distinct from the determination of the convenient forum that occurs where there is no forum selection clause. The Court found that the judge's approach was incorrect because it considered the existence of the forum selection clause as one of a number of factors in determining the convenient forum for the action. The only time that a forum selection clause in a commercial agreement will not be upheld is where there are "exceptional circumstances" justifying a departure from the bargain made by the parties. Examples of such circumstances were given by the Court, including where a party was induced to agree to the clause by fraud, where the jurisdiction indicated in the clause cannot or refuses to deal with the claim, or where one party can reasonably anticipate not being able to have a fair trial in the stipulated jurisdiction.

## *Fairbanx Corp. v. Royal Bank of Canada, 2010 ONCA 385*

Areas of Law: Secured Transactions

Under Appeal: Justice Thorburn

The appellant Fairbanx and respondent bank were both creditors of the bankrupt Friction Technology Consultants Inc. (“Friction”). The appellant’s business is to factor accounts receivable, meaning that it purchases accounts receivable and then registers the assignment of accounts agreement pursuant to the Personal Property Security Act (the “PPSA”). The appellant factored Friction’s accounts receivable and attempted to register the agreement in the PPSA registry (the “PPR”). However, the registration was made against an incorrect debtor’s name, “Friction Technology Consultants” (emphasis added), which was the name Friction carried on its business using, the name that appeared on its letterhead and invoices, and the name used in the agreement with Fairbanx. Subsequently, the respondent bank registered a financing statement as a first charge against Friction in the PPR to secure a revolving demand facility. When Friction initially approached the bank for a loan, the bank searched the PPR using the incorrect debtor name and found the Fairbanx registration. When the loan was finalized, the bank’s head office conducted searches again under the proper debtor name, not finding the Fairbanx registration. However, knowing that Friction had been factoring its accounts, the bank stipulated in the loan agreement that Friction cease factoring. The bank obtained postponement agreements from the three registered creditors of Friction to ensure its priority, but did not obtain such an agreement from Fairbanx, who did not show up on the final PPR searches as a creditor. On Friction’s bankruptcy, a dispute arose as to the priorities between the appellant and the respondent bank. The application judge concluded that the respondent bank’s security interest was perfected and took priority. The error in the spelling of the debtor’s name in the PPR meant that the security interest of Fairbanx was unperfected, causing them to rank as an unsecured creditor of Friction.

Held: Appeal Dismissed

[CLICK HERE TO ACCESS THE ENTIRE JUDGMENT.](#)

The appellant advanced two alternative arguments, both of which were rejected by the Court. First, the appellant argued that the assignment of accounts receivable constituted an outright sale because value was paid and all steps were taken to achieve an absolute assignment. The Court held that the PPSA, by its explicit wording, is applicable to all transactions that, in substance, create security interests, including assignments that secure the performance of obligations, as the assignment to Fairbanx did. Further, even though the Conveyancing and Law of Property Act states that an absolute assignment is subject only to equitable rights, the PPSA contains a provisions which explicitly states that, where the PPSA conflicts with another act other than the Consumer Protection Act, the provisions of the PPSA prevail.

(continued on the next page)

*Fairbanx Corp. v. Royal Bank of Canada, 2010 ONCA 385*

CONTINUED

Held: Appeal Dismissed (continued)

The alternative argument of the appellant was that the curative provision in the PPSA, section 46(4), was applicable. The section states that a financing statement is not invalidated by an error or omission unless a reasonable person is likely to be misled materially by such an error or omission. The Court agreed with the analysis of the applications judge, concluding that the leading case on this provision confirms that the subjective knowledge of another creditor of an error in a financing statement is irrelevant. Further, because the error at issue was the spelling of the debtor's name rather than another aspect of the financing statement, a reasonable person searching the actual name of the debtor would not even encounter the erroneous registration, so could not make an assessment as to whether further inquiries were required to confirm or deny the erroneous aspects of the registration. Finally, section 46(4) could not validate the error in the financing statement because the only thing the provision can do is to maintain the perfection of the security interest of the registering creditor against the named debtor, not the correctly spelled debtor name. The Court confirmed that Fairbanx maintained an unperfected security interest in the accounts receivable which ranked behind the respondent bank's properly perfected security interests in the same collateral.



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



## *Southcott Estates Inc. v. Toronto Catholic School Board, 2010 ONCA 310*

Areas of Law: Contracts; Duty to Mitigate

The appellant and respondent entered an Agreement of Purchase and Sale in relation to a parcel of land. The agreement was contingent on the appellant obtaining a severance from the Committee of Adjustments (the “Committee”) prior to closing. The agreement contemplated a due diligence period during which the respondent could terminate the agreement at will. This period was extended twice, and not enough time remained before the initially agreed upon closing date to obtain the severance. The closing date was extended for another five months, at which time the severance had not been obtained because the Committee concluded it was premature as a development plan had not been submitted concurrently with the severance application. The appellant refused the respondent’s request for an extension of the closing date by relying on the time of the essence clause in the agreement. The trial judge concluded that the appellant breached its contractual obligations to make best efforts to obtain the severance

because it had inadequately communicated with the Committee, the municipal counselors, and the respondent about the need for a development plan. The parties agreed on how much profit the respondent would have made if the transaction had closed on the extended closing date, and 60% of the lost profit was awarded to the respondent as damages, reflecting the trial judge’s finding that there was a 60% chance of the severance being granted on time but for the appellant’s breaches.

**Held: Appeal allowed**

[CLICK HERE TO ACCESS THE ENTIRE JUDGMENT](#)

The Court agreed with the appellant that the respondent had made no effort to mitigate the damages it incurred. The respondent was not insulated from its duty to mitigate just because it was seeking specific performance. In order to rely on specific performance as a reason not to mitigate, a party must have a real, fair and substantial justification for doing so. Purchasing development property does not give rise to such a justification. At trial, evidence from the directing mind of the respondent company, being the same directing mind as the parent company of the respondent, indicated that it never had any intention to use the respondent company to purchase other land as it was a single-purpose entity with the sole aim of using money advanced from its parent company to acquire this specific land. The directing mind also indicated that he would not use the respondent company to acquire more land because the company was involved in litigation and because of the financial risks associated with litigation. The Court found that the respondent’s clear admission at trial of having no intention to mitigate was sufficient to conclude that it had not mitigated its damages and the appellant was under no further obligation to provide evidence on this point. The Court concluded that the trial judge erred by imposing too onerous a standard on the appellant to prove a lack of mitigation, even had the admission by the respondent been lacking. The Court set aside the trial judgment and awarded the respondent nominal damages of \$1.

*Ksiazek v. Halton (Police Services Board)*, 2010 ONCA 341

Area of Law: Costs

Under Appeal: Justice Harris

The appellant was injured in a motor vehicle accident and the respondents admitted liability at trial. Four of the appellant's family members also made claims pursuant to the Family Law Act for damages arising from loss of guidance, care and companionship. After a 25-day trial addressing quantum of damages only, the trial judge awarded the appellant \$45,000 and her family members \$24,000 in damages. Costs were awarded to the plaintiffs on a partial indemnity basis for the

whole action. The respondents made two offers of settlement, the first for \$76,000 and the second for \$140,000. Only the second offer included some compensation for three of the four of the appellant's family



[CLICK HERE TO ACCESS THE ENTIRE JUDGMENT.](#)

*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*

## Held: Appeal dismissed

Among other grounds of appeal brought by both parties, the respondents sought leave to appeal the costs order. They argued that their second offer to settle, rejected by the appellant, exceeded the amount of damages she ultimately recovered at trial, triggering the special costs rule in Rule 49.10(2) of the Rules of Civil Procedure. The trial judge rejected the respondent's arguments on costs, finding that the offer to settle was insufficient to trigger the special costs rule because the amounts offered to each plaintiff did not exceed the amounts ultimately awarded to each plaintiff, even though the total amount offered was greater than the total amount received by the plaintiffs as a group. The Court agreed that Rule 49.10(2) was not triggered for this reason. However, the Court concluded that the trial judge ought to have considered that the second offer was far greater than the amount eventually recovered by the appellant. The Court relied on Rule 49.13, which permits trial judges to consider offers to settle which do not engage the special costs rules when making discretionary costs award. For this reason, the Court concluded that the trial judge erred, and substituted an order instead requiring each party to be responsible for their own costs from the time of the second offer onward. The Court also confirmed that the trial judge erred by including in his calculation of the ultimate damage award to the plaintiff the statutory benefits she received pursuant to the Insurance Act.

## *Piresferreira v. Ayotte*, 2010 ONCA 384

Areas of Law: Employment; Remedies

Under Appeal: Judge Aitken

The respondent worked for Bell Mobility under the supervision of the appellant. On learning of her failure to schedule a client meeting, the appellant became angry with the respondent, yelled at her and pushed her into a filing cabinet. The appellant never returned to work due to post traumatic stress disorder, anxiety and depression. She sued the appellant and Bell Mobility, claiming damages arising out of battery, intentional and negligent infliction of mental suffering and constructive dismissal. The trial judge concluded that both the appellant and Bell Mobility were liable for the negligent infliction of mental suffering.

[CLICK HERE TO ACCESS  
ENTIRE JUDGMENT](#)

(Continued on the next page)



## *Piresferreira v. Ayotte*, 2010 ONCA 384

CONTINUED

### Held: Appeal allowed

The Court found that the tort of negligent infliction of mental suffering was not available in the context of an employment relationship and that the tort of intentional infliction of mental suffering was not made out on the evidence.

In analyzing whether the tort of negligent infliction of mental suffering was available to the respondent, the Court used the framework established in *Anns* because no appellate court in Canada had yet recognized a free-standing cause of action in tort against an employer for the negligent infliction of mental suffering. On the first prong of the *Anns* test, whether the relationship between the plaintiff and defendant was sufficiently proximate to give rise to a duty of care and make damages reasonably foreseeable, the Court concluded that the trial judge was correct in finding both a duty of care and that damages were reasonably foreseeable. It was on the second prong of the *Anns* test, whether any countervailing policy considerations ought to foreclose the recognition of a duty of care, that the Court departed from the trial judge's findings.

The Court advanced several reasons for this conclusion. In accordance with the Supreme Court's reasons in both *Wallace* and more recently in *Honda*, the recognition of such a tort in the employment context would constitute a significant shift in employment law, which should be left to the legislature to determine. In *Wallace*, the Supreme Court rejected a similar but more narrow duty, which indicated that the imposition of the broader duty argued for in this case would be inappropriate. The Court characterized the duty in this case as one that would require employers to shield employees from acts of other employees that could cause mental suffering throughout the employment relationship- a much broader duty than the duty rejected in *Wallace*, which would have required employers to act fairly and in good faith in the termination process. Finally, the *Honda* decision sets out the framework for employees to be compensated for mental distress arising from their termination, and allowing a second cause of action for the same wrong was unnecessary. The Court confirmed that the tort of intentional infliction of mental suffering is still available to employees who suffer damages as a result of their termination.