

# Take Five

March 2010

## ONTARIO EDITION

### Inside this Issue:

This month we have summarized what we consider to be the five most interesting cases from the Ontario C.A. in February.

We highlight cases from the following areas of law: Conflict of Laws (p.3); Contracts (p.4); Civil Procedure (p.5 and p.7), and Security for Costs (p.6).

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We chose this photograph of Tuscany just because we like it...feel free to send us any of your favourite photos and we'd be happy to feature them on a future cover of *Take Five*.



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Our farm animal of the month...

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## *Van Breda v. Village Resorts Ltd.*, 2010 ONCA 84

Areas of Law: Conflict of Laws

Under Appeal: Justices Pattillo and Mulligan

Two cases were heard together by a panel of five members of the Court of Appeal. Both cases involved actions against various defendants for injuries sustained during vacations to Cuba. The defendants include tour companies, Cuban resorts and travel agencies. The motions judges in both cases held that Ontario had jurisdiction over the out-of-province defendants pursuant to the test for assumed jurisdiction established by the Court in *Muscott* in 2002. The appeal centered on whether the Court ought to reconsider its decision in *Muscott*.

Held: Both appeals were dismissed.

The appellate Court revised and simplified the test for assumed jurisdiction that was established in *Muscott*. The revisions were intended to maintain flexibility but also provide greater certainty and consistency in the application of the test. Of the revisions, the most significant was a new presumption whereby satisfying any but two of the requirements for service ex-juris in the Rules of Civil Procedure will presumptively satisfy the “real and substantial connection” test. Rule 17.02 governs service ex-juris and enumerates a number of situations where service ex-juris will presumptively be granted to a plaintiff. The two situations where service ex-juris may be granted but which will not give rise to a presumption of a real and substantial connection are “damages sustained in Ontario” and “a necessary or proper party.” The Court concluded that these two situations were not sufficiently indicative of a real and substantial connection. Once the presumption of a real and substantial connection is established, the onus shifts to the defendant to show that such a connection does not exist. The Court also stated that the remaining *Muscott* factors are not to be considered independently or given equal weight, but are instead general legal principles that bear upon the analysis of whether assuming jurisdiction is appropriate.

*1397868 Ontario Ltd. v. Nordic Gaming Corporation (Fort Erie Race Track), 2010 ONCA 101*

Area of Law: Contracts

Under Appeal: Madam Justice Tucker

The appellant and respondent entered a memorandum of understanding whereby the respondent would provide operating premises for the appellant's off-track betting operation and provide food and beverage services to the off-track betting customers. The memorandum had a clause indicating that the agreement would renew annually so long as the contractual requirements were being fulfilled. Just over a year after the agreement was executed, the appellant indicated to the respondent that they were not renewing the contract. The appellant removed its property from the respondent's premises a week later. The appellant never alleged that the respondent had not fulfilled its contractual obligations. The trial judge determined that the appellant's failure to renew the contract was a breach of the contract. She also disagreed with the appellant's position that a reasonable notice provision for termination ought to be implied in the contract.

Held: Remitted back to trial.

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The appellants did not contest liability but did appeal the damage calculation. The Court allowed the appeal and ordered a new trial to quantify damages. In overturning the damage quantification of the trial judge, the Court considered how to deal with contracts that are not fixed-term contracts. Courts can either treat the contract as perpetual, as did the trial judge, or they can imply a provision of unilateral termination on reasonable notice. Historically, there was a presumption of perpetuity for non-fixed term contracts, however, the Court concluded that rather than rely on a presumption, the proper approach was to look at the terms of the contract, the relationship of the parties and the surrounding circumstances. The Court concluded that the trial judge did not fully consider the relevant factors when determining if the contract was perpetual. Rather than characterize the contract, the Court remitted the issue to be dealt with at the new trial.

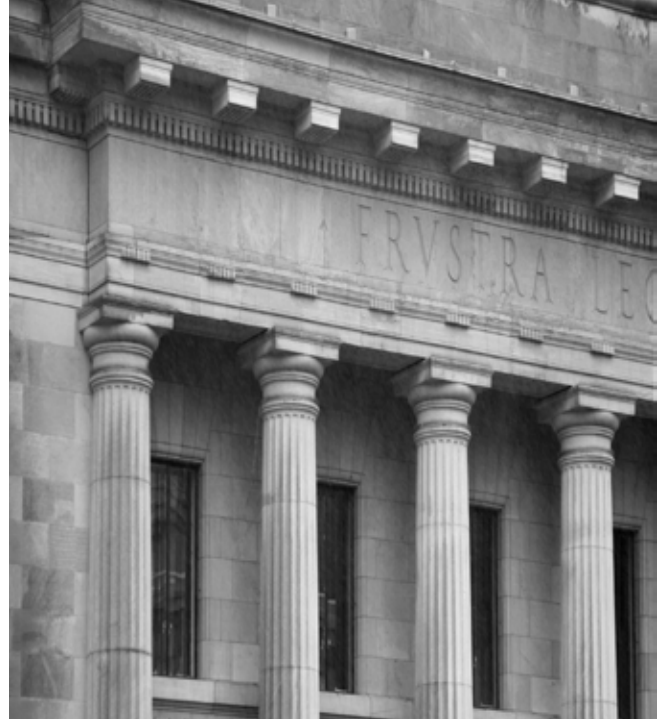


## *Kovach v. Linn, 2010 ONCA 126*

Area of Law: Civil Procedure

Under Appeal: Justices Carnwath, Swinton and Bellamy

In a personal injury case arising from a motor vehicle accident, both parties served jury notices. The appellants moved for a bifurcation of issues, with separate juries hearing the liability and damages issues. The motion was denied by a master on the grounds that prior Ontario jurisprudence prohibited bifurcation in jury trials when one party objects. On appeal to a justice, this decision was overturned and the motion for bifurcation was granted. The Divisional Court reversed the justice's decision, and held that the law in Ontario is that a jury trial cannot be bifurcated if one party objects



Held: Appeal dismissed

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The appeal was dismissed. The Court addressed the Superior Court's jurisdiction to bifurcate a jury trial, acknowledging that the direct applicability of its decision may be limited to cases arising prior to January 1, 2010, the effective date of the new Rule 6.1.01. This new rule explicitly permits bifurcation of issues where parties consent. The Court held that the power to bifurcate a trial was not expressly conferred to the Superior Court by statute, but the power stemmed from the court's inherent jurisdiction in cases other than where a jury notice had been served. The Court analyzed the legislation conferring power on the Superior Court as well as jurisprudence giving rise to the jury exception and concluded that the jury exception was well founded and protected the principle that once a trier of a fact is seized of an action it has sole jurisdiction over the issues until a decision is made. The Court was not persuaded that bifurcation of issues in a jury trial ought to be encouraged as a form of case management and determined that such a substantial change to civil procedure was best left to the Rules Committee or the legislature.

## *Donaldson International Livestock Ltd. v. Znamensky Selekcionno-Gibridny Center LLC*, 2010 ONCA 137

Area of Law: Appellate Procedure; Security for Costs

The parties entered a contract requiring the respondent, a Canadian exporter of pigs, to provide the moving party, an agro-industrial Russian company, with 8,505 pigs. The moving party was dissatisfied with the health of the pigs, and, pursuant to the mandatory arbitration clause in the contract, filed a claim with the designated arbitration court in Moscow, Russia. The respondent brought an action in the Ontario Superior Court of Justice seeking an anti-suit injunction to prohibit the arbitration. This was denied and the respondent appealed, but the appeal failed. As a result of this procedural history, the respondent was indebted to the moving party for costs awards and interest in the amount of approximately \$115,000.00. The arbitral court rendered two decisions in favor of the moving party, who then sought to have the arbitral awards enforced in Ontario. Justice Pitt granted the enforcement of the arbitral awards, a decision the respondent appealed. Given the outstanding indebtedness of the respondent with respect to prior costs awards, the moving party brought this motion for security for costs in the amount of \$25,000.

Held: Security for Costs denied

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Justice Blair, in chambers, denied the motion for security for costs. The motion was brought pursuant to Rule 61.06(1) of the Rules of Civil Procedure which permits an appellate court to order security for costs in certain situations. The motion turned on subsection (c) of the Rule which permits security for costs to be ordered for “other good reason.” Justice Blair determined that the word “other” in this subsection meant that the reason must be distinct from the other subsections of the Rule, namely, subsection (b), which permits security for costs to be ordered in circumstances outlined in Rule 56.01. This Rule permits security for costs where, among other things, the appellant has not paid costs awards owing to the respondent, or where the appellant is a corporation and is believed to have insufficient assets in Ontario to pay the respondent’s costs. The moving party conceded that a line of appellate authority prohibited reliance on subsection (b) by a respondent on appeal because security for costs should not be imposed on foreign or impecunious defendants who are forced into court by others to defend themselves. Justice Blair determined that the moving party could not rely on the previous unpaid costs of the respondent as an “other good reason” pursuant to subsection (c), because to do so would be to use the subsection to access the rationale behind subsection (b), which the moving party is prohibited from accessing directly.



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## *Aronowicz v. Emtwo Properties Inc., 2010 ONCA 96*

Areas of Law: Civil Procedure, Summary Judgment Under Appeal: Justice Wilton-Siegel

Two brothers, Abraham and Harry Aronowicz, each owned or controlled half of the respondent company, Emtwo Properties, until 2006. In 1988, a unanimous shareholder agreement was executed containing a buy/sell shotgun provision. In 2004, Harry triggered the shotgun provision and, after arbitration about Abraham's response to the trigger, Harry acquired full

ownership of the respondent company. When Abraham, the appellant in this action, learned of the way that his brother financed the acquisition, he sued his brother, the lender who financed the acquisition, and their representative companies - including the respondent company - on various grounds, including: breach of fiduciary duty, breach of duty of good faith, theft of a corporate

opportunity, disclosure of confidential information, oppression, deceit or misrepresentation, conspiracy, inducing breach of contract, unjust enrichment and waiver of tort. Summary judgment was granted in favor of the defendant respondents and the action was dismissed in its entirety.

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### Held: Appeal dismissed

Of the three grounds of appeal, the Court focused on the proper test for summary judgment and determined that the motions judge correctly applied the proper test: whether there was a genuine issue of material fact that required a trial for resolution. Each cause of action was evaluated by the motions judge and for each cause he determined that there were no material facts in dispute nor any claims that required a trial for determination. The Court concluded that the "no chance of success test" referred to by the motions judge was simply another way of describing the approach that if there are no genuine issues for trial and the claim cannot be proved on the basis of undisputed facts the claim ought not to proceed. The Court also considered the extent to which the motions judge in a motion for summary judgment may assume facts and concluded that such assumptions are impermissible where they relate to a critical factual dispute and the assumption would undermine the ability of a party to present its case in relation to other issues, or where it would lead to inconsistent factual or legal findings in the same proceeding. The Court concluded that the motions judge's assumption that there was a duty of good faith and honesty was an appropriate assumption for the purpose of determining whether a trial was necessary because even if such a duty existed, it would not give rise to a remedy.