

Take Five

May 2010

ONTARIO EDITION

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

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In this edition, we summarize cases from the following areas of law:

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OnPoint Legal Research
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Welcome Efrat Arbel

We are pleased to announce the addition of Efrat Arbel to our team; with her remarkable background and outstanding achievements, she is an asset to both divisions of OnPoint.

Efrat graduated at the top of her UBC Law Class in 2004. After clerking at the British Columbia Supreme Court, she articulated and practised at Fasken Martineau in general litigation. She then went on to attend Harvard Law School, where she is now a Doctoral Candidate (expected June 2011).

Efrat has been busy while at Harvard. She has been a teaching assistant for the Graduate Program Writing Workshop, a research assistant to two law professors, and a volunteer clinician and researcher with the Harvard Law School Immigration and Refugee Clinic.

We are excited to have Efrat join us and look forward to involving her in a variety of research and litigation projects.



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. 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.

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**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.

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**Rose Keith, Rose
Keith Law Corp**

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Ken Kramer, KMK Law Corp

Our research lawyers range from a 5-year call to a 12-year call, all with extensive litigation and research experience. Whatever the nature of your project, we have the right researcher to help you.



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D.G. Sports Inc. v. WWK Sportsdome Inc., 2010 ONCA 234

Area of Law: Real Property; Landlord and Tenant

Under Appeal: Justice Price

The plaintiff respondent, D.G. Sports, entered a lease with the appellant for space in a soccer dome the appellant was building. The lease indicated that the soccer dome was to be completed by the end of September 2007 in order to accommodate the beginning of the fall soccer season on October 1. By early October, the dome was inflated but did not have heat or water and an occupancy permit had not been granted. The lease permitted termination by the lessee if the “air-supported structure” was not completed by September 30. The respondent sought to terminate the lease and recover deposits it had made. The motions judge granted the motion on summary judgment.

Held: Both appeals were dismissed.

The appeal was dismissed. The appellants argued that a trial was required to resolve the meaning of the undefined term “air-supported structure” in the lease, the appellants being of the view that having an inflated dome was sufficient to comply with their obligations under the lease. The Court held that the motions judge correctly determined that no trial was necessary. Interpreting the contract contextually with a view to the purpose of the parties indicated that “air-supported structure” meant a facility that could actually be used by the respondent rather than simply an inflated dome that could not be used. The Court also disagreed with the appellant’s argument that the duration and value of the lease, being 4.5 years and \$3.5 million, respectively, ought to be considered when determining whether a 2-week delay in having the facility ready to use should permit the termination of the lease. The appellants couched this argument in the rubric of ‘good business sense,’ suggesting that the termination clause of the lease must be interpreted with a view to the length and value of the lease as compared to the short delay in having the facility ready for use. The Court held that it was in fact the respondent who exercised ‘good business sense’ by invoking the termination clause of the lease given that the facility was not ready for the fall soccer season, the appellant provided no indication of when the facility would be ready, and the appellant was threatening legal action over an unpaid rent installment in respect of the facility. The Court concluded that the motions judge properly interpreted the words of the contract with a view to the purpose of the contract as a whole: to make available an indoor soccer dome at the beginning of the fall soccer season.

Snopko v. Union Gas Ltd., 2010 ONCA 248

Areas of Law: Natural Resources; Oil and Gas; Contracts Under Appeal: Justice Desotti

The appellant plaintiffs are landowners in an area where the defendant respondent operates natural gas storage pools. The relationship between the parties and their predecessors in interest dates back to the 1970's when petroleum and natural gas leases were executed. In the intervening years, some or all of the appellants executed amending agreements and gas storage agreements with the respondents. In 2000, landowners in the area sought compensation from resource companies pursuant to the Ontario Energy Board Act (the "Act"), requiring parties who use designated gas storage areas to make "just and equitable compensation" for both the right to store gas and any resulting damages. Before the Ontario Energy Board (the "Board") addressed the substantive issues in relation to compensation, a settlement on compensation was reached and approved. In 2008, the appellants commenced an action against both the respondent and its predecessor in interest, alleging breach of contract, unjust enrichment, nuisance, negligence and a declaratory order that initial gas storage agreements had been terminated. The motions judge granted summary judgment in favor of the respondents on the grounds that the Superior Court lacked jurisdiction and the Board was the proper adjudicator of the issues.

Held: Appeal dismissed

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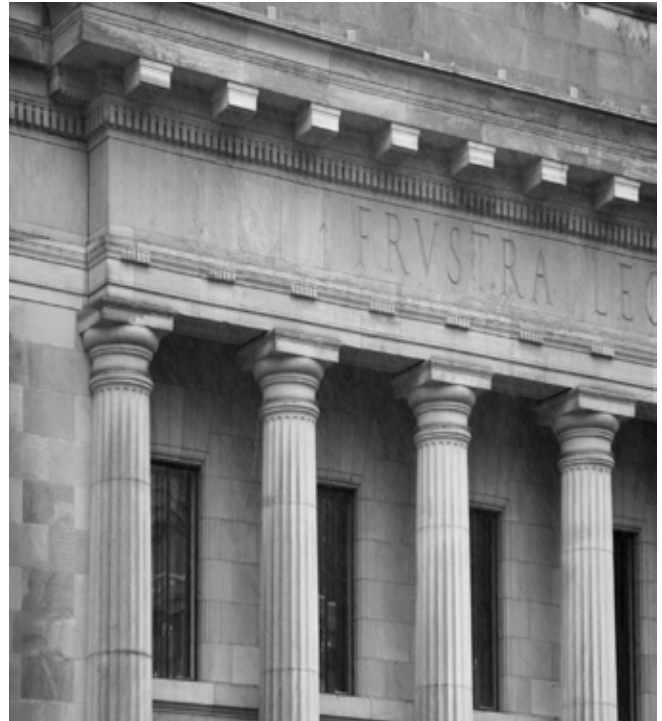
The Court concluded that the broad jurisdiction conferred by the legislature to the Board meant that civil proceedings in relation to compensation were wholly within the Board's jurisdiction. All of the claims presented by the appellants related to issues of compensation and the Court confirmed that the substance, rather than form, of the claims was determinative of the issue of jurisdiction. Section 38 of the Act confers exclusive jurisdiction on the Board to determine issues of compensation, and a privative clause at subsection (3) gives the Board jurisdiction to hear all questions of law and fact, which the Court concluded was a generous and expansive conferral of jurisdiction. The Court also confirmed that the motions judge appropriately resolved the issue by way of summary judgment, as questions of jurisdiction are questions of pure law.



Toronto Hydro-Electric System Limited v. Ontario Energy Board, 2010 ONCA 284

Areas of Law: Public Law; Corporate Commercial
Under Appeal: Justices Lederman, Kiteley and Swinton

The appellant regulator imposed a condition on the respondent electricity distributor requiring future dividend payments to be approved by a majority of the respondent's independent directors. The appellant was concerned with interest payments the respondent paid to its parent company, which were above market rate, as well as dividends paid to the same parent company. The respondent appealed to the Divisional Court. A majority of the Divisional Court applied a correctness standard to determine that the appellant lacked jurisdiction to impose such a condition on the respondent.



Held: Appeal allowed

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The Court began its analysis with an inquiry of the jurisdiction of the appellant, finding it to be a highly specialized tribunal with a broad legislative mandate to set electricity rates. The Court evaluated both prior jurisprudence and the enabling statute in concluding that the legislature intended to confer a subjective and open-ended grant of power to the appellant to enable it to make appropriate inquiries in the rate-setting process. As a result, the appellant's decision to impose a condition on the respondent was within its jurisdiction, and the Court declined to review the issue. The decision of the appellant to impose a condition on the respondent invited curial review on a standard of reasonableness. The Court found that the appellant provided reasons for its decision that were consistent with the requirements of justification, transparency and intelligibility, as set out in the jurisprudence. In particular, the appellant's reasons disclosed concerns about the respondent's potential lack of capital resulting from dividend payments and above-market interest payments to its parent company, which could result in adverse effects on rate payers in the long term. The Court found that the reasons of the respondent's reasons were reasonable in addressing the interests of both the customers and shareholders of the appellant.

St. Elizabeth Home Society v. Hamilton (City), 2010 ONCA 280

Area of Law: Costs

Under Appeal: Justice Crane

The appellant operates a retirement home in Hamilton. In 1994, the City of Hamilton (the “City”) and the Region of Hamilton-Wentworth (the “Region”) issued an order to comply against the retirement home for allegedly violating by-laws in relation to the admission of residents, nursing care, reports and records and food. Several months later, a city councilor leaked the order to comply to a reporter and the local newspaper ran a number of stories about the retirement home including references to the order to comply. The plaintiff brought an action in December 1996 against the City and the Region, and in 2001, amended its statement of claim to allege defamation, among other causes of action, in relation to the order to comply. The trial judge dismissed the action in its entirety after a lengthy trial. Prior to the resolution of the trial, the plaintiff made an offer to settle at \$1,299,000 and the defendants made an offer to settle at \$153,200. Costs were awarded to the City and the Region, totaling \$4,262,000. The City and the Region were amalgamated in January 2001.

Held: Appeal allowed, in part.

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The Court dismissed a number of grounds of appeal relating to the substance of the trial judge’s decision, but allowed leave to appeal on the issue of costs, allowed the appeal on costs, and reduced the costs award. The Court confirmed that costs awards are within the discretion of the trial judge and can be set aside only where the trial judge made an error in principle or the award is plainly wrong. The Court agreed with the appellant’s contention that the City and the Region were not entitled to separate costs awards following their amalgamation because they were one entity and only one interest was being defended. The trial judge awarded costs on a partial indemnity basis for the period prior to the respondent’s offer to settle, and on a substantial indemnity basis following the offer. The Court disagreed with this approach and found it to be inconsistent with the Rules of Civil Procedure. Rule 49.10(1) permits substantial indemnity costs to be awarded to a plaintiff who offers to settle and ultimately obtains a judgment at least as favorable as the offer to settle. In this case, substantial indemnity costs are awarded from the date of the offer. However, there is no equivalent provision for defendants who offer to settle in an amount that is greater than the ultimate award. The Court also found no basis in the Rules or jurisprudence for the trial judge’s consideration of the plaintiff’s high offer to settle as a ground for the award of substantial indemnity costs.



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Adams v. Cook, 2010 ONCA 293

Areas of Law: Personal Injury; Medical Examination; Tape Recordings

The plaintiff was injured in a motor vehicle accident and her doctor diagnosed her injury as cervical whiplash. Counsel for the defendant sought an order to have her examined by a rehabilitation specialist and the plaintiff agreed on the condition that the examination be audio recorded. Counsel for the defendant brought a

motion in Superior Court to compel the plaintiff to attend the examination without recording. The motion was dismissed. The motions justice concluded that affidavit evidence filed by the plaintiff indicated that there was a potential bona fide concern about bias on the part of defence medical examiners generally. The Divisional Court

upheld the decision and found that the evidence before the motions judge concerning general bias in the conduct of defence medical examinations was sufficient, even though there were no specific allegations of abuse against the medical specialist chosen in this case.

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Held: Appeal dismissed

A five-member panel of the Court was convened to reconsider their previous ruling in the 1992 case of *Bellamy v. Johnson* (1992), 8 O.R. (3d) 591(C.A.). *Bellamy* concerned the parameters for an order permitting the audio recording of a medical examination by the defence. The decision to allow recording must be based on a case-specific basis or established bias on the part of the proposed examiner. The Court divided on the outcome, with a majority of three justices allowing the appeal and upholding *Bellamy*. The majority opined that, while it is not necessary to find specific evidence about the bias or credibility of a medical examiner, there must be something specific in the facts of the case to suggest an audio recording is appropriate and it is insufficient to rely on an allegation of general bias on the part of defence medical examiners. The majority found that the motions judge and Divisional Court both erred in their application of *Bellamy* by accepting evidence of systemic bias on the part of defence medical examiners. The majority rejected the invitation to expand the application of *Bellamy*, finding the record in this case to be insufficient to draw general conclusions about systemic bias. The majority did concede that it may be appropriate for routine audio recording of defence medical examinations and suggested that the Civil Rules Committee may be better suited to make recommendations on the matter.