

# Take Five

August 2009

## Welcome to our New Look!

### Inside this Issue:

This month we have summarized what we consider to be the five most interesting cases from the BCCA in June. We accidentally summarized July's cases in last month's edition, so this month we're hopping back a month. Seemed a shame to let the summaries go to waste.

This month we highlight cases from the following areas of law: personal injury (p. 3), two involving civil procedure (one on costs, p. 6; and one on document disclosure, p.4), administrative law (p. 5), and estates (p. 7).

*But first., a plug for our upcoming research course...*

**W**hat does a sheep have to do with legal research?

**Absolutely nothing. We just liked the picture. We get tired of photos of books, gavels, and scales of justice.**



OnPoint Legal Research  
t. 604-879-4280  
www.onpointlaw.com

We are excited to announce that our upcoming course, *Legal Research: From Problems to Solutions 2009*, will count towards six credits of the Law Society's CPD requirement. What better way to earn credits than to learn the latest research techniques from our over 10 years of research and writing experience?

### Who should attend?

Senior lawyers wanting a refresher course or needing to be updated on the latest techniques, junior lawyers wanting to become better researchers, and students hoping to start off their careers with valuable tips from research specialists.



## ONPOINT FEATURE COURSE:

*Legal Research: From Problems to Solutions 2009*

**Earn six CPD Credits while learning the latest research techniques**

OnPoint has been researching for other lawyers for over 10 years.



Drawing from our experience, we will demonstrate how to best map out research strategies, examine which resources to use to tackle various problems, and navigate through electronic sources. We will provide countless "insider" tips, discuss legislative research techniques under the guidance of a law librarian from the BC Courthouse Library, and walk through a sample issue, from start to finish.

### Our Panel Knows Research

Join a panel of three research specialists, each selected for their varying backgrounds and areas of expertise. If you would like to learn

more about our panel or other aspects of the course, please contact us at **604-879-4280** or send us an [email](#). Information can also be downloaded from our [website](#).

The objective of the course will be to convey practical solutions to everyday problems.

[Click here](#) for more information and a registration form.

Back to photos of books



gavels

and scales of justice....



## *Stone v. Ellerman*, 2009 BCCA 294

Areas of Law: Personal Injury; Civil Practice and Procedure

The defendants appealed an order awarding the plaintiff damages resulting from a motor vehicle accident. The defendants claimed the trial was fundamentally flawed when, partway through the plaintiff's evidence in

chief and over the objection of the defence, the plaintiff was permitted to refer to a pain journal, a previously unidentified document over which the plaintiff claimed privilege. The trial judge exercised the power granted by Rule 26(14) to permit the use of the pain journal during

the plaintiff's evidence in chief, and it was used extensively thereafter to refresh the plaintiff's memory.

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Held:

Appeal allowed

Although the Court found that the pain journal was properly treated as within the lawyer's brief of litigation privilege, the description in the plaintiff's affidavit of documents failed to provide any information that would have enabled the defendants to assess the validity of the claim of privilege. For the purposes of Rule 26(14), the plaintiff failed to make discovery of the pain journal. Notwithstanding the non-disclosure, the Court held that the trial judge failed to exercise his discretion judicially in permitting the use of the pain journal. The judge failed to consider whether there was any reasonable explanation for the plaintiff's failure to comply with the disclosure rule and to adequately consider whether there was prejudice to the defence in being refused the opportunity to make a full and reasoned objection to the late production of the document. The Court concluded that permission to use the document amounted to a miscarriage of justice. The Court allowed the appeal, set aside the judgment and ordered a new trial.<sup>e</sup>

## Wong v. Antunes, 2009 BCCA 278

Areas of Law: Criminal; Civil Practice and Procedure

This was an appeal by the Attorney General from the order of a chambers judge for document disclosure by the VPD. There were criminal proceedings which paralleled the civil proceedings. In accordance with its Stinchcombe obligations, the Crown disclosed to the accused, who was also the defendant in the civil action, documentation assembled by the police in the course of its investigation. In the civil proceedings, the defendant did not list the police investigation documents as being in his possession. The plaintiff applied under Rule 26(11) for production by the VPD all documents in its possession or control relating to the collision, subject to the implied undertaking of confidentiality governing production of documents in civil proceedings. The chambers judge found no reason why the defendant should be in a position to know the police evidence but the plaintiff should not. He further concluded that the Crown disclosure resulted in a limited loss of privilege. The chambers judge ordered the VPD to produce the relevant documents to the plaintiff, and should it object to the production of any document, it was to provide the reason for doing so and apply for a ruling on the matter.

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Held:

Appeal allowed

The Court found that the chambers judge's order created practical problems and also failed to recognize that disclosure under Stinchcombe served a different purpose than disclosure in the civil context. The Court preferred to consider litigation privilege, solicitor-client privilege, implied undertakings, and public interest immunity in the context of specific or class documents which the Crown objects to producing in a particular case. In this case, the Court held that the preferable alternative was to make a desk order that incorporated the public interest immunity claimed by the Crown.

*Did you know?*

OnPoint research lawyers complete a variety of projects for other lawyers, from case summaries and memoranda, to argument briefs and facta.

All of our research lawyers have years of experience as litigators at major downtown firms, and many of them have completed a clerkship in B.C. or Alberta.

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.



## *Hubbard v. Acheson*, 2009 BCCA 251

Areas of Law: Administrative; Judicial Review

The appellants appealed an order of the Supreme Court granting the respondent's application for judicial review of proceedings in the Provincial Court, and remitting the matter back to the Provincial Court for a rehearing. The proceedings began as an action in breach of contract by the appellants against the respondent. Default judgment was granted against the respondent and she applied to set it aside. Her application was dismissed and she then sought judicial review of the Provincial Court judge's order in the Supreme Court, which was granted. The appellants contended that the Supreme Court judge erred in holding the Provincial Court decision to be unreasonable and therefore reviewable.

### Held:

Appeal dismissed

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The Court found that the Supreme Court judge both articulated and applied the correct standard of review of reasonableness. The reasons of the Provincial Court judge did not address the respondent's explanation for her failure to file a reply nor did they provide any analysis as to why that failure was blameworthy. The Court further found that the Supreme Court judge did not err in holding that it was unreasonable for the Provincial Court judge to rule that there was no defence worthy of investigation. The Provincial Court judge failed to consider that the appellants' loss may have occurred without any fault on the respondent's part, that there was little or nothing that could have supported damage awards for either pain and suffering or for punitive damages, and that there was evidence that the appellants failed to mitigate their loss.

## *Evergreen Building Ltd. v. IBI Leaseholds, 2009 BCCA 275*

### Areas of Law: Costs

The appellant, Evergreen Building Ltd., appealed from an order awarding special costs to the respondent, IBI Leaseholds Ltd. The award of costs was notable from the perspective that Evergreen had prevailed in the litigation. The issue before the Court was whether special costs may be awarded for conduct which was arguably characterized as occurring outside the litigation itself, although contemporaneous to the proceedings. The appellant owned a building in which the respondent was a commercial tenant. The appellant had plans to convert the building into residential space. It intended to terminate the respondent's lease and recognized that it would be in breach of its

contractual obligations in doing so. The respondent sought to enforce its right to enjoy the space it occupied. The trial judge was of the view that the appellant sought the Court's sanction of its intention to bring the lease to an end without legal justification, decided to re-enter the premises after it became concerned that it would take too long to resolve the matter in court, thereby requiring the respondent to obtain injunctive relief, and allowed the mortgage to go into foreclosure for the purpose of defeating the respondent's interest. While the trial judge concluded that the appellant did not in fact or law breach the lease and did not re-enter the premises, he reasoned that

the appellant's conduct was in this case reprehensible such that an award for special costs was warranted.

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### Held:

#### Appeal allowed

The Court noted a conflict in the authorities on whether special costs may only be awarded for reprehensible conduct during the litigation or whether the jurisdiction extended to allow for the sanction of conduct in circumstances giving rise to the cause of action. Notwithstanding the controversy, Mr. Justice Bauman, on behalf of the appellate Court, found that there were no authorities that went so far as to countenance an award of special costs in respect of conduct outside the litigation that did not found a cause of action. The trial judge penalized conduct which he found to be reprehensible but which he also found gave rise to no actionable wrong. The Court held that those findings precluded an award of special costs in respect of conduct which did not give rise to a compensable legal wrong. The Court concluded that the judge made an error in principle and proceeded on a clearly wrong finding of fact.

## *Clock Holdings Ltd. v. Braich* 2009 BCCA 269

Areas of Law: Practice on Appeal; Estates

The appellant was unsuccessful at trial in challenging the transfer of real property from one company to another. Following the dismissal of its action, the appellant filed a notice of appeal. That notice was filed, but not served, in time. Section 14(2) of the Court of Appeal Act requires an appellant to both file and serve its notice of appeal within 30 days after the day on which the order being appealed was pronounced. Based on the appellant's failure to properly serve its notice of appeal, some of the respondents applied for an order either quashing or dismissing the appeal. In response to that motion, the appellant applied for an order to regularize its appeal.

Held:

Appeal dismissed as abandoned

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In determining whether to grant an extension of time to bring the appeal, the Court noted that the appellant had always had a bona fide intention to appeal and the respondents became aware of the appeal shortly after the 30-day appeal period expired. While the Court found that the appeal had some merit, and that the respondents would not be unduly prejudiced by allowing it to go forward, it concluded that the appellant, by its conduct, disentitled itself to any dispensation from the rules. The appellant knew that it had failed to meet the service requirements and over the next three months, filed transcripts, appeal record, and appeal books but did nothing to address the fact that it did not have a "live" appeal. The Court found that it would be contrary to the interests of justice to grant an order curing the service problem.





Sarah Picciotto



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## Who is OnPoint?

OnPoint is not a “temp” agency. We are a law firm of on-call lawyers actively involved in our clients’ files, albeit on a fractional basis. We have two divisions: legal research and on-call associates.

**Legal Research Division:** For over 10 years, our research division has completed research and writing projects for lawyers in the private and public sectors, 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**

**On-Call Associates Division:** Our on-call associates division responds to the need to control costs while effectively managing workload variances. Our litigators are available for a range of services, from background assistance and file management to court appearances and locums. Whether we are engaged for a set period of time, a particular file or a specific project, our clients benefit from having access to temporary assistance from outstanding lawyers without the overhead associated with employing full-time associates.

*“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 Corporation**

*“OnPoint is a great resource for my practice.”*

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