

Take Five

November 2009

Inside this Issue:

This month we have summarized what we consider to be the five most interesting cases from the BCCA in October.

This month we highlight cases from the following areas of law: Civil Practice and Procedure (p.5, p.6, p.8 and p.9); and Personal Injury (p.7).

Our research course worth 6 CPD credits is next week!

Join us on November 19, 2009

See pages 2-4



In honor of our legal research course next Thursday, we thought it would be fitting for our November photo contest to require you to determine the identity of this building, the largest law library in the world. To enter, send us an email by Dec.15 with the name and location of this building, as well as how many items are added to the collection daily. The winner (drawn from all correct entries) will win a \$100 gift certificate for the restaurant of your choice. We'll take a break from buildings and return to livestock as cover models next month...

Legal Research: From Problems to Solutions 2009

OnPoint has been researching for other lawyers for over 10 years. Drawing from our experience, we will demonstrate how to 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, and walk through a sample issue, from start to finish.

EARN 6
CPD CREDITS

INCLUDES 1 HOUR
ETHICS COMPONENT

WHO SHOULD ATTEND?

We have created this course for all levels. It is appropriate for senior lawyers wanting a refresher course or needing to be updated on the latest techniques, junior lawyers wishing to become better researchers, and students wanting to start off their careers with valuable tips from research specialists. Paralegals will also benefit from this course.

Our Panel Knows Research

Chair: Sarah Picciotto, Founder of OnPoint Legal Research



Ellen Vandergrift, OnPoint Legal Research - Ellen has a winning combination of a keen analytical mind, a clerkship with the Alberta C.A., a stint at Fraser Milner, and a drive to keep digging until she finds the right answer. If it's out there, Ellen will find it! You will learn from her years of experience when to use what resource and how best to use it.



Doug Morrison, OnPoint Legal Research - With over 30 years of experience as a litigator, the majority with Bull Housser & Tupper, Doug brings to the table an extraordinary ability to see the big picture and chart out a research course to get the end results he wants. He will show you how to strategically map out a research plan and effectively present results to clients, other lawyers and the court.



Susan Caird, Librarian and Manager of Reference Services, Courthouse Libraries BC - Susan has 9 years of experience at the courthouse library and has tackled her share of tricky legislative questions over the years. In addition to working on the two legislative publications that the courthouse library publishes, she has recently co-taught legal research to library students at UBC.

Agenda



- 8:30- 9:00- **Registration and Continental Breakfast**
- 9:00- 9:10- **Welcome from Sarah Picciotto, Founder of OnPoint**
- 9:10-10:00- **Doug Morrison- “Preparing for the Trek”**
- Determining the end goal to ensure you head down the right path
 - Considering your audience in constructing the journey
 - The importance of getting the proper facts, instructions, and scope of the research
- 10:00-10:45- **Ellen Vandergrift- “Starting Out on the Expedition and Staying on the Right Course”**
- The importance of paper and online secondary materials in legal research (texts, digests, encyclopedias and course materials)
 - Tips on the best secondary sources to use and how to make the most of them
 - Making good research choices- when to stop, when to take a different path, when to check back with the client or supervising lawyer
- 10:45- 11:00-**Coffee break (with pastries)**
- 11:00- 12:00-**Ellen Vandergrift- “Navigating the Electronic Terrain”**
- Insider tips from a research lawyer who performs computer research every day
 - Cost-efficient uses of electronic resources
 - Pointers on when to use which resource for what task
 - Tips on how to construct effective searches and manage search results
 - Noting up as an essential research tool
 - Important resources for keeping current
- 12:00- 1:30- **Lunch (on own)**
- 1:30- 2:30- **Susan Caird- “The Legislative Research Journey Made Painless”**
- Tracing legislation back to original provisions
 - Locating judicial consideration of legislation using different methods and sources
 - Ensuring legislation is current and in force
 - Using free and for-fee electronic sources and useful print materials
 - Pitfalls of legislative research and how to avoid them
- 2:30- 3:30- **Ellen and Doug- “Showing Someone Else the Way”**
- Keeping notes for future research or to defend research choices
 - A review of our Research Checklist
 - How to best create the product for another lawyer, a client, or the court
 - Doug will take participants through the process of developing submissions to court using an Outline filed in the BCSC as a model
- 3:30- 3:45- **Coffee break (with goodies)**
- 3:45- 4:30- **Ellen Vandergrift- “Time to Take the Plunge: A Sample Research Issue, Step By Step”**

Course Registration Form



Program Name: *Legal Research: From Problems to Solutions 2009*

Date: November 19, 2009- 9:00 to 4:30 (continental breakfast starts at 8:30)

Format: Live Program with Materials

Location: Sutton Place Hotel, 845 Burrard St., Vancouver
Regular: \$495; Student: \$295

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Position: SOLE PRACTITIONER PARTNER ASSOCIATE STUDENT PARALEGAL

OTHER _____

Year of Call: _____

Student ----- \$295 + \$14.75 GST = \$309.75

Regular ----- \$495 + \$24.75 GST = \$519.75

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By Fax:
604.648.8930

By Mail:
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Our research lawyers range from a 5-year call to a 32-year call, all with extensive litigation and research experience. Whatever the nature of your project, we have the right researcher to help you.



Shooting Star Amusements Ltd. v. Prince George Agricultural and Historical Association, 2009 BCCA 452

Areas of Law: Civil Procedure; Privilege

Under Appeal: Madam Justice Bruce

The appellant, a non-profit society, sought leave to appeal an interlocutory order requiring it to produce unredacted copies of meeting minutes at which its dealings with the respondent were discussed. The respondent had requested the minutes previously and while the appellant had produced copies, portions had been deleted on the basis that the deleted information was privileged. The respondent applied to have the documents produced in full. The chambers judge noted that the appellant had not put forth any material to indicate on what grounds privilege was being claimed over the redacted portions of the minutes and ordered it to produce the minutes in its unredacted form.

Held: Application dismissed.

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On appeal, the appellant argued that the chambers judge erred in failing to provide the appellant with the opportunity to file affidavit material in support of its claim for privilege or in failing to inspect the documents herself. The appellant argued that the current authorities conflicted as to the proper process to be followed by litigants when asserting claims of privilege and, accordingly, this was a significant issue that the court ought to address. The appellant court held that the appellant did not meet the necessary criteria for leave to be granted. The court found that there was clear case law to support the view that the party asserting privilege with respect to a document bears the onus of establishing privilege. In this case, the court noted that appellant's counsel had refused to provide any details about the meetings and offered nothing more than his opinion to the chambers judge.

Kedia International Inc. v. Royal Bank, 2009 BCCA 427

Area of Law: Civil Procedure; Time to Appeal

Under Review: Mr. Justice Chiasson

The appellants applied for a review of an order dismissing their application for an extension of time to appeal an order dismissing their action and awarding damages to the respondents on their counterclaim. Mr. Justice Chiasson did not consider the appellants' proposed appeal to be meritorious, nor did he find that the interests of justice would be served by granting the order for the extension. The appellants raised six new grounds of appeal that were not raised on the original application.

Held: Review application dismissed.

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The appellate court stated that the onus was on the appellants to establish that the judge presiding over the original application erred in law or in principle or misconstrued the facts. In reviewing the judge's reasons for dismissing the application, the court failed to find anything the judge said to be in error. The court further noted that, in a review application of this sort, it was not open to the court to consider the new grounds of appeal that the appellants had not advanced in the original application. Notwithstanding this ruling, the court found that the additional grounds of appeal raised by the appellants lacked substance and would not in any event have altered the judge's decision not to grant the order for an extension of time.



Plakhholm v. Victoria (City), 2009 BCCA 466

Areas of Law: Personal Injury; Occupiers' Liability

Under Appeal: Mr. Justice Johnston

After alighting from a bus, the respondent had started to walk across a street when she fell and dislocated and fractured her shoulder. She commenced an action against the appellant city, alleging that she had tripped over an area of pavement that was uneven and in a state of disrepair. At the summary trial, the judge found that the Occupiers' Liability Act did not apply in this case by virtue of s. 8(2)(b) which limited the scope of liability for municipalities as occupiers of public roads. The trial judge deemed the respondent as a licensee of the appellant city and concluded that

the appellant owed a duty to the respondent to "avoid foreseeable risks of harm from unusual danger of which the City knew or ought to have known". The trial judge found that following repairs to the road, the appellant knew that there would be a height differential between the old and new pavement that would constitute an unusual danger to pedestrians crossing the street, yet there were no warnings alerting pedestrians to the danger. The appellant was held to be liable to the respondent for damages and the appellant appealed.



Held: Appeal allowed; remitted to trial for re-trial.

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The appellant argued that the trial judge applied the wrong standard of care in determining liability and failed to apply the "policy defence" that renders a municipality immune from liability if it has followed a bona fide policy. The appellate court held that the trial judge erred in applying a standard of care higher than the generalized standard found in the Act; he was not, however, bound to apply that generalized standard. The court further found that trial judge ought to have completed an analysis of whether the appellant had exercised its discretion in putting a bona fide policy in place, and if so, whether the policy had been reasonably carried out. The court was not of the view that it was in its purview to proceed with such an analysis and in allowing the appeal, the matter was remitted back to the lower court for re-trial.

Luu v. Wang, 2009 BCCA 414

Areas of Law: Civil Procedure; Amendment of Pleadings

Under Appeal: Mr. Justice Pearlman

The appellant commenced a debt action against the respondents. Monies were owing to a corporation in which the respondents obtained shares. The appellant claimed that he had entered into an oral agreement with the respondents to pay their debts to the corporation and did so. In turn, the respondents granted the appellant an interest in the company shares as collateral. In their pleadings, the respondents denied that the appellant advanced the amount he alleged and argued that the monies that he had advanced had been repaid. The appellant sought to amend his Statement of Claim and the application was dismissed by the case management judge. The judge held that the amendments sought by the appellant were not necessary in order to determine the fundamental issue of whether the appellant was entitled to repayment of the debt. The judge further found that the shares held as security would be sufficient to satisfy the debts. In doing so, the judge dismissed the appellant's application to amend the Statement of Claim. The appellant applied for leave to appeal the interlocutory order.

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Held:

Leave to Appeal Denied.

The Court reviewed the factors to be considered on an application for leave to appeal: whether the point on appeal was of significance to the practice and to the action itself, and whether the appeal was meritorious or frivolous, and would unduly hinder the progress of the action. The Court rejected the appellant's submission that the case management judge's decision had the effect of denying the appellant equitable relief under the Law and Equity Act. The Court held that the proposed amendments expanded beyond the scope of the debt claim. The Court concluded that the proposed appeal was of no merit and denied leave to appeal.

Did you know...

OnPoint offers a mobile affidavit service called iWitness. We travel to doctors' offices or wherever your deponent is located. For more information, please *click here*.





Fraser Valley Refrigeration Ltd. v. British Columbia, 2009 BCCA 422

Areas of Law: Practice on Appeal; Jurisdiction

Under Appeal: Mr. Justice Masuhara

The respondent, a company that sold and installed refrigeration equipment to farm operations, was audited by the provincial Consumer Taxation Audit Branch and subsequently was assessed social service tax as a result of the sales agreements it entered into with its clients. On appeal, the Minister confirmed the assessment and the respondent appealed the Minister's

decision to the Supreme Court. The respondent also applied to for rectification of the sales agreements to reflect the reasoning behind its use of the social service tax exemption. The respondent agreed not to object to the appellant's participation in the rectification hearing if the appellant agreed not to seek consolidation of the proceeding with the appeal. The respondent did, however, take the position that the

appellant was not a party to the sales agreement nor was it a party to the rectification action. Upon hearing the rectification application, the judge granted the rectification order. The appellant filed a notice of appeal of the judge's decision and the respondent filed a notice of motion to quash the appeal on the basis that the appellant lacked standing to appeal the order.

Held: Appeal and Cross-Appeal dismissed

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

The appellate court identified two issues raised in the appellant's motion: whether a single justice of the Court of Appeal had jurisdiction under s. 10(2) of the Court of Appeal Act to dismiss an appeal for want of standing and whether the appellant had standing to appeal the decision. In reviewing the authorities, the court concluded that the jurisdiction of a single justice is limited to making orders incidental to an appeal. Only a full division of the court has jurisdiction to decide the merits of the case. The court noted that incidental could be defined as "small and relatively unimportant, minor, supplementary and not essential". In this case, a decision by the court to grant or deny standing to the appellant determined the existence of an appeal, which was not a minor or insignificant matter. As such, the court concluded that it had no jurisdiction to dismiss an appeal for want of standing. The jurisdiction to make such an order rested with a full division of the court and in dismissing the respondent's motion, the court preserved the respondent's right to bring the same motion before a full division of the court.



Sarah Picciotto



Ellen Vandergrift



Doug Morrison

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