

Take Five

September 2011

ALBERTA EDITION



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P2 Third Annual Legal Research Course, "From Problems to Solutions, 2011"- Nov.15, 2011

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THIRD ANNUAL ONPOINT FEATURE COURSE

Legal Research:

From Problems to Solutions 2011

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“FOR A LAWYER IN PRIVATE PRACTICE WHO WANTS TO RESEARCH THE LAW WITH CONFIDENCE, IT WAS WELL WORTH THE PRICE OF ADMISSION.”

“I REALLY ENJOYED THE COURSE. I FOUND THE INFORMATION VERY PRACTICAL AND PERTINENT TO MY WORK.”

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November 15, 2011
The Sutton Place Hotel
9:00 am - 4:00 pm



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OnPoint Legal Research L.C. has been researching for other lawyers for over 12 years. In the third annual presentation of this course, OnPoint research lawyers and guest research experts will draw from their experience to 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 lead an interactive session on how to approach a sample legal issue.



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.

Course Registration Form

Date: November 15, 2011- 9:00 to 4:00 (continental breakfast starts at 8:30)
Format: Live Program with Materials
Location: The Sutton Place Hotel, Vancouver
Price: Early Bird (register before Oct.15): Regular: \$425; Paralegal: \$375; Student: \$250
After Oct.15: Regular: \$495; Paralegal: \$425; Student: \$295

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Reece v. Edmonton (City), 2011 ABCA 238

Areas of Law : Abuse of Process; Standing; Declaratory Action

Under Appeal : Justice Rooke

CLICK HERE TO ACCESS
THE JUDGMENT

BACKGROUND

The appellants were Tove Reece, Zoocheck Canada Inc. (“Zoocheck”) and People for the Ethical Treatment of Animals, Inc. The respondent was the City of Edmonton. The appellants, who were animal welfare advocates, were concerned about the living conditions and health of Lucy, an elephant at the zoo operated by the respondent. They sought to have her moved to an elephant sanctuary, but the respondent refused, arguing that her situation and facilities at the zoo were adequate, and that Lucy was not healthy enough

to survive a long-distance move. After receiving a letter from Zoocheck complaining about the conditions under which Lucy was kept, the Edmonton Humane Society (“EHS”), which was charged with enforcing the Animal Protection Act, investigated the matter and concluded that it would not be in Lucy’s best interest to be transported out of the zoo. The appellants filed an originating notice seeking a declaration that the respondent was in breach of the Act. The respondent applied to have the originating notice struck on the grounds that the applicants had no standing, that the proceedings were an abuse of process, or alternatively, that the appellants chose the wrong procedure. The chambers judge granted the application and struck the originating notice based on the finding that the proceedings were an abuse of process because a private party cannot seek a declaration that the respondent was in breach of a penal provision. The chambers judge also concluded that the action should have been commenced by way of statement of claim, not originating notice. He further ruled that the appellants had no standing to pursue the relief sought.

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*Reece v. Edmonton (City), (cont.)***APPELLATE DECISION**

The appeal was dismissed. Finding it unnecessary to rule on the questions regarding standing and procedure, the Court of Appeal dealt only with the abuse of process issue. The Court held that applications for a declaration that the respondent was in breach of a penal statute were generally denied because the burden of proof in civil proceedings is different from penal proceedings, and the presumption of innocence would be lost or undermined

in a declaratory action. The Court also noted that allowing the action to proceed would undermine not only the jurisdiction of the criminal courts to try an alleged breach of the Act, but also the authority of the Attorney General to enforce the law. Moreover, as the declaration sought implied that the respondent breached its licence to operate the zoo, the proceedings would undermine the authority of the public officials charged with regulating zoo operations. The Court held that, absent any showing that the EHS, the Attorney General and the Department of Sustainable Resource Development had been remiss in their duty to enforce the Act, the courts cannot usurp or interfere with their authority to make decisions involving animal welfare. The Court further clarified that the authority of superior courts could not go beyond reviewing the legality of executive action. It could not extend to examining every operational or policy decision made by the executive branch.



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Globex Foreign Exchange Corporation v. Kelcher, 2011 ABCA 240

Areas of Law : Employment Contracts; Restrictive Covenants; Duty of Confidentiality

Under Appeal : Justice Hawco

[CLICK HERE TO ACCESS
THE JUDGMENT](#)

BACKGROUND

The appellant was Globex Foreign Exchange Corporation. The respondents were, inter alia, David Kelcher (“Kelcher”), Mark MacLean (“MacLean”), Luciano Oliverio (“Oliverio”), Axiom Foreign Exchange International Inc., and several numbered companies. The appellant, a company engaged in the foreign currency exchange business, employed Kelcher, MacLean and Oliverio at its Calgary office in 2000, 2001 and 2003, respectively, until they all left the company in March 2005. Each respondent had signed an employment contract which prohibited them from soliciting any of the appellant’s clients and competing in any business similar to the appellant’s within twelve months from the termination of their employment. In 2005, the respondents started their own foreign currency exchange company which competed with the appellant and solicited

business from its clients. The appellant sued the respondents for damages arising from breach of the non-solicitation and non-competition clauses of their employment contracts. In the alternative, the appellant claimed that the respondents breached their duty of fidelity and confidentiality not to compete unfairly with the appellant and exploit the latter’s information for their own purposes and profit. The trial judge ruled that the restrictive covenants were not enforceable against MacLean because he was wrongfully terminated. He also found that the employment contracts of Kelcher and Oliverio were unenforceable for lack of consideration. The trial judge ruled that the non-competition covenants were too broadly worded and hence could not be enforced. As for the non-solicitation covenants, the trial judge found them enforceable only against Kelcher. The trial judge rejected the appellant’s claim of breach of confidentiality as there was no evidence showing that the respondents used the appellant’s confidential or proprietary information. The appellant was awarded damages in the amount of \$17,927, representing the loss arising from Kelcher’s breach of the non-solicitation covenant. On appeal, the appellant challenged the findings of the trial judge. Kelcher filed a cross-appeal arguing that the non-solicitation covenant in his employment contract was likewise unenforceable.

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*Globex Foreign Exchange Corporation v. Kelcher, (cont.)***APPELLATE DECISION**

The appeal was dismissed and the cross-appeal was allowed. The Court of Appeal agreed with the trial judge's conclusion that MacLean's wrongful dismissal relieved him of the duty to comply with the restrictive covenants. When the appellant wrongfully terminated MacLean, it repudiated the employment contract and MacLean accepted the repudiation when he

sought employment elsewhere. With the repudiation of the employment contract, the restrictive covenants ceased to bind MacLean. The Court upheld the finding that the covenants were unenforceable with respect to Kelcher and Oliverio because they did not receive any consideration for agreeing to such restrictions. The Court further held that the restrictive covenants, including the non-solicitation clause in Kelcher's employment contract, were too broad and ambiguous to be enforceable. The Court ruled that there was no breach of confidentiality by the respondents as they made the list of the appellants' clients for a bona fide purpose. There was also no misuse of proprietary information as the appellant's business methods were not sufficiently unique to be considered proprietary.

brilliant [bril-yuhnt]

– **adjective**

1. having or showing great intelligence, talent, quality, etc.

See also:

Lawyers who save time and money outsourcing their legal research and drafting to OnPoint Legal Research Law Corporation.

Autoweld Systems Limited v. CRC-Evans Pipeline International, Inc., 2011 ABCA 243

Areas of Law : Security for Costs; Appeal of Interlocutory Orders

Under Appeal : Justice McMahon

[CLICK HERE TO ACCESS
THE JUDGMENT](#)**BACKGROUND**

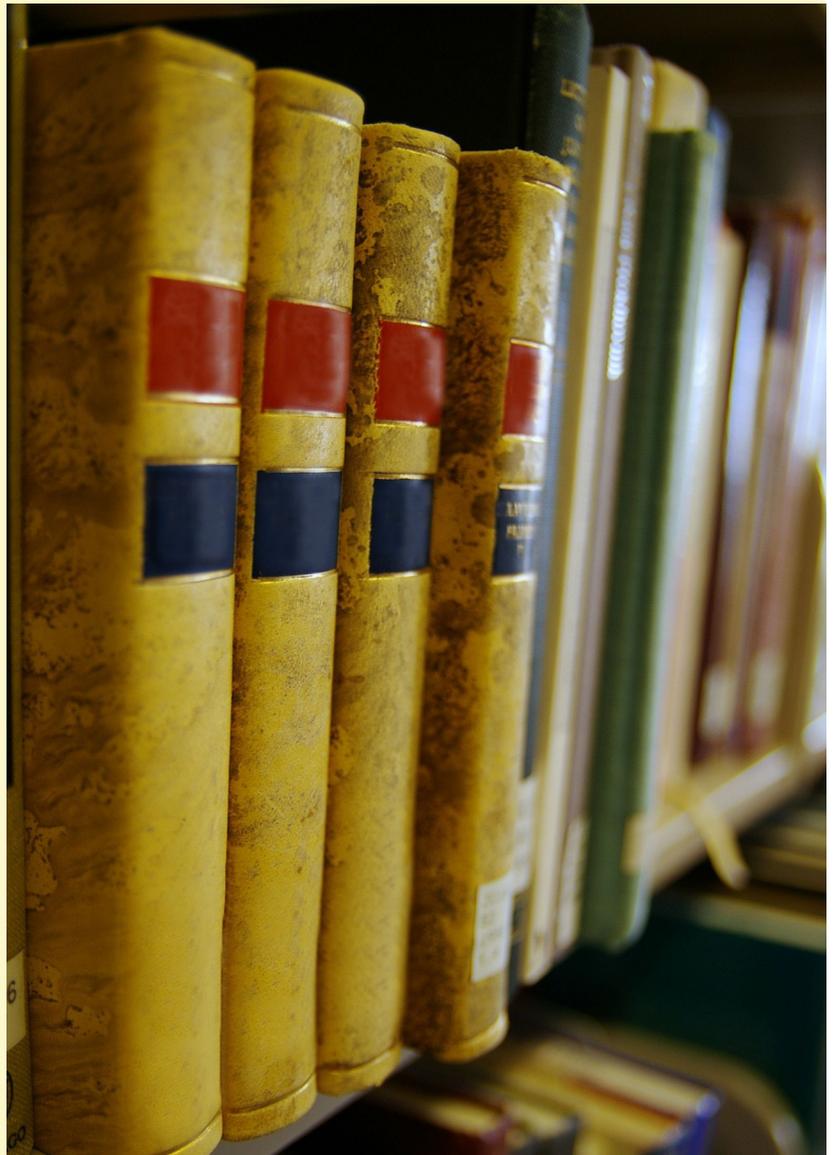
This case involved an application for leave to appeal. The applicant was Autoweld Systems Limited. The respondents were CRC-Evans Pipeline International, Inc., CRC-Evans Automatic Welding, Inc., Malcolm Timothy Carey and Richard Lee Jones. The applicant, a company based in England with no assets or business in Alberta, sued the respondents for rescission of a settlement which the parties executed to resolve a prior lawsuit brought by the respondents against the applicant for wrongful use of proprietary welding

technology. The applicant sought about \$11 million dollars in damages for breach of warranty, deceit, and fraudulent or negligent misrepresentation. The respondents applied for security for costs in the amount of \$605,975 based on its estimate that the pre-trial questioning would take 40 days. The applicant countered that the questioning would take no more than five days. Finding the respondents' estimate too high and the applicant's too low, the case management judge took a middle ground estimate of 20 days of pre-trial questioning and fixed the security for costs at \$250,000. The applicant sought leave to appeal the order of the case management judge arguing that the order unduly prejudiced its ability to prosecute its claim and that the judge overestimated the number of days it would take to complete the pre-trial questioning. The applicant asserted that the leave application should be granted because the appeal raised a serious question of general importance and it stood a reasonable chance of success.

*Autoweld Systems Limited v. CRC-Evans Pipeline International, Inc., (cont.)***APPELLATE DECISION**

The application for leave to appeal was denied. The Court upheld the order of the case management judge as it was reasonable and as the judge did not commit any palpable and overriding error in arriving at his conclusions. The Court ruled that there was no evidentiary basis for the applicant's claim of undue prejudice as it was not established that it could not raise the funds to satisfy the security for costs order. The Court deferred to the judge's finding regarding the quantum of the costs as his experience in litigation and his familiarity with the case placed him in a better position to make the determination. The Court held that since the applicant failed to raise a serious question of general importance and the appeal was not likely to succeed

due to insufficiency of evidence, the stringent requirements for obtaining leave to appeal interlocutory orders were not satisfied in this case.



Christensen v. Calgary (City), 2011 ABCA 244

Areas of Law : Damages; Torts; Occupier's Liability

Under Appeal : Justice Martin

CLICK HERE TO ACCESS
THE JUDGMENT**BACKGROUND**

The appellant was the City of Calgary. The respondents were Jim Christensen ("Christensen") and Stephen Neil Gaston ("Gaston"). Christensen and Gaston sued the City under the Occupiers' Liability Act for injuries they sustained in separate accidents that occurred while they were in-line skating at a public recreational park designed by the City. The accidents occurred on a steep hill which was described by an

expert witness as difficult and dangerous for beginner-to-intermediate skaters and challenging even to expert skaters. The expert witness considered Christensen and Gaston as average skaters. After trial, the judge found that the City's failure to keep the pathway reasonably safe for users caused or materially contributed to the accidents. She also attributed contributory negligence on the part of the respondents, assessing 10% to Christensen and 25% to Gaston. The City appealed, arguing that the respondents had the burden of presenting evidence of the reasonable standard of care required to be met by the City. The City further asserted that the trial judge erred in not requiring evidence to establish causation between the City's deficient actions and the respondents' injuries.

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*Christensen v. Calgary (City), (cont.)***APPELLATE DECISION**

The appeal was dismissed. The Court of Appeal agreed with the findings of the trial judge that the City failed to maintain the pathway where the accidents occurred in a reasonably safe condition for use by in-line skaters. The Court ruled that it was not necessary for the respondents to articulate the standard of care to which the City was to be held. It was enough that they established on a balance of probabilities that, but for the omissions of

the City, the respondents would not have been injured. Based on the evidence, it was established that the City failed to consult the in-line skating community before the pathway was renovated, it did not consider the needs of in-line skaters or conduct proper research when the pathway was being designed, and it did not place adequate signs warning skaters of the steep hill. The Court held that there was ample evidence on record establishing the causal connection between the City's deficient conduct and the respondents' injuries.



United Nurses of Alberta, Local 85 v. Capital Health Authority (Sturgeon Community Hospital), 2011 ABCA 247

Areas of Law : Collective Agreement; Call-back Pay; Overtime

Under Appeal : Justice Acton

CLICK HERE TO ACCESS
THE JUDGMENT

BACKGROUND

The appellant was Capital Health Authority (Sturgeon Community Hospital). The respondent was United Nurses of Alberta, Local 85. One Friday morning, two members of the respondent union were called in to report for a surgical procedure 30 minutes earlier

than the start of their regular shift. They clocked in at 7:00 a.m., and worked until the end of their shift at 3:45 p.m. They were paid overtime for the 30 minutes worked before the start of their regular shift. The union filed a grievance, claiming that the nurses were entitled to the three hour call-back premium under the collective agreement. The arbitration Board that heard the matter dismissed the grievance and ruled in favour

CONFLICT OF INTEREST? REFERRAL?



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United Nurses of Alberta, Local 85 v. Capital Health Authority, (cont.)

of the employer. It interpreted the relevant provisions of the collective agreement to mean that the nurses were entitled to receive call-back pay only when the call-back required them to make an unscheduled trip to the hospital. As the 30 minutes of work performed by the nurses were contiguous to the start of

their regular shift and they did not have to make an extra trip to the hospital, the Board concluded that they were not entitled to call-back pay. The union applied for judicial review and the chambers judge quashed the Board's decision on the ground that its interpretation of the collective agreement provision on call-back pay was unreasonable. The chambers judge found that the Board read a nonexistent limitation in the disputed article of the collective agreement. The employer appealed.

APPELLATE DECISION

The appeal was allowed. The Court of Appeal upheld the decision of the Board, describing it as intelligible, transparent, and well within the range of reasonable outcomes. The Court explained that case authority on the issue of entitlement to call-back pay adopted either of two views. One view was that a separate trip to the workplace was necessary to trigger the application of the call-back

provision, while the other view did not impose that limitation. The Court, however, observed that jurisprudence on the matter was not squarely applicable to the present case, as the call-back provisions in the prior cases were differently worded. Contrary to the findings of the chambers judge, the Court held that the collective agreement in the present case was ambiguous and did not expressly state whether a separate trip to the workplace was required. Thus, the Board was found to have correctly interpreted the relevant provisions of the collective agreement by determining the parties' intent through a reading of the actual wording of the contested provision and then examining it in light of other provisions relating to call-back pay.

Who is OnPoint Legal Research?

We are a firm of legal research lawyers. For over 12 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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Who We Are:

Our research lawyers are well versed with both traditional research sources and the latest in research technology. They are academics -- all have completed a clerkship in B.C., Alberta, or at the Supreme Court of Canada. 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.

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Sarah Picciotto, B.A., LL.B.
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