

LEXPERT

THE BUSINESS MAGAZINE FOR LAWYERS

REPRINTED WITH PERMISSION FROM JANUARY 2007
ISSUE OF THE LEXPERT MAGAZINE®. COPYRIGHT
THOMSON-CARSWELL®.



Inco had it all—great gobs of cash, national pride, warring boards and stealthy hedge funds. But it was only one among many deals last year marked by discord, drama and the demise of Canadian icons.

The Top 10 Deals of 2006

William Ainley, Davies;
Garth Girvan, McCarthy Tétrault;
Dale Ponder, Osler;
William Braithwaite, Silkman Elliott


Publications Mail Agreement 40065782

THE **Top**

10

BUSINESS CASES
OF 2006

By Julius Melnitzer



Last year held a mixture of sun and clouds for corporate litigators and their clients. From the critical importance of e-discovery strategies in *Air Canada*, to trademark protection in *Veuve Clicquot*, to the payment of “success premiums” in *Walker*, we review the rulings that will have the greatest impact on the business climate over the coming year

If corporate Canada was to rate the business-friendliness of Canada’s courts and tribunals based on *Lexpert’s* Top 10 Business Cases of 2006, the appraisals would be decidedly mixed.

Reviews, and reviewers’ points of view, are always a mixed bag, of course. But the one big advantage the *Lexpert* ratings have over those of the movie critics is that we’re transparent about our criteria. In determining the Top 10, we asked ourselves the following question: which 10 litigation decisions have the greatest impact or potential for impact on the business community? And in deciding whether those decisions are felicitous or not, we look at them from the perspective of business, and business only.

That is, for example, why a seemingly innocuous case, *Air Canada v. WestJet Airlines*, topped our annual rankings. While it was the actual settlement between the country’s two major airlines that provoked the biggest headlines, it was a procedural decision in the case that proved to be the catalyst for resolution of what had been a very bitter lawsuit. The decision made it clear—as has long been the case in the US—that a party’s e-discovery strategy and its lawyers’ success in getting judges to adopt that strategy, will be among the most powerful tactical weapons in future lawsuits.

Looking at the impact on the business community also accounts for the absence of the widely publicized “social host” case, *Childs v. Desormeaux*, from our list. While the Supreme Court of Canada’s ruling is tremendously significant to the public and the insurance industry, it simply doesn’t cut a wide enough swath through the country’s financial corridors to rank in our top 10.

This year’s list is weighted towards private disputes, which constitute seven of our top 10 cases. On the positive side, the Ontario Court of Appeal’s decision in *Kerr v. Danier* allayed concern in the business community that Bill 198 and similar legislation elsewhere, which created civil liability for misrepresentation in the secondary market for securities, would open a Pandora’s box of US-style shareholder litigation. Otherwise, the Supreme Court put to rest the mind-boggling notion that defendants ought to pay fee premiums earned by the plaintiffs’ bar, even as Quebec courts made a considerable dent in the province’s reputation as a “class-action haven.”

On the negative side, the Supreme Court of Canada lim-

TOP 10 BUSINESS CASES, 2006

ited the scope of trademark protection it would afford to favourite brands, gave leave to appeal in *Kerr v. Danier*, and raised the prospect of routine claims for aggravated damages in commercial cases.

The results were also mixed when government took on business. On the one hand, the Federal Court of Appeal tightened up the abuse of dominance rules even as the Ontario Securities Commission (OSC) served notice of its sensitivity to minority shareholders in an era where American-style shareholder activism is proliferating in Canada. On the other hand, after the longest hearing in its history, the British Columbia Securities Commission (BCSC) was scathing in its disapproval of regulators who equate effective enforcement with highly publicized, broadly worded charges that fall flat when competent lawyers challenge their specifics.

In selecting the Top 10, *Lexpert* considered reasoned decisions from any level of court or tribunal rendered between November 1, 2005 and October 31, 2006. Four of our choices emanated from the Supreme Court of Canada (three originating in Ontario and one in Quebec), one from the Ontario Court of Appeal, one from the Federal Court of Appeal, one each from the Superior Courts of Ontario and Quebec, and one each from the securities commissions

I AIR CANADA v. WESTJET AIRLINES LTD.

in Ontario and BC.

Our cases touch heavily on class actions, securities law, intellectual property issues and competition law. But it is a procedural case from Ontario that tops the list.

Neither the parties nor the substantive issues in this case need introductions. *Air Canada v. WestJet* has been a boon for headline writers with its spectacular revelations since Air Canada sued WestJet in April 2004, accusing the defendant of hacking into a confidential internal website. Air Canada went so far as to hire a detective who discovered shredded documents by rummaging through the garbage of a WestJet co-founder.

In the end, WestJet admitted to spying on Air Canada, acknowledged that management at the highest levels were directly involved in the spying, paid Air Canada \$5 million, and made a \$10 million donation to children's charities in the names of both airlines.

While the May 2006 settlement seemed a clear-cut victory for Air Canada, the airline may well have taken a much tougher stance on its \$200 million claim had it not been for

a ruling delivered by Justice Ian Nordheimer of the Ontario Superior Court of Justice just three weeks earlier.

After producing some 10,000 documents, Air Canada said that it had 75,000 more to deliver. It had identified these documents by way of an electronic search on the basis of search terms to which the parties had agreed.

But Air Canada wanted to produce the 75,000 documents without reviewing them manually for privilege or relevance issues. Such an undertaking, argued the company's counsel—Earl Cherniak, Peter Jervis and Susan Wortzman of Lerner's LLP—was too costly and laborious.

But Justice Nordheimer disagreed. He ordered Air Canada to manually review the 75,000 documents that had been the subject of the e-discovery order before producing them to WestJet, proving that even in the high-tech modern age there's nothing that encourages dispute resolution more than a court putting the parties to work and expense.

"Air Canada simply wanted to send the documents over to WestJet and leave WestJet with the obligation to return privileged or irrelevant documents," says Bryan Finlay of Toronto's WeirFoulds LLP, one of WestJet's lawyers.

"This decision is the first Canadian case to deal with the obligation to review documents manually and what it says is that you can't have your cake and eat it too. It's an important statement on what's becoming a hugely important issue."

In his ruling, Justice Nordheimer was among the first Canadian judges to define the obligations surrounding e-discovery. He noted that different categories of documents might require different standards and that Air Canada was not under an obligation to review each page of each document.

"It is up to Air Canada and its counsel to determine to what extent a detailed review of the electronic documents must be conducted," Justice Nordheimer wrote. "They must do so, however, cognizant of the obligations under the *Rules of Civil Procedure* regarding the production of documents that include the requirement that an officer of the corporation swear an affidavit of documents that confirms that a 'diligent search' has been conducted for all documents."

Greg Richards, managing partner of WeirFoulds, says the case affords a glimpse into the future of business litigation.

"When you try to apply discovery principles to the electronic world, you start to realize that *Air Canada v. WestJet* is the future and just how much of a brave new world of litigation issues we've entered," he said. "Any commercial litigator worth his or her salt will have to do a lot of work to get up to speed."

THE TOP 10

BUSINESS DECISIONS OF

2006

SUIT	PLAYERS*
<i>1. Air Canada v. WestJet Airlines Ltd.</i>	
Air Canada and ZIP Air Inc.	Lerners: Earl Cherniak, Q.C., Peter Jervis and Susan Wortzman
WestJet Airlines Ltd.	WeirFoulds: Bryan Finlay, Q.C., and Marie-Andrée Vermette Burnet, Duckworth & Palmer: Daniel McDonald, Q.C., and Shannon Wray
Clive Beddoe	Lax O'Sullivan Scott: Terrence O'Sullivan
<i>2. Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée/Mattel Inc. v. 3894207 Canada Inc.</i>	
Veuve Clicquot Ponsardin	Léger Robic Richard: Jacques Léger, Q.C., Barry Gamache and Marie-France Major
Boutiques Cliquot Ltée	Miller Thomson Pouliot: Louis Coallier and Alexandre Ajami
International Trademark Association	Gowling Lafleur Henderson: Scott Jolliffe and Kevin Sartorio
Mattel, Inc.	Gowling Lafleur Henderson: Paul Blanchard, Henry Brown, Q.C., and Lisa Vatch
3894207 Canada Inc.	Desjardins Ducharme: Sophie Picard
<i>3. Kerr v. Danier Leather Inc.</i>	
Douglas Kerr, S. Grace Kerr and James Frederick Durst	Lerners: Peter Jervis, George Glezos, Jasmine Akbarali and Melanie Schweizer
Danier Leather Inc.	Lenczner Slaght Royce Smith Griffin: Alan Lenczner, Q.C., and Craig Martin
Irving Wortsman, Jeffrey Wortsman and Bryan Tatoff	Goodmans: Benjamin Zarnett and Jessica Kimmel
<i>4. Option Consommateurs v. Novopharm Ltd.</i>	
Option Consommateurs	Kugler Kandestin: Gordon Kugler, Robert Kugler and Stuart Kugler
Novopharm Ltd. and Ratiopharm Inc.	Heenan Blaikie: Gary Morrison
Genpharm Inc., Apotex Inc. and Pharmascience Inc.	Liebman & Associés: Irwin Liebman
Pharmascience Inc.	Davies Ward Phillips & Vineberg: Guy Du Pont, Mathieu Bouchard, David Stolow and Nick Rodrigo
Laboratoire Riva Inc.	Blake, Cassels & Graydon: Robert Torralbo and Nassif BouMalhab
Rhoxalpharma Inc.	Langlois Kronström Desjardins: Chantal Chatelain
Lison Pharma Inc.	Fraser Milner Casgrain: Diane Quenneville and Pascale Dionne-Bourassa
Pro-Doc Ltd.	Sébastien Downs Astell Lachance: Luc Lachance and Alain Brophy

*Lawyers at firms indicated at the time of judgement

SUIT

PLAYERS

5. *Fidler v. Sun Life Assurance Company of Canada*

Connie Fidler

Arvay Findlay: Joseph Arvay, Q.C., and Faith Hayman

Sun Life Assurance Company of Canada

Fasken Martineau: Avon Mersey, William Westeringh and Michael Sobkin

6. *Sears Holdings Corp. v. Ontario Securities Commission*

Sears Holdings Corporation and SHLD Acquisition Corp.

Osler, Hoskin & Harcourt: Mark Gelowitz, Allan Coleman and Shawn Irving

Ontario Securities Commission

Ontario Securities Commission: Kelley McKinnon

Hawkeye Capital Management, LLC, Knot Partners Management, LLC, and Pershing Square Capital Management, L.P.

Davies Ward Phillips & Vineberg: Kent Thomson, Luis Sarabia and Sean Campbell

Bank of Nova Scotia and Scotia Capital Inc.

McCarthy Tétrault: Paul Steep and Thomas Sutton

Royal Bank of Canada

Stikeman Elliott: Peter Howard

7. *Re Pacific International Securities Inc.*

Pacific International Securities Inc., Max Meier, Jean-Paul Philippe Bachelier, Robert Herbert Blades, John Todd Eymann, Alberto John Quattrociochi and Martin J. Reynolds

Miller Thomson: Donald Sorochan, Q.C., John Shewfelt and Catherine Esson

Lawrence Hugh McQuid

Lang Michener: Mark Skwarok and Stephen Zolnay

Executive director

BC Securities Commission: James (Sasha) Angus, Mark Hilford and C. Paige Leggat

8. *GMAC Commercial Credit Corporation–Canada v. T.C.T. Logistics Inc.*

Industrial Wood & Allied Workers of Canada, Local 700

Koskie Minsky: Stephen Wahl and Andrew Hatnay

GMAC Commercial Credit Corporation–Canada et al.

Ogilvy Renault: Orestes Pasparakis and Susan Rothfels

KPMG Inc.

Goodmans: Benjamin Zarnett and Frederick Myers

9. *Canada v. Canada Pipe*

Commissioner of Competition

Johnston & Buchan: Leslie Milton
Special counsel: Randall Hofley

Canada Pipe Company Ltd.

Davies Ward Phillips & Vineberg: Kent Thomson, James Doris and Charles Tingley

10. *Walker v. Ritchie*

Donald J. Ritchie and Harold Marcus Limited

Lerners: Earl A. Cherniak, Q.C., and Andra L. Maxwell Baker

Stephanie Suzanne Walker, Gary Walker, Rosemary Walker, Laura Walker, Alyssa Walker and Christine Walker, an infant by her litigation guardian, Gary Walker

Lenczner Slaght Royce Smith Griffin: Ronald G. Slaght, Q.C., and Rebecca Jones