

THE CANADIAN INSTITUTE'S 4TH ANNUAL
**LITIGATION AGAINST
THE CROWN**

ESSENTIAL INFORMATION FOR THE PLAINTIFF AND DEFENCE BAR

WITH PARTICIPATION FROM:

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THIS INTENSIVE TWO-DAY CONFERENCE WILL BRING YOU UP-TO-DATE ON IMPORTANT DEVELOPMENTS INCLUDING:

- Which **class actions against the Crown** are succeeding or failing?
- Steering clear of **regulatory negligence** cases: Best practices
- Demystifying the bidder-owner relationship: Recent **procurement** cases
- When are **advance costs** being awarded against the Crown?
- Collecting and controlling the **myriad documents** in government cases

NEW TOPICS FOR 2008!

- *Post-Hill*: Who is at risk for claims of **negligent investigation**?
- Preparing for a **public inquiry**: Overcoming critical challenges
- Proving **malicious prosecution** claims: Is the standard falling?
- Litigating **issues of race** against the Crown: Tips and traps
- Is the **whistleblower** issue headed back to the Supreme Court of Canada?

DON'T MISS OUR POST-CONFERENCE INTERACTIVE WORKSHOP:

Successfully Bringing and Defending
Class Actions against the Crown

June 25, 2008



See inside for details



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THE LAW IS CHANGING: ARE YOU STILL UP-TO-DATE?

With numerous recent and critical developments at the Supreme Court and provincial appellate courts, the rules for litigation against the Crown are rapidly shifting. Whether you are suing or defending the Crown, you must be up to speed to win your case.

The Canadian Institute's 4th annual conference on "Litigation against the Crown" is your best source of practical and current information on successfully litigating these claims. This year's conference will cover hot button issues, including:

- How is the *Hill* case impacting negligent investigation claims?
- Getting up-to-date on class actions against the Crown
- Analyzing recent developments bidding and tendering case law
- Public inquiries and litigation: Comparing and contrasting the processes
- Litigating regulatory negligence, abuse of public office and malicious prosecution cases: Best practices
- Using effective discovery strategies to control masses of documents

Take advantage of the post-conference workshop, "Successfully Bringing and Defending Class Actions against the Crown" on June 25, 2008. Find out how to get the best results for your client.

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WHO SHOULD ATTEND

- Government Counsel
- Crown Agents
- Insurance Claims Managers and Adjusters
- In-House Counsel for Insurance Companies and Police Forces
- Plaintiff Lawyers
- Class Action Lawyers
- Government Procurement Counsel



This program has been accredited by the Law Society of Upper Canada towards the professional development requirement for certification.

Civil Litigation	Main Conference 12 hours	Workshop 3 hours
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and papers."*

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Susan M. Vella
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Janet E. Minor
General Counsel
Ontario Ministry of the Attorney General

Dale Yurka
General Counsel
Justice Canada



DAY ONE

MONDAY, JUNE 23, 2008

8:00 Registration Opens, Coffee Served

8:45 **Opening Remarks from the Co-Chairs**

Kirk Baert
Partner
Koskie Minsky LLP

Susan M. Vella
Partner
Rochon Genova LLP

9:00 **Deciphering *Hill* and the Negligent Investigation Tort: What Will the Fallout Be?**

David G. Boghosian
Boghosian & Associates

Lise Favreau
Counsel
Crown Law Office – Civil
Ontario Ministry of the Attorney General

Sean Dewart
Partner
Sack, Goldblatt and Mitchell LLP

- Getting up-to-date on the Supreme Court of Canada's decision in *Hill v. Hamilton-Wentworth Regional Police Services Board*
 - what standard of care do police owe to suspects in criminal investigations?
 - is there a duty of care owed to victims?
 - distinguishing errors in judgment from actionable negligence
- What are the implications of *Hill* to negligent investigation claims against the government?
 - assessing the spill-over effect into other forms of investigation
 - will there be a chilling effect on investigations?
 - will there be fewer wrongful prosecutions and convictions?
- Could there be negligence claims against Crown attorneys? Is there immunity for negligence?
- What is the role of insurance underwriters and loss prevention experts in police investigations?
- What is the next step? Analysing negligent investigation cases post-*Hill*

10:00 Networking Refreshment Break

10:15 **Regulatory Negligence Liability: Avoiding Lawsuits and Damages**

Dennis W. Brown, Q.C.
General Counsel
Crown Law Office – Civil
Ontario Ministry of the Attorney General

John Tyhurst
Senior Counsel
Justice Canada

R. Douglas Elliott
Partner
Roy Elliott O'Connor LLP

- Learning lessons from recent critical cases: *West Nile, S.A.R.S., Larcade, Sauer*
- Examining the lower courts' application of *Cooper* and *Edwards*: Which way is the pendulum swinging?
- Distinguishing unreasonable mistakes v. mere error in judgment: *Post-Hill*
- Under what circumstances will courts find a private law duty of care
- Have the elements of negligence in actions against the Crown changed?
- Understanding the grounds for liability in negligence
- What are the statutory and common law defences?
- When should you consider a pre-emptive strike to kill the action without an evidentiary record?
- Minimizing your risk of lawsuits for regulatory negligence: Special considerations for defendants
- Emerging trends in the recovery of damages: Are public officials liable?
- Trends in recent case law: What regulatory regimes are at risk?
 - health care: failing to regulate drugs and medical devices, contrasting the recent U.S. Supreme Court decision in *Riegel v. Medtronic*
 - environment: spraying of insecticides, catastrophic environmental claims

11:30 **Litigating Malicious Prosecution Claims: Where Does the Tort Stand in Light of *Hill*?**

Kim Mullin
Partner
WeirFoulds LLP

Dale Yurka
General Counsel
Justice Canada

- Getting up-to-date on significant case law
- What are the elements of an action for malicious prosecution?
- Understanding special practice and pleading considerations
- Determining the proper parties: Practical guidelines
- Has the test for malice changed? How do you prove it? When will it be inferred?
- Is the standard for proving malicious prosecution still falling?
- Who is attracting these torts?
- Will these claims continue to increase?

12:30 **Networking Luncheon for Delegates and Speakers**

1:45 **Are Class Actions against the Crown on the Rise? Effectively Managing Your Case**

Kirk Baert
Partner
Koskie Minsky LLP

David Klein
Partner
Klein Lyons

Paul Vickery
Senior General Counsel
Justice Canada

Class actions against the Crown are growing in number and complexity. As well, they are becoming more costly and aggressive. This panel will provide updates and practical information to help you manage these high-stakes cases.

- What types of class actions are succeeding and failing?
- Getting up-to-date on key cases of the past year
- Emerging areas of class action litigation against the government
- Are class actions being used to avoid judicial review applications on administrative law grounds?
- Crystal ball gazing: Forecasting the trends in class actions

2:45 Networking Refreshment Break

3:00 Successful Strategies for Winning and Defending Strike Motions

Roger Horst
Partner
Blaney McMurtry LLP

Identifying Potentially Fatal Errors

- Is there a statutory right to sue?
- Is the action statute barred against an individual government employee, the government or both?
- Is there a statute that limits liability, provides defences or ousts the common law?
- What are the limits on the courts' discretion to fix problems in the litigation?
- Do you have standing? Who are the proper parties?
- Assessing special limitation periods
- What defences are available to the Crown?
- Does the Crown have immunity?
 - locating statutory immunity provisions
 - inter-jurisdictional immunity: when might provincial laws apply to the federal government?

Is the Desired Remedy Available?

- What kinds of orders are available?
- Are punitive damages available?
- Is there a statute that sets out available remedies?
- If the plaintiff wins, can the government change the rules retroactively?

3:45 Litigating Issues of Race against the Crown and Recent Developments in the Tort of Abuse of Public Office

Julian Falconer
Partner
Falconer Charney LLP

Gareth Morley
Barrister
B.C. Ministry of the Attorney General

- Obtaining access to civil remedies in respect of issues of race
- Addressing claims of racial discrimination against public officials: How has this civil litigation evolved?
- Getting up-to-date on trends in race litigation across the provinces
- Are these claims succeeding?
- What are the parameters of the tort of abuse of public office after *Odhavji v. Woodhouse*?
- Learning how to build and defend abuse of public office cases
- What elements are required to establish the tort?
 - is there still a distinction between omission and commission?
 - how can plaintiffs prove intent or recklessness?
 - how can plaintiffs obtain the evidence to prove the tort?
- Who is a "public officer"? When is one acting in the capacity of a public official?
- Discussing the gaps in jurisprudence in the intentional tort of abuse of public office
- How are damages assessed?
- What are the likely future trends in abuse of public office cases?

4:45 Co-Chairs Remarks and Conference Adjourns

DAY TWO
TUESDAY, JUNE 24, 2008



8:15 Coffee Served ☕

8:45 Opening Remarks from the Co-Chairs

Kirk Baert
Partner
Koskie Minsky LLP

Susan M. Vella
Partner
Rochon Genova LLP

9:00 Recent Case Law Affecting Public Procurement

Glenn Ackerley
Partner
WeirFoulds LLP

- Getting up-to-date on bidding and tendering case law
- Understanding the bidder-owner relationship under an RFP (v. tender)
 - what are the government's obligations in the RFP process?
 - what is the legal definition of "fair treatment"?
 - analysing "fairness" in the selection process
 - defining the role of good faith and ethical duties
 - what happens when there is a clear breach?

- What is an owner's duty of care to subcontractors of bidders?
- What is the effect of clauses excluding liability?
 - recent decisions on exclusion clauses
 - what language works? what doesn't?
 - what language goes too far?
- What are your remedies? How do you get them?
 - understanding the latest developments in restitution
- How are current statutes, regulations and trade agreements impacting the procurement process?

10:00 Networking Refreshment Break

10:15 Your Essential Guide to Judicial Review Applications

Janet E. Minor
 General Counsel
 Ontario Ministry of the Attorney General
 Constitutional Law Branch

In more and more circumstances, courts are requiring a judicial review application before litigation can be commenced. This session will help you get ready to handle your next judicial review.

- What decisions are subject to judicial review?
- What if there is a statutory appeal available?
- Determining the proper court
- What deadlines apply?
- What is the appropriate remedy?
- Assessing the likelihood of obtaining the desired remedy
- What are the grounds of judicial review?
- What is the proper standard of review?
- What goes into the court record?
- What evidence is admissible?
- Preparing and appearing on an application for judicial review
 - how should you approach written argument?
 - how should you approach oral argument?
 - identifying and avoiding common mistakes

11:00 Handling Public Inquiries: How Do the Rules of Engagement Differ?

Moderator

Susan M. Vella
 Partner
 Rochon Genova LLP

Panel

Linda Rothstein
 Partner
 Paliare Roland Rosenberg Rothstein LLP

Mark Sandler
 Partner
 Cooper & Sandler, Barristers and Solicitors

Kim Twohig
 General Counsel, Crown Law Office – Civil
 Ontario Ministry of the Attorney General

Public inquiries have become fashionable once again. Soon you could find yourself appointed to handle one. What should you do next? This panel discussion will explore the differences and the relationship between public inquiries and litigation.

- Understanding the various types of inquiries
- What are the triggers for inquiries?
- Why would counsel ask for an inquiry?
- What is the benefit for each party involved?
- How are public inquiries and litigation related?
- How is the inquiry process distinguishable from litigation?
 - can transcripts from inquiries be used in litigation?
 - marshalling the evidence
 - how do you compel out-of-province witnesses?
 - who has standing?
 - budgetary concerns
 - what is the scope of the examination?
 - do you have access to witnesses in advance?
- Preparing for a public inquiry: What should you expect?
- Identifying and avoiding common mistakes
- Managing the media to control political uproar
- Overcoming challenges in documentary disclosure
 - public interest immunity, including Cabinet documents
 - solicitor client privilege
 - statutory prohibitions
 - publication bans
- How are legal fees paid? How lucrative are they?
- **CASE STUDY:** What works, what doesn't?

12:15 Networking Luncheon for Delegates and Speakers

1:30 Critical Developments in Advance Cost Awards: How Do You Get/Avoid Them?

John Rowinski
 Barrister and Solicitor
 Law Office of John Rowinski

- Examining significant decisions in advance cost orders against the Crown
 - when will they be awarded?
 - what are the policy arguments for/against these awards?
 - assessing the propriety of these awards
 - will they continue to be made?
- When is the Crown entitled to its costs?
- When is the Crown required to pay costs?
- Costs in *Charter* litigation, class actions and criminal proceedings
- What are future expected trends in cost awards?

2:15 Establishing Effective Discovery Strategies to Avoid Drowning in Paper

Daniel Urbas
 Partner
 Borden Ladner Gervais LLP

- How does discovery differ in actions against the Crown?
- What discovery is available or useful?
- What are the limits on the Crown's obligation to disclose?
- Evaluating the limits of Crown privilege
 - what is the reasonability of claiming national security?
 - what are the consequences?
 - what is considered overreaching?
- What is the impact of the *Freedom of Information and Protection of Information Act* on government disclosure?



POST-CONFERENCE
INTERACTIVE WORKSHOP:
WEDNESDAY, JUNE 25, 2008

9:00 a.m. - 12:00 p.m.

Successfully Bringing and Defending Class
Actions against the Crown

David O'Connor

Partner
Roy Elliott O'Connor LLP

Whether you are new to the area or need a refresher, this interactive workshop will provide critical perspectives into the procedural and substantive law issues involved in bringing and defending class actions against the Crown.

- Determining if your case is appropriate for a class action: Essential considerations
- Spotting jurisdictional issues: Is there provincial jurisdiction over federal claims?
- Managing class litigation: The Crown's approach
- What is the role of the media and politicians in class actions against government?
- Politically motivated class actions
- Assessing pre-certification strike and summary judgment motions
- What factors will the courts consider before certifying class actions against governments?
 - threshold issues
 - motions for summary judgement prior to certification
- Pleading and practice tips for class actions
- Best practices for motion materials
- Considerations for settlement
- Are governments quick to settle once there is a certification? Why or why not?
- What are the restrictions on the government regarding settlement?
- Convincing a reluctant government to come to the table: Best strategies
- Controlling defence costs: Best practices
- Special considerations for suing Crown corporations
 - notice periods
 - limitation periods
 - exemption clauses
 - procedures
 - what can you sue them for?

Q & A

- Managing the logistical complexity of document gathering for government counsel
- Controlling the large volume of materials in government cases: Practical tips
- Searching and producing e-documents for e-discovery: Best practices

3:00 Networking Refreshment Break

3:15 Reconciling Contradictory Decisions
in Employment Law and Whistleblower Cases:
How Do They Impact Your Case?

Dougald E. Brown

Partner
Nelligan O'Brien Payne LLP

Sean Gaudet

Senior Counsel
Justice Canada

- Under what circumstances are courts hearing whistleblower lawsuits post-*Vaughan v. Canada*?
- Will courts get involved in government employees' cases if there is an "absence of recourse to independent adjudication"?
- Analysing recent conflicting NB and NS whistleblower decisions: Is this issue headed back to the Supreme Court of Canada?
- What recent whistleblower cases has the Supreme Court of Canada refused to hear? Why?
- Getting up-to-date on recent and notable U.S. and Canadian whistleblower cases

4:00 Untangling the Procedural Web in Litigation
against the Crown

John Terry

Partner
Torys LLP

- In which court does the action belong?
- What happens if the action is commenced in the wrong court?
- Sources of procedural rules
- When and to whom does the plaintiff have to give notice, and does that affect limitation periods?
- Must the Crown produce civil servants for discovery?
- Which party should be named?
- Effecting proper service of the claim
- Does the plaintiff need to exhaust administrative remedies first?
- Which rules apply if there are both government and private defendants?
- How do access to information and privacy legislation affect litigation against the government?
- Interveners: Lining them up, arguing for or against their standing
- When are injunctions against the Crown available? How are they different
- Quashing summonses and subpoenas against public officials
- Can the plaintiff execute on a judgment?

4:45 Co-Chairs' Closing Remarks
and Conference Concludes

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ESSENTIAL INFORMATION FOR THE PLAINTIFF AND DEFENCE BAR

Top Reasons to Attend

- ✓ Discover emerging areas of **class actions against the Crown**
- ✓ Minimize your risk of **negligent investigation claims**
- ✓ Get the latest insights on **regulatory negligence cases**
- ✓ Find out how recent **procurement cases** impact the tendering process
- ✓ Demystify the **public inquiry process**: Getting prepared

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