



the advantage

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Public-Private Partnerships

On October 27, 2003, WeirFoulds LLP hosted a half-day seminar entitled "Making P3s Work: The Public Sector Perspective". The article that follows was part of the material offered at the seminar.

Structuring and Financing P3s

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Structuring the P3

One of the most difficult, time-consuming and important challenges facing the public sector is how to structure the Public-Private Partnership (the "P3") to adequately protect relevant public policy and public interest objectives and concerns, while attracting the desired level of private sector involvement, private investment and risk transference to the private sector.

It is extremely important to ensure that the public sector is aware, at the outset of the process, of any limitations on the public sector's ability to structure the particular project in a certain way. By way of

example, before structuring a sophisticated independent corporate entity intended to shield the public sector from liability for project financing, determine: will project financing be available without an adequate guarantee from the public sector entity; or will financing be so much more costly in the absence of such financial support or guarantee from the public sector entity that it will not bear the scrutiny of tests for best value and cost effectiveness that are critical to the project.

There are many ways in which a P3 project can be structured. The following are examples of some structures that can be utilized.

1. After finalizing an agreement with the preferred proponent that is satisfactory to both the public sector and the private sector, the public sector can enter into a Concession Agreement with either the private sector company or consortium, or a special purpose corporation incorporated by the successful proponent. In situations utilizing a special purpose corporation or where the project work is being done by a party other than the party receiving the concession,

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further contracts, such as Design-Build Agreements and Operations and Maintenance Agreements, can be entered into with the party or parties actually doing the work. The public sector often requires that Design-Build and Operations and Maintenance Agreements be assigned to it as collateral security for performance of the concessionaire's obligations under the Concession Agreement. The length of a Concession Agreement depends on the type of project, and the terms of one agreement may vary considerably from the terms of another.

2. Ontario municipalities may now incorporate municipal business corporations under the newly-enacted Regulations under the *Municipal Act*. Such a municipal business corporation can have expanded objects and powers to facilitate various types of P3 projects and commercial undertakings. A municipal business corporation may also permit the public sector and private sector to structure their risk/reward allocations and equity investment through shareholdings in the corporation. So long as appropriate structures are implemented, it may be possible for a municipality to utilize a municipal business corporation to shield the municipality from liability.
3. In some P3 transactions, the public sector retains title to lands and enters into a lease with the

private sector. Under the terms of the Ground Lease, the private sector constructs a building or facilities on the leased land. The private sector is also responsible for operating and maintaining the building or facilities, or arranging for the operation and maintenance of the building and facilities. At the end of the Ground Lease, whether by expiry of the term or early termination, the leasehold interest of the private sector is at an end and, usually, the buildings and facilities then become the property of the public sector.

4. In some P3 transactions, ownership of the lands is transferred in fee simple by the public sector to the private sector. The private sector then undertakes the design, construction, operation and maintenance of the project. At some point in time and subject to specified payments by the public sector to the private sector, title may revert to the public sector.

In choosing the appropriate structure for the P3, the public sector should be mindful of the following:

1. How will governance be handled? Governance deals with, among other things, how decisions are undertaken. In a P3 project, there are decisions that traditionally might have been made by the public sector and which are either made by the private sector alone or jointly by the public sector and the private

sector. The issues of who makes decisions and whether public sector approval is required fall within the topic of governance.

2. Is it anticipated that the private sector is going to contribute equity in the project? If so, the public sector may want to structure the transaction utilizing a corporation so that the private sector can contribute equity to and obtain shares in the corporation.
3. The public sector must always be mindful of the twin needs for accountability and transparency. These are unique requirements faced by the public sector and it is important that the public sector be cognizant of these needs when structuring the P3 project.
4. What control will be had by the public sector over fares, tolls or other revenue from the project, and which contract will embody those controls?
5. What rights will be had by lenders if private sector financing is obtained for the project? The public sector needs to consider this while the project is being structured because lenders will not provide private financing unless the rights, obligations, and responsibilities of the public sector partner, the private sector partner, and the lender are acceptable to all three.
6. The public sector should consider what will happen if the private sector partner defaults

during the term of the Concession Agreement, Ground Lease or other governing document. If the service being provided by the private sector partner through the P3 project is an essential service, the public sector will need to either step in directly or arrange for another party to do so as soon as possible to prevent disruption in the essential service.

Financing the P3

This section briefly describes the sources, types and attributes of both public and private financings for P3s and some important and related issues.

Public Financing Sources

Municipal—

usually equity in a municipal infrastructure project.

Provincial—

for example, the former Ontario SuperBuild Corporation, Golden Horseshoe Transit Investment Partnerships and Transit Investment Partnerships initiatives.

Federal—

Canada Strategic Infrastructure Fund.

Timing and Politics

In Ontario, unlike in some other provinces, there are often two separate agreements—one for each of the federal and provincial funders. This results in two bipartite

agreements as opposed to one tripartite agreement.

This fact gives rise to certain complexities. While the two agreements have to be separately negotiated, they must mesh properly in areas relating to, for example, the conditions of funding, timing of funding and defining expenditures qualifying for funding. If they do not, a host of logistical difficulties can result that can negatively impact the project. We will deal with some of those issues below. Separate negotiations increase the time required to finalize documentation. The project schedule must accommodate sufficient time from the announcement of funding until the agreements are completed so that funds can flow and construction can start. Lengthier time requirements can increase the risks to funding associated with political change or interest group opposition or adverse media coverage. Excessive delays in finalizing documents can jeopardize project schedules or budgets.

The Final Agreements

The terms of the final agreements from Senior Government funders can give rise to some challenges for the P3 project that need to be anticipated and dealt with appropriately.

Unfunded Expenditures

- (a) Funding agreements usually require equal one-third contributions from each of the municipality, the province and the federal government for defined Eligible Expenditures on a

line item basis. The requirement that each funder make a one-third contribution for each Eligible Expenditure on a line item basis means that if an expenditure is ineligible for funding from one funder, it is automatically ineligible for funding from the other funders.

- (b) Many expenditures, especially those related to soft costs, may be capped or may not fall within the definition of Eligible Expenditures under one or both of federal and provincial funding agreements.

The combination of (a) and (b) can result in some necessary expenditures being ineligible for Senior Government funding. This, in turn, means that if the project is to proceed, the public sector partner or the private sector partner may have to fund some unanticipated expenditures.

Cash flow Issues

Sometimes there is a lag between when the funds flow from the Senior Government under funding agreements and when expenditures have to be made in order for the project to proceed.

For example:

- (a) Under many Senior Government funding agreements, funding flows when certain conditions

are met and at the 30, 60, 90 and 100 per cent completion milestones. However, under traditional construction relationships, payments to contractors and subcontractors must be made much more frequently in order for construction to proceed.

- (b) Senior Government funding agreements often provide that funding flows only after expenditures have been made and applications have been submitted and reviewed.
- (c) Senior Government holdbacks are often larger in amount and lengthier than the holdbacks that are permitted under typical construction contracts and subcontracts.

As a result, either the public sector or private sector partner often have to fund cash flow and working capital requirements of the project and to bridge finance between the time when expenditures are practically made for the purposes of the project and when Senior Government funding is actually received.

Private Financing

Types

Private financing can be in the form of equity or debt.

Equity will usually come from the private sector partner and debt can come from the private sector or

private financing entities such as banks, pension funds or insurance companies.

The Essential Business Case

Regardless of the form of private financing or how it is provided, private financing will be achieved only if there is a fundamental business case that establishes the commercial reasonableness of the investment.

First, if private at-risk capital is to be obtained, it must be established that there is a way of quantifying the risk and that a commercially acceptable rate of return can be delivered for the risk being taken.

Ensuring a rate of return is often problematic in a public infrastructure project. They are often money-losing by definition—witness losses of public transit operations on a combined operational and capital basis or even an operational basis alone. Techniques to segregate money-making and money-losing operations (or government guarantees, shadow tolls or subsidy commitments) may be necessary in order to attract private financing to certain portions of otherwise money-losing projects.

If a project does have the opportunity to establish a business case to attract private financing, the business case needs to be supported by commercially acceptable evidence. Some examples follow:

- full review and analysis by credit rating agencies and the issuance of a credit rating.
- investment grade ridership, utilization and revenue forecasts.

These undertakings obviously give rise to cost and timing issues that need to be addressed at the outset.

The Impact of Private Financing on Structure

If the public sector requires at-risk financing by the private sector, it must be prepared to release some control over the management and operation of the project and some of its ability to restrict or control user fees and revenues generated by the project. In other words, in order to transfer risk, the public sector must offer some control over management and revenues to the party accepting the risk. This can be problematic when the project invariably relates to the providing of a public service and requires the protection of a public interest. For example, how far is a municipality willing to go in giving up control over prices for essential services in order to attract private at-risk investment? The objective is to work on these issues in a timely fashion to achieve the appropriate protection of the public interest, given the commercial realities of attracting private financing.



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Commercial Leasing Law

Update on 1497777 Ontario Inc. v. Leon's Furniture Limited

Angela Mockford

Subtenants (and head tenants) may be surprised by the September 2003 decision of the Ontario Court of Appeal in **1497777 Ontario Inc. v. Leon's Furniture Limited** ("Leon's"). The court overturned the June 2002 decision of the Superior Court of Justice of Ontario, which we reported in the Winter/Spring 2003 issue of *The Advantage*.

In *Leon's*, the head landlord had sought a declaration that the head lease terminated due to Leon's default for not obtaining the head landlord's written consent to the renewal of a

sublease with Marca. The head tenant (Leon's) argued that the head landlord was using a technical argument to justify terminating the head lease, when what the head landlord really wanted was to terminate because the head lease provided for rent well below market rate.

Leon's took the position on the application that because:

- (a) the head landlord had previously provided written consent to the original sublease and to an expansion agreement involving Marca, and
- (b) the head landlord had no legitimate basis to argue that Marca was an unsuitable subtenant,

the head landlord was disentitled to terminate. While the applications judge agreed with Leon's and Marca and found that the head landlord was not entitled to terminate, the Ontario Court of Appeal disagreed, allowing the head landlord's appeal and setting aside the judgment.

The applications judge had found most helpful the decision in *St. Jane Plaza Ltd. v. Sunoco Inc.* ("*St. Jane*"), in which the head landlord of a long-term lease had sat back and collected rent for many years while the assignee was in possession, notwithstanding the absence of written consent. Unfortunately for Leon's and the subtenant, the Ontario Court of Appeal distinguished it on the basis that *St. Jane* revolved around a request for a declaration that the head landlord had unreasonably withheld

consent, not a claim for relief from forfeiture. In addition, the Court of Appeal found that the previous consents had to be "read in a particular context and not as unprompted and unilateral gestures on the part of the [head] landlord". It did not "make sense to interpret the scope of the consent to include a period of time slightly more than twenty years in addition to that sought in the requests".

The Court of Appeal therefore determined that the head landlord was indeed entitled to terminate and that Leon's recourse was a claim for relief from forfeiture. However, given the need to glean more facts, the Court ordered that Leon's claim for relief proceed back to the Superior Court of Justice by way of trial and that the subtenant's accompanying claim for relief under section 21 of the *Commercial Tenancies Act* be determined (if necessary) at the same time.

It is interesting to note that while the head landlord was successful in the instant appeal, in that it obtained its termination order, the decision is also quite positive for head tenants and subtenants across Ontario seeking equitable relief. The head landlord immediately raised the argument that relief from forfeiture for sublet without consent is prohibited by section 20(7) of the *Commercial Tenancies Act*; however, the Court of Appeal voiced the view that section 20(7) "does not stand in the way of resort to the equitable jurisdiction of the court" (e.g., under section 98 of the *Courts of Justice Act*). Stay tuned for further developments.



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Municipal and Planning Law

Standard of Judicial Review

Ian J. Lord

The Ontario Municipal Board (OMB) is an expert tribunal representing the pinnacle of planning decision-making in the province, especially since the removal of cabinet petitions in respect of *Planning Act* matters. However, in terms of law and jurisdiction, it is not the final decision-maker. Although it is a court of record, the legislature and common law have seen fit to provide several avenues for the courts to review the decision-making processes of the OMB. The *Ontario Municipal Board Act* provides for a right of appeal, with leave, on questions of law (or jurisdiction). Access to the court system can also be gained by way of an application for judicial review where there is an assertion of a denial of natural justice or the need to obtain a declaration, injunction,

order in the nature of prohibition or other special relief from a court.

Issue: *When accessed, what degree of deference should a court pay to a tribunal such as the Ontario Municipal Board, being constituted a tribunal with expertise in municipal and planning related matters?*

This matter is generally a subject of much consideration. Essentially, the degree of judicial deference is dependent upon the court's perception of the tribunal, the subject matter at issue and the manner in which the matter comes before the court. There are options in the approaches which the courts have defined; moreover, different standards of review may apply to the same tribunal over the course of the same case as a function of the questions involved.

The prospects of an appeal from an OMB decision and the attitude of the court to an OMB appeal are based on a "pragmatic and functional" approach. Is the matter one left to the exclusive decision of the OMB? If so, then there is a very strong reluctance to intervene. With this, an additional factor arises, particularly on an application for judicial review—is there a privative clause? In the case of the OMB, there is.

The OMB Act provides as follows:

96.(4) Save as provided in this section and in sections 43 and 95,

(a) every decision or order of the Board is final; and

(b) no order, decision or proceeding of the Board shall be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari* or any other process or proceeding in any court.

This is less than a full privative clause as it should be noted that appeals are subject to sections 43 (the review power) and 95 (the petition to the Lieutenant Governor in Council application right) of the *Ontario Municipal Board Act*. In section 95, the standard applied to judicial review is higher. For example, if the OMB's decision is "patently unreasonable".

The appropriate spectrum of deference has a number of standards.

(1) "correctness"

no deference, regardless of a privative clause where the issue or question of law goes to the jurisdiction of the tribunal, e.g., a *Charter* interpretation.

In a recent development charges appeal, a conflict between an existing agreement and the current development charge regime was in dispute. At issue was whether the existing agreement specifically precluded future capital charges and created a conflict according to the wording of the statute, as to which document was to govern—the agreement or the by-law. The court found the standard of review to be correctness on the issue of whether

the two regimes could co-exist, given the wording in Ontario Regulation 82/98, Section 17.

- (2) “reasonableness *simpliciter*”
intermediate deference standard;
- (3) “patent unreasonableness”
high level of deference, save for an error on the face of the record or decision.

A court’s choice of the standard to apply is influenced by appeal rights under the statute and the express wording of any privative clause.

Valuable facts to remember in assessing prospects on an appeal or possible judicial review of an OMB decision are:

- The strength of a privative clause, e.g., “final and binding” grants deference;
- the nature of the expertise in issue: the relative level of expertise is important; and
- the perspective of the Act.

In a program of the Municipal Law Section of the Ontario Bar Association, David Stratus paraphrased the “Southam” sort analysis to work out the anticipated standards of deference:

- (1) the terms of the statute creating the right of review.
- (2) the relative expertise.
- (3) the nature of the process.
- (4) the nature of the problem.

Issue: Is the matter one of fact or law?

Questions of fact are generally not to be entertained by the courts; but questions of law attract scrutiny as to their relationship to the tribunal’s expertise. The practitioner must address whether the question of law in issue is one to which the expertise of the tribunal relates.

As the Honourable Justice Blair explained: “There is no standard standard of review. The duty is to ensure that the hearing of an appeal not be hijacked with the search for the standard.”



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Embee Properties Limited et. al.

Paul Chronis, Senior Planner

Introduction

This case summary illustrates how a landowner may strategically gain control over an otherwise unwieldy planning process. If the right circumstances exist to invoke a Joint Board consolidated hearing under

the provisions of the *Consolidated Hearings Act* (“CHA”), any hearings that may proceed within the same land area covered by the CHA might be precluded from proceeding.

The CHA provides the opportunity to issue a Notice of Undertaking (“Notice”) where hearing approvals are required or may be required under two or more of the *Scheduled Acts*. The purpose of this statute is to bring all required approvals together under one tribunal at one hearing to streamline the approval process, eliminate duplication and avoid conflicting decisions. In this particular case, the Niagara Escarpment Commission (“NEC”), as a proponent to an undertaking involving the *Niagara Escarpment Planning and Development Act* (“NEPDA”) and the *Ontario Planning and Development Act* (“OPDA”), chose not to issue Notice. Instead, it decided to proceed towards a hearing under the NEPDA for proposed Niagara Escarpment Plan Amendment No. 71 (“NEPA 71”) without consolidating a related approval under the OPDA [Parkway Belt West Plan Amendment No. 78 (PBWP Amendment No. 78)].

A Notice was subsequently issued by landowners within the area affected by proposed NEPA 71 (as proponents) under the CHA. In the end, the effect of this Notice precluded the Hearing Officer (who was appointed by the NEC to hear, determine and make recommendations on NEPA 71) from holding his hearing for any of the lands affected the Notice.

Particulars of the Case

In the Municipal and Planning Law Client Bulletin (February 2003), we reported on the judicial review of an Order of the Hearing Officer appointed under the NEPDA [*Embee Properties Limited et. al. v. Niagara Escarpment Commission et. al.* (Superior Court of Justice – Divisional Court, December 11, 2002)].

Following this decision, the applicants filed three amendment applications seeking a special study area (“SSA”) designation on a portion of the lands proposed to be covered by NEPA 71. Since more than one hearing was required or may have been required, before different tribunals on the applicants’ amendment applications, a Notice was given. This invoked the provisions of the CHA. A Joint Board was subsequently established and a prehearing conference was held.

The lands subject to the proponents’ SSA undertaking were the same lands affected by proposed NEPA 71. At a Joint Board prehearing conference, the NEC and other public agencies brought a motion to dismiss the proponents’ appeals or, in the alternative, obtain an Order that the proponents’ applications be deferred to the original deciding authority for a hearing.

The Joint Board dismissed the motion and concluded that there were important triable issues that merited a hearing. Suggestions that the proponents’ motives amounted to “venue shopping” and an abuse of

process were rejected by the Joint Board.

The Joint Board was also required to determine, under the circumstances, the relationship between sections 20 and 24 of the CHA as they apply to NEPA 71 and the proponents’ SSA undertaking. Sections 20 and 24 of the CHA are set out below:

1. In the Act,...

“undertaking” means an enterprise or activity, or a proposal, plan or program in respect of an enterprise or activity.

20.(1) Where a proponent of an undertaking gives notice under section 3 to the Hearings Registrar, no person acting under any Act specified in the Schedule or prescribed by the regulations shall hold in respect of the undertaking a hearing specified in the notice or in any amendment to the notice.

(2) Subsection (1) does not apply where the notice under section 3 is withdrawn in accordance with section 6.

24.(1) This Act does not apply in respect of an undertaking in relation to which, before the day referred to in section 3, a hearing has been commenced under an Act set out in the

Schedule or prescribed by the regulations.

(2) Despite subsection (1), the tribunal holding the hearing mentioned in subsection (1), upon application with notice by a party to the proceedings, may order the proponent of the undertaking to give to the Hearings Registrar the written notice mentioned in subsection 3(1).

(3) Upon the making of the order, this Act applies in respect of the undertaking.

The public agencies argued that the hearing on NEPA 71 had commenced, within the meaning of subsection 24(1) of the CHA, before a Hearing Officer for which six prehearing conferences were held and that NEPA 71 constituted an undertaking under the provisions of subsection 24(1) of the CHA. The proponents urged the Joint Board to find that, to the extent there was an overlap between NEPA 71 and the proponents’ SSA undertaking, section 20 of the CHA precluded the Hearing Officer from dealing with that portion of the NEPA 71 lands, which were part of the Proponents’ SSA undertaking, in any hearing to be held by the Hearing Officer.

While the Joint Board concurred that two undertakings existed, only the proponents’ SSA undertaking was recognized, as it was the only one subject to Notice as required under

the CHA. In particular, the Joint Board found that the undertaking referred to in subsection 24(1) of the CHA only pertained to the NEC's undertaking which was not the subject of a consolidated hearing (because the NEC had chosen to proceed with two distinct and separate hearings). Accordingly, subsection 24(2) did not apply because the NEC, as a proponent of the NEPA 71/PBWP No. 78, had not filed a Notice under the CHA and no order had been issued.

Section 20 of the CHA applied only to the Proponents' SSA undertaking since the requisite notice under section 3 was given to the Hearings Registrar. Under the circumstances, section 20 operated in a manner that precluded the Hearing Office (and any other tribunal) from proceeding with a hearing under any of the Scheduled Acts in relation to the Proponents' SSA undertaking.

The Motion was dismissed and a further prehearing conference was ordered to be scheduled forthwith. In accordance with the provisions of the CHA, the City of Burlington and Region of Halton have jointly filed an application asking that Cabinet reverse the Joint Board's decision. As well, the NEC, City and Region have sought a judicial review of it.

Summary

With the right factual circumstances, the CHA proved to be a valuable opportunity for landowners to pursue their property right interests with a creative strategy to eliminate a multiplicity of hearings and have one

tribunal hear their full argument on the issues they sought to address.



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Construction Law

Requests for Proposal

Glenn Ackerley

With the release of her decision in *Buttcon et al. v. Toronto Electric Commissioners*, Madam Justice MacFarland of the Ontario Superior Court of Justice provided some much-needed guidance to understanding the legal rules applicable to the Request for Proposal process.

The Request for Proposal ("RFP") process is increasingly finding favour with owners as a way of choosing a design and in selecting a constructor for a project. Where owners have an idea of what they want in terms of program and function, but are less certain about how to achieve their goals, the RFP process offers owners the opportunity to obtain innovative and creative solutions to meet their needs.

Unlike the traditional tender approach, where the project is designed and then bids are solicited through a tender call, the RFP process involves the owner

developing a set of requirements which are then described in a proposal call document. Interested parties are invited to submit proposals in response to the call, and the owner then evaluates the submissions. Depending on the nature of the project, the evaluation process may be exhaustive, covering a wide range of evaluation criteria and usually involving at least some degree of subjectivity. Price is usually just one factor in determining the winning proposal.

Once the best proposal is chosen, the parties enter into a period of negotiation to settle on the details of the project, from design elements to contract terms. If the negotiations fail to lead to a contract, the owner may turn to one of the other proponents and attempt to negotiate a contract. Alternatively, the owner may decide to scrap the process and take a different route altogether.

The law governing the tender process has been developing since the *Ron Engineering* case in 1981 and by now is well-established and the rules are clear. In recent years, the Supreme Court of Canada, in its decisions in *MJB Enterprises*, *Martel Buildings* and *Naylor*, has dealt extensively with the Contract A/Contract B analysis applicable to tenders.

Those cases have held that the tender process includes an implied contractual obligation on the owner to treat bidders fairly, and to reject bidders whose bids are "non-compliant" or fail to properly respond to the tender call.

What about the RFP process?

Does the same Contract A/Contract B analysis apply, or is an RFP simply a form of “beauty contest” without legal effect? These were the questions faced by MacFarland J. in the Buttcon case.

The action arose out of a request for proposal process run by the Toronto Electric Commissioners (“Toronto Hydro”) in 1993. Toronto Hydro needed to expand its service centre facilities by either renovating its existing facilities and adding a second new site or consolidating all of its operations into a new location. Toronto Hydro decided to explore both the decentralized and centralized approaches and went into the market in early 1993 through a request for expressions of interest process to seek proposals from the construction/development community. The object of the RFEI stage was to elicit proposals for design and construction teams and possible sites. From those who responded, a short list of five proponents was drawn up.

The RFP stage came next. The short-listed proponents were provided with a detailed package setting out Toronto Hydro’s technical and functional requirements. The documentation described the criteria that Toronto Hydro would use to evaluate the proposals submitted including the quality of the design and both the capital and long-term operating costs of the proposal.

Four proponents submitted detailed design-build proposals for both the centralized and decentralized

scenarios. The four proposals varied greatly in both design and price. Two of the proposals had a capital cost of just over \$27 million, while the other two (including “Buttcon”) were over \$40 million.

After carrying out the detailed evaluation of all proposals, Toronto Hydro ended up selecting the second lowest-priced proposal to build a centralized facility. Internorth Construction Company Limited was awarded the contract and proceeded to build the new service centre.

In the meantime, Buttcon and other members of its design team complained that the process had been fatally flawed and the result unfair. In particular, based on an M.J.B. Enterprises-type analysis, Buttcon believed Toronto Hydro had selected a non-compliant bidder and therefore breached its obligations to the other bidders. Although Buttcon had been about \$13 million more expensive than the Internorth proposal, it had scored second in the overall rankings. Buttcon argued that Had Internorth been properly disqualified, Buttcon would have been awarded the contract. Buttcon sued for damages, claiming that Toronto Hydro’s conduct had caused Buttcon to lose the opportunity to earn the anticipated profits.

The five-week trial of the action was held before MacFarland J. in late 2002. In her reasons released, in July 2003, MacFarland J. dismissed the action.

The first issue the court had to consider was the nature of the request for proposal process. Was it like a

tender, giving rise to Contract A? Recognizing the principle in *M.J.B. Enterprises* that whether Contract A arises or not depends on the intentions of the parties, the court concluded that the RFP in this case was “exactly that—a request for proposals and nothing more.” The RFP was therefore a mere invitation to treat.

The court carefully examined the RFP language to reach this conclusion. Of all the factors considered by the court, one of the most important was that the timetable for the process clearly contemplated a significant period of negotiation after the selection of the “preferred proponent” to finalize the scope of the project and the contract terms. The court considered that the prize for the successful proponent at the end of the exercise was the opportunity to negotiate for a contract to build the services centre. The court thought that this suggested something quite different from the Contract A/Contract B issues of *Ron Engineering*.

In the result, Buttcon’s complaint that there had been a breach of Contract A by Toronto Hydro failed, since Contract A had not arisen on the facts.

However, the court went on to consider whether a further legal duty fell on Toronto Hydro to be fair, outside of any implied contractual obligation arising under Contract A. The British Columbia Court of Appeal in *Mid-West Management and Powder Mountain* had recently held that no free-standing duty of fairness

exists in law where no Contract A has arisen. By contrast, the Manitoba Court of Appeal in *Mellco Developments* concluded that even absent Contract A, the proponents in an RFP were at least entitled to have their proposal considered fairly.

MacFarland J. opted to adopt the *Mellco Developments* approach, and held that the owner does owe a duty to consider proposals fairly without favouring or giving an unfair advantage to one over another, even without Contract A. On the facts, the court concluded that Toronto Hydro had treated the four proposals it received in an equitable and fair manner, reviewing each proposal using the same criteria.

In arriving at this conclusion, the court had to consider and then dismiss Buttcon's argument that the winning proposal had not complied with the stated requirements in the RFP in various ways, including the choice of proposed mechanical systems.

Implicit in the court's analysis is this novel concept: even where a Contract A does not arise, the owner's selection of a non-compliant proposal—one which clearly falls outside of what was being asked for—might be considered "unfair treatment" of the other proponents. In this case, however, no such unfairness was demonstrated.

In assessing damages, the court refused to accept Buttcon's argument that its team lost the opportunity to have been awarded the project. The court concluded that it was more

likely that Toronto Hydro would have cancelled the process and run the proposal call again rather than accept Buttcon's much higher-priced proposal. If damages were to have been given, they would have been confined to the costs of preparing the proposal, and even further restricted to Buttcon's costs alone and not those of the other design team members, who were held to be in the position of subcontractors without a direct cause of action against Toronto Hydro.

This case is of interest to both owners and proponents involved in RFPs, as it is the first case in Ontario to impose on an owner a duty to consider proposals fairly even where Contract A does not arise. The case represents an interesting step in the evolution of "fairness" principles in law. Although in this case the owner was held to have been fair in fact, the next step in the evolution will occur where an owner is found to have actually been unfair to one or more proponents. In such a case in the future, the court will have to articulate more fully the true nature of this "fairness" obligation and what are the consequences of breaching it.

Glenn W. Ackerley is a construction lawyer at WeirFoulds LLP and was co-counsel for the successful defendant Toronto Hydro.



Glenn is a partner and member of the Litigation and ADR Practice Groups whose primary area of practice is construction law. He has

represented owners, developers, contractors, subtrades, suppliers, and consultants - ranging from public hospitals and municipalities through to individual tradespeople - with respect to a variety of construction-related matters. Glenn can be reached at 416-947-5008 or at ackerley@weirfoulds.com.

Supreme Court of Canada Law

Supreme Court of Canada Reformulates the Elements of an Unjust Enrichment Claim

Paul M. Perell

The judgment of the Supreme Court of Canada in *Garland v. Consumers' Gas* received attention in daily newspapers because of Justice Iacobucci's stern statement that allowing Consumers' Gas to retain late payment charges—which violated the criminal interest rate provisions of the *Criminal Code*—would let Consumers' Gas profit from a crime and benefit from its own wrongdoing. Justice Iacobucci's dramatic statement overshadows the fact that although Consumers' Gas lost and although it will have to pay a substantial judgment estimated at \$88 million, it was not obliged to repay illegal charges for the period between 1981 and 1994, the period before the start of the class action brought by the plaintiff Gordon Garland.

And, it is worthy of note that Consumers' Gas was obliged only to

repay late payment charges for the period after 1994 to the extent that the charges exceeded an interest charge of 60 per cent per annum. The Supreme Court's judgment in *Garland v. Consumers' Gas* deserves closer scrutiny than provided by the popular press.

Moreover, Justice Iacobucci's dramatic statement in the *Garland* case should also not overshadow the importance of the Supreme Court's judgment in that it goes beyond the claims of customers who sought repayment of illegal late penalty charges imposed by Consumers' Gas starting in 1981. The *Garland* judgment addresses and solves several fundamental theoretical issues about the constituent elements and the available defences to claims for "unjust enrichment". The *Garland* case is a very important case about the claim of unjust enrichment, which may, amongst other things, require the surrender of ill-gotten gains.

The background facts were that Consumers' Gas (now known as Enbridge Gas Distribution Inc.) supplied natural gas to customers in Ontario. The prices it charged were regulated by the Ontario Energy Board. In 1975, Consumers' Gas sought permission from the Energy Board to impose a penalty on late-paying customers. The Board held hearings, and it approved a flat penalty of 5 per cent. The Energy Board recognized that depending on the time of payment, the penalty, if calculated as an interest charge, would be a very high rate of interest.

At the time of board approval, the charge was not illegal.

In 1981, section 347 of the *Criminal Code* was enacted. This section makes it a crime to charge a criminal rate of interest, which is defined to be a rate in excess of 60 per cent per annum. Consumers' Gas did not immediately appreciate that its late payment charge was contrary to section 347.

In 1994, the plaintiff Gordon Garland brought a class action against Consumers' Gas on behalf of 500,000 Consumers' Gas customers. Garland and his wife had paid approximately \$75 in late payment charges between 1983 and 1995. He asserted that the extraction of these late payment charges violated section 347 of the *Criminal Code*. Consumers' Gas denied that its charge was illegal.

Garland's class action and the issue of whether the *Criminal Code* had been violated reached the Supreme Court of Canada, and the court found that the late payment charge was illegal. The court remitted the matter back to the trial judge to consider whether Garland and the other customers were entitled to a judgment for restitution based on what is known as a claim for unjust enrichment.

Justice Winkler, the trial judge, rejected a variety of defences raised by Consumers' Gas, but he ultimately dismissed Garland's claim on the ground that the class action was really a collateral attack on the decision of the Ontario Energy Board that had authorized the late payment charge and that such an attack was not permitted. Garland appealed to the

court of the Appeal for Ontario. A majority of the court (McMurtry, C.J.O., MacPherson, J.A. concurring, Borins, J.A. dissenting) held that there was no collateral attack. However, the majority ultimately held that Garland's claim failed because he could not satisfy all the elements of a claim for unjust enrichment. Garland appealed to the Supreme Court of Canada, where the court concluded that there was a viable action for unjust enrichment and no viable defences.

Justice Iacobucci said that the test for unjust enrichment was well established. This cause of action had three constituent elements:

- (1) the defendant has been enriched;
- (2) the plaintiff has suffered a corresponding deprivation; and
- (3) there is no juristic reason for the enrichment.

In the *Garland v. Consumers' Gas Co.* case, there was no doubt about the second element. Garland and the other natural gas customers had suffered a deprivation by having to pay an illegal charge. The problematic elements, which required study by the Supreme Court, were the first and the third elements of the claim for unjust enrichment.

With respect to the first element, the majority of the Ontario Court of Appeal had concluded that the defendant Consumers' Gas had not benefited or been enriched from having imposed and received the late payment charges. The argument supporting this conclusion was that

given that the charges for natural gas are regulated and set by a government body, the actual beneficiaries of the late charges were customers, who were charged less for the regular cost of gas because of the recovery of moneys from the customers who paid late.

Justice Winkler, the trial judge, Justice Borins, the dissenting judge in the Court of Appeal, and Justice Iacobucci for the Supreme Court all disagreed with this argument. The argument that Consumers' Gas should be exculpated because it, in effect, passed on the benefit to its customers was really a "change of position" defence. Later, Justice Iacobucci would conclude that this defence failed. In the view of all of these judges, the first element of whether the defendant was enriched should be addressed by a straightforward economic approach. Consumers' Gas received payments from the customers and, where money is transferred from plaintiff to defendant, this is an enrichment of the defendant. Thus, the first element of the test for unjust enrichment was satisfied.

The third element for an unjust enrichment claim is that there be no juristic reason for the enrichment. Justice Iacobucci noted that this element had been the subject of academic debate and criticism for several reasons, including the objections that: its meaning was unclear; it seemed to require the plaintiff to prove a vaguely defined negative; and because, in England, the third element of its comparable test for unjust enrichment is the

seemingly more simple requirement that the defendant's enrichment be unjust.

Justice Iacobucci responded to these criticisms by developing a new Canadian approach to the third element of an unjust enrichment claim. The new approach would involve the recognition of established categories of juristic reasons that would justify the defendant's enrichment and then there would be a two-stage analysis. Already established categories that would justify a defendant keeping his or her gains were:

- (1) contract, that is, the parties had contracted for the defendant's gain;
- (2) disposition of law, that is, a valid statute or common law or equitable rule justified the defendant's gain; and
- (3) a donative intent, that is, the plaintiff was making a gift and this justified the defendant keeping any benefit.

With these categories already established, the first stage would require the plaintiff to show that none of the established categories applied to preclude his or her unjust enrichment claim. The second stage then would allow the defendant to show that there was another reason to deny the plaintiff any recovery based on public policy or the reasonable expectations of the parties. The defendant's other reason might be specific to the particular case or it might establish a new general category. However, if there was no established category and no

other justifying reason, then the defendant would not be allowed to keep his or her gains, unless there was a substantive defence to the plaintiff's claim.

Justice Iacobucci stated:

As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of the case but which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed.

Applying this approach to the circumstances of Consumers' Gas illegal late payment charge, the only possible juristic reason was that the Ontario Energy Board's approval of the charge was a statutory justification. This possibility, however, could not be fully realized because the Board's approval could

not be taken as authorizing an illegal charge. The board's approval was inoperative to the extent of a conflict with section 347 of the *Criminal Code*.

Pausing here, it is helpful to explain that Justice Iacobucci was making a constitutional law point. The federal legislative authority to regulate the criminal law is paramount to the provincial legislative authority to regulate property and civil rights in the province, which empowered the province to regulate the supply of natural gas by establishing an Energy Board. Because the Board's order was constitutionally inoperative, it could not fully justify Consumers' Gas late payment charges.

Consumers' Gas also could not establish a new category or a case specific justification for its illegal charges. The reasonable expectations of the parties would not encompass illegal charges and public policy did not justify Consumers' Gas keeping the illegal portion of the charges. It was here that Justice Iacobucci made his stern pronouncement. He stated: "The overriding policy consideration in this case is the fact that the LPPs [late payment penalty] were collected in contravention of the *Criminal Code*. As a matter of public policy, criminals should not be permitted to keep the proceeds of their crime."

It was also at this point of his analysis that Justice Iacobucci made the limited order, the significance of which may have been ignored in the press reporting of the case. He reasoned that for the period between

1981 to 1994, in the absence of actual or constructive notice that the Board's orders were inoperative because of illegality, there was a juristic reason for Consumers' Gas's enrichment. Awarding restitution from 1981 would be unfair since Consumers' Gas was entitled to reasonably rely on the Board orders until the start of the class action. Restitution should be awarded only from 1994, after which it was no longer reasonable for Consumers' Gas to rely on the Board's orders.

Subject to the success of any substantive defences raised by Consumers' Gas, Justice Iacobucci concluded that the plaintiffs in the class action were entitled to restitution of the portion of monies paid to satisfy the late payment charges that exceeded an interest rate of 60 per cent as defined in s. 347 of the *Criminal Code*.

The plaintiff having established an unjust enrichment claim, Consumers' Gas attempted to raise a variety of substantive defences. These defences failed. Justice Iacobucci's consideration of the defences makes a further contribution to developing the law of unjust enrichment.

As already noted above, Consumers' Gas was taken to have raised a change of position defence. This defence was based on the authority of cases that have held that even where the elements of unjust enrichment are established, the remedy of restitution will be denied where an **innocent defendant** demonstrates that it has materially changed its position as a result of an

enrichment such that it would be inequitable to require the benefit to be returned. Justice Iacobucci concluded that this defence was not available to Consumers' Gas because it was not an innocent defendant. It was a wrongdoer by making charges that contravened the *Criminal Code*.

Consumers' Gas also failed to establish other substantive defences. It failed to show that the *Ontario Energy Board Act* authorized the charges. It failed to show that there was an impermissible collateral attack against the Energy Board's decision. The doctrine of collateral attack did not apply because the purpose of the class action was to recover money, not to invalidate an Energy Board order. Further, Consumers' Gas failed to establish the "regulated industries defence". This defence depends upon interpreting the *Criminal Code* criminal interest rate provisions as providing an exemption for rates authorized by the Ontario Energy Board. In other cases where this defence had succeeded, the exemption was supported by the language of the statute in issue. Appropriate language, however, was not present in section 347 of the *Criminal Code*. Finally, Consumers' Gas could not rely on the *de facto* doctrine, which might provide a defence to a government official acting under colour of authority. Consumers' Gas was a private corporation, not a government official vested with some sort of authority.

In the result, to the extent described above, Consumers' Gas was responsible to repay late payment

charges collected after 1994. The exact amount is to be determined by the trial judge.



Paul M. Perell was called to the bar in 1976. Paul received his Masters of Law degree in 1989 and his Doctor of Jurisprudence degree in 1998, both from

Osgoode Hall Law School. His practice is in the areas of research and civil litigation. He is an adjunct professor at Osgoode Hall Law School where he teaches the Real Estate Transactions Course. Paul is an editor of the Ontario Reports. He is the author of Remedies and the Sale of Land, Conflicts of Interest in the Legal Profession, Written Advocacy, and The Fusion of Law and Equity. Paul can be reached at 416-947-5027 or at pperell@weirfoulds.com.

appointments/elections

Sylvia Adriano has been appointed to the executive of the Real Estate Section for the Ontario Bar Association.

Raj Anand has been elected President of Pro Bono Law Ontario, the organization initiated by the Chief Justice of Ontario and the Law Society of Upper Canada whose mission is to increase access to justice in Ontario by creating and promoting opportunities for lawyers to provide pro bono legal services to persons of limited means. Raj has been on the Board of Directors since its inception.

Raj Anand has been appointed to the Court Challenges Program's Equality Rights Panel effective April 1, 2004 through to November 30, 2006.

Jeff Cowan assumed the office of president of the Canadian Property Tax Association for 2004 at the Annual General Meeting which occurred on September 27 - October 1, 2003.

Sean Foran was elected as Secretary of the Ontario Expropriation Association.

Dianne Hipwell was appointed Chair of the GTA Chapter Committee of the OPPI starting June 1, 2003 for a two-year term.

John McKellar was elected Chairman of the Board of Ingenium Group Inc. (formerly Giffels Holdings Inc.) and of all the Giffels and NORR subsidiary companies. He is also Chair of the Governance, Finance and Audit, and Compensation Committees.

Derry Millar has been officially appointed to the Civil Rule Committee by the Chief Justice of Ontario for a further three year term from October 1, 2002 to October 1, 2005. Derry has been a member of the Civil Rules Committee and its predecessor since November 1, 1976.

Derry Millar was re-elected as Bencher to the Law Society of Upper Canada. This is his third successful election. He has served as a Bencher since 1995. He is currently Chair of the Inter-Jurisdictional Mobility Committee; Vice-Chair of the Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochones; Chair of the Appeal Panel; Director of Legal Aid Ontario; and Director of LawPro.

Derry Millar has been named lead counsel to the Commission of Inquiry into the shooting death of Dudley George at Ipperwash Provincial Park in 1995. The judicial inquiry will be led by Justice Sidney Linden.

Lynda Tanaka was elected Secretary of the Board of the ADR Institute of Ontario Inc. on June 18, 2003.

Lynda Tanaka was appointed Chair of the Ontario Racing Commission, effective August 1, 2003.

Lynda Tanaka was appointed by the executive of the OBA to head a task force to inquire into and report on the appropriate model for expansion of the opportunities for programming for Professional Development including Sections, the Annual Institute and CLE. OBA task forces have a year to carry out their mandate and there will be opportunity for input from many sources.

Chris Tzekas was made an honorary member of the Board of Directors of the Hellenic Canadian Lawyers Association. This is an organization he helped found in the early 1980s. He is a Past President.

Richard Wozenilek was appointed Chair of Casa Loma Board of Trustees for a two-year term.

Richard Wozenilek was appointed Chair of the Executive and Senior Officer, for a two-year term, of Timothy Eaton Memorial Church, the largest congregation in the United Church of Canada.

Richard Wozenilek was appointed to the Executive of the Toronto Lawyers' Association (formerly the MTLA) as Assistant Treasurer.

awards

Raj Anand and **Paul Perell** were each awarded with the Law Society of Upper Canada's highest honour—the Law Society Medal in 2003. This is the first time that two lawyers from the same firm have been awarded the Law Society Medal in the same year. Five Law Society Medals were awarded in 2003.

Malcolm Archibald is the recipient of the 2003 Ontario Bar Association's (OBA) Award for Excellence in Trusts and Estates.

Paul Perell is the recipient of the 2004 Ontario Bar Association's (OBA) Award for Excellence in Real Property.

published

Glenn Ackerley: "Construction Liens Enter the Electronic Age", Toronto Construction News, November 2003.

Raj Anand: "PBLO in the clinic context" ("From the Chair" message), Pro Bono News, Fall 2003.

Ralph Kroman: "Confidentiality Agreements Need To Be Solid", Silicon Valley North, July/August 2003, page 15.

Chris Johnston: "Tax Exemption and Relief of the Poor", Focus on Canadian Municipal Assessment & Taxation, April 2003.

Brad McLellan: "The Annotated Agreement of Purchase and Sale for Residential Property" (co-authored with Craig Carter and Gregory Mulligan), CLE Publications – The Law Society of Upper Canada.

The Municipal and Planning Law Practice Group: Ontario Planning Practice: Annotated Statutes and Regulation, Canada Law Book, 2004.

Paul Perell: Case comment - "Disqualifying Conflicts of Interest, Reductio Ad Absurdum, and R. v. Neil", (2003), 27 Adv. Q. 218.

Paul Perell: "Rule 76 and Its Costs Consequences" (2003), 27 Adv. Q. 328.

Paul Perell: "Changing the Common Law and Why the Supreme Court of Canada's Incremental Change Test Does not Work", (2003) 26 Adv. Q. 345.

Paul Perell: "New Developments in Ontario Contingency Fee Agreements" (2003) C.B.L.J. 472 (Volume 38, Number 3).

Paul Perell: "Refusing to Close a Real Estate Transaction" (2003) 7 R.P.R. (4th) 230.

Paul Perell: "Rule 76 and Its Costs Consequences", in the October 2003 issue of The Advocates Quarterly.

George Rust-D'Eye: "The Ontario Municipal Act: A User's Manual" (co-written with Ophi Bar-Moshe), Thomson-Carswell, 2004.

George Rust-D'Eye: "One Year Later - Ontario's New Municipal Act", *Municipal World* (Vol. 114, No. 4), April 2004.

seminars

The Transportation Law Group at WeirFoulds and NewPort Partners Inc, a mergers and acquisitions advisory firm based in downtown Toronto, co-hosted a breakfast seminar at the Brampton Golf & Country Club on September 9, 2003 on the topic of buying and selling a transportation/logistics company.

The WeirFoulds Restructuring and Insolvency Practice Group hosted a breakfast seminar on February 25, 2004 to review the changes in privacy legislation to clarify obligations and to develop strategies for compliance. John Wilkinson, a partner and member of the WeirFoulds Intellectual Property, Information Technology and Privacy Law Group presented.

sponsored conferences

International Council of Shopping Centres Canadian Law Conference, March 4 and 5, 2004.

WeirFoulds LLP sponsored the delegate bags and a cocktail reception.

National Health Law Conference 2004 (organized by University of Toronto), Toronto, Ontario, January 23 and 24, 2004.

WeirFoulds LLP was a sponsor and supported the Student Poster and Paper Competitions which gave current health policy students and recent graduates the opportunity to present the results of research on a topic related to health law and policy.

Insight Conference's 5th Annual Private Equity Markets Summit, Toronto, Ontario, November 17, 2003.

WeirFoulds LLP was a Breakfast Sponsor.

2003 Ontario Hospital Association (OHA) Convention and Exhibition, Toronto, Ontario, November 3- 5, 2003.

WeirFoulds LLP was an exhibitor.

Annual Association of Municipalities of Ontario (AMO) Conference, Toronto, Ontario, August 17 - 20, 2003.

WeirFoulds LLP was an exhibitor and a silver sponsor. Barnet Kussner was a speaker at the conference.

Legal Aid International Conference 2003 – Connections & Directions, Hamilton, Ontario, June 22–25, 2003.

WeirFoulds was a Plenary Sponsor.

Association of Municipal Managers, Clerks and Treasurers of Ontario 65th Annual Meeting and Professional Development Institute, June 2003.

WeirFoulds is a Silver Level sponsor of the conference. George Rust-D'Eye was a speaker at the event.

speaking engagements & continuing legal education

Raj Anand: Speaker, "Recent Supreme Court Decisions that Affect the Practice of Administrative Law", Infonex Conference - Key Changes and Updated Procedures in Administrative Law: A Practical Guide for Lawyers and Tribunal Members, March 31, 2004.

Jeff Cowan: Chair, OBA Administrative Law - The Public Inquiry: Public Accountability or Distraction?, Toronto, Ontario, March 30, 2004.

Raj Anand: Co-Chair, Canadian Institute - National Forum on The Employer's Duty to Accommodate, Toronto, Ontario, March 29 and 30, 2004.

Raj Anand: Moderator, "The Relationship Between Workers' Compensation Systems and the Duty to Accommodate: Dealing with the Overlap", Canadian Institute - National Forum on The Employer's Duty to Accommodate, Toronto, Ontario, March 29 and 30, 2004.

Paul Perell: Speaker, "Fiduciary Obligations or Is it a Breach of Fiduciary Duty to Accept an Appointment to the Bench?", Osgoode Hall Law School - The James Lewtas Lecture, March 15, 2004.

Jeff Cowan: Speaker, "Property Tax Allocation Issues", I.C.S.C - Canadian Law Conference, Toronto, Ontario, March 4, 2004.

Jeff Cowan and Jill Dougherty: Speakers, Aboriginal Claims section of "Dealing with Title Issues", LSUC - Best Practices for Recreational Property Transactions, Toronto, Ontario, March 3, 2004.

Heidi Blustein: Panelist and Presenter, "What Law School Didn't Teach You But You Really Need to Know", University of Ottawa - Career Day, Ottawa, Ontario, March 2, 2004.

Jeff Cowan: Panel Member, "The Constitution and Administrative Discretion", OBA CLE - The Constitution in Your Administrative Law Practice", Toronto, Ontario, March 2, 2004.

Frank Walwyn: Speaker, "Bringing in The Law", OBA - Your First Civil Trial: Practical Tips from Top Practitioners, Toronto, Ontario, February 25, 2004.

George Rust-D'Eye: Speaker, "Our Built Heritage Is Becoming History - A 30-Year Retrospective: The Ontario Heritage Act, 1974", OBA 2004 Institute of Continuing Litigation, Toronto, January 30, 2004.

Jeff Cowan: Course Leader, "Fundamentals of Administrative Law & Practice", The Canadian Institute, Toronto, Ontario, April 22 & 23, 2004.

Sean Foran: Workshop Instructor, "Dynamic Discoveries", The Advocates' Society, April 1, 2004.

John Wilkinson: Speaker, "PIPEDA: A Practical Primer: 10 Principles", Toronto Lawyers' Association, Toronto, Ontario, February 10, 2004.

Richard Wozenilek: Chair, "PIPEDA: A Practical Primer: 10 Principles", Toronto Lawyers' Association, Toronto, Ontario, February 10, 2004.

David Brown: Panel Member, "Negotiating Techniques", Venture Skills Summit, Toronto, Ontario, February 2, 2004.

John Wilkinson: Speaker, "Your Charity in Business: Revenue Diversification for Nonprofit Organizations", Canadian Fundraiser Workshop, January 21, 2004.

Raj Anand: Speaker, OBA - Administrative Law - Annual Update on Judicial Review, Toronto, Ontario, January 15, 2004.

John Hamilton: Chair, Osgoode Hall Law School CLE - The Essential Curriculum in Charities, Toronto, Ontario, January 15, 2004.

Bay Ryley: Speaker, "Being a lawyer...", Grade 11 students at Branksome Hall, January 15, 2004.

Lisa Borsook: Presenter, Interactive Learning Network - The Annotated Retail Lease, Toronto, Ontario, January 22, 2003.

Glenn Ackerley: Speaker, "Trust Claims and Other Effective Recovery Techniques", PM Expo Show 2003, Toronto, Ontario, December 3, 2003.

Sean Foran: Workshop Instructor, The Advocates' Society - Effective Examination in Chief, December 2, 2003.

Paul Perell: Director, Osgoode Hall Law School - Professional Development Program - Part-Time LLM Specializing in Real Property Law.

George Rust-D'Eye: Panel Moderator, "The Exercise of Municipal Powers", OBA Program - Much Ado or Much to Do: The Municipal Act, 2001, December 12, 2003.

David Wingfield: Panelist, "Balancing the Interest of the Parties Affected by DIP Financing", Insight 2nd Annual Debtor in Possession Financing Forum, Toronto, Ontario, December 9-10, 2003.

Greg Richards: Chair, The Advocates' Society Civil Litigation Skills Certificate Program - Effective Examination-in-Chief, December 2, 2003.

Bryan Finlay: Speaker, The Advocates' Society Civil Litigation Skills Certificate Program - Effective Examination-in-Chief, December 2, 2003.

David Brown: Panel member, "Best Practices in Private Equity Investing", Insight Conference - 5th Annual Private Equity Markets Summit, Toronto, Ontario, November 17, 2003.

Greg Richards: Faculty, The Advocates' Society Civil Litigation Skills Certificate Program - Civil Motions Workshop 2003, Toronto, Ontario, November 15, 2003.

Zirka Jakibchuk: Judge, Cherniak Cup Trial Advocacy Competition, University of Western Ontario, November 10, 2003.

Bryan Finlay and Paul Perell: Faculty, Osgoode Hall Law School and The Advocates' Society - Seventh Annual Workshop on Written Advocacy, Toronto, Ontario, November 7 and 8, 2003.

Raj Anand: Speaker, "Annual Update on Administrative Law", 2003 OBA Conference, November 7, 2003.

Raj Anand: Speaker, "Update on Administrative Law", Society of Ontario Adjudicators and Regulators, Toronto, Ontario, November 6, 2003.

Raj Anand: Co-chair, LSUC - 2nd Annual The New Lawyer Experience, Toronto, Ontario, October 27, 2003.

Brad McLellan: Faculty, LSUC - 2nd Annual The New Lawyer Experience, Toronto, Ontario, October 27, 2003.

Lynda Tanaka: Speaker, "Compensating Developers", British Columbia Expropriation Association Meeting, Vancouver, British Columbia, October 24, 2003.

John Hamilton: Participant, Demonstration Mediation, Advocates Society, October 23, 2003.

Lisa Borsook and Debbie Rogers: Speakers, "Differences that American Retailers can expect in the Leasing Process when coming to Canada", U.S. International Council of Shopping Centre Law Conference, October 22 – 25, Palm Desert, CA.

Lynda Tanaka: Panelist, "Change in ADR, provincial initiatives and the Racing Commission", Annual Meeting of the ADR Institute of Canada, October 17, 2003.

George Rust-D'Eye: Speaker, "Future of Municipal Government and Legislative Impact on CAO and Council Relationships", 2003 Ontario Municipal Administrators' Association – Fall Conference, Oakville, October 16, 2003.

George Rust-D'Eye: Speaker, Transitional Provisions in Municipal Legislation, 68th Annual Conference of the International Municipal Lawyers Association – Canadian Department Meeting, Minneapolis, Minnesota, October 14, 2003.

Lynda Tanaka and Chris Johnston: Speakers, "Annual Case Update", Ontario Expropriation Association Annual Meeting, October 10, 2003.

George Rust-D'Eye: Co-chair, Canadian Institute – Creating Enforceable Municipal By-Laws, Toronto, Ontario, October 2-3, 2003.

George Rust-D'Eye: Speaker, "Winning Strategies for Justifying New Business Licensing By-Laws", Canadian Institute – Creating Enforceable Municipal By-Laws, Toronto, Ontario, October 2-3, 2003.

Jeff Cowan: Chair, Canadian Property Tax Association - 37th Annual National Workshop - New Municipal Powers, New Values, New Taxes-A New Deal for Tax Payers?", Vancouver, British Columbia, September 28 – October 1, 2003.

John O'Sullivan: Participant, Roundtable Discussion - "Recent Developments in ADR", Centre for the Study of Financial Innovation, London, England, October 2003.

David Brown: Speaker, Mergers and Acquisitions Skills Summit 2003, Federated Press, September 29, 30 and October 1, 2003.

David Brown: Panel Chair, "Targeting an Acquisition for the Right Fit", Mergers and Acquisitions Skills Summit 2003, Federated Press, September 29, 30 and October 1, 2003.

Ian Lord: Speaker, Lorman Seminar - Zoning and Land Use in Ontario, Metro Toronto Convention Centre, September 23, 2003

Nicholas Holland: Panelist, "Break Out Session A – Barrister and Solicitor Groups", OBA – Excelling at Articles: What you didn't learn at Bar Ads, Toronto, Ontario, September 18, 2003.

Nicholas Holland: Panelist, "Opening Plenary Discussion: Optimize your Mentor–Mentee Relationship and Practice Management", OBA – Excelling at Articles: What you didn't learn at Bar Ads, Toronto, Ontario, September 18, 2003.

the advantage



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