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**1. C.A. Reads Down Burden of Proof**

In [Baril v. Obelnicki](#), 2007 MBCA 40 (CanLII) the court considers the constitutionality of provisions of *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*. The court finds that the legislation falls within provincial jurisdiction. The court goes on to find that "...while the Act does infringe the respondent's freedom of expression, prohibiting expression that is unwanted by the applicant and in some cases harmful is justified under s. 1 of the Charter." The court continues:

The real crux of this case lies in an analysis of s. 7 and its application to this Act. An order limiting the respondent's freedom of movement in relation to the applicant so as to prevent contact between the two and end stalking behaviour is indeed an infringement of the respondent's liberty. However, that infringement is in accord with the principles of fundamental justice so long as the respondent is accorded a fair trial with fair procedures, the nature of those procedures being determined within the context of the Act's purpose and objectives. Provisions allowing for a protection order to be granted without notice and for the transcribed evidence from the without notice hearing to be used at the review hearing are in accord with the principles of fundamental justice. However, a clause that places the legal burden of proof on the respondent rather than the applicant is problematic. The clause requires the respondent "to demonstrate, on a balance of probabilities, that the protection order should be set aside" (s. 12(2) of the Act). Rather than strike it down, as the motions court judge did, I would read it down to constitute an evidentiary burden. A respondent need not show that the without notice order was granted in error. A respondent need only show, on a balance of probabilities, that there is an issue arising from the without notice hearing that entitles them to have the order set aside on the basis of absence of full disclosure or based on the weight of all the evidence adduced at both the without notice and review hearings.

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**2. Law Firm Not Negligent in Mortgage Fraud: B.C.C.A.**

The B.C. Court of Appeal in [B.S.A. Investors Ltd. v. DSB](#), 2007 BCCA 94 (CanLII) allows the defendant law firm's appeal, finding that the firm cannot be found negligent in a mortgage fraud perpetrated by their client, a co-defendant. The court held that this was not an exceptional case in which the court should infer causation, and that the plaintiffs had not met the burden as to causation, which included in this case, the requirement to show that had the lawyer performed his duty the client's misdeeds would have been stopped.

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### **3. Apology Act Update**

In last month's Update, we advised you about Private Members Bill 217, *The Apology Act* which had received first reading in the Legislative Assembly in mid-April. The Bill subsequently died on the Order paper with the calling of the provincial election.

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### **4. Small Claims CLE**

Small Claims Court can be an important tool for business clients seeking to collect outstanding accounts. For an update on the procedures in this court as well as a review of the recent amendments to [\*The Court of Queen's Bench Small Claims Practices Act\*](#), attend the upcoming Law Society CLE program, [\*Small Claims Court: Amendments, Significant Decisions & Practical Considerations\*](#) on June 19.

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### **5. Expert Evidence Materials**

The following articles provide some useful tips in the use of expert witnesses at trial:

- [\*Expert Evidence Part 1 - The Expert's Role\*](#)
  - [\*Expert Evidence Part 2 - Hearing Process\*](#)
  - [\*Enhancing Expert Witness Trial Testimony: Collaboration Between Testimony and Technology\*](#)
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