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1. State of the Art Design Need not be Perfect: S.C.C.

In *Canadian National Railway Co. v. Royal and Sun Alliance Insurance Co. of Canada*, 2008 SCC 66 the court considered whether an insurance exclusion clause for "faulty or improper design" was applicable so that the insurer was not liable for costs occasioned by a delay in the conclusion of a tunnel boring machine design project undertaken by CNR. A 4-3 majority decided in favour of the insured, holding that:

> In my view, the words "faulty or improper" require the insurers to go beyond simply showing a failure in circumstances of foreseeable risk. The words "faulty or improper", and in particular the word "improper", require the insurers to establish that the design fell below a "realistic" standard. Such a standard can require no more than that the design comply with the state of the art. A standard of perfection in relation to all foreseeable risks, in my view, was not required by the words used by the parties. It was for the insurers to demonstrate that the exclusion applies….The insurers are entitled to the benefit of the exemption unless the design met the very highest of standards of the day and failure occurred simply because engineering knowledge was inadequate to the task at hand.

For discussion on the decision, read *CN Rail v. Royal and Sun Alliance: Faulty Insurance Not Faulty Design* by Jeremy Barretto published on November 24, 2008 on The Court.

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2. 3rd Party Disclosure Crosses the Border: F.C.A.

The Federal Court of Appeal in *eBay Canada Ltd. v. Canada (National Revenue)*, 2008 FCA 348 (CanLII) considered whether the Minister of National Revenue could, pursuant to the *Income Tax Act*, obtain information regarding 3rd party sellers from eBay where that information was stored on electronic servers located in the United States. In coming to its decision to allow the access and dismiss the appeal, the court found that:

> The principal question to be decided in this appeal is whether the information sought by the Minister is "foreign-based" because it is "available or located outside Canada" for the purpose of subsection 231.6, despite the fact that the appellants, Canadian corporations, have been authorized to access it in Canada for use in their business, but do not download it to their computers.
>
> In my view, Justice Hughes made no reversible error in concluding on the facts before

him that the information sought was not "foreign-based information"; even though stored on servers outside Canada, it was also located in Canada because of its ready accessibility to and use by the appellants. Consequently, it was open to the Minister to seek its production by a requirement imposed on the appellants under section 231.2, without regard to any possible limitations on those powers flowing from the presence of section 231.6.

The decision is reviewed in some detail in the article *Federal Court of Appeal Orders Disclosure of Third Party Information Located Outside Canada* published in the November 11, 2008 issue of the *Osler Update*.

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3. The Master Controls the Process: Q.B.

The court in *Spiring v. Gould*, 2008 MBQB 282 (CanLII) considered an appeal from a master's order refusing to enforce a subpoena issued against the applicant in an assessment hearing on a lawyer's bill. The applicant refused to produce documents requested by the respondent lawyer and the master directed the respondent to bring a motion for disclosure in advance of the assessment hearing. Instead of doing so, the respondent issued a subpoena against the applicant. On appeal, the court held that the master couldn't quash the subpoena as it was not inherently within a master's jurisdiction; however, it held that the master does have inherent power to control the process. The respondent, in disregarding the directions of the master and resorting to another means to obtain disclosure of documents was found to be abusive of the court process.

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4. No Injunction against Police Entry: Q.B.

The plaintiff's motion for an interim injunction against the Chief of Police in *Mallett v. McCaskill*, 2008 MBQB 286 (CanLII) was refused. The injunction sought would have required all police to abstain from entering upon the plaintiff's property, and was sought in conjunction with a claim alleging trespass and breaches of the Charter and privacy legislation. Although the plaintiff established there were serious issues of whether there had been a legal entry by police and whether they had assaulted her, the court was not satisfied that there was any reasonable concern for her safety. Further, there was no irreparable harm found as the evidence did not establish that any police officer was targeting her. Finally, the uninterrupted right and duty of police to enter the plaintiff's home on an emergency call militated against granting the injunction.

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5. Federal Court Procedures: CLE

The Manitoba Bar Association's Aboriginal Law and Civil Litigation Sections are co-presenting a program, *Federal Court Procedures - A Practitioner's Perspective* on Tuesday, December 9, 2008 at 12:30 p.m. in the 12th Floor Boardroom - Woodsworth Building, 405 Broadway. Presenters Norman Boudreau and Paul Anderson will address the general processes involved in the Federal Court and the differences between the Queen's Bench Rules and Federal Court Rules, including differences relating to service, filing of records, time limits, and case management. They will also discuss recent cases and issues specific to the practice of aboriginal law. Contact the Manitoba Bar Association for further details and to register for the program.

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