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Journalist-Source Privilege a Case-by-Case Determination: SCC

The Supreme Court of Canada's recent decision in [*Globe and Mail v. Canada \(Attorney General\)*](#), 2010 SCC 41 confirms the finding in last spring's [*National Post*](#) decision that while there is no *Charter* or class-based journalist-source privilege, there is a common law basis for determining whether a privilege exists in a particular case. In this case, the court sent the matter (concerning a confidential source used in uncovering the federal sponsorship scandal) back to the Quebec court to apply the case-by-case Wigmore test to determine whether a privilege should be accorded. The court summarises the proposed test at para. 65 of the decision. The following articles discuss the decision and its implications for investigative journalism in greater detail:

- [*Wigmore Criteria Upheld for Journalistic Sources*](#), by Omar Ha-Redeye, posted October 24, 2010 on Slaw;
- [*Globe and Mail v Canada - More Case-by-Case Privilege for Journalists and Confidential Sources*](#), a Heenan Blaikie LLP blog post from October 29, 2010;
- [*Media confidentiality gets big boost by Supreme Court*](#), a *Lawyers Weekly* article from November 5, 2010.

Wrongful Dismissal Restatement: ABCA

The Alberta Court of Appeal decision in [*Merrill Lynch Canada Inc. v. Soost*](#), 2010 ABCA 251 is a must read for employment law lawyers as it gives a detailed summary of the law of wrongful dismissal (and the employer's right to dismiss) and sheds light on a number of damages issues that have been considered post [*Honda Canada Inc. v. Keays*](#), 2008 SCC 39. The court overturned a lower court decision awarding a high performing financial advisor \$1.6 million for loss of reputation and book business, finding that neither the stigma of dismissal nor economic loss from being dismissed are compensable. The \$600,000 damages in lieu of notice award was not contested on appeal. Among other things, the appeal court found that, unless the dismissal itself was unduly unfair or insensitive (the *Honda* scenario), "damages because of dismissal with neither reasonable notice nor pay in lieu cannot exceed what pay in lieu would have been." (para.15) Most commentators believe the decision reflects a trend away from large damage awards and bad faith compensation. The *Lawyers Weekly* article [*Appeal court rejects damages for stigma of dismissal*](#), provides a succinct summary of the decision.

Impecunious Plaintiff Deserves Day in Court: MBQB

The court ordered severance of the issues of liability and damages in [*O'Brien v. Tyrone Enterprises Ltd*](#), 2010 MBQB 229, a personal injury action where there was clear evidence that the permanently disabled plaintiff would be financially unable to proceed to trial if she had to incur expenses for medical and loss of income evidence without an earlier confirmation of liability against the defendant. The court accepted the plaintiff's "access to justice" argument, finding that "Litigants in the economic position of this plaintiff, absent any evidence or suggestion that their claim is frivolous or vexatious or otherwise without merit, have little or no ability to fund the cost of litigation in today's economy." (para. 18) The court distinguished earlier cases suggesting that severance is the exception rather than the rule in Manitoba, finding this to be "one of the "exceptional cases" where it is "just" and "most expeditious" for severance to be granted."

Authenticating Foreign Documents: MBQB

In [*Nandwani v. Nandwani*](#), 2010 MBQB 227 the court considers the proper procedure for permitting the proof of the authenticity of documents under Rule 53.02. The plaintiff, a resident of India, requested an order permitting the introduction of affidavit evidence from a lawyer or official in India as to the authenticity of birth certificates indicating he was the son of a deceased Manitoba resident. The court found that while in some cases affidavit evidence may be sufficient,

where there may be records coming from the same foreign jurisdiction which say different things, the reliability of those records is put into issue. In those circumstances, a court may insist upon more cogent proof of the documents. In particular, the court may require proof of the documents from a knowledgeable witness in a manner that permits appropriate cross-examination of that witness.

The court adjourned the matter for the plaintiff to prepare the affidavits and to allow both sides to explore whether cross-examinations would be necessary and how that might be facilitated (e.g. by video conferencing rather than having witnesses travel from Calcutta).

Final Report on Limitations: MLRC

The Manitoba Law Reform Commission released its final report on [*Limitations*](#) on October 26, 2010. The report identifies the primary areas of Manitoba limitations law requiring modernization and recommends the best ways of accomplishing the goal of new limitations legislation. Among other things the Commission suggests abolishing the various categories of claims set out in the current act and replacing them with a single two year limitation period running from when the claim was discovered or discoverable (with a 15 year ultimate limitation running from the date the act or omission took place). Copies of the report and the [*executive summary*](#) are available online or at Information Services, Room 29, Legislative Building.

Proportionality in Electronic Disclosure and Discovery

The Sedona Conference Working Group 7 has released the "public comment" version of [The Sedona Canada Commentary on Proportionality in Electronic Disclosure & Discovery](#) and is seeking feedback from litigators. The commentary offers principles-based guidelines and advice on the application of proportionality, which has become a practical requirement as much as a conceptual ideal as the volume of electronically stored information has grown. The report includes two appendices: a table of civil procedure rules from each jurisdiction dealing with relevance and proportionality; and an outline of the factors to be considered when applying proportionality analyses at each stage of discovery. To comment download the [form](#) from the [website](#) or email comments to rgb@sedonaconference.org.

Free Webinar

The webinar [Preparing the Expert for Trial](#) is available for free download from the BC CLE Practice Points website.

Lock Up Your Children

The article [Negligence and Young Children](#), posted October 31, 2010 on Slaw, discusses the much talked about [decision](#) of the New York Supreme Court which held that a bike-riding four year old who knocked over an elderly woman (who later died) could be sued for negligence. The author questions the absurdity of applying tort law to young children and looks at how Canadian courts have dealt with child negligence. It's interesting reading.

Upcoming CPD Programs: LSM

[Hearings Before the Master](#) - The last program in the Bench and Beer series for junior lawyers will be held December 2, 2010 at 5:00 p.m. at the Law Society classroom. Presenters Senior Master Rick Lee, Master Shayne Berthaudin, and Andrew Loewen will speak on how to enhance your appearances before Masters of the Court of Queen's Bench. [Register](#) now to confirm your spot.

[Gain the Edge! Negotiation Strategies for Lawyers](#) - This day long seminar, presented by Martin Latz, negotiation expert and author of *Gain the Edge! Negotiating to Get What You Want*, received rave reviews when it was presented in 2009. Attendees will learn to approach negotiations with a strategic mindset, a critical skill that benefits inexperienced and seasoned negotiators alike. The program will be held February 11, 2011 at the Law Society classroom. [Register](#) by January 15th to take advantage of the early bird discount.

Remedies From Dollars to Sense? - 2010 Isaac Pitblado Lectures

The [2010 Isaac Pitblado Lectures](#) will explore developments in the law of remedies in both the traditional courts and administrative bodies. Keynote speakers include The Hon. Mr. Justice Cromwell of the Supreme Court of Canada, Dame Hazel Genn, Faculty of Laws, University College, London, and Professors John McCamus, Kent Roach and Gerald Heckman. The lectures will be held November 26 and 27, 2010 at the Fort Garry Hotel.

New *Code of Professional Conduct*

The Benchers have approved a new *Code of Professional Conduct* which will come into effect on January 1, 2011. The new *Code* provides a clear, concise and updated set of rules by which lawyers will be expected to conduct themselves. All members of the profession will be required to complete some form of training on the *Code* within one year of its implementation. The Law Society will offer training in a number of formats, including in person training (there are free programs scheduled in [Brandon](#) on December 2, 2010 and [Winnipeg](#) on December 10, 2010), online self-study, and teleseminars.

