



eLaw - Litigation Update

March / April 2011 - No. 48

ISSN 1916-3932

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Consumer Protection Trumps Mandatory Arbitration: SCC

The divisive decision in [*Seidel v. TELUS Communications Inc.*](#), 2011 SCC 15 has opened the door to future court challenges of mandatory arbitration clauses and increased judicial intervention in the arbitration process say those commenting on the widely anticipated decision. The court held (5-4) that compliance with B.C. consumer protection legislation (s. 172 of the *Business Practices and Consumer Protection Act*) cannot be waived by contract. Thus the appellant can proceed with a class action proceeding against her cell phone provider despite clauses in their contract requiring disputes to be settled by arbitration and waiving the right to participate in class actions. The majority found that

The policy objectives of s. 172 would not be well served by low-profile, private and confidential arbitrations where consumers of a particular product may have little opportunity to connect with other consumers who may share their experience and complaints and seek vindication through a well-publicized court action. (para.37)

The minority disagreed, calling the majority interpretation "an inexplicable throwback to a time when courts monopolized decision making and arbitrators were treated as second-class adjudicators." (para. 55)

These articles discuss the decision:

- [*Supreme Court of Canada Allows Parties to Escape Arbitration Clause and Pursue Class Action*](#), March 24, 2011, Osler Update;
- [*Supreme Court overrules B.C. top court. says consumers can join class actions despite signed contracts*](#), March 18, 2011, Vancouver Sun.

The Limits of Class Action Defamation: SCC

Each member of the group in a class action for defamation must prove they personally

suffered damage to their reputation according to the Supreme Court in [Bou Malhab v. Diffusion Métromédia CMR inc.](#), 2011 SCC 9, an unsuccessful attempt to sue a Quebec radio host who made disparaging comments about Arabic taxi drivers. The court outlines the constituent elements of the law of defamation at para. 22ff and lists the factors used to determine whether an injury has been sustained at paras. 57-79. It also comments on the need to strike a balance between the protection of reputation and freedom of expression. These articles provide more detail:

- [Supreme Court of Canada Denies Taxi Drivers' Class Action Against Radio Host](#), March 4, 2011, Osler Update;
- [Bou Malhab v. Diffusion Métromédia](#), by Alysia Lau, posted March 2, 2011 on The Court.

Recent Manitoba Decisions

- [Bodnarchuk v. RBC Life Insurance Co. et al.](#), 2011 MBCA 18 - This case reviews Manitoba case law on what evidence is necessary to demonstrate the existence of a genuine issue for trial in a summary judgment context. The court concludes that a "theoretical possibility" that a claim may succeed, unsupported by hard evidence and negated by an unequivocal fact-based denial, is insufficient to meet the defendant's burden at the second stage of a Rule 20 application to establish that the claim has a real chance of success.
- [Smith v. The City of Winnipeg](#), 2011 MBQB 52 - In failing to connect a residential property sewer line to a new sewer main the City breached its duty of care to the property owner and was found liable in negligence for flooding and sewer backup resulting from the pooling of water and effluent in the soil surrounding and beneath the foundation of the house.
- [Michaud v. Government of Manitoba](#), 2011 MBQB 34 - The court confirms the dismissal of the plaintiff's action to recover the value of grain destroyed by environmental officers, finding the action to be both "an impermissible collateral attack and an abuse of process." The plaintiff had neither heeded the clean up and remedial orders issued concerning the contaminated grain, nor challenged the Director's decisions by appealing to the Minister of Conservation as provided in s.26(1) of *The Dangerous Goods Handling and Transportation Act*.
- [Roschuk v. Relf](#), 2011 MBQB 37 - A car repair business owner who left a customer's vehicle parked outside over night was found liable in negligence for loss of property stolen from the vehicle. The court found that the owner had failed to meet his onus as a bailee for reward to prove that he was not negligent in his care of the vehicle.

Controversial Facebook Preservation Order

Much has been written about the controversial preservation order in [Sparks v. Dubé](#), 2011 NBQB 40, requiring a lawyer to arrange a meeting with his client to allow a hired agent to seize the contents of the unsuspecting client's Facebook account. The order was sought by the insurance agent for the other driver in the personal injury case, who argued that the Facebook data might not otherwise be retrievable as it wasn't necessarily stored on the client's hard drive. The decision will not be appealed as the case was recently settled. It highlights the need for lawyers to warn clients of the dangers of posting incriminating material on social networking sites. For commentary see:

- [Court Grants Ex Parte Order to Preserve Facebook](#), All About Information blog, February 21, 2011;
- [Lawyer Ordered to Download His Own Client's Facebook Account Data In Injury Lawsuit](#), BC Personal Injury Lawyers Blog;
- [Judge orders secret meeting to download Facebook account](#), *National Post*, March 1, 2011;
- [Facebook photo seizure settlement reached](#), CBC news March 1, 2011.

Recommended Reading

Litigators may be interested in these recent publications:

- [Emerging Legal Issues in Social Media: Part II](#) by Ken Strutin, published March 21, 2011 on LLRX, summarizes and links to the latest research on law-related social media issues.
- [The art of examinations-in-chief \(and more\)](#) - this *Canadian Lawyer* article by Winnipeg litigator Dave Hill sets out a framework for proper examination-in-chief and offers practical tips on telling a story through the use of an agreed book of documents and maintaining your own trial book on common evidentiary topics.
- [A question of proportionality](#) - this *Inhouse* article from April 2011 discusses one of the downsides of the digitization of society - escalating disclosure costs when a matter goes to court - and the new proportionality principles (and rule changes in some provinces) which have developed to address the problem.
- In [Proof of Cause, Probability, Statistics](#), a March 12, 2011 Slaw posting, David Cheifetz recommends that all litigators read this UK judgment dealing with causation in a case of asbestos exposure: [Sienkiewicz v Greif \(UK\) Ltd \[2011\] UKSC 10](#).
- [Did Mustapha alter rules for psychological harm?](#), a *Law Times* article from March 1, 2011, discusses the Ontario Court of Appeal decision in [Healey v. Lakeridge Health Corporation](#), 2011 ONCA 55, which may or may not have altered the threshold for compensable psychological injury unaccompanied by physical injury.
- The website for the Ontario Court of Appeal contains an [archive of speeches](#) by judges of the court, including this article on [Writing More Persuasive Factums](#) by the Honourable Mr. Justice John Laskin, recently [recommended](#) by Eugene Meehan, Q.C. in his SCC LawLetter.

E-Discovery Case Digests Updated

The Sedona Canada Working Group (WG7) has updated its [Canadian E-Discovery Case Law Digest](#) as of March 6, 2011. The digest now has two new topic areas (Pleading practices and Conduct, civility and collegiality), and cases have been added to the sections on Scope of Production and discovery, Requests for further production, Spoliation, Proportionality and Marginal Utility, Form of production, and Social Media and Internet Information.

Upcoming Continuing Professional Development Programs: LSM

Register soon for these upcoming CPD programs offered by the Law Society:

- [Accommodation in the Workplace](#) - Presenters will examine such current issues as family/marital status, gender identity and disability in this dynamic area of law. The program will take place May 17, 2011, from 1:00 to 4:00 p.m. at the Law Society classroom.
- [Time Mastery for Support Staff](#) and [Time Mastery for Lawyers](#) - Don't miss this opportunity to learn how to increase the organization and efficiency of your office and improve the job satisfaction of you and your employees. Frank Sanitate has taught this popular program since 1977 and receives enthusiastic reviews. The programs take place April 27, 2011 (support staff) and April 28, 2011 (lawyers) from 8:30 a.m. to 4:30 p.m. at the Law Society classroom.

Manitoba Bar Association Programs

It's Bring a Buddy month at the Manitoba Bar Association, so non-members are welcome to attend the following programs. Contact the MBA for further information or to RSVP.

- The Young Lawyers section will present the program [Limitation Periods and Drafting of Pleadings](#) on April 12, 2011, from noon to 1:30 p.m. at the Law Society classroom. Master Shayne Berthaudin and Ted Bock will offer tips and advice on the use and drafting of pleadings and the steps to take and to avoid when making an application to extend a limitation period under *The Limitation of Actions Act*.
- The Administrative Law section will present [A Tribunal's View of the Charter: What has changed since R. v. Conway?](#) on April 15, 2011, from noon to 1:30 p.m. at the Law Society classroom. Speaker John Stefaniuk, Chair of the Manitoba Criminal Code Review Board, will discuss *R. v. Conway*, 2010 SCC 22 (which confirmed that an administrative tribunal which can consider and decide legal

questions is a court of competent jurisdiction for the purpose of providing a *Charter* remedy) and examine its practical impact on administrative tribunals.

- [A Primer on Records Management and e-Discovery](#), a joint program offered by the Civil Litigation and Technology and Intellectual Property sections, will take place April 18, 2011 at the Law Society classroom, from noon to 1:30 p.m. Join Susan Wortzman and John Myers as they discuss records management policies, litigation holds, and best practice approaches for all phases of discovery.
- The Civil Litigation section is presenting the program [The Art of Direct and Cross-Examination: A Perspective from the Bench and the Bar](#) on April 29, 2011, from noon to 1:30 p.m. at the Law Society classroom, with speakers The Hon. Justice Shawn Greenberg, Richard Handlon, and Robert Sokalski.

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