May 2, 2016

I. INSURANCE ISSUES

General information of claims practices and company personnel obtained by an insurer's in-house counsel is not the type of confidential information that will disqualify the lawyer from acting as Plaintiff's counsel against the insurer in a bad faith claim.

***McMyn v. Manufacturers Life Insurance Co.*, 2015 BCSC 2205, per E.M. Meyers J. [4180]**

I. FACTS AND ISSUES

This application was brought by the defendant insurer in an attempt to disqualify the plaintiff's lawyer from acting in the main action. In the underlying action giving rise to this decision, the plaintiff sought coverage for benefits under a disability insurance policy and damages for bad faith.

a) The Background

The plaintiff's lawyer, Fishman worked for the insurer as in-house counsel from 2002 until 2012. During Fishman's employment with the insurer, he defended actions brought against the insurer, including actions for long-term disability. During Fishman's employment with the insurer, he often worked closely with a particular claims consultant, Guy Lize. The particular claim giving rise to this action was brought by Ms. McMyn approximately 18 months after Fishman had left his employment with the insurer. The claims consultant on Ms. McMyn's case was Guy Lize.

b) The Positions

a. The insurer's position

Although the insurer acknowledged that Fishman had left the company before Ms. McMyn's claim was received and that therefore he did not have confidential information relating specifically to her file, in the insurer's opinion, Fishman was still disqualified from acting in this case because he possessed "knowledge of [the insurer's] business practices, litigation strategies, insurance policies and certain claims personnel" (para 2). To support its position, the insurer presented evidence from Guy Lize, who testified that he and Fishman discussed the performance of case managers and appeal specialists in depth and that he shared strategic information with Fishman, such as which case managers were stronger, which would make better witnesses, and which would be uncomfortable if cross-examined. According to the insurer, this inside knowledge of the "personalities and practices of the company" should disqualify him from acting (para 16).

b. Fishman's position

Fishman denied that he was ever given any secret strategy information regarding the insurer's claims process and asserted that he had no special knowledge of the people dealing with the claims or the insurer's general claims handling practice. He emphasized that all litigation lawyers were intentionally separated from the initial file handling units and case managers in order to avoid the risk that litigation lawyers would be forced to act as witnesses if the claim got to court. While he acknowledged working with Guy Lize, he minimized the type of discussions and interactions they had, arguing that he "simply provided legal advice" and helped prepare for questioning (para 9).

c. The Galley action

Both parties brought up the fact that Fishman was acting against the insurer in an almost identical action, known as the *Galley* action. The insurer initially objected to Fishman's representation of the plaintiff in the *Galley* action, but by the time this application came before the Court, the insurer had revised its position and was happy to let Fishman continue to act. Fishman raised this issue to suggest the insurer was being inconsistent in its approach. The insurer raised the issue to attempt to prove that it was not being unreasonable and was not adopting a blanket policy against Fishman. The insurer claimed that the difference between the *Galley* action and the McMyn action was that the *Galley* file had been primarily dealt with by staff in Toronto, most of whom Fishman had not personally dealt with (para 11-12).

Issues:

1. Is knowledge obtained by in-house counsel of a company's general strategies and approach sufficient to create a category of conflict?
2. Is Fishman in possession of confidential information which would disqualify him from acting due to a conflict of interest?

II. <u>HELD</u>: For the Plaintiff; Fishman could continue to represent the Plaintiff.

1. There are two standard categories of lawyer conflict (para 14). This case does not fall into either of the two categories the Court usually deals with:

> (a) It is not a case where the lawyer is representing two clients who are adverse in interest to one another. It is not a case where the "bright line" test is met. The bright line was defined in ***R. v. Neil***, 2002 SCC 70 (S.C.C.) as:
>
> > i. the general rule that a lawyer may not represent one client whose interests are ***directly*** adverse to the ***immediate*** interests of another current client - even if the two mandates are unrelated - unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.
>
> (b) It is not a case where a lawyer has moved to a new firm that acts against a former client of

the first firm.

2. The issue in finding a conflict is whether the lawyer has acquired confidential information and whether that information will be used in carrying out the file. The approach the Court followed in analyzing this issue was from ***ATCO Gas & Pipelines Ltd. v. Sheard***, 2003 ABCA 61 (Alta CA) (para 19):

> (a) The Court will first determine if the two retainers are sufficiently related such that it would be reasonable to conclude the lawyer had obtained confidential information in the first action that would be relevant in the second.
>
> (b) If yes, there is a presumption that the lawyer has confidential information. The lawyer must then prove that the confidential information was not relevant.

3. The Court should take a cautious approach when determining if there is a conflict in each case. The Court should only "interfere in 'clear cases'" (para 37).

4. The fact that the position held was one of in-house lawyer is relevant to the analysis (para 23).

> (a) Relying on ***MacDonald Estate v. Martin***, [1990] 3 S.C.R. 1235 (S.C.C.), the Court noted that there are competing interests at stake that must be considered when determining whether an in-house lawyer is acting in a conflict of interest (para 23). These competing interests include:
>
> > (i) The integrity of the legal profession;
> >
> > (ii) The ability of a client to choose counsel; and
> >
> > (iii) The mobility of lawyers.

5. In proving that a conflict exists, it is not enough to show merely that a former employee has knowledge of the corporation, its general practices, its litigation philosophy etc.

> (a) As stated by the Court in ***Canadian Pacific Railway v. Aikins, MacAulay & Thorvaldson*** (1998), 157 D.L.R. (4th) 473 (Man. C.A.), "[t]here is a distinction between possessing information that is relevant to the matter at issue and having an understanding of the corporate philosophy of a previous employer" (para 27).
>
> (b) Rather, according to ***Wallace v. Canadian Pacific Railway***, 2013 SCC 39 (S.C.C.), "[t]he information must be capable of being used against the client in some tangible manner" (para 27).

6. The type of information obtained by Fishman in his role as in-house counsel with the insurer was not the type of confidential information that will disqualify him from acting.

> (a) The kind of general knowledge Fishman has of claims practices and company personnel is not enough to "raise the rebuttable presumption" that he has confidential information (para 40-41).
>
> (b) Whether Ms. McMyn's illness/injury fits within the terms of the policy will depend on the medical evidence available and the wording of the policy. There is no possibility for any kind of secret information affecting this (para 32).

(c) Whether the allegation of bad faith is true or not will depend on how the claim was treated. Fishman can have no specific information as to how this particular claim was treated because he was not an employee at the time the claim was processed (para 33).

(d) Fishman's knowledge of how particular employees perform under cross examination etc. gives him an advantage, but the information could be gleaned by any other plaintiff lawyer working often against the same insurer (para 34-35).

(e) The insurer cannot use the fact that Guy Lize is on this file as a barrier to Fishman acting. It had the power to appoint a different claims consultant if it chose (para 39).

COMMENTARY: With respect, the logic of this decision is questionable. While a knowledge of the opposing client's personnel and practices is not generally grounds for a conflict of interest, insurance bad faith claims are a different breed of cat from other litigation. Where the plaintiff insured seeks to prove that the defendant insurer acted in a high-handed, malicious fashion, an intimate knowledge of the insurer's people and protocols should be grounds for disqualification on the basis of conflict of interest.

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May 2, 2016

II. LIABILITY ISSUES

Where an owner consents to possession of a vehicle to the driver, conditions on that consent do not bind third parties who are injured or suffer loss.

***Fernandes v. Araujo*, 2015 ONCA 571 [4179]**

I. FACTS AND ISSUES

Eliana Araujo ("Araujo"), John-Paul Almeida ("John-Paul") and Sara Fernandes ("Fernandes") were visiting a farm owned by Carlos Almeida ("Carlos"). Carlos owned an ATV which he used around the farm. During the visit, he gave Fernandes and Araujo permission to use the ATV. John-Paul expressly told Araujo and Fernandes that they should only use it within the farm limits. Despite this warning, Fernandes and Araujo took the ATV out on the highway to visit Carlos's cousin on a neighbouring farm. On the return journey, the ATV was hit by a car on the highway and Fernandes was injured. At the time of the accident, Araujo did not have a license that allowed her to operate an ATV. Allstate (the owner's insurer) was third-partied into the main action against the owner and, although it initially denied coverage for Araujo, was third-partied in by the Motor Vehicle Assurance Fund.

Allstate brought two motions for summary judgement. In its first motion, it asked for the third party claim against it in the Araujo action to be dismissed on the grounds that the statutory conditions of the Ontario policy limited coverage to a driver with the appropriate class of license. Allstate was successful in this first motion, with the court agreeing that Araujo fell outside of the policy limits.

In its second motion, Allstate asked for the claim against it in the "main action" to be dismissed, arguing that Araujo was not driving with Carlos's consent at the time of the accident, a prerequisite pursuant to section 192(2) of Ontario's *Highway Traffic Act*, RSO 1990, c H.8 [the "*Highway Traffic Act*"]. This motion was unsuccessful.

The motion judge first found as a fact that Carlos had given Aruajo unconditional permission to use the ATV. Although the judge recognized that John-Paul had warned Araujo not to take the ATV off of the farm, he found that this did not affect the owner of the vehicle's unconditional grant. In addition, the motion judge interpreted the law to hold that once Carlos consented to Araujo's use of the ATV, he became liable for *any* use of that vehicle even if such use exceeded the terms she was given permission under. In other word, even if Carlos had specifically prohibited Araujo from taking the ATV off of the farm, he would be liable. Allstate appealed the Court's decision on this second motion.

At issue on appeal was the interpretation of section 192(2) of the *Highway Traffic Act*, which reads as follows:

> 192(2) The owner of a motor vehicle or street car is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle or street car on a highway, *unless the motor vehicle or street car was without the owner's consent in the possession of some person other than the owner* or the owner's chauffeur.

II. HELD: Appeal dismissed; Allstate liable under the owner's policy

1. The motion judge was held to be in finding that Aruajo was driving the vehicle with the owner's consent. Allstate is liable under the owner's policy. The Court first noted that s. 192(2) is there to protect the public, and acts to encourage owners to be careful about who they lend their cars to (para 20).

2. The Court then turned its mind first to whether there the motion judge was correct in finding that Carlos had not expressly prohibited Araujo's use of the vehicle on the highway. Relying on ***Myers-Gordon (Litigation Guardian of) v. Martin***, 2013 ONSC 5441, Allstate argued that "the test for consent essentially turns on the subjective belief of the party in possession of the vehicle." The Court rejected this argument, holding that this "would be inconsistent with the language and purpose of s. 192(2)." It added

> It cannot be the case that if the person in possession subjectively believes that he or she has the owner's consent, that alone is sufficient to determine the liability of the owner. That would allow anyone with actual possession of the vehicle to fix the owner with liability even where the owner had not consented to that person having possession of the vehicle. The focus of the language and purpose of the provision are on the actions of the owner who is charged with the responsibility of exercising appropriate caution when giving another person possession of the vehicle (para 25).

3. Although the Court accepted that there is a "subjective component to the test," it is just that – a component, and will not be determinative in the absence of other corroborative evidence (para 28).

4. The Court then moved on to address the decision in ***Newman v. Terdik*** *(1952),* [1953] O.R. 1, a decision relied upon by Allstate. In ***Newman***, the driver was specifically told by the owner not to take the car onto the highway. Although the Court in ***Newman*** acknowledged that the driver was initially given permission to use the vehicle, it found that "possession can change from rightful possession to wrongful possession or from possession with consent to possession without consent." The Court found that permission to drive on private property did not equate to permission to drive on the highway, and that by taking the vehicle off of private property, the driver lost the consent of the owner such that the owner was no longer liable.

5. Although the motion judge in this case found that Carlos did not expressly prohibit the use of the vehicle on the highway in the same way as the owner in ***Newman***, the Court recognized that *if the motion judge had found otherwise*, ***Newman*** would act as "authority for the proposition that Carlos is not vicariously liable as the owner of the ATV." For that

reason, it was necessary to address the correctness of that decision.

(a) To that end, at para 36, the Court noted first, relying on the 2008 Court of Appeal decision in *Finlayson v. GMAC Leaseco Ltd.*, 2007 ONCA 557, that

> [i]t is fundamental to th[e] purpose, and to the operation of s. 192(2), that the owner's vicarious liability is triggered by consenting to possession and that the concepts of possession and operation are distinct" "[C]onsent to possession of a vehicle is not synonymous with consent to operate it. Public policy considerations reinforce the importance of maintaining that distinction" ***Finlayson***, at para. 3.

The Court then referenced the weight of other authorities supporting the decision in ***Finlayson***, which have consistently held that "where the owner has consented to possession, the owner will be liable pursuant to s. 192(2) even if the vehicle is operated in a manner forbidden by the owner" (para 37).

(b) Allstate argued that the decision in ***Newman*** represents a narrow carve-out from that general rule, noting that the statute "refers to the owner's liability for "negligence in the operation of the motor vehicle...on a highway" and arguing that "where the owner did not consent to the vehicle being taken on the highway, the consent required by the statue is absent" (para 42). However, the Court of Appeal readily rejected that argument, finding that

> the reference to "negligence in the operation of the motor vehicle...*on a highway*" means nothing more than that the owner's liability will only be triggered where the place of the negligence and injury is on a highway. That does not qualify the general proposition that the owner's liability turns on consent to possession, and consent to possession is not vitiated by violation of a condition attached by the owner to his or her consent to possession. If the owner cannot escape liability where the person with possession violates a condition that he or she not drive the car at all, it is difficult to see why the result should be different where the condition is that the car not be driven on a highway. I see nothing in the language of s. 192(2) capable of justifying treating a stipulation by an owner that his or her vehicle not be taken on the highway differently from any other stipulation restricting the use or operation of the vehicle (para 43).

As a result, although the Court recognized that it is normally bound to follow decisions from the same level of court, it found that this was a circumstance where it warranted a departure from that general rule, stating at paras 47-49:

> The common law has long prided itself in its capacity to evolve and improve with the times. The rule of *stare decisis* is not absolute. There comes a point at which the values of certainty and predictability must yield to allow the law to purge itself of past errors or decisions that no longer

serve the interests of justice. Moreover, decisions that rest on an unstable foundation tend to undermine the very values of certainty and predictability that *stare decisis* is meant to foster.

In my view, the advantages of overruling ***Newman*** and correcting the error it made outweigh the disadvantages. I think it highly unlikely that Carlos or any other vehicle owner would have relied on ***Newman*** when deciding to grant possession of a vehicle to another party. Nor do I think it likely that insurers such as Allstate, who must provide owners with coverage even where the vehicle is operated in a manner prohibited by the owner, have placed any significant reliance on ***Newman*** in the management of their affairs.

To leave ***Newman*** intact would not serve the interests of certainty and predictability in the law. The court's reasoning was inconsistent with the earlier 1933 decision in ***Thompson***, and its authority has been severely attenuated by a steady string of subsequent decisions. It creates an anomaly that cannot be supported in principle, one that undermines the coherence of this area of law and that is likely to lead to confusion.

Given the weight of jurisprudence against ***Newman***, the Court rejected it as a precedent, and dismissed Allstate's appeal.

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May 2, 2016

III. QUANTUM/DAMAGES ISSUES

A. TMJ, concussion, depression, PTSD, and chronic pain held not to be "minor injuries" within the meaning of the *Minor Injury Regulation.*

***McLean v. Parmar*, 2015 ABQB 62, per Eidsvik, J. [4177]**

I. FACTS AND ISSUES

The Plaintiff was in a motor vehicle accident with a bus. Defendants admitted liability, leaving the only issue as quantum of damages. The Plaintiff claimed that she suffered from severe soft tissue injury (a WAD II injury) to her neck, shoulders and back, headaches, dizziness, injury to her TMJ, PTSD, depression, a concussion and chronic pain that lasted approximately two and a half years. A Certified Medical Examiner (CME) had given the opinion that her injuries were "minor injuries."

The Plaintiff was working two jobs at the time of the accident. As a result of the accident, she had to quit her second job. Plaintiff also had to delay starting a two year course towards obtaining her Certified General Accountant (CGA) designation by two years.

The issues were whether any of her injuries qualified as "minor injuries" under the *Minor Injury Regulation*, Alta.Reg. 123/2004, what her loss of earning capacity was, and what her loss of housekeeping capacity was.

II. HELD: Injuries are not minor injuries, entitled to recover general damages.

1. The Plaintiff's injuries were held not to qualify as "minor injuries" under the *Minor Injury Regulation*.

(a) The only injury that could potentially be considered minor was the WAD II soft tissue injuries to the Plaintiff's neck, back, arms and hip.

(i) TMJ, concussion, depression, PTSD, and chronic pain were held not to be "minor injuries."

(b) The opinion of the Certified Examiner under s.12 of the *MIR* that the injuries were minor is *prima facie* evidence that the injuries are minor.

(c) Under the definition of "minor injury" in the *MIR*, the injury does not result in a "serious impairment."

(i) "Serious impairment" is defined as an impairment of a physical or cognitive function that results in a substantial inability to perform the essential task of the Plaintiff's employment, education/training program, or of normal

activities of daily living, that has been ongoing since the accident and is not expected to improve substantially.

(ii) For the WAD injury to be considered "seriously impairing," it must be the primary factor contributing to the impairment.

(d) The Court found that the Plaintiff had displaced the *prima facie* CME opinion, as she was unable to continue her employment as a server. Although her injuries had "recovered," this meant she was maximally recovered, not that she was able to return to such a physically demanding job.

(i) The Plaintiff was also unable to perform activities of daily living, including housecleaning and sports such as softball, which she played regularly prior to the accident. Although the ability to perform housecleaning did recover, the ability to play softball did not.

(e) The Court also found that although she was able to enroll in the CGA program eventually (two and a half years later), the fact that she was delayed such that the impact on her career and child bearing decisions was considered a "serious impairment to her life" from which there could be no recovery.

(i) However, the Court did not accept the Plaintiff's argument that this delay in training meant that she would be impaired over her lifetime and for that reason fits within "serious impairment," as the impairment contemplated in the act is one of "physical or cognitive function," while this loss in career and life choice would attract economic and non-pecuniary damages rather than physical or cognitive ones.

(f) The Court also looked at her injuries from a "common sense point of view" to find that the injuries suffered were not the kind contemplated by the Legislature to be "minor."

(i) Her 60 physiotherapy sessions were well beyond the 21 session automatically approved in a "minor injury" situation.

(ii) Her problems lasted two and a half years, which is classified as "chronic pain" as it is longer than three – six months, and therefore it is not a minor injury.

(g) The Court found that although she could technically be considered to have "improved substantially" as most of her WAD injuries had recovered, her situation was not one where the Legislature intended to define as "minor."

(i) The Court also found that it cannot assess each of the Plaintiff's injuries individually, as the effects are "inextricably intertwined" and therefore her damages must be assessed globally.

(h) The Plaintiff was awarded $60,000 in general damages:

(i) $25,000 for the moderate whiplash, concussion and chronic pain.

(ii) $10,000 to $15,000 for the TMJ.

(iii) $20,000 to $25,000 for the PTSD and depression problems.

2. The Plaintiff's Loss of Earning Capacity was quantified at $40,800 regarding her loss of the serving job and $55,000 with respect to the two-year delay in beginning her CGA courses.

(a) The Plaintiff was claiming loss of earning capacity for being unable to continue her serving job, as well as economic loss due to delay in starting her CGA courses.

(b) Serving job

(i) The Court rejected the Defendant's economist's 5 shifts per month estimate based on her pre-accident employment records for a few weeks in favour of the Plaintiff's estimate that she worked approximately 12 shifts per month historically.

(ii) The Plaintiff conceded that she may have quit the part time job during her CGA in any event, but the Court accepted that she may have worked between courses and over the holidays.

(iii) The Court also found that moving to Saskatoon would not have necessarily been a barrier to this work, and that she probably would have continued working part time until she had her child.

(iv) The Court allowed her full loss for the period prior to taking her CGA courses, 50% of her losses during the time should would have been taking the courses, and 50% for the time after the courses until she had her baby, as it was possible she would have reduced her hours once her income went up due to becoming a CGA.

(v) The total amount awarded for the part time serving job was $40,800.

(c) CGA delay

(i) The Plaintiff claimed that she would forever be two years behind in her career due to the delay.

(ii) The Court limited the claim to a few years, rather than all the way through her career, rather than relying on the assessments of the two economists.

(iii) The Court did not rely on the defence economist's opinion because it was based on the assumption that the Plaintiff would work in Saskatchewan for the remainder of her career (and there was a possibility of moving back to Alberta in the future where her wages would be higher) and the economist used only earnings statistics for female accountants, instead of a blend of male and female, where this Plaintiff had not followed the average earning pattern of a female accountant.

(iv) The Court found that the loss would be felt more acutely in her first few years of her career as at some point the loss would likely not be as noticeable due to

so many other factors that enter into the progression of a career.

(v) The Court granted a loss at the higher end of the estimates, and awarded $55,000.

3. The Plaintiff's housekeeping claim was quantified at $12,500.

(a) Prior the collision, the Plaintiff did 90 – 95% of the housecleaning.

(b) After the accident, she testified that "everything was a struggle and that she did very little to nothing."

(c) It took approximately a year and half before she was able to do the cleaning and cooking again. Prior to this, her mother came into town and helped, as did her husband.

(d) The plaintiff bought a robot vacuum and hired extra cleaning help when they moved.

(e) The Court found the statement of law in ***Willeson v. Calgary (City)***, 2007 ABQB 117 to the effect that taking longer to do housework or having other people living with you do them does not attract damages to have been misinterpreted.

(i) The Court found that the Court of Appeal has found that gratuitous and voluntary services performed by others as a result of the Plaintiff's incapacity does not bar a claim.

(ii) As well, taking longer can potentially entail an economic housekeeping loss, depending on the evidence.

(f) The Court used her estimate of 6 hours per week of housekeeping for a year and half, at $20/hour to come to the award of $12,500 and awarded:

(i) $12,000 for this calculation.

(ii) $500 for the help painting by her mother.

III. COMMENTARY: This case does go against the prevailing notion that housekeeping that takes longer than usual is not compensable. As well, it appears to restrict the definition of "minor injury" to a case by case basis, and appears to reject the ability to separate injuries in this determination.

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May 2, 2016

B. In assessing the quantum for loss of future income earning capacity, negative contingencies must be supported by evidence.

***Sunner v. Rana*, 2015 BCCA 406, per Chaisson, J.A. [4178]**

I. FACTS AND ISSUES

This is an appeal by the defendants from damages of $350,000 for future loss of income and $20,000 for cost of future care awarded to the respondent for injuries suffered in a 2008 motor vehicle accident. Due to his injuries, the respondent, then 32, was unable to continue working as a taxi driver or janitor. In 2011, the respondent and his brothers purchased a gas station in the US. The trial judge found the gas station was selling gas at a loss due to competition from a nearby First Nation. In assessing the respondent's loss of future income, the trial judge awarded him $100,000 for the negative contingency that the gas station business was at risk of failing. Neither the respondent nor his brother testified that they feared the business would fail. There was no expert evidence on the likelihood of the business succeeding or failing. In 2013, revenue to November 30 from fuel sales exceeded the cost of fuel by approximately $110,000. In the four years prior to the accident, the respondent's average income was $32,236. The average for the five years after the accident was $11,009.

II. HELD: Appeal allowed. The award of $100,000 for a negative contingency was set aside. The award for future loss of income was reduced to $200,000. The issue of the costs of future care was remitted to the trial court.

1. Future loss of income and negative contingencies:

a. The cornerstone of the judge's concern was his understanding that the gas station was selling gas at a loss. This observation was based on the testimony of the respondent and his brother.

b. Although they recognized that any business has risk, neither the respondent nor his brother testified that they feared the business would fail.

c. The financial records of the business do not support either selling gas at below cost or the business failing because of the sale price of gas:

25 The judge's concern with the competition with the First Nations gas station may be understandable, but, in my view, on the available evidence, it cannot translate into a conclusion that there was

> a serious risk the respondent's business would fail and an award for a negative contingency…

d. Though the trial judge did not fully explain his reasoning for awarding $250,000 for future loss of income, the Court of Appeal explained:

> **30** … this Court must examine not only the reasons, but the record to determine whether the award is supported by the evidence: *Shannon v. Shannon*, 2011 BCCA 397 at paras. 9, 28. It also is important to note that the assessment of damages is not a mathematical exercise and that it should take into account negative and positive contingencies when it is appropriate to do so: *Harlow v. Thompson*, 1999 BCCA 271; *Westbroek v. Brizuela*, 2014 BCCA 48.

e. The respondent testified that he worked three or four days per week in the gas station business. Subsequently, he could work full-time managing a family business, although this likely would require him to upgrade his language and other skills. This might be considered to be a positive contingency. The trial judge did consider the potential for the respondent to continue full-time employment in the gas station business or in a management position.

> **39** The judge was entitled to reject the appellants' position that the respondent was entitled to only a modest amount for loss of earning capacity and to award a significant sum for that loss. In my view, the judge erred in not considering the evidence that the respondent could work full time and in not considering that the gas station business would succeed and provide the respondent with an income at least comparable with his pre-accident income.
>
> **. . .**
>
> **41** The judge was influenced by the negative contingency in awarding the appellant $250,000 for loss of earning capacity and did not consider the positive potential for the respondent to work full-time in the gas station business or in a management capacity despite his inability to work as a janitor or taxi driver. In my view, he erred on both counts.
>
> **42** While respecting the judge's award of significant damages for loss of future income, in my view, it must be reduced. I would reduce the award to $200,000.
>
> **. . .**
>
> **56** There is no evidence to support the $100,000 awarded by the judge for the negative contingency that there is a high risk the business would fail. The basic $250,000 assessed by the judge as the present loss of future income, is infected with his concern that the business would fail and with his failure to consider the positive contingencies of full-time employment, consistent with the expert evidence, and possible success of the business based on its financial records…

III. COMMENTARY: This case illustrates that negative contingencies must be supported by evidence. Further, it also illustrates that award for future loss of income must also consider positive contingencies.

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IV. PRACTICE ISSUES

A. Do police need a warrant to access the data on a vehicle's airbag control module without the owner or driver's permission?

***R. v. Glenfield*, [2015] O.J. No. 1212, per Hambly, J. [4175]**

I. FACTS AND ISSUES

The Accused, Glenfield, was charged with impaired driving causing death, dangerous driving causing death and refusing to provide a breath sample arising from a motor vehicle accident on December 22, 2011. Glenfield was driving a 2010 Jeep Cherokee owned by his employer (a Jeep dealership) but designated for his exclusive use. He drove west on Gerber Road through a stop sign and struck the Huber Dodge Caravan that was proceeding south on Nafziger Road. Just prior to the accident scene, Glenfield had crossed a bridge over a creek (135 metres back from the scene) and then went uphill towards the intersection. There were signs posted warning of the approaching intersection. Both vehicles were extensively damaged. An 11 year old passenger in the Huber van was killed.

There was evidence that Glenfield had consumed alcohol before the accident. He failed a roadside breath test. After Glenfield failed the roadside breath test, he was arrested and transported to the police detachment.

Subsequently, Cst. Stotts entered the Jeep to download information from the Event Data Recorder (EDR) that was part of the Airbag Control Module (ACM). He did this without obtaining consent of Glenfield. He felt that it was necessary to download the data at the scene to avoid the EDR being activated by another event (such as being jostled during a towing process) which might erase the EDR data relating to the collision. To access the EDR, Cst. Stotts "forcibly removed the cover in the front seat area of the Jeep at the console which exposed the ACM" and "made no attempt to remove the cover by taking out the screws that held it in place." He then downloaded the data to his own computer. He did not download the data from the Huber van because his computer equipment was not compatible with the EDR in that vehicle.

The EDR data from Glenfield's vehicle showed that his Jeep decelerated from 106 kms/hr at 5 seconds prior to the accident (and 134 metres from the point of impact) down to 86 kms/hr (2 metres from the point of impact) at 0.1 seconds prior to the collision. It showed that the accelerator was 0 percent at between 5 and .08 seconds before impact. It increased to 2 percent at 0.6 seconds before impact, and to 37.8 percent at 0.3 seconds before impact, dropping down to 32.3 percent

at 0.2 seconds prior to impact. The accelerator was at 0 percent at 0.1 seconds before impact. The Court noted "that the data had indicated Glenfield accelerated at the hill west of the intersection immediately before the accident" and "did not activate his brakes in the 5 seconds before the accident."

The Crown called an expert motor vehicle collision analyst who gave the opinion that aggressive driving on the part of Glenfield with a long episode of inattention explained why he ran the stop sign, based in part on the EDR data.

The downloading of the EDR took place before the decision in ***R. v. Hamilton*** [2014] O.J. No. 747 was issued (which held that the owner of a vehicle has a privacy interest in the vehicle's EDR data, such that police must obtain a warrant to download it).

At trial, Glenfield applied to have the EDR data excluded on the basis that it had been the result of an illegal search, contrary to his *Charter*, section 8 rights against unreasonable search and seizure.

II. <u>HELD</u>: For the Crown; EDR data admitted

1. The Court held that Cst. Stotts' activity in accessing and downloading the data from the EDR was a warrantless search and thus presumptively unreasonable.

2. The Court held that Glenfield had a subjective expectation of privacy in the subject matter of the search to qualify for section 8 protection, noting that the concept of reasonableness does not add or detract from whether or not the accused had a subjective expectation of privacy.

3. Glenfield's expectation of privacy was held to be objectively reasonable.

4. The Court considered the factors outlined in ***R. v. Hamilton*** to conclude that Glenfield's section 8 ***Charter Rights*** had been breached by the warrantless search of his EDR.

> (a) It was held that in entering the Glenfield vehicle the police committed a trespass.
>
> (b) It was held that the information in the EDR module, revealing precise details of Glenfield's driving, was "private information to which the police should not automatically have access" (para. 49).
>
> (c) It was held that the information on the EDR was not in public view, was obtained by an intrusive technique that was objectively unreasonable. The Court held that the police had a right to enter the vehicle to deactivate the power source to the EDR to protect it from a risk of recorded information being erased in a subsequent jostling incident, and to allow police to seek a warrant to actually download the data on the device (para. 51 – 54).

5. However, the Court held that the evidence ought not to be excluded, despite the *Charter* breach, based on the three-part test set out in ***R. v. Grant*** [2009] 2 S.C.R. 353.

> (a) The Court held that the seriousness of the police *Charter* breach was at the "low end of the spectrum." Cst. Stotts did not know that Glenfield had been arrested when he downloaded the data. He acted in accordance with his police agency's policies which allowed

for search and seizure of an EDR without a warrant, and this was done before the ***Hamilton*** case was decided.

(b) The impact of the accused *Charter*-protected interest was held to be "minimal."

(c) The Court held that society's interest in the case being adjudicated on its merits "could scarcely be overstated." Even though it would not "gut" the prosecution case, the charges involved the death of an 11 year old child.

III. COMMENTARY: A key point to note about this case is that it held that police access of Airbag Control Module data involves a breach of the driver's section 8 *Charter Rights*. The *Grant* analysis as to whether or not the evidence should be excluded could go differently today. A key factor in the Court's ruling was that the search took place long before case law was decided that stressed the importance of privacy in digital devices (relating to search and seizure of same) and the *Hamilton* case which held that a warrant was required.

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May 2, 2016

B. Do police need a warrant to access the data on a vehicle's airbag control module without the owner or driver's permission?

***R. v. Fedan*, 2016 BCCA 26, per Smith, J.A.** [4176]

I. FACTS AND ISSUES

The Accused, Fedan, appealed his convictions for two counts of dangerous driving causing death arising from a single vehicle accident that occurred in the early morning hours of March 20, 2010. Fedan lost control of his pickup truck in attempting to negotiate a curve in a residential area of Kamloops where the speed limit was 50 km/hour. Two of his passengers died as a result of the accident.

Fedan's vehicle was seized by the police pursuant to the *Criminal Code*, R.S.C. 1985, c. C-46, Section 489(2) and stored at a towing compound. Police members in charge of the criminal investigation obtained a warrant to conduct a forensic search of the vehicle for blood, DNA, fingerprints, personal effects, documents relating to the registration, insurance and maintenance of the truck. The warrant did not expressly authorize the seizure of the airbag control module (referred to in this case as a Sensing Diagnostic Module or SDM).

Independent of the police members in charge of the criminal investigation, Sgt. Noonan (a police collision analyst and accident reconstruction expert) attended at the towing yard, removed the SDM from the truck (where it was bolted to the floor underneath the driver's seat) and downloaded its data. He testified that he did not obtain a warrant because he had been advised back in 2005 by the Department of Justice that a search warrant was not required to access an SDM. After the search of Fedan's SDM ***R. v. Hamilton***, 2014 ONSC 447 was decided and Sgt. Noonan learned of it. That case held that a search warrant was required such that the removal of the SDM from the vehicle amounted to a breach of the driver's rights against unreasonable search and seizure under Section 8 of the *Charter*.

The Court noted that the primary function of the SDM was to deploy the airbags upon a "deployment event" (a collision) or a "near-deployment event" (a sudden deceleration in speed). Its secondary function was to capture and store data with respect to the speed, throttle and braking of the vehicle in the five seconds before the event or near-deployment event. It was noted that the "data… can only be imaged with highly specialized equipment that is generally not in the possession of the ordinary driver." In this case, although the airbags were not deployed, a near-deployment event occurred when the vehicle struck a tree which triggered the SDM to capture the data in question.

The data revealed that in the five seconds prior to the accident, the vehicle sped up from 91.71 km/hour to a speed of 106.19 km/hour (two seconds before the impact with the tree), that the throttle was at 82 percent in the four seconds before the brakes were engaged and that the brakes had only been applied in the last second before the collision.

At trial, the Accused argued that the data downloaded from the SDM was inadmissible because it had been obtained by police in breach of the Accused's Section 8 *Charter* rights. A *voir dire* was held to determine the admissibility of the data. Fedan did not testify and there was no evidence that he was aware of or understood the purpose of the SDM.

The trial judge held that Fedan's *Charter* rights had not been breached. She found that there was no evidence that Fedan was aware of the SDM and therefore he had not established a subjective expectation of privacy with respect to the data. She distinguished the ***Hamilton*** case as a case where the accused was an off-duty police officer who testified that in the course of his police duties he had learned that his vehicle contained an SDM and as to what information it stored such that he had formed a belief that the data stored on it belonged to him. Also, the trial judge held that ***Hamilton*** was wrongly decided in comparing the SDM to an "onboard computer" since it did not contain core biographical data with respect to the driver of the vehicle. Without a subjective expectation of privacy, the trial judge held that Section 8 of the *Charter* was not engaged and did not go on to consider the other factors involved with respect to the reasonableness of the search.

In the alternative, the trial judge held that even if Fedan's Section 8 *Charter* rights had been breached, she would not exclude the evidence pursuant to Section 24(2) of the *Charter* because Sgt. Noonan had acted in good faith based on legal advice, the impact on Fedan's privacy interest was held to be minimal since the vehicle had been completely destroyed and had been lawfully seized and the evidence was reliable and essential to the Crown's case.

Fedan appealed, primarily arguing that the trial judge had erred in admitting the evidence of the SDM data.

II. HELD: For the Crown; appeal dismissed

> 1. The Court held that Section 8 of the *Charter* guarantees the right to be secure from unreasonable search and seizure, which "is a personal right that protects people, not places" and "is only engaged if the applicant can establish a reasonable expectation of privacy in the subject matter of the seizure and search" (para. 62).
>
> 2. The Court held that privacy interests protected by Section 8 cover personal, territorial and informational privacy:
>
> 64 The privacy interests protected by Section 8 include personal privacy, territorial privacy and informational privacy: ***Tessling*** [***R. v. Tessliing***, 2004 SCC 67] at para. 20; ***Patrick*** [***R. v. Patrick***, 2009 SCC 17] at para. 32; and ***Spencer*** [***R. v. Spencer***, 2014 SCC 43] at para. 35. These three broad categories of privacy interests are "not strict or mutually exclusive" and often overlap (Spencer at para. 35). Their usefulness is in providing "analytical tools" for a "principled" and "purposive" analysis of when a reasonable expectation of privacy is engaged: ***Tessling*** at

para. 19; ***Spencer*** at para. 35. In this case, Mr. Fedan's personal privacy interest, which protects bodily integrity, was not engaged; the inquiry was limited to whether he had a territorial and/or informational privacy interest in the SDM and its data.

65 Territorial privacy has been recognized in a "nuanced hierarchy" with a home at the top (***R. v. Feeney***, [1997] 2 S.C.R. 13 (S.C.C.)) and a vehicle near the bottom (***Wise*** [***R. v. Wise*** [1992] 1 S.C.R. 527]; ***Mellenthin*** []***R. v. Mellenthin***, [1992] 3 S.C.R. 615). In ***Wise*** at 534, the Court held there was a significantly reduced expectation of privacy in a vehicle because of the highly regulated aspect of driving on a public road:

> Society then requires and expects protection from drunken drivers, speeding drivers and dangerous drivers. A reasonable level of surveillance of each and every motor vehicle is readily accepted, indeed demanded, by society to obtain this protection. All this is set out to emphasize that, although there remains an expectation of privacy in automobile travel, it is markedly decreased relative to the expectation of privacy in one's home or office.

66 Similarly in ***Belnavis*** [***R. v. Belnavais***, [1997] 3 S.C.R. 341], the Court echoed the comments in ***Wise*** with respect to the reduced expectation of privacy in a vehicle:

> [39] A person can expect that his home can and should be a safe castle of privacy. A person cannot possibly have the same expectation of a vehicle. Vehicular traffic must be regulated, with opportunities for inspection to protect public safety. A dangerous car is a threat to those on or near our roads. The reasonable expectation of privacy in a car must, from common experience and for the good of all, be greatly reduced. ...

67 Informational privacy is about protecting personal information that may reveal intimate details of the biographical core, lifestyle and personal choices of the individual, or that directly compromises the individual's "dignity, integrity and autonomy:" ***R. v. Plant***, [1993] 3 S.C.R. 281 (S.C.C.), at 293. In that case, the accused was found to have no reasonable expectation of privacy in computer records revealing the electricity consumption of his residence because he had no control over or access to the content of the information. Spencer introduced an additional facet to informational privacy: privacy as anonymity. While identifying the primary privacy interest as informational, the Court in ***Spencer*** also recognized that an overlap existed between the accused's informational and territorial privacy as the computer that was the subject matter of the warrantless search was situated in the accused's home.

3. The Court held that to qualify for Section 8 protection, the Accused must have a subjective expectation of privacy in the subject matter that is objectively reasonable, but that the courts should not place too much emphasis on the need for a subjective expectation of privacy because expectation of privacy "is a normative rather than a descriptive standard:"

> 63 A reasonable expectation of privacy requires a subjective expectation of privacy that is objectively reasonable. However, as was noted in ***Tessling***:
>
> > [42] ... The subjective expectation of privacy is important but its absence should not be used too quickly to undermine the protection afforded by s. 8 to the values of a free and democratic society.... Suggestions that a diminished subjective expectation of privacy should automatically result in a lowering of constitutional protection should therefore be opposed. It is one thing to say that a person who puts out the garbage has no reasonable expectation of privacy in it. It is quite another to say that someone who fears their telephone is bugged no longer has a subjective expectation of and thereby forfeits the protection of Section 8. Expectation of privacy is a normative rather than a descriptive standard.
>
> . . .
>
> 68 A subjective expectation of privacy requires a finding that an individual had or is presumed to have had an expectation of privacy in the information content of the subject matter of the search. See ***Patrick*** at para. 37. It may be presumed to exist (***Tessling*** at para. 38; ***R. v. Nolet***, 2010 SCC 24 (S.C.C.) at para. 31) or may be inferred from the circumstances (***R. v. Cole***, 2012 SCC 53 (S.C.C.) at para. 34; ***Spencer*** at para. 19). The finding of a subjective expectation of privacy is "not a high hurdle": ***Patrick*** at para. 37.
>
> [Emphasis added by the Court.]

4. The Court listed the factors to be considered in determining whether or not an accused's subjective expectation of privacy in a subject matter of the search is objectively reasonable:

> 69 The objective reasonableness of a subjective expectation of privacy is determined on "the totality of the circumstances" of a particular case with "close attention to context" (***Patrick*** at para. 26). The analytical framework for assessing whether an applicant had a reasonable expectation of privacy in the subject matter of the search was set out in ***Patrick*** at para. 27 (see also ***Edwards*** at para. 45; ***Tessling*** at para. 19). It includes a consideration of the following factors:
>
> > 1. The nature or subject matter of the search;
> >
> > 2. Whether the applicant had a direct interest in the subject matter of the search;
> >
> > 3. Whether the applicant had a subjective expectation of privacy in the informational content of the subject matter of the search; and

4. Whether the applicant's subjective expectation of privacy was objectively reasonable.

70 In ***Patrick***, the Court listed a number of factors to be considered in assessing objective reasonableness (at para. 27):

a. The place where the search occurred;

b. Whether the informational content of the subject matter was in public view;

c. Whether the informational content of the subject matter had been abandoned;

d. Whether the information was already in the hands of third parties; if so was it subject to an obligation of confidentiality?

e. Whether the police technique was intrusive in relation to the privacy interest;

f. Whether the use of this evidence gathering technique was itself objectively unreasonable; and

g. Whether the informational content exposed any intimate details of the appellant's lifestyle, or information of a biographic nature.

71 The more personal and confidential the information, the greater there will likely be a reasonable expectation of privacy in the information: Cole at para. 46. However, "not all information an individual may wish to keep confidential necessarily enjoys s. 8 protection": Tessling at para. 26.

5. The Court held that Fedan's vehicle had been lawfully seized without a warrant under Section 489(2) of the *Criminal Code*, which "generally includes a right of examination of that item," except that this does not apply "with respect to personal computers that were not specifically listed in the search warrant as there were significant privacy interests engaged in the search of the computer that might contain a vast amount of personal information."

(a) The Court also concluded that Fedan could not have had a residual territorial privacy interest in the SDM after the vehicle had been lawfully seized.

6. The Court held that the trial judge had erred in concluding that Fedan did not have a subjective expectation of privacy in the SDM data, noting that "the jurisprudence supports a presumption that Mr. Fedan had an expectation of privacy in his vehicle, albeit markedly reduced from a home or office, which extended to the SDM as it was an integral component of his vehicle, not unlike an engine" (para. 76).

7. However, the Court held that Fedan's subjective expectation of privacy in the SDM data was not objectively reasonable, since the data had no personal identifiers that linked him to it, the SDM is not an analogous to a personal computer which does contain biographical core data and that it was difficult to

accept that a vehicle operator might reasonably have intended that the last five seconds of information relating to his/her driving before a collision would be private.

8. In the alternative, the Court held that even if the Accused's Section 8 *Charter* rights had been breached, the SDM data should not have been excluded under Section 24(2) of the *Charter* because Sgt. Noonan acted in good faith relying on a legal opinion, the impact of a *Charter* breach was minimal because the vehicle had been destroyed and lawfully seized. Also, exclusion of the evidence "would have substantially weakened the Crown's case… which would have had a marked negative impact on the truth-seeking function of the trial" with respect to evidence that was "non-conscripted, accurate and reliable."

III. COMMENTARY: With respect, the reasoning in ***Hamilton*** and the case of ***R. v. Glenfield***, 2015 ONSC 1304 is to be preferred. Those decisions held that although police had the right to seize the vehicle without a warrant to protect and preserve the evidence contained on the airbag module, a warrant still was required to access the contents thereof. Requiring a warrant in such circumstances is not at all onerous. There are at least two problems with this decision:

1. After deciding that Fedan had a subjective expectation of privacy in the data, the Court held that this subjective expectation was not objectively reasonable because it was difficult to accept that a vehicle operator might reasonably have intended that the last five seconds of information relating to his/her driving before a collision would be private (i.e. that he did not have a subjective expectation of privacy). This is a serious inconsistency.

2. In deciding that Fedan's expectation of privacy ended once the vehicle was lawfully seized by police, the Court ignored binding Supreme Court of Canada precedent which distinguishes between the police ability to seize a device to preserve the evidence and then seeking a warrant to access the data thereon: ***R. v. Cole***, 2012 SCC 53.

We have been advised that Fedan is pursuing leave to appeal to the Supreme Court of Canada. In light of the conflicting authority from Ontario, that Court may well see the need to hear the case and decide the point. For now, police will rely on the uncertainty in the law created by the conflicting Ontario and British Columbia cases.

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May 2, 2016

V. SURETY AND BOND ISSUES

Liability of surety in Quebec under a labour and material payment bond consistent with common law principles

***L'Unique Assurances Générales inc., Appelante, c Échafauds Plus (Laval) inc., Intimée*, 2015 QCCA 1725 [4174]**

I. FACTS AND ISSUES

This decision was reported only in French and involves the interpretation of the Québec Civil Code.

In 2010, the Ministry of Transport of Québec (the "Ministry") granted a contract to repair a ramp of a motor interchange (the "Project") to AC Construction and Demolition (the "Contractor"), a company specializing in concrete repair. Pursuant to the requirements made by the Ministry, the contract included a bond for wages, materials and services (the "Bond") signed by UAG Inc. (the "Surety") to guarantee the Contractor's financial obligations to suppliers and subcontractors, for an amount up to $3,977,810. Our translation of the relevant provisions of the Bond is:

> 1. [UAG Inc.], whose principal office is located at 925 Grande Allée West, Suite 240, Québec (Québec) G1S 1C1, represented by Mélanie Fournier, attorney, duly authorized, hereinafter called the SURETY after taking cognizance of the tender duly accepted by the MINISTRY OF TRANSPORTATION OF QUEBEC
>
> hereinafter called the PUBLIC BODY for File no. 8503-09-0230 - Repair of the ramp E Turcot Interchange (repair of the upper slab and building interiors slabs) 850 783 311 Contract
>
> and on behalf of 9122-2497 Québec Inc. (AC Construction Demolition) [the Contractor] whose principal office is located at 5555, boul. Forges, Suite 203. Trois-Rivières, Québec, G8Y 5L5 here represented by Alain Crête duly authorized, hereinafter called the entrepreneur,
>
> are jointly and severally obliged with the CONTRACTOR, to the PUBLIC BODY to pay directly the creditors hereinafter defined, the SURETY may in no case be required to pay more than three million nine hundred and seventy-seven thousand and eight hundred ten dollars ($3,977,810).
>
> 2. Creditor means:
>
> > 1. Any subcontractor of the CONTRACTOR;

2. Any natural person or legal person having sold or leased to the CONTRACTOR or its subcontractors services, materials or equipment intended exclusively for the work, equipment hire being determined only as Current standards for the construction industry; and

3. Any supplier of materials specially prepared for that work and for this contract.

4. Subject to Article 3, no creditor has direct recourse against the SURETY unless he has addressed to him and to the CONTRACTOR, a request for payment within 120 days after the date he completed his work or supplied the last services, materials or equipment.

Any creditor who has contracted directly with the CONTRACTOR has no direct recourse against the SURETY unless the creditor has notified the CONTRACTOR in writing of the contract within 60 days of the rental beginning or delivery of services, materials or equipment, such notice must indicate the work concerned, the object of the contract, the name of the subcontractor and the PUBLIC BODY concerned.

A subcontractor has no direct recourse against the SURETY for deductions imposed on it by the CONTRACTOR unless he has sent a request for payment to the SURETY and to the CONTRACTOR within 120 days following the date on which these deductions were due.

5. Any creditor may institute proceedings against the SURETY on the expiry of 30 days following the notice provided for in Article 4, provided that the prosecution is not instituted before 90 days of the date on which the creditor's work was executed or the date on which the last services, materials or equipment were provided

[. . .]

The Contractor entered into a contract with EPL Inc. for scaffolding equipment and services. The Project was suspended during winter. In spring, when the Contractor was preparing to resume its work, EPL Inc. served the Contractor with notice to pay the cost of the equipment rental, then unpaid. At the same time EPL Inc. issued a request for payment to the Surety in accordance with the Bond conditions. Due to a lack of response from the Contractor, EPL Inc. commenced an action to recover from the Contractor and the Surety.

The Contractor and EPL Inc. negotiated an agreement under which the Contractor agreed to immediately pay EPL Inc. partial recovery and settle the remainder of the account when the equipment was returned at the end of the Project (the "Settlement"). The Settlement also reserved to EPL Inc. the right to pursue from the Defendants rental incurred subsequently.

Following the Settlement, and after the Project was complete, EPL Inc. amended its Statement of Claim to reflect the new claims for additional rental fee for the equipment used since May 2011 and the value of unreturned equipment. EPL Inc. did not issue to the Surety a new request for payment under the Bond. At trial, EPL Inc. successfully recovered from the Defendants $166,462,51 for value of unreturned equipment and rental costs. The Surety appealed.

II. HELD: Appeal allowed in part;

On appeal, the Court of Appeal considered four issues:

> 1. What is the scope of the Bond? More specifically, did it impose on the Surety an obligation to compensate EPL Inc. for damages suffered due to non-return of its equipment?
>
> 2. Did the Settlement novate the original contract? If not, did the Settlement, in any way, effectively release the Surety from its obligations under the Bond?
>
> 3. Has EPL Inc. met the formalities prescribed in the Bond? Specifically, was a second request for payment to the Surety required regarding the amended claim?
>
> 4. Does the evidence establish that the Contractor has used the equipment as part of the Project, from May to September 2011?

The Court of Appeal allowed the appeal in part. The Court cited five provisions of the Québec Civil Code relating to the law of surety. The English versions of those provisions are:

> 2333. Suretyship is a contract by which a person, the surety, binds himself towards the creditor, gratuitously or for remuneration, to perform the obligation of the debtor if he fails to fulfill it.
>
> 2335. Suretyship is not presumed; it is effected only if it is express.
>
> 2342. Suretyship may be contracted for part of the principal obligation only and with less onerous conditions.
>
> 2343. Suretyship may not be extended beyond the limits for which it was contracted.
>
> 2344. Suretyship extends to all the accessories of the principal obligation, even to the costs of the original action, and to all costs subsequent to notice of it given to the surety.

On the first issue the Court of Appeal held, reversing the trial decision, that the Bond provided that workers, subcontractors and suppliers would be paid for services rendered, but did not cover damage in connection with loss of equipment. Damages for loss of equipment were not an accessory to the price for services rendered and therefore, the trial judge erred in granting damages for value of unreturned equipment.

On the second issue the Court of Appeal held that the trial judge did not err in finding that the rental contract and the Settlement constituted two distinct sources of obligations. The Settlement did not have the effect of triggering novation and while the claim was settled, the Surety was not released for additional claims covered by the Bond.

On the third issue the Surety argued that the amendment constituted an entirely new claim and, consequently, must meet the notice obligations outlined in the Bond. In considering whether EPL Inc. met the formalities of the Bond, the Court considered the specifics of this case, and held that the trial judge did not err in concluding that the original request for payment to the Surety was sufficient. The Court of Appeal also noted that the Settlement reserved EPL Inc.'s right to pursue additional recovery, which put the Surety on notice.

Finally, the Court held that the trial judge did not err in finding that the Contractor had used the equipment in the relevant period. In the Settlement, the Contractor acknowledged that the equipment rented by EPL Inc. was still on site, so the equipment was used and the equipment would continue to be used until the completion of the Project.

III. COMMENTARY: While this decision is based on the Québec Civil Code, the principles the Court invokes strongly resemble common law principles with respect to labour and material payment bonds. The Court must look at the wording of such bonds when determining the scope of the obligations of a surety. The language found in a typical labour and material payment bond used in the common law provinces would likely lead to the same result. In the normal course, a surety does not become liable for damages arising from the breach of contract on the part of the principal which are beyond the express undertakings found in the bond wording (e.g. damages for delay or damages from equipment not being returned).

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