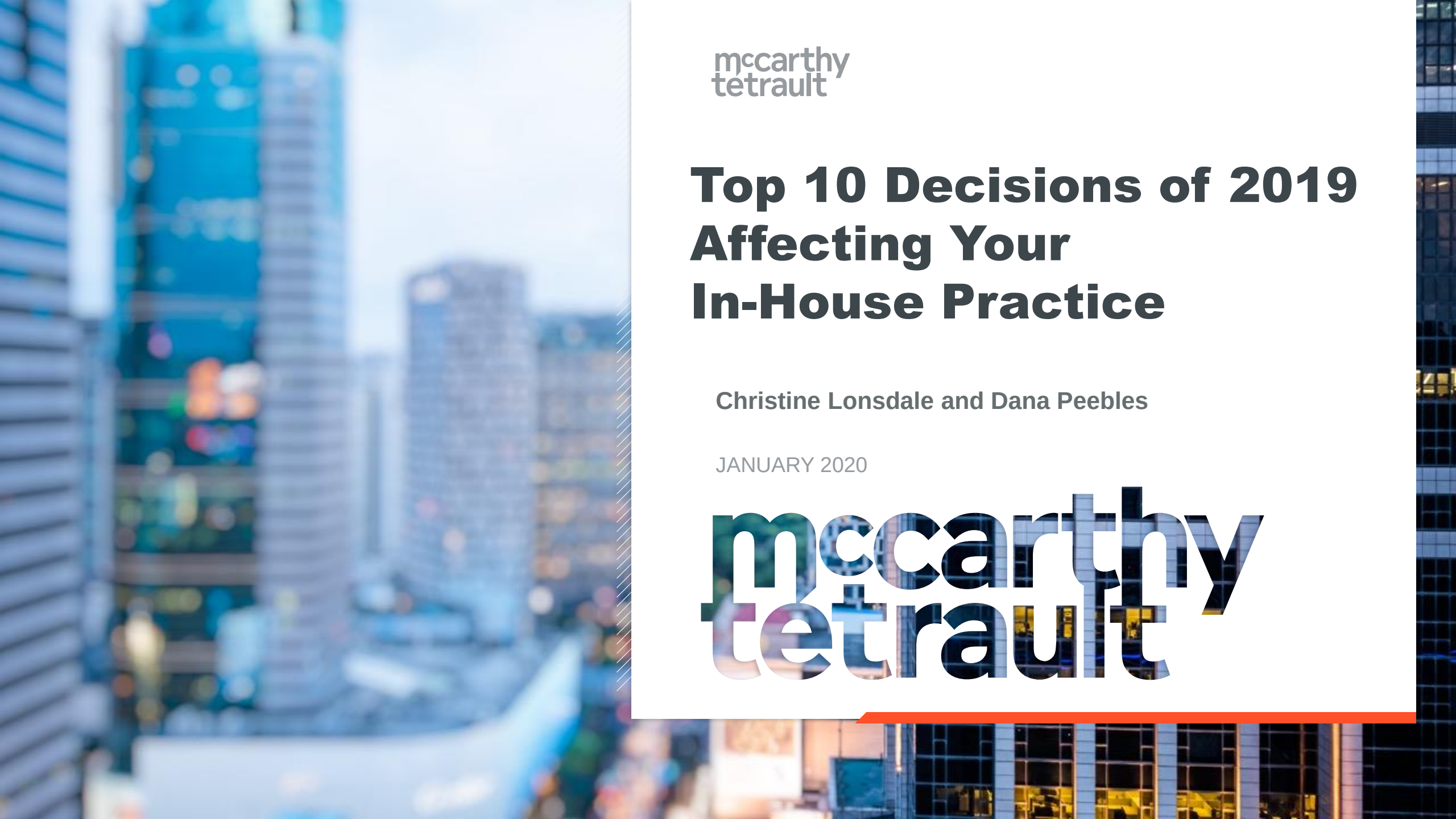

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Top 10 Decisions of 2019 Affecting Your In-House Practice

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1. REVISITING STANDARD OF REVIEW

Revised Framework

“It starts with a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions.”

Exemptions to Presumption of Reasonablenes

“In these reasons, we have identified five situations in which a derogation from the presumption of reasonableness review is warranted either on the basis of legislative intent (i.e., legislated standards of review and statutory appeal mechanisms) or because correctness review is required by the rule of law (i.e., constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding jurisdictional boundaries between administrative bodies).”

Canada (Minister of Citizenship and Immigration) v. Vavilov,
2019 SCC 65 at paras. 16, 69

REVISITING STANDARD OF REVIEW

Guidance on a Reasonableness Review

"[T]he reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision."

Importance of Reasons

"…But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape."

Canada (Minister of Citizenship and Immigration) v. Vavilov,
2019 SCC 65 at paras. 99, 138

REVISITING STANDARD OF REVIEW

Impact of a Statutory Appeal Provision

"Given that the appellants have challenged the CRTC's Final Decision and Final Order by way of the statutory appeal mechanism provided for in s. 31(2) of the *Broadcasting Act*, the appellate standards of review apply here (Vavilov, at paras. 36-52). And because the issues in these appeals raise legal questions that go directly to the limits of the CRTC's statutory grant of power, and therefore plainly fall within the scope of the statutory appeal mechanism referred to above, the applicable standard is correctness."

Bell Canada vs. Canada Attorney General,
2019 SCC 66 at para. 4

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REVISITING STANDARD OF REVIEW - Takeaways

Explicit attempt by the SCC to reset the law around standard of review in administrative law.

The law is now changed if there is a statutory right of appeal. It is the appellate standard which applies: correctness for questions of law and palpable and overriding error for questions of fact or mixed fact and law.

With very few other exceptions the standard of review will be reasonableness for a judicial review

If you are advising on whether to challenge an administrative decision:

- Is there a statutory right of appeal?
- If not, start with reviewing the reasons—do they deal with your arguments, do they explain why you lost, did they disregard a critical fact or body of law?
- Do you have a constitutional issue, a legal issue of central importance to the legal system, an issue re boundaries between administrative tribunals that can shift the review standard to correctness?

If you are an administrative decision maker have you taken into account the “culture of accountability” warning from the SCC?

Canada (Minister of Citizenship and Immigration) v. Vavilov,
2019 SCC 65

Bell Canada vs. Canada Attorney General,
2019 SCC 66

2. CONTRACT – DUTY OF GOOD FAITH

The arbitrator used the organizing principle of good faith in contract to adjust the price of a long-term contract. The BCCA overturned

Limits on duty of good faith

"If the Court in *Bhasin* did not intend to change the principle of good faith substantially, nor to establish a new "free-standing" duty, it seems to me unlikely that it intended to suggest the duty of good faith would as a matter of law be breached whenever a party exercising a contractual discretion fails to have 'appropriate regard' for the other party's (contractual) interests."

Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District,

2019 BCCA 66 at para. 70

**leave to appeal to SCC granted and argued December 2019*

DUTY OF GOOD FAITH
Takeaways

- **The Court overturned an arbitral award to maintain a conservative view on how far the organizing principle of good faith can go to modify a contract**
- **Continues to be a thorny issue**
- **Stay tuned. *Wastech* and *CM Callow Inc.* were argued before SCC in December 2019.**

Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District,
2019 BCCA 66
***leave to appeal to SCC granted and argued December 2019*
CM Callow Inc. v. Zollinger,
2018 ONCA 896
**leave to appeal to SCC granted and argued December 2019*

3. ARBITRATION CLAUSES

A Class Action for wireless customers – who is required to arbitrate instead?

All customers during a specific period (commercial and individual) alleged that TELUS breached the standard form contract by rounding up the duration of calls to the nearest minute. Despite the fact that the contract required dispute resolution through mediation and then arbitration, a class action was certified.

- In Ontario, the *Consumer Protection Act, 2002* allowed individual consumers to pursue their claims in the class action, despite the arbitration clause.

- The Defendant moved to enforce the contracts against the 600,000 business customers and stay their actions; the Motions Judge exercised her discretion under the *Arbitration Act* to refuse to do so, stating that it would not be reasonable to force them into arbitration when the consumer class action was proceeding.

- The Ontario Court of Appeal agreed, following an earlier decision to the same effect (*Griffin v. Dell*).

- The Supreme Court, in a close (5-4) decision, granted the appeal of TELUS, and stayed the claims of the business customers, even though the consumer class action would proceed.

TELUS Communications Inc. v. Wellman,

2019 SCC 19

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ARBITRATION CLAUSES
Takeaways

A significant – if narrow – victory for freedom of contract, and for a disciplined approach to statutory interpretation

- The Majority favoured the rights of parties to agree that their disputes will be resolved outside the Court system. They noted prior "judicial hostility" to arbitration, but found the "modern approach" to be respectful of alternative processes.
- The dissent thought it was wrong to allow a large corporation to shield itself from a class action, and would have used the discretionary provision in the *Arbitration Act, 1991* to over-ride the arbitration clause in the TELUS contracts, in the interests of "access to justice".
- But in the end, the Supreme Court decided not to undermine the "careful policy choice" of the Ontario Legislature to shield only individual consumers under the *Consumer Protection Act, 2002*. It is for Legislatures, not the Courts, to make these policy decisions.

TELUS Communications Inc. v. Wellman,
2019 SCC 19

4. (Real Estate) FRAUD

The Battle of the Defrauded Victims

When two groups are defrauded, when can one group trace damages to the other?

The DB parties and the CD parties each partnered with the Waltons to create companies to buy separate properties. When the investments collapsed, the DB parties ($111 million invested) alleged that some of their money had ended up in properties in which the CD parties ($4 million invested) held an interest, such that the latter benefitted when the properties were liquidated.

- Who had priority over the disputed funds?

- At the Ontario Court of Appeal, the DB parties (which lost more) succeeded in recovering money from the CD properties, even though no specific DB funds could be traced through to the CD properties, on the basis that the CD companies (through its officer, Ms Walton), had “knowingly assisted” the fraud.

- The Supreme Court reversed. It held that a Director or Officers’ fraud is not attributed to the corporation when the company’s wrongful acts are found to be part of a larger fraudulent scheme in which the company is also a victim. Since Ms Walton “was in charge of the entire enterprise”, using both sets of companies to carry out the fraud, the Court decided not to re-allocate the monies lost by all parties.

Christine DeJong Medicine Professional Corporation v. DBDC Spadina Ltd.,

2019 SCC 30

(Real Estate) FRAUD
Takeaways

— The dissenting Judge in the Court of Appeal had strongly disagreed with the re-allocation of funds, considering it to be possible only by relaxing recognized restitutionary principles.

— The Supreme Court reversed, by unanimously adopting the dissent in the Court of Appeal, in full. It concluded that a corporation will not be held liable for the wrongful conduct of a directing mind if it too was a victim. Further, defrauded investors cannot successfully blame one another for passively assisting in a fraud in which they were all victims.

Christine DeJong Medicine Professional Corporation v. DBDC Spadina Ltd.,

2019 SCC 30

5. (Internet) FRAUD

Which of two victims of an e-fraud bears the loss?

Here, opposing parties to a lawsuit settled. A fraudster hacked the receiving law firm, took control of the clerk's e-mail account, pretended to be the clerk, directed the payor to send the settlement funds to a personal bank account, withdrew the funds, and disappeared (the "Business E-Mail Compromise" scam).

— Who bears the loss – the creditor (which was unpaid), or the debtor (which had already paid)? The Court, noting the dearth of case law, concluded that the payor must complete the settlement and (re -) pay the rightful recipient, unless:
  - there is a contract between the parties with terms that shift liability for a fraudulent loss;
  - the rightful recipient acted with willful misconduct or dishonesty towards the payor; or
  - the rightful recipient was negligent.

St. Lawrence Testing & Inspection Co. Ltd. v Lanark Leeds Distribution Ltd.,
2019 CanLII 69697 (Ont. Small Claims)

(Internet) FRAUD
Takeaways

- This method of fraud is becoming more common (both the U.S. and Canadian governments have issued warnings to companies), and the fraudsters are becoming more skilled and brazen. Recent techniques have included mimicking both parties to the transaction – the criminal (as the payor) placated the recipient to wait longer for the incoming funds, while simultaneously (as the recipient) inveigling the payor to send the funds to the falsified account.

- In this instance, the Court favoured the receiving party, concluding that there was no evidence that it was negligent in having been hacked, while the debtor was "best able to prevent the harm" (in that it knew that the fraudster had changed the earlier terms of payment agreed between the parties).

- More cases will come. When that happens, there is a U.S. precedent in which the Court, on other facts, decided that the fair outcome was to split the loss between the two parties. There is at least one other potential precedent where a Canadian Court, on different facts, settled the loss on the party better able to sustain it (that is, the deeper pocket).

St. Lawrence Testing & Inspection Co. Ltd. v Lanark Leeds Distribution Ltd.,
2019 CanLII 69697 (Ont. Small Claims)

6. CLASS ACTIONS – Appeal Rights?

This case provides clarity on what rights of appeal class members, as opposed to the representative class member, class counsel, or parties have to appeal a settlement approval decision

"Class members have a right to notice of a certified class proceeding, the right to opt out of the class, and the right to object to settlement agreements. However, class members who do not choose to opt out of the class proceeding, are bound by the outcome. A settlement of a class proceeding that is approved by the court binds all class members."

"There are sound policy reasons why class members should not be entitled to appeal a settlement order where the representative plaintiff declines to do so."

Bancroft-Snell v. Visa Canada Corporation,
2019 ONCA 822 at paras. 3, 22
**leave to appeal to the SCC sought but no decision yet on granting leave.*

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Bancroft Snell
Takeaways

- If you want to control the fate of litigation where you are a class member opt out or invest in objecting at the settlement approval hearing
- A settlement of the class proceeding that is approved by the Court will bind all class members
- This case provides more certainty for defendants when bargaining with the representative plaintiff and class counsel

Bancroft-Snell v. Visa Canada Corporation,
2019 ONCA 822
** leave to appeal to the SCC sought but no decision on granting leave yet.*

7. EMPLOYMENT – Reasonable Notice

Ontario Court of Appeal re-affirms 24 months notice

“He requested an ‘exit strategy’. While Mr. Dawe may have soon come to regret his decision, this factor ought to have weighed against a finding that this case involved "exceptional circumstances" justifying a notice period in excess of 24 months. I agree with the motion judge that Mr. Dawe's circumstances — including his senior position, career-long years of service at the same company, age at the time of termination, and his difficulty in finding new employment — warranted a substantial notice period. However, there was no basis to award Mr. Dawe more than 24 months' notice.”

“In my view, when read in context, the terms of the bonus plans are unambiguous, and the termination provision would have been enforceable against Mr. Dawe had it been brought to his attention. However, as explained below, there was an evidentiary basis which entitled the motion judge to conclude that the termination provision had not been brought to Mr. Dawe's attention and was unenforceable for this reason.”

Dawe v. The Equitable Life Insurance Company of Canada,

2019 ONCA 512 at paras. 41-42, 46

** leave to appeal to the SCC sought but not decision on granting leave yet.*

EMPLOYMENT – Reasonable Notice Takeaways

- Generally a notice period of 24 months constitutes the high end of range
- Exceptional circumstances may warrant notice periods in excess of 24 months
- Bring unfavourable terms of bonus plans to an employee's attention and document

Dawe v. The Equitable Life Insurance Company of Canada,
2019 ONCA 512
***** *leave to appeal to the SCC sought but no decision on granting leave yet.*

8. INSURANCE JURISDICTION RE SABS CLAIMS

Ontario Court of Appeal re-affirms *License Appeal Tribunal*'s exclusive first instance jurisdiction over the courts for Statutory Accident Benefits Claims

"Neither the legal characterization of the cause of action asserted against the insurer nor the relief claimed determines whether a claim falls within the scope of the dispute resolution provisions. If the dispute relates to the insurer's compliance with obligations to the insured concerning SABs, the timeliness of performance of those obligations and/or the manner in which they were administered, it falls within the broad reach of the dispute resolution provisions, and within the jurisdiction of the LAT. The prohibition on court proceedings will apply."

Stegenga v. Economical Mutual Insurance Company,
2019 ONCA 615 at para. 22

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INSURANCE JURISDICTION RE SABS CLAIMS

Takeaways

Gives significant protection from litigation at first instance for insurance companies

- SABs dispute resolution provisions capture a broad range of disputes, including how an insurer handles the claim
- It is not the legal characterization of the claim but the facts giving rise to the dispute that are determinative
- There is potential to extend this protection into the realm of class action litigation

Stegenga v. Economical Mutual Insurance Company,
2019 ONCA 615

9. PRIVACY/DATA BREACH

Data breaches (in addition to instances in which data is lost or mis-used by companies) continue to increase in scope and frequency.

The Courts have not caught up.

- There is no appellate Court guidance on the principles of liability, causation and damages to assist companies and their customers in assessing culpability and valuation in breach situations.

- In December 2019, the Ontario Superior Court certified a data breach class action in *Equifax*, rejecting a litany of defences and submissions asserted by the Defendants.

- The Court certified a variety of causes of action – intrusion upon seclusion, breach of privacy legislation, breach of contract, breach of consumer protection legislation – as well as the assertion of aggregate damages as a common issue.

Agnew-Americano v. Equifax Canada Co.,
2019 ONSC 7110

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PRIVACY/DATA BREACH
Takeaways

- There have been a wide variety of factual circumstances for the impingement upon privacy, and of the types of information accessed. There is no clear understanding of when a "loss" has occurred: is the simple fact that your information was (or could have been) accessed, enough to receive compensation?; Must you have suffered an economic loss?; What about a loss of time?; What about emotional distress?

- While other lower Courts have been less welcoming to class action plaintiffs, in *Equifax*, in the absence of "settled law", a wide variety of liability theories and damages theories were certified for trial.

Agnew-Americano v. Equifax Canada Co.,
2019 ONSC 7110

10. LITIGATION – Punitive Damages

Litigation is "enormously stressful": can a party exercise its full rights, where doing so harms the opponent, without attracting punitive damages?

In *McCabe,* the plaintiff sued the Church, alleging vicarious liability for sexual abuse in the past by a since-deceased priest. The Church defended the case for years, and then admitted vicarious liability on the first day of the jury trial. At the end of the damages trial, the jury awarded compensation under various heads of damage, including punitive damages arising out of the decision to admit liability only at trial.

- The Ontario Court of Appeal split on the punitive damages question, over-turning the award.
  - Justice Benotto, in dissent, found that although punitives were reserved for "malicious and outrageous" acts, the jury was entitled to award them here to "address conduct of the litigation deserving of condemnation", specifically, the Defendant's "strategic decision not to admit liability to a vulnerable victim of abuse", knowing that additional harm would be caused.
  - The majority (Roberts and Strathy JJA) disagreed, and set aside the "new and unprecedented category of punitive damages arising out of the timing of the [defendant's] admission of liability". The Defendant was under "no obligation to admit liability" and could put the plaintiff to "the strict proof of " their allegation, "no matter how painful the litigation process proves to be… without invoking the fear of a punitive damages award".

McCabe v. Roman Catholic Episcopal Corporation for the Diocese of Toronto, in Canada,
2019 ONCA 213

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LITIGATION – Punitive Damages
Takeaways

- All of the Judges agreed punitive damages remain exceptional, requiring a “very high standard that is not easily reached”.
- The right to conduct litigation within the rules was upheld, regardless of the effect on the other litigant – so far as punitive damages are concerned.
- The majority did warn that “litigation misconduct or abuse of process” may warrant an award of costs up to full indemnity. (Although even then, the Court seemed reluctant to encourage trial Judges to look behind the decision of a party to defend a case to the very end.)

McCabe v. Roman Catholic Episcopal Corporation for the Diocese of Toronto, in Canada,
2019 ONCA 213

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Questions?

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