

September 6, 2010

# LAW BRIEF

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**KEAM v. CADDEY,  
ON CA, 2010 August 31**  
INSURANCE -- PERSONAL INJURIES --  
MEDIATION -- COSTS

Appeal from a costs award that did not award any special costs. HELD: Appeal allowed. Quantum of the fee portion of the costs awarded to the appellants at trial increased from \$110,000 to \$150,000 plus applicable taxes. The statutory framework for the analysis is found in ss. 258.6(1) and (2) of the Insurance Act. Sections 258.5(1) and 258.6(1) are directed at an insurer that is defending a claim for personal injuries arising out of an automobile accident. The sections impose two obligations on the insurer. Section 258.6(1) makes participating in mediation mandatory when requested, while s. 258.5(1) requires the insurer to attempt to settle the claim as expeditiously as possible. Sections 258.6(2) and s. 258.5(2) provide the sanction for non-compliance with the statutory duties: the court is required to consider the insurer's failure to comply when awarding costs following trial. In this case, the respondents' insurer took the position that the claim did not meet the threshold and therefore there was nothing to negotiate. However, it is this approach that the legislature has disavowed by making mediation mandatory. Rather, the legislature's approach recognizes that participation in mediation could have a salutary effect on one or both sides, with input from an experienced and respected mediator. In order to make the insurer's statutory obligation to participate in mediation meaningful, the legislature had to find a way to put teeth into it by providing a consequence for failure to comply. Following trial, where an insurer has not complied, the trial judge is required to consider the appropriate cost consequence of the insurer's actions. The cost consequences will follow whether the plaintiff or the defendant has been successful at trial, so that, for example, where a plaintiff's claim is dismissed, the trial judge may deprive the winning defendant "represented by the insurer that refused to accept a request to mediate" of all or part of its costs that would normally follow the event. The legislature chose not to provide a specific cost consequence for an insurer's failure to participate in mediation, such as substantial indemnity costs against a losing defendant or deprivation of full costs of a winning defendant. Instead, the trial judge is accorded the discretion to determine the appropriate cost consequence in each case. In summary, where an insurer breaches s. 258.6(1), s.

258.6(2) requires the trial judge to ascertain the appropriate remedial costs penalty in the circumstances. Although the insurer's conduct may not have risen to the level required for the imposition of substantial indemnity costs, a significant remedial penalty was required in all the circumstances. An increase of \$40,000 in the costs award is ordered to reflect the censure of the court and to provide an appropriately significant recovery for the appellants.

**CASSELLS v. UNIVERSITY OF VICTORIA,  
BC SC, CULLEN J.,  
2010 August 30**  
PROCEDURES -- JURISDICTION --  
STANDING -- INJUNCTION -- PROVINCIAL  
REGULATION

Application to set aside an ex parte injunction. HELD: Application allowed. In Saanich Inlet Preservation Society v. Cowichan Valley (Regional District) (1983), 44 B.C.L.R. 121 at 123 (C.A.), Hutcheon J.A. explained that standing is "the legal entitlement of [the petitioner] to invoke the jurisdiction of the court". In Kitimat (District) v. Alcan Inc., 2006 BCCA 75, 51 B.C.L.R. (4th ) 314, Finch C.J.B.C. confirmed that a ruling on standing may be addressed as a preliminary matter, where a trial of the merits is unlikely to materially change the outcome of the issue. In this case, the petitioner's claim rests upon her assertion that the applicant's Feral Rabbit Management Plan, and some of the activities occurring on its property, engage and may violate various provisions of the Wildlife Act and / or the Prevention of Cruelty to Animals Act and / or Health Canada Regulations. At the heart of her claim is an assertion that the Feral Rabbit Management Plan, as it existed, should be curtailed or prohibited under the Wildlife Act, in particular, by s. 40. Despite that position, no governmental or other agency responsible for the administration or enforcement of any of those Acts or Regulations is joined as a party to this action and there is nothing in this action which can be construed as a challenge to the constitutional validity of any of the Acts at issue, in particular, the Wildlife Act. Insofar as the proscriptions in the Wildlife Act are concerned, s. 5 of the Offence Act, R.S.B.C. 1996, C. 338, reads as follows: A person who contravenes an enactment by doing an act that it forbids, or omitting to do an act that it requires to be done, commits an offence against the enactment. Section 84 of the Wildlife Act provides for fines and penalties for a person convicted of an offence under the Act. Section 84.1 provides that in addition to any punishment imposed a court may make an order, among other orders: ..prohibiting the person from doing any act or engaging in any activity that may in the opinion of the court result in the continuation or repetition of the offence. The Wildlife Act, read with the Offence Act, establishes a regime of quasi criminal or criminal legislation under which prosecutions may be mounted by the Attorney General. As noted by Callaghan J. in Greenpeace Foundation of British Columbia et al v. Minister of the Environment (1981), 122 D.L.R. (3d) 179 at 184 (B.C.S.C.): In general, private individuals have no inherent right to seek injunctive relief to protect the public at large from a wrongful invasion of its rights. It is for the Attorney General to discharge that function. An Attorney General is always competent to institute proceedings to protect the public at large, but a private citizen may sue it seems in two situations. One, where interference with a public right interferes "with a private right of his own", or two, where no private right of his own is interfered with but in respect of his public right

he suffers "special damage peculiar to himself" from the interference with the public right. In Carruthers v. Langley (1985), 23 D.L.R. (4th) 623, (B.C.C.A.), leave to appeal to S.C.C. ref'd, (1986), 70 B.C.L.R. XI, the plaintiff brought an action seeking to have s. 251 of the Criminal Code clarified and enforced "so as to restrict the performance of therapeutic abortions in accredited hospitals". The court in that case noted as follows at pg. 627: Thus, they seek by means of a private action to redress alleged public wrongs, i.e. non-compliance with s. 251 of the Criminal Code. The appellant plaintiffs in that case did not challenge the validity of the legislation at issue, but submitted standing is not confined to such circumstances. In rejecting the plaintiff appellant's argument in that case, the court held, as follows at pg. 629: We think neither of the appellants has a sufficient interest to acquire the status to bring this action in his own name. The enforcement of s. 251 of the Criminal Code relates to a public right. As Lord Wilberforce pointed out in Gouriet v. Union of Post Office Workers, [1977] 3 All E.R. 70, the distinction between public rights and private rights is fundamental. His remarks at p. 84 are particularly apposite in this case: The distinction between public rights which the Attorney General can and the individual (absent special interest) cannot seek to enforce, and private rights is fundamental in our law. To break it, as counsel for Mr. Gouriet frankly invited us to do, is not a development of the law, but the destruction of one of its pillars. The petitioner in the present case has not demonstrated either that she has a "private right" or that she will suffer "special damage peculiar to herself" sufficient to establish her legal entitlement to invoke the court's jurisdiction. Pursuant to s. 2(1) of the Wildlife Act, ownership of all wildlife in British Columbia is vested in the government, and accordingly, Ms. Cassells has no legal, equitable or proprietary interest in the rabbits, which would overlap with the public rights provided for in the statute. The private interest or special damage which gives rise to standing, must flow from the impact of the asserted public wrong on the petitioner independently of the political or social activism which she undertook to oppose it. In Injunctions and Specific Performance, at para. 3.530, Mr. Justice Sharpe points to two factors that constrain the courts in finding standing where an individual seeks a remedy with respect to a matter of general public interest: 1. Fear of a flood of unnecessary litigation that might result from affording broad rights of standing. 2. A concern over the politicization of the judicial process; where ordinary members of the public are permitted to raise public law issues in which they have no particular interest, they may unnecessarily involve the courts in political controversies and disputes. [An alternative means of achieving status to invoke the jurisdiction of the court is through public interest standing. An explanation of that concept can be found in Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236, where Cory J. stated: 30. The state has been required to intervene in an ever more extensive manner in the affairs of its citizens. The increase of state activism has led to the growth of the concept of public rights. The validity of government intervention must be reviewed by courts. Even before the passage of the Charter this Court had considered and weighed the merits of broadening access to the courts against the need to conserve scarce judicial resources. It expanded the rules of standing in a trilogy of cases; Thorson v. Attorney General of Canada, supra, Nova Scotia Board of

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Censors v. McNeil, [1976] 2 S.C.R. 265, and Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575. Writing for the majority in Borowski, supra, Martland J. set forth the conditions which a plaintiff must satisfy in order to be granted standing, at p. 598: ... to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court. Those then were the conditions which had to be met in 1981. A constitutional issue need not be raised for public interest standing to be available in pursuing public rights. In Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607, the court held that the approach to public interest standing reflected in Thorson v. Canada (Attorney General), [1975] 1 S.C.R. 138; Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265; and Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575, should be extended to a non-constitutional challenge to the statutory authority for public expenditure and other administrative action. In two decisions of this court in which public interest standing was granted to a private entity seeking injunctive relief, the circumstances made it clear that such standing will not be granted where governmental action is not brought into question. In both cases, the relevant ministry of government was made a party and it was clear that it was the governmental action, not the private respondent's action that justified granting public interest standing. In the present case, the action is only brought against the University as a private entity in its capacity as a landowner, dealing with wildlife on its property. The petitioner's action does not challenge the constitutional validity of legislation. It appears that Ms. Cassells and her group were successful in speeding up the approval process, but her petition does not implicate the Minister's exercise of discretion under s. 40, reflected in his August 19, 2010 letter. This is a case which is amenable to the sort of social and political activism which the petitioner has, with her supporters, pursued vigorously and successfully. It is not, however, a case which lends itself to legal action because it lacks the indicia of a private interest or special damage peculiar to Ms. Cassells, and it lacks critical aspects of an action attracting public interest standing: a challenge to the validity of legislation or the exercise of administrative and executive authority. The only respondent in this case is the University. Its original Rabbit Management Plan was approved by the Ministry of the Environment, and the Minister's actions are not challenged in this action. Whatever issue the petitioner may have with the Wildlife Act, the Ministry of the Environment, the Prevention of Cruelty to Animals Act or the British Columbia Society for the Prevention of Cruelty to Animals are not matters that can be determined by this petition. The petitioner is in effect seeking to achieve the objectives of a criminal or quasi criminal prosecution through her petition and

through the maintenance of the interlocutory injunction. What she seeks would stigmatize the University with quasi criminal liability without the approval of the Attorney General through whom the public law is to be enforced, without an objective or full investigation by representatives of the Ministry of the Environment, and without a proper or full hearing observant of the rules of evidence and the applicable standard of proof. Although the subject matter of this case has drawn significant public concern and attention, that does not justify ignoring the need for a plaintiff or petitioner to establish a proper foundation for invoking the jurisdiction of the court particularly in cases involving criminal or quasi criminal public law issues.

**HERON BAY INVESTMENTS v. HER MAJESTY THE QUEEN,  
FCA, 2010 July 29  
INCOME TAX - PROCEDURE - BIAS -  
FAIR TRIAL**

Appeal from a decision that refused deductions for certain loans. HELD: Appeal allowed, new trial ordered before a different judge. This Court expresses no opinion on whether the judge's interpretation and proposed application of section 69 is correct. The introduction of section 69 without inviting submissions was a breach of the rules of procedural fairness and should not have occurred. However, this breach did not result in a detriment to Heron Bay. Having carefully reviewed all of the judge's comments on the issue of whether the Viewmark loan was doubtful on August 31, 1995. The reference to section 69 was obiter. This particular breach, by itself, does not justify a retrial. Whether the judge intervened excessively in examinations and cross-examinations [40] It is common ground that excessive intervention by a trial judge may warrant a new trial (see James v. Canada (Minister of National Revenue - M.N.R.) (2000), 266 N.R. 104, [2001] 1 C.T.C. 227, 2001 D.T.C. 5075 (F.C.A.); Chippewas of Mnjikaning First Nation v. Ontario (Minister of Native Affairs), 2010 ONCA 47. [41] The relevant principles are stated as follows in James (paragraphs 51-53): [¶51] The applicable principles are not in dispute. They are well established in such cases as Yuill v. Yuill, [1945] 1 All E.R. 183 (C.A.), Jones v. National Coal Board, [1957] 2 All E.R. 155 (C.A.), Majcenic v. Natale, [1968] 1 O.R. 189 (C.A.); R. v. Brouillard, [1985] 1 S.C.R. 39, Rajaratnam v. Canada (Minister of Employment and Immigration), (1991), 135 N.R. 300, [1991] F.C.J. No. 1271 (F.C.A.)(QL); Sorger v. Bank of Nova Scotia (1998), 39 O.R. (3d) 1, 160 D.L.R. (4th) 66 (C.A.). The general rule is that a judge may ask a witness questions of clarification and amplification, but should not intervene in the questioning of a witness to such an extent as to give the impression of taking on the role of counsel. A judge who does so necessarily will be seen as having adopted a position in opposition to one of the parties. That diminishes the appearance of impartiality that is critical to the goal of ensuring that justice is not only done, but is seen to be done. It may also interfere with the effective presentation of the case by counsel. The number of interventions by the judge during the examination in chief of Mr. Libfeld was

extraordinary, but that by itself does not establish that the interventions were improper. Many of the judge's questions were appropriate attempts to clarify the facts and gain a full understanding of the transactions. However, very early in the course of the examination in chief of Mr. Libfeld, the judge seemed to fall into the habit of taking over the questioning. It is sufficiently clear from the judge's reasons that the evidence of Mr. Libfeld elicited by the judge provided the evidentiary basis upon which the judge relied for a critical conclusion in favour of the Crown. It is also clear that this evidence was elicited by the judge in the course of a lengthy intervention toward the end of a morning of questioning of Mr. Libfeld in which the judge almost routinely took over the questioning from counsel for Heron Bay. The record is such as to give a reasonable and well informed observer the impression that the judge, during the examination of Mr. Libfeld and as a result of his own questioning, adopted a position in opposition to Heron Bay on a critical issue in the case, giving rise to a reasonable apprehension that the judge was not a fair and impartial arbiter. This procedural flaw is such that the judgment cannot stand, and the matter must be returned to the Tax Court for a new trial before a different judge.

**R. v. PARE,  
ON CA, 2010 August 30  
(PUBLICATION BAN)  
CRIMINAL LAW -- ATTEMPTED  
OBSTRUCTION -- ELEMENTS OF  
OFFENCE**

Crown appeal from acquittal on a charge of attempted obstruction of justice. HELD: Appeal allowed. New trial ordered. This case turns on the meaning to be attached to s. 139(3)(a) of the Criminal Code, which provides that every one who, in a judicial proceeding, "dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence" shall be deemed to wilfully attempt to obstruct the course of justice. The gist of the offence is the use of corrupt means to influence a witness. As is said in some of the cases, merely attempting by reasoned argument to have a witness tell the truth is not an offence. But attempting to persuade a witness to change their testimony, even to change the testimony to what the accused believes is the truth, is an offence where the means of persuasion is corrupt. Offering money to a complainant in a criminal case to change her testimony is a classic example of corrupt means. See R. v. Kotch (1990), 61 C.C.C. (3d) 132 (Alta. C.A.) at 136. The mens rea of the offence is made out where the accused intentionally offers the improper inducement for the purpose of dissuading the witness from giving evidence, even if the accused is merely trying to persuade the witness to tell what the accused believes is the truth. The term "wilfully" requires that the accused act intentionally. For the purposes of this case it is unnecessary to decide whether recklessness would also suffice to establish that the accused acted wilfully. See R. v. Buzzanga and Durocher (1979), 49 C.C.C. (2d) 369 (Ont. C.A.), at 379-82. The trial judge erred in acquitting the respondent on the basis that his motive was to ensure that Ms. Z told the truth. Ordinarily, the

appropriate disposition, given the trial judge's findings of fact, would be to set aside the acquittal and enter a conviction. However, there is a problem in the basis for the trial judge's finding that Mr. Harcus made the various threats and inducements at the instigation of the respondent. It was somewhat clearer that the respondent had instructed Mr. Harcus to tell Ms. Z that if she persisted in her false complaint he would sue her. The more difficult question is whether the respondent had the specific intent to threaten Ms. Z. In other words was this an improper attempt to intimidate the witness by corrupt means or merely an attempt at persuasion? In some circumstances a threat to exercise legal rights by instituting a civil suit could amount to a corrupt means depending upon the accused's intent. However, because the trial judge misinterpreted the requisite mens rea, he did not make the necessary findings as to whether the respondent instructed Mr. Harcus to threaten Ms. Z.

**CHRYSLER CANADA INC. v. EASTWOOD  
CHRYSLER DODGE LTD.,  
MB CA, 2010 August 13  
PROCEDURE -- ARBITRATION --  
STRIKING OF PLEADINGS**

Appeal from a decision that dismissed an application to strike counterclaims. HELD: Appeal allowed. The selection of the appropriate standard of review depends largely on the nature of the question in issue: whether it is a question of law, fact or mixed law and fact. Questions of law are reviewed for correctness. Questions of fact (including inferences drawn from the evidence) are reviewed only for palpable and overriding error. Questions of mixed fact and law are also reviewed only for palpable and overriding error, unless an extricable or severable legal error from the factual determination is evident, in which case deference is not owed and the correctness standard can be used. See Housen v. Nikolaisen, 2002 SCC 33 (CanLII), 2002 SCC 33, [2002] 2 S.C.R. 235. 24 The first issue is whether the motions judge erred by failing to strike out the counterclaim for disclosing no reasonable cause of action. As a result, the standard of review on the motions judge's decision on whether to strike out the counterclaim for disclosing no reasonable cause of action can be expressed as follows: absent an error in law or a palpable and overriding error on a question of fact, the decision of the motions judge is entitled to deference and this court will not intervene unless the decision is so clearly wrong as to amount to an injustice. See Towers Ltd. v. Quinton's Cleaners Ltd. et al., 2009 MBCA 81 (CanLII), 2009 MBCA 81, 245 Man.R. (2d) 70 at paras. 24-28. 25 The second issue is whether the motions judge erred in failing to dismiss or stay the counterclaim given that Eastwood agreed to the application of the NADAP Arbitration Rules, as opposed to court proceedings, to resolve any dispute it had with Chrysler. The question of whether those rules apply with respect to the issue raised in the counterclaim and, if they do apply, whether the court has jurisdiction to intervene under The Arbitration Act, C.C.S.M., c. A120 (the Act), involves the interpretation of an agreement as well as the legislation and some consideration of the underlying facts.

Although this would seem to be a question of mixed fact and law, the nature of the question in the circumstances of this case is more akin to one of law than one of mixed fact and law and is therefore to be reviewed on correctness. See Canada (Director of Investigation and Research) v. Southam Inc., 1997 CanLII 385 (S.C.C.), [1997] 1 S.C.R. 748 at para. 35. The motions judge erred in law by failing to strike out Chiappetta's counterclaim because the pleadings do not assert that Chiappetta was a party to the SSA, to the NADAP Arbitration Rules agreement, or to any alleged agreement that may have been reached with respect to the chargebacks. Although Chiappetta was involved in the chargeback audit dealings, he was not acting in his personal capacity. Chiappetta's counterclaim should be struck as disclosing no reasonable cause of action pursuant to Rule 25.11(d) of the Court of Queen's Bench Rules. The motions judge erred with respect to the Eastwood Claim. The motions judge clearly erred on a question relating to a material fact when he found that Eastwood was barred from proceeding any further under the internal resolution process. There was no evidence before the motions judge that Chrysler ever denied Eastwood a Vice-Presidential Review or even ever asserted that Eastwood was unable to proceed with such a review. The premise which led the motions judge to find that it would be "unjust to require [Eastwood] to withdraw its counterclaim" was absent. This material misdirection led to error and no deference is owed to his decision. It is well settled that in deciding whether to stay a court proceeding on the ground that there is a contractual dispute resolution process in place, the general principle is that the court will determine if the essential character of a dispute comes within the ambit of that resolution agreement. If it does, the dispute is generally to be determined by the arbitration process and not by the courts (see Warraich v. University of Manitoba, 2003 MBCA 58 (CanLII), 2003 MBCA 58, 173 Man.R. (2d) 202 at para. 8, and ss. 6 and 7 of the Act which are reproduced in the following paragraph). 33 With the case at hand, it is without dispute that the parties agreed to the application of the NADAP Arbitration Rules and that the essential character of Eastwood's counterclaim fell within the ambit of those rules. In the circumstances, the court's role in resolving the dispute is very constrained. The matter should be allowed to proceed pursuant to the NADAP Arbitration Rules, unless it falls within the following exceptions set out in ss. 6 and 7 of the Act. There can be no doubt that the NAPAD Arbitration Rules are intended to provide a complete dispute resolution scheme to govern the relationship between the parties. The question of whether a dispute still remains within the ambit of the NAPAD Arbitration Rules is one that should be decided on its merits by the arbitrator. MDG Kingston Inc. v. MDG Computers Canada Inc., 2008 ONCA 656 (CanLII), 2008 ONCA 656, 92 O.R. (3d) 4 at para. 32 (a motion for extension of time to file leave to appeal to the Supreme Court of Canada dismissed on May 27, 2010, Docket 33605), where it was held that it is for the arbitrator to decide its own jurisdiction.

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