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# Bad Faith Claims and Bifurcation after *Bhasin v. Hrynew*: An Insurance Perspective

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## Overview

With the recent Supreme Court of Canada decision in *Bhasin v. Hrynew,*[1] a fair amount of commentary has been written about the emerging importance of good faith in contractual relationships. One should not consider this decision to represent a sudden judicial pronouncement concerning entirely novel duties owed amongst contractual parties; rather, the doctrine of good faith has existed for some time for certain categories of contracting parties and the courts have adopted a distinct method for uniquely assessing the duties imposed. This article reviews the recent Supreme Court of Canada decision under the lens of the pre-existing doctrine of bad faith as it exists between contracting parties in the insurance market.

## *Bhasin v. Hrynew*

The Supreme Court of Canada decision of *Bhasin v. Hrynew* recently established a comprehensive, overarching doctrine of good faith and a duty of honesty between contracting parties. The unanimous decision, written by Justice Cromwell, now requires that contracting parties generally must perform their contractual duties honestly and reasonably, not capriciously or arbitrarily.[2] Contracting parties are now required to have "appropriate regard" for the other party's interests. While this does not require the contracting parties to subordinate their own interests to the other party's interests, it merely requires that contracting parties do not seek to undermine those interests in bad faith.[3] In other words, the Supreme Court was not seeking to impose a duty of loyalty in contractual relationships, but instead, held that there ought to be a minimum standard of honesty between contracting parties.[4]

In *Bhasin v. Hrynew,* Mr. Bhasin was an enrollment director for one agency for Canadian American Financial Corp. ("Can-Am"). Can-Am marketed educational savings plans to investors through enrollment directors, including Mr. Bhasin. Mr. Hrynew was also the enrollment director of a separate agency, and so was in direct competition with Mr. Bhasin. Mr. Hrynew coveted Mr. Bhasin's market and approached Mr. Bhasin several times to propose a merger of their agencies. Mr. Bhasin refused Mr. Hrynew's approaches. Mr. Hrynew later became Can-Am's provincial trading officer, where he was able to audit Mr. Bhasin's level of

[1] *Bhasin v. Hrynew*, 2014 SCC 71, 2014 CSC 71.
[2] *Ibid,* at para 63.
[3] *Ibid,* at para 65.
[4] *Ibid,* at para 74.

regulatory compliance. At the same time, Can-Am was considering the restructuring of its agencies. Mr. Bhasin refused to allow Mr. Hrynew to audit his records, and Can-Am responded by threatening to and eventually terminating Mr. Bhasin's agreement by non-renewal. Once Mr. Bhasin's contract expired, he lost the value in his business in his assembled workforce, and the majority of his sales agents were successfully solicited by Mr. Hrynew.[5]

In *Bhasin v. Hrynew*, the Supreme Court held that the trial judge accurately concluded that Can-Am acted dishonestly during the time leading up to and including the non-renewal of Mr. Bhasin's contract. The failure to act honestly was generally rooted in Can-Am's actions, as they:

- Repeatedly misled Mr. Bhasin by telling him that Mr. Hrynew, as provincial trading officer, was under an obligation to treat the information confidentially, which was untrue;
- Failed to detail the role Mr. Hrynew would have as Can-Am's provincial trading officer;
- Misled Mr. Bhasin by stating that the Commission had rejected a proposal to have an outside provincial trading officer, which was untrue;
- Did not honestly inform Mr. Bhasin about the realities that Can-Am's license may be revoked by the Commission, and that Can-Am was actively trying to forestall that possibility;
- Misled Mr. Bhasin regarding the extent of Can-Am's plans for him to merge with Mr. Hrynew, which were considered to be a 'done deal'; and,
- Exercised its non-renewal clause only after Mr. Bhasin refused to allow Mr. Hrynew to conduct the audit.[6]

Can-Am was found liable for the damages sustained by Mr. Bhasin as a result of the non-renewal of his contract. The claims against Mr. Hrynew for conspiracy and inducing breach of contract were dismissed.[7]

**Good Faith in Insurance Contracts**

Universally recognized in the insurance industry is the mutual obligation between an insured and an insurer to act in the utmost good faith.[8] The foundation of good faith obligations on both parties derives from the dependency of knowledge present between the two parties. Each party is undertaking certain contractual commitments based on the representations of the other. As no quantifiable product is actually changing hands, the risk to either party is completely dependent upon the reliance and honesty of information from the other.

[5] *Ibid,* at paras 2-13.
[6] *Ibid,* at paras 2-13.
[7] *Ibid,* at paras 108.
[8] *Whiten v. Pilot Insurance Co.* (2002), [2002] 1 S.C.R. 595 (S.C.C.), see also *Bhasin v. Hrynew*, 2014 SCC 71, 2014 CSC 71 at para 55.

Accordingly, whenever an insurance contract is contemplated, an insured is bound to first disclose all matters relevant to the risk, regardless of any inquiries of the insurer.[9] Likewise, an insurer has an implied obligation to deal with the claims of its insureds in good faith, separate and apart from the insurer's obligation to compensate it's insured for a loss covered by the policy. An insurer also owes duties strictly summarized by commitments expressed in the insurance policy, which form the basis for the charged premium.

Thereafter, because of its acceptance of the insured's risk (in a multitude of forms), an insurer is bound to consider the interest of the insured when responding to a crystallized risk; in other words, it cannot treat its own interest as paramount to the interest of the insured.[10] This requires the insurer to assess the merits of the claim in a reasonable, balanced, and fair manner. The insurer cannot arbitrarily decide to deny coverage, or choose to deny or delay coverage in order to take advantage of the economic vulnerability of an insured, or to gain bargaining leverage in negotiating a settlement. Simply, an insurer's decision to refuse coverage should be based on a reasonable interpretation of its obligations under the policy, not using the situation of the insured to its advantage.

In Canada, a cause of action in bad faith is different from an action on the policy for damages for insured loss. Breach of an insurer's obligation to act in good faith must be sufficient to constitute a separate or independent actionable wrong for which compensation is payable.[11] Accordingly, the conduct surrounding a bad faith breach of the contract must involve a marked departure from ordinary standards of decency. A claim for bad faith can arise from the insurer's actions in the underwriting of the claim, or in the insurer's handling of the claim when the insured presents for defence or payment.

**Tackling Bad Faith Claims**

The litigation of insurance-based bad faith claims presents a distinct problem separate from judicial assessment of the alleged breach of the insurance contract itself. The bad faith allegation must pertain to some course of conduct distinct from the wording in the contract, or in this case, the insurance policy.

In an effort to assess the bad faith allegations against an appropriate factual background, courts have imposed upon insurers a duty to promptly disclose to the insured all material information touching upon the coverage assessment, the insured's position in the litigation and settlement negotiations.[12] It is not a matter for the insurer to pick and choose which information it discloses; all information that is relevant ought to be disclosed. Continually, an insurer's level of disclosure in a coverage dispute can itself lead to allegations that the insurer has been acting in a breach of the utmost good faith. A denial of information can

[9] *Ferme Gérald Laplante & Fils Ltée v. Grenville Patron Mutual Fire Insurance Co.* (2002), 61 O.R. (3d) 481 (Ont. C.A.); leave to appeal refused 2003 CarswellOnt 2737 (S.C.C.).
[10] *Plaza Fiberglas Manufacturing Ltd. v. Cardinal Insurance Co.* (1994), 18 O.R. (3d) 663 (Ont. C.A.).
[11] *Tembec Industries Inc. v. Lumberman's Underwriting Alliance* (2001), 52 O.R. (3d) 334 (Ont. S.C.J.); *Whiten v. Pilot Insurance Co.* (1999), 42 O.R. (3d) 641 (Ont. C.A.).
[12] *Shea v. Manitoba Public Insurance Corp.,* [1991] 55 B.C.L.R. (2d) 15, 1 C.C.L.L. (2d) 61.

happen by many means, such as: incomplete or limited affidavits;[13] insufficient evidence; questionable investigations and assessments;[14] as well as not providing documents used in assessing coverage, such as unexpurgated credit card and bank account statements.[15]

However, as we discuss below, the insurer's disclosure requirements can still remain subject to litigation and solicitor-client privilege. These privileges can then potentially run at odds with an approach to production of information based solely on relevance.[16]

The case of *Norex Petroleum Ltd. v. Chubb Insurance Co. of Canada*[17] is an example how bad faith allegations arise, and the manner in which a court may deal with these allegations. In *Norex*, the plaintiff brought bad faith claims against its insurer after claiming that its insurer denied coverage inappropriately for various reasons. In response, the insurer brought an application to sever (or bifurcate) the plaintiffs' bad faith claims from their contractual insurance claims, and to stay all proceedings in relation to bad faith claims until contractual insurance claims were determined.

**Bifurcation**

Bifurcation, or the severance of two separate aspects of one claim, involves a request by a party (usually the insurer) to sever the bad faith allegations from the primary question concerning the appropriate scope of coverage under the policy. In these cases, the goal of severance is to allow the coverage question to be assessed as a breach of contract issue first, without the potentially prejudicial effect of the bad faith claims being addressed at the same time. Then, if the coverage question is answered affirmatively, a separate proceeding would occur afterwards, relying upon separate evidence in order to determine whether or not the insurer acted in bad faith. In other words, if the coverage assessment determines there is no coverage, there is no longer a basis for the bad faith claim to proceed, as the insurer acted in accordance with their obligations under the policy.

Courts differ on whether or not they prefer to bifurcate coverage or contractual and bad faith claims. For instance, in the United States, many courts have held that a contemporaneous assessment of the allegations of bad faith together with the issues of insurance coverage is simply too prejudicial to the insurer's coverage defence. As a result, the bifurcation of these disputes becomes all but automatic. Conversely, Canadian courts have generally been less accepting to the theory of significant prejudice requiring bifurcation, following the decision of Tobias J. in *Bourne v. Saunby*.[18] As a result, Canadian courts have therefore been less willing to bifurcate bad faith claims from coverage claims.

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[13] *Martens v. Wawanesa Life Insurance Co.*, 2011 SKQB 448, 209 ACWS (3d) 847 at paras 27-37.
[14] *McDonald v. Insurance Corp of British Columbia*, 2012 BCSC 283, 212 ACWS (3d) 819.
[15] *Astels v. Canada Life Assurance Co.*, [2006] B.C.J. No. 1426 (B.C. S.C.) at para 24.
[16] *SNC-Lavalin Engineers & Constructors Inc v Citadel General Assurance Co*, [2003] 63 OR (3d) 226, 31 CPC (5th) 371 (Ont Master).
[17] *Norex Petroleum Ltd. v. Chubb Insurance Co. of Canada*, [2008] 444 AR 88, 167 ACWS (3d) 669.
[18] *Bourne v. Saunby*, [1993] O.J. No. 2606 (Ont. Gen. Div.).

This jurisprudential difference has led to two streams of authorities concerning the severance of bad faith insurance claims from contractual insurance claims:[19] the first originating in British Columbia with *Wonderful Ventures Ltd v. Maylam,*[20] and the second originating in Ontario with *Sempecos v. State Farm Fire & Casualty Co.*[21] The *Wonderful Ventures* line of decisions[22] suggests that western courts are fairly receptive to severing bad faith insurance claims from contractual insurance claims, while the *Sempecos* line of decisions[23] suggests that eastern courts focus on maintaining a singular action, with only one trial for all triable issues.[24]

**Privilege**

The differentiating factor between *Sempecos* and *Wonderful Ventures* is that of privilege. In *Wonderful Ventures*, the insurer obtained legal advice prior to denying coverage, and had its counsel review the investigations carried out by its adjusters.[25] In other words, in order to address the coverage dispute, the veil of solicitor-client privilege would have to be pierced as the lawyer would be a material witness to the bad faith claim. In *Sempecos*, despite arguing otherwise, the insurer was able to put forward affidavit evidence that did not contain legal advice.[26]

In *Wonderful Ventures*, the court held that the level of prejudice to the insurer for having to disclose privileged communications would be more significant than any prejudice the plaintiff would suffer as a result of having the contract claim and bad faith claim tried separately.[27] However, in *Sempecos*, the insurer faced no such prejudice, so the court held that bifurcation

[19] *Norex Petroleum Ltd. v. Chubb Insurance Co. of Canada*, [2008] 444 AR 88, 167 ACWS (3d) 669.
[20] *Wonderful Ventures Ltd. v. Maylam*, 91 B.C.L.R. (3d) 319, 2001 BCSC 775 (B.C. S.C. [In Chambers]).
[21] *Sempecos v. State Farm Fire & Casualty Co.* (2001), 17 C.P.C. (5th) 371 (Ont. S.C.J.), aff'd (2002), 29 C.P.C. (5th) 99 (Ont. Div. Ct.), aff'd (2003), 38 C.P.C. (5th) 64 (Ont. C.A.).
[22] *Norex Petroleum Ltd. v. Chubb Insurance Co. of Canada*, [2008] 444 AR 88, 167 ACWS (3d) 669 at para 18. The line of authorities originating in British Columbia with *Wonderful Ventures* includes the following British Columbia and Alberta authorities: *Lawrence v. Insurance Corp. of British Columbia*, 96 B.C.L.R. (3d) 375, 2001 BCSC 1530 (B.C. S.C.); *Read v. Insurance Corp. of British Columbia*, 2002 BCSC 1607 (B.C. S.C.); *Sanders v. Clarica Life Insurance Co.*, 30 C.P.C. (5th) 364, 2003 BCSC 403 (B.C. S.C. [In Chambers]); *Stuart v. Manufacturers Life Insurance Co.*, 10 C.C.L.L. (4th) 142, 2004 BCSC 501 (B.C. Master); *Stevens v. Sun Life Assurance Co. of Canada*, 9 C.C.L.L. (4th) 245, 2004 BCSC 468 (B.C. S.C.); *Kursar v. BCAA Insurance Corp.*, 17 C.C.L.L. (4th) 65, 2004 BCSC 1006 (B.C. S.C.); and *Ennis v. RBC Life Insurance Co.*, 53 C.C.L.L. (4th) 270, 2007 BCSC 1131 (B.C. Master).
[23] *Norex Petroleum Ltd. v. Chubb Insurance Co. of Canada*, [2008] 444 AR 88, 167 ACWS (3d) 669 at para 18. The line of authorities originating in Ontario with *Sempecos* includes the following Ontario and Newfoundland authorities: *SNC-Lavalin Engineers & Constructors Inc. v. Citadel General Assurance Co.* (2003), 63 O.R. (3d) 226 (Ont. Master); *Osborne v. Non-Marine Underwriters, Lloyd's London* (2003), 32 C.P.C. (5th) 345 (Ont. Master), varied on other grounds (2003), 68 O.R. (3d) 770 (Ont. S.C.J.); *Plester v. Wawanesa Mutual Insurance Co.* (2006), 269 D.L.R. (4th) 624 (Ont. C.A.), leave to appeal refused [2006] S.C.C.A. No. 315 (S.C.C.); and *Lundrigan v. Non-Marine Underwriters, Lloyd's London* (2002), 36 C.C.L.L. (3d) 263 (Nfld. T.D.).
[24] *Norex Petroleum Ltd. v. Chubb Insurance Co. of Canada*, [2008] 444 AR 88, 167 ACWS (3d) 669 at para 14.
[25] *Wonderful Ventures Ltd. v. Maylam*, 91 B.C.L.R. (3d) 319, 2001 BCSC 775 (B.C. S.C. [In Chambers]) at para 14.
[26] *Sempecos v. State Farm Fire & Casualty Co.* (2001), 17 C.P.C. (5th) 371 (Ont. S.C.J.) at paras 11-15, and 32, aff'd (2002), 29 C.P.C. (5th) 99 (Ont. Div. Ct.), aff'd (2003), 38 C.P.C. (5th) 64 (Ont. C.A.).
[27] *Wonderful Ventures Ltd. v. Maylam*, 91 B.C.L.R. (3d) 319, 2001 BCSC 775 (B.C. S.C. [In Chambers]) at para 34.

would have resulted in unfairness, inefficiency, and a potentially prejudicial result to the plaintiff.[28]

While, both lines of cases do stress the importance of solicitor-client privilege, the decision in *Sempecos*, on its face, appears to consider privilege concerns as less important in comparison to the right of the plaintiff to have a just resolution of its claim.[29]

In considering the implications of the decision in *Bhasin v. Hryne*w, bifurcation arguments may be made in order to address the contractual claim prior to the good faith claim. However, bifurcation is equally likely to be constrained in Ontario cases, following the *Sempecos* decision.

**Conclusion**

Insurers have long been required to deal with insureds in good faith, and the presence of "bad faith" is often raised in insurance disputes. The decision in *Bhasin v. Hrynew* expressly extends the doctrine of good faith to the behaviour of all contracting parties, such that any contracting party is now legally obliged to have appropriate regard for the interests of the other.

As *Bhasin v. Hrynew* represents a potential avenue of pleading an absence of good faith in all contracting claims (not only insurance coverage disputes), it may foster new litigation as courts and contracting parties learn the parameters of the Supreme Court of Canada's good faith doctrine. Given this advancement in the law of general contract, we await what implications the decision will have on all contracting parties, and whether courts begin to address claims alleging an absence of good faith in the contractual context similarly to claims made as the result of specific instances of bad faith in the insurance context discussed above.

Drawing from our experiences litigating insurance-based bad faith claims, it remains to be seen whether this doctrine will alter how parties deal with one another, how they engage in or out of contractual relationships, how they engage counsel for such purposes, and how damages arising from these contractual breaches are allocated. Ultimately, *Bhasin v. Hrynew* may reduce the likelihood of courts bifurcating insurance bad faith claims across Canada, as the assessment of good faith will likely become commonplace.

[28] *Sempecos v. State Farm Fire & Casualty Co.* (2001), 17 C.P.C. (5th) 371 (Ont. S.C.J.) at para 43, aff'd (2002), 29 C.P.C. (5th) 99 (Ont. Div. Ct.), aff'd (2003), 38 C.P.C. (5th) 64 (Ont. C.A.).
[29] *Sempecos v. State Farm Fire & Casualty Co.* (2001), 17 C.P.C. (5th) 371 (Ont. S.C.J.) at para 36, aff'd (2002), 29 C.P.C. (5th) 99 (Ont. Div. Ct.), aff'd (2003), 38 C.P.C. (5th) 64 (Ont. C.A.).

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# Who Cares about Legal Research?

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When you advise clients that legal research[1] is needed in their case, they might ask: "why? who cares about legal research?". As elaborated below, you can tell them that judges and the law society care.[2]

**Judges Care**

In various sources, including judgments, lectures and correspondence, judges have said that legal research is important. For example, in Ontario recently, members and former members of the bench have underscored this point.

In five class action cases[3] released together, Justice Belobaba recently wrote "legal research is obviously essential". At a class actions symposium last year, former Chief Justice Winkler said: "Lawyers are supposed to research; otherwise you'll get the wrong answer; it's part of being a lawyer."[4] In an email to me about research lawyers' work, a senior Superior Court judge, after invoking the concept of *stare decisis*, bluntly stated: "The quality of the submissions made in reliance on research lawyers' memos is only as good as the research itself and the quality of the resulting judgments is only as good as the submissions. So, if you mess up, the whole legal system breaks down and we end up with (more) stupid law and it's all your fault!"[5]

The bench's emphasis on a lawyer's duty to perform proper legal research has a modern lineage. Probably the most comprehensive judicial comment on this duty, made by Ferguson J. a couple decades ago, remains apt. In *Gibb v. Jiwan*[6] he observed that the court must rely

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[1] In practice legal research includes, but often means more than, finding authoritative law. Legal research broadly involves analyzing what you have found, reaching a conclusion, crafting an opinion, strategy or argument based on it and ultimately solving your client's problem. The meaning of "legal research" as a noun can include both a skill and the product of exercising that skill.

[2] For the related venerable discussion about the importance of teaching legal research at law schools and beyond, see the plethora of articles in sources like SLAW – Canada's Online Legal Magazine, http://www.slaw.ca.

[3] *Crisante v. DePuy Orthopaedics Inc.*, 2013 ONSC 6351 at para. 5, fn. 7 (November 8, 2013); *Dugal v. Manulife Financial* (sub nom. *Ironworkers Ontario Pension Fund (Trustee of) v. Manulife Financial Corp.*, 2013 ONSC 6354 at para. 5, fn. 7 (November 8, 2013); *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 6356 at para. 5, fn. 7 (November 8, 2013); *Brown v. Canada (Attorney General)*, 2013 ONSC 6887 at para. 5 (November 13, 2013); *Sankar v. Bell Mobility Inc.*, 2013 ONSC 6886 at para. 5, fn. 7 (November 13, 2013).

[4] The Honourable Mr Warren Winkler, "Now I Can Say What I Really Think: A Farewell Message", Osgoode's 11th National Symposium on Class Actions (April 25, 2014).

[5] This comment echoes Nathanson J.'s much earlier postscript in *Re Hanna*, 1988 CarswellNS 348, [1988] N.S.J. No. 435 at para. 15 (S.C.T.D.) as follows:

> All counsel are expected to prepare properly. The trial courts rely upon the submissions of counsel; they do not normally have the time or resources to conduct their own legal research. If counsel do not do their job properly, the decisions of the courts and the quality of justice that Canadians have a right to expect may be affected adversely.

See also *Lougheed Enterprises Ltd v. Armbruster* (1992), 63 B.C.L.R. (2d) 316, 1992 CarswellBC 20 at paras. 32-38 (C.A.). More recently, in *Kelley-Frost v. MacQuarrie*, 2014 NSFC 13 at para. 16, William J. Dyer Fam. Ct. J. "stressed the importance of legal research" when suggesting to an unrepresented litigant to get a lawyer.

[6] 1996 CarswellOnt 1222, [1996] O.J. No. 1370 at paras 33-40 (Gen. Div.).

on counsel to conduct reasonably complete research on points of law they raise;[7] that counsel have a duty to note up cases upon which they rely to determine whether these cases are still good law;[8] that "the judicial system cannot function effectively unless counsel fulfil this duty because judges cannot possibly know the law on all issues that come before them".[9] Ferguson J. revealed that in the case at bar he and the court's law clerk had to do the research that counsel had neglected to do. He said this was "particularly annoying in view of the court's scarce and dwindling resources".[10] He lamented that counsel's lack of preparation and research is "commonplace" on civil motions and at civil trials.[11]

Even the Supreme Court of Canada has weighed in that a lawyer is expected to discover rules of law that are not commonly known but may be found by standard research techniques.[12]

**The Law Society Cares**

The Law Society of Upper Canada also addresses the importance of conducting legal research where the matter requires it. The LSUC's *Rules of Professional Conduct* require a lawyer to "perform any legal services undertaken on a client's behalf to the standard of a competent lawyer."[13]

"Competent lawyer" is expansively defined to mean, in part, "a lawyer who has and applies relevant knowledge,[14] skills and attributes in a manner appropriate to each matter undertaken on behalf of a client including … (c) implementing, as each matter requires, the chosen course of action through the application of appropriate skills, including, (i) legal research, ….".[15]

**Consequences of Not Caring**

Failure to conduct proper research when the circumstances of the case require it can be found to be incompetent professional practice. This may give rise to disciplinary action and

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[7] *Id.*, at para. 36.
[8] *Id.*, at para. 37.
[9] *Id.*, at para. 38.
[10] *Id.*, at para. 39.
[11] *Id.*, at para. 42.
[12] *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at pp. 213-14, 1986 CarswellNS 40 at para. 67, LeDain J. A lawyer's duty to know elementary principles and discover additional ones using research was stated in 7 Am Jur 2d, *Attorneys at Law*, para. 200, in a passage that was first quoted by Jones J.A., in the Appeal Division in *Central & Eastern Trust Co. v. Rafuse*, 1983 CarswellNS 119, [1983] N.S.J. No. 55 at para. 22 and repeated by LeDain J. This passage about the requirement of professional competence has been quoted at least ten times by courts across the country, including in Ontario by Greer J. in *Payne v. Carr*, 1996 CarswellOnt 4880, [1996] O.J. No. 4458, at para. 64 (Gen. Div.).
[13] Rule 3.1-2.
[14] The word "knowledge" was recently added (and "values" removed) from this rule in amendments that came into force October 1, 2014.
[15] Rule 3.1-1 This rule lists various skills, separately identifying legal research, from such other skills as analysis, application of the law to the relevant facts, writing and drafting, and problem-solving. In fact, in practice, capable research lawyers effectively integrate these and other abilities. See Mark Gannage, "The Roles of Research Lawyers in Private Practice in Canada" (2001) 24 Advocates' Quarterly 202, and also, for *e.g.*, Ted Tjaden, "The Role of Legal Research Lawyers in Law Firms" (SLAW, November 28, 2007) http://www.slaw.ca/2007/11/28/the-role-of-legal-research-lawyers-in-law-firms/ and linked articles, Catherine Best, *Best Guide to Canadian Legal Research*, http://legalresearch.org/essentials/importance-of-legal-research/.

costs sanctions against counsel personally.[16] It might also be actionable for damages in negligence or contract.

**Conclusion**

Hence, if clients ask why in suitable cases you have to research the law, you might consider asking them in return: "You want to win, don't you?" You can tell them because not only is it in their best interest that you do proper legal research, but also that the courts and law society want you to. They care. So your clients should too.

[16] See, *e.g.*, *Gibb v. Jiwan*,1996 CarswellOnt 1222, [1996] O.J. No. 1370 at paras. 39-42 (Gen. Div.), *World Wide Treasure Adventures Inc. v. Trivia Games Inc.* (1987), 16 B.C.L.R. 135, 1987 CarswellBC 219 at paras. 17-24 (S.C.).

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# Throwing the Precautionary Principle to the Wind? Determining the Constitutionality of Ontario's *Green Energy Act* in *Dixon v. Director, Ministry of the Environment*[1]

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## Introduction

In 2013 and 2014 the Director of the Ontario Ministry of the Environment authorized the construction and operation of three wind turbine farms in Huron and Bruce Counties: a 33 MW, 15 wind turbine farm; a 270 MW, 140 wind turbine farm; and an 180 MW, 92 turbine farm. The Director issued a renewable energy approval (REA) for each project under the new wind turbine approval process established by the *Green Energy Act*[2] in Part V.0.1 of the *Environmental Protection Act*.[3]

Ontario residents living in close proximity to each project sought a hearing to review the Director's decisions before the Environmental Review Tribunal. In each case the Tribunal refused to revoke the Director's decision.

Under the *Environmental Protection Act*, the residents appealed from each of the Tribunal's decisions to the Divisional Court on "a question of law." Namely, the appellants argued that the regulatory regime for the approval of wind turbines violates their rights to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" under s. 7 of the *Canadian Charter of Rights and Freedoms*.

Although the Divisional Court dismissed the appeals, they nonetheless raise urgent questions about the future role of s. 7 of the *Charter* in the positive protection of the natural environment and human health.

## The Renewable Energy Rush: Leaving the Environment Behind? The Wind Turbine Approval Process under the *Green Energy Act* and the *Environmental Protection Act*

Ontario's regulatory regime for commercial wind turbine farms was enacted in 2009 through the *Green Energy Act*, the legislative objectives of which are as follows:

> The Government of Ontario is committed to fostering the growth of renewable energy projects, which use cleaner sources of energy, and to removing barriers to and promoting opportunities for renewable energy projects and to promoting a green economy.

[1] *Dixon v. Director, Ministry of the Environment*, 2014 ONSC 7404 (Div. Court).
[2] *Green Energy Act, 2009*, S.O. 2009, c. 12, Sched. A.
[3] *Environmental Protection Act*, R.S.O. 1990, c. E.19.

> The Government of Ontario is committed to ensuring that the Government of Ontario and the broader public sector, including government-funded institutions, conserve energy efficiently in conducting their affairs.
>
> The Government of Ontario is committed to promoting and expanding energy conservation by all Ontarians and to encouraging all Ontarians to use energy efficiently.[4]

The *Green Energy Act* established a regulatory approval process for wind turbine projects under Part V.0.1 of the *Environmental Protection Act*. That Act prohibits the discharge of "contaminants" into the natural environment if the discharge *might cause* an "adverse effect."[5] Notably, the definition of an "adverse effect" under the *Act* includes "harm or material discomfort to any person", "an adverse effect on the health of any person", "impairment of the safety of any person", and "loss of enjoyment of normal use of property."[6]

Under Part V.0.1, however, a different approval process applies to renewable energy projects. But before getting to that new process, it is important to note that the Act nevertheless defines the purpose of Part V.0.1 as "the protection and conservation of the environment", with "environment" being defined as including "human life" and "the social, economic and cultural conditions that influence the life of humans or a community."[7] Moreover, under s. 9(1) of the Act, a person is prohibited from constructing or operating any plant or equipment that might discharge a "contaminant" into the natural environment. But Part V.0.1 exempts renewable energy projects from that prohibition and provides instead that a person not undertake a renewable energy project except with the approval of the Director appointed under the Act.

Upon considering an application, the Director may, "if in his or her opinion it is in the public interest to do so, (a) issue or renew a renewable energy approval; or (b) refuse to issue or renew a renewable energy approval."[8] The considerable scope of the Director's discretion apparent on the face of the Act and its use of "the public interest" standard appears broader still in light of the Act's provisions governing reviews of the Director's decisions.

**Bringing Environmental Precaution and Protection Back In? The *Environmental Protection Act's* Decision-Making Review Process**

A broad class of persons can require a hearing before the Environmental Review Tribunal to review a decision of the Director. Under s. 142.1 of the Act, "a person resident in Ontario" may "require a hearing", but only on the "grounds that engaging in the renewable energy project in accordance with the renewable energy approval will cause (a) serious harm to human health; or (b) serious and irreversible harm to plant life, animal life or the natural environment."

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[4] *Green Energy Act, supra*, Preamble. A "renewable energy source" is defined as "an energy source that is renewed by natural processes and includes wind, water, biomass, biogas, biofuel, solar energy, geothermal energy, tidal forces and such other energy sources as may be prescribed by the regulations".
[5] *Environmental Protection Act, supra,* s. 1(1).
[6] *Id.*
[7] *Id.*, ss. 47.1, 47.2(1).
[8] *Id.*, s. 47.5(1).

The onus of demonstrating such serious harm, however, rests with the person requiring the hearing. Under s. 142.2 of the Act, an applicant for a hearing under s. 142.1 "shall state in the notice requiring the hearing (a) a description of how engaging in the renewable energy project in accordance with the renewable energy approval will cause (i) serious harm to human health, or (ii) serious and irreversible harm to plant life, animal life or the natural environment".

Under the current regulatory regime for what are called Class 4 commercial wind turbine farm facilities, wind turbines in rural areas must be set-back a minimum of 550 meters from a noise receptor (*i.e.*, a dwelling house) and, at that set-back distance, not exceed the sound level of 40 dBA at the lowest specified wind speed.

How were these levels established? That was the question argued before the Divisional Court in *Hanna v. Ontario (Attorney General)*.[9] More specifically, the Court considered whether the set-back and sound conditions complied with the precautionary principle, which is incorporated into s. 11 of the *Environmental Bill of Rights*. Section 11 of the *Environmental Bill of Rights* provides that the Minister shall take every reasonable step to consider the Ministry Statement of Environmental Values when making decisions affecting the environment. In turn, the Ministry's Statement of Environmental Values obligates the Ministry to use "a precautionary, science-based approach in its decision-making to protect human health and the environment."[10]

Although formulations vary, the core idea animating the precautionary principle is that "where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."[11] Some formulations, however, go further and stipulate that where there is the potential for serious or irreversible harm in the face of scientific uncertainty, the onus of proof ought to shift from a project opponent having to prove harm to the project proponent having to prove safety.[12] This brings us to the core of the appellants' s. 7 *Charter* claim.

**Absence of Evidence ≠ Evidence of Absence: The Future of Section 7 of the *Charter* and Environmental Protection**

The appellants in the cases at bar argued that "the uncertainty of the state of scientific knowledge about the effects on human health of commercial wind farms"[13] should inform the analysis of the constitutional validity of ss. 141.1 and 142.2 of the *Environmental Protection Act*, which places the onus on the opponents of a wind farm project to establish serious harm, rather than requiring – as the precautionary principle requires – the project proponents to establish safety. As the Divisional Court in the cases at bar rightly noted, "[t]here is a difference between a negative determination that serious harm to human health has not been proven and a positive determination that engaging in the renewable energy project in

[9] *Hanna v. Ontario (Attorney General)*, 2011 ONSVC 609 (CanLII).
[10] *Environmental Bill of Rights*, S.O. 1993, c. 28, s. 11.
[11] *Bergen Ministerial Declaration on Sustainable Development* (1990).
[12] See e.g. the United Nations Global Compact ("Businesses should support a precautionary approach to environmental challenges"), available online: https://www.unglobalcompact.org/abouttheGC/thetenprinciples/index.html (accessed January 14, 2015).
[13] *Dixon v. Director, Ministry of the Environment, supra*, at para. 66.

accordance with the renewable energy approval will not cause serious harm to human health."[14]

Without for a moment questioning either the efficacy or the urgency of transitioning to a green economy fueled by renewable energy (including energy generated by wind turbine farms), it simply cannot be said that there is scientific certainty surrounding the human health effects of commercial wind farms. In an otherwise well argued report, *Blowing Smoke: Correcting Anti-Wind Myths in Ontario*, Environmental Defence and the Ontario Sustainable Energy Association state that "[r]epeated studies around the world have found no scientific evidence of health impacts from wind power projects." [15] In the Divisional Court's formulation, this is a negative determination, not a positive one. This raises the question of whether such a positive determination is possible at this time.

In the most recent update on its "Wind Turbine Noise and Health Study," Health Canada noted that "[t]he scientific evidence base in relation to WTN [wind turbine noise] exposure and health is limited, *which includes uncertainty* as to whether or not low frequency noise (LFN) and infrasound from wind turbines contributes to the observed community response and potential health impacts. Studies that are available differ in many important areas including methodological design, the evaluated health effects, and strength of the conclusions offered."[16] Indeed, Health Canada launched its study in 2012 for the purposes of creating "a broader evidence base on which to offer federal advice and in acknowledgement of the community health concerns in relation to wind turbines."[17]

All of which raises the question of whether s. 7 of the *Charter* ought to be interpreted in light of this broader context of scientific uncertainty in such a way as to (1) reverse the onus of proof and (2) ground positive obligations on the part of the government (as opposed to exclusively protecting claimants from state-imposed harms). As the majority of the Supreme Court of Canada noted in *Gosselin v. Québec (Attorney General),* "[o]ne day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136, the *Canadian Charter* must be viewed as 'a living tree capable of growth and expansion within its natural limits': see *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 180, *per* McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases."[18]

U.S. environmental law scholar William H. Rodgers, Jr. once observed – likely because we needed reminding – that environmental law "is better if it increases the prospect of protecting the natural world or its inhabitants."[19] In light of the sorry state of Canadian environmental law and policy performance, the need for carefully tailored judicial innovation

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[14] *Id.*, at para. 28.
[15] Environmental Defence & Ontario Sustainable Energy Association, *Blowing Smoke: Correcting Anti-Wind Myths in Ontario* (June 2011), at p. 3, available online: http://www.prowind.ca/downloads/Resources/BlowingSmokeReport_FINAL2.pdf (accessed January 14, 2015).
[16] Health Canada, "Wind Turbine Noise and Health Study: Summary of Results" (October 30, 2014), at p. 1 [emphasis added], available online: http://www.hc-sc.gc.ca/ewh-semt/noise-bruit/turbine-eoliennes/summary-resume-eng.php (accessed January 14, 2015).
[17] *Id.*
[18] *Gosselin v. Québec (Attorney General),* [2002] 4 S.C.R. 429, at para. 82.
[19] William H. Rodgers, Jr., "The Most Creative Moments in the History of Environmental Law: The Who's" (1999) 39 Washburn Law Journal 1, at p. 1.

has never been greater.[20] Doubtless the day has come to revisit and rethink s. 7 of the *Charter* and its guarantee of "life, liberty and security of the person" in a positive light obliging our governments to promote environmental protection, including human health.

[20] See e.g. the latest report of Canada's Commissioner of the Environment and Sustainable Development, available online: http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201410_e_39845.html (accessed January 14, 2015). In her introduction to the report, the Commissioner observed that "[i]n many key areas that we looked at, it is not clear how the government intends to address the significant environmental challenges that future growth and development will likely bring about."

Toronto Law Journal

# Conflict of Interest

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Conflict of interest remains a challenging area for judicial officers.

The recent Newfoundland and Labrador decision in *Cabana v. Newfoundland and Labrador*, 2014 NLCA 34 suggests that disqualifying conflict may not be present in matters where Ontario judicial officers have customarily found it.

As a general rule Ontario judicial officers decline to hear contested matters where one of the parties is represented by someone who is a member of the same law firm as the judicial officer's spouse. So a judge will not hear her husband's associate argue a matter.

The customary refusal is based in part on the view that there is a potential (albeit slight) financial benefit to the judge or justice in ruling in favour of a spouse's colleague. More generally some would see it as unseemly for a judicial officer's spouse's associate to appear before the judicial officer.

The Newfoundland and Labrador Court of Appeal disagreed with this traditional position. The Court was unconcerned about the whether and attendance was seemly. Further the Court noted that disqualification for financial gain is not automatic in Canada. In the case of a judicial officer's spouse appearing the court said the financial benefit was too remote to matter:

> "The question is whether the possible financial gain satisfies the reasonable apprehension of bias test. ...
>
> The fact that the judge’s husband earns money as a partner in the law firm and that a portion of that money comes from litigation undertaken by the firm cannot form the basis for a finding of reasonable apprehension of bias by the judge in this case. "

Accordingly disqualification was not required.