Toronto Law Journal

Federal Court of Appeal Allows Nuclear Project Allowed to Proceed

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On September 10, 2015, the Federal Court of Appeal (FCA) overturned the decision of the Federal Court of Canada (FCC) in *Greenpeace Canada v. Attorney General of Canada*, 2014 FC 463, which had (i) revoked the Site Preparation Licence (Licence) issued to Ontario Power Generation (OPG) to construct new nuclear generation units at the existing Darlington nuclear facility, and (ii) ordered that the environmental assessment (EA) under the *Canadian Environmental Assessment Act* (CEAA 1992)[1] be returned to the Joint Review Panel (JRP) for further consideration.

This decision affirms the existing understanding of the role of a JRP tasked with gathering and "considering" the potential environmental effects of a project under sections 16(1)(a) and (b) of CEAA 1992. The FCA applied the well-established standard that the JRP must give "some consideration" to the relevant issues; since the CEAA 1992 does not stipulate how an environmental effect is to be considered, the scope of consideration is in the discretion of the JRP.

The decision also affirms that the standard of review of a JRP's decision is one of reasonableness, requiring reviewing judges to defer to the JRP's expertise and first-hand review of evidence. A reviewing court must not impose its own opinion as to how environmental effects are to be considered. The decision assists in understanding the analytical framework that the Court will apply. The FCA's dissent by Rennie J.A. highlights that even though the framework is simple, judges can and will differ on how that analytical framework is applied.

Finally, this decision highlights the deference that must be granted to JRPs as to their consideration of the environmental effects of a project, and how the JRP manages the evidence before it, in light of: (a) the requirement that EAs must take place as early as practicable in the planning process; and (b) the uncertainty that can arise in predicting environmental effects of certain projects.

Background

In June 2006, OPG sought approval for the construction of a new nuclear power generation facility at the existing Darlington nuclear site in Clarington, Ontario. The federal Darlington New Nuclear Power Plant Project (the Project), which included the construction, operation, decommissioning and abandonment of nuclear reactors and the management of the associated conventional and radioactive waste, triggered an EA under CEAA 1992 and Law List

Regulations. The Project was the first proposed nuclear new build in Canada in over a generation, the first since CEAA 1992 was enacted, and the first to potentially use enriched uranium fuel.

The EA of the Project was referred to a three-member JRP, with a mandate that included: (a) conducting an EA of the Project based on an Environmental Impact Statement (EIS) prepared by OPG; and (b) reviewing OPG's application for the Licence. The EA process engaged the public, the CNSC, and other government agencies and departments, including public hearings and written submissions.

Since OPG had not yet committed to a particular reactor design for the Project, the EIS examined – and the JRP considered – multiple possible reactor designs using the "plant parameter envelope" (PPE) approach,[2] which involves examining reactor design and site parameters in a way that strives to consider the greatest potential adverse impact to the environment.

On August 25, 2011, the JRP issued its report (Report), concluding that the Project is not likely to cause significant adverse environmental effects, provided that the JRP's recommendations and OPG's commitments are fulfilled. The Report stated that, if the Project is to go forward, the selected reactor technology "must be demonstrated to conform to the [PPE approach] and regulatory requirements, and must be consistent with the assumptions, conclusions and recommendations" of the EA. If the reactor technology selected "is fundamentally different than those assessed" by the JRP, the Report stated that the EA "does not apply and a new environmental assessment must be conducted." Based in part on the EA, the CNSC issued the ten-year Licence to OPG.

On May 14, 2014, the FCC released its decision in *Greenpeace Canada v. Attorney General of Canada*, 2014 FC 463. The case, brought by environmental non-governmental organizations, challenged OPG's proposal to construct up to four new nuclear reactors as part of the Project. The decision considered two judicial review applications:

- a challenge to the adequacy of the federal EA of the Project under CEAA 1992; and
- a challenge to the Licence based on the failure to comply with the requirements of CEAA 1992 and the *Nuclear Safety and Control Act* (NSCA).

The FCC disagreed with the Applicants' over-arching argument about the inadequacy of the EA (holding that there is "no one prescriptive method of conducting an EA"), but concluded the EA failed to comply with subsections 16(1)(a) and (b) of CEAA 1992 by failing to "consider" three issues:

- gaps in the bounding scenario regarding hazardous substance emissions and on-site chemical inventories (the "HSE Issue");

- consideration of spent nuclear fuels (the "Spent Nuclear Fuel Issue"); and
- deferral of the analysis of a severe common cause accident (the "Common Cause Accident Issue").

Consequently, the FCC remitted the EA back to the JRP for reconsideration of these three matters, and quashed the licence to prepare the site on the ground that the EA had yet to fully comply with CEAA 1992. OPG, CNSC and the Attorney General appealed the decision to the FCA.

FCA Decision

The majority reasons for judgment were delivered by Trudel and Ryer JJ.A., with Rennie J.A. delivering dissenting reasons, which set out the analytical framework adopted by the Majority.

The Court was unanimous in its conclusion that the FCC Judge erred in his determinations with respect to the Spent Nuclear Fuel Issue and the Common Cause Accident Issue. Regarding the former, the Court held that the JRP had carefully considered the issue, and the lower court judge erred by substituting his view for that of the JRP. With respect to the latter, the Court held that CEAA 1992 does not require the JRP to consider the environmental effects of all improbable scenarios. Therefore, the JRP's assessment of the probability of an accident, and hence its limited assessment of the environmental effects, was a matter within the scope of its discretion and its conclusion was reasonable in the context of the evidence and issues before it.

However, the Court was split with respect to the FCC's determination of the HSE Issue. Rennie J.A., in dissent, concluded that the issue had not been adequately considered while the Majority concluded that it had.

The Majority framed the appeal issues as:

a) whether the Judge selected the correct standard of review upon which to review the JRP's consideration of the HSE Issue under CEAA 1992; and
b) whether the Judge misapplied the standard of review.

On the first question, the Court agreed with the FCC decision that the question must be reviewed on the standard of review of reasonableness.

On the second question, the Majority held that the FCC had misapplied the standard of review and had ultimately imposed its own opinion rather than properly deferring to that of the JRP. In applying the reasonableness standard to the question, the Court "must consider the [JRP's] decision as a whole, in the context of the underlying record, to determine whether the [JRP's] implicit conclusion that it had complied with the consideration requirements is reasonable."

The Majority held that the type and level of consideration that must be given to an environmental effect, such as HSE, under paragraphs 16(1)(a) and (b) of CEAA 1992, is a matter to be determined by the JRP. The Majority quoted Justice Pelletier in *Inverhuron & District Ratepayers' Assn. v. Canada (Minister of the Environment)*,[3] where it was determined that the low threshold of "some consideration" of the environmental effect will be sufficient to satisfy the legislative requirement. In the absence of any legislative guidance, the JRP was at "liberty to determine the type and level of consideration that it was required to give to the HSE environmental effects in conducting the EA."

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[1] CEAA 1992 was replaced by the Canadian Environmental Assessment Act, 2012 (S.C. 2012, c. 19, s. 52) July 6, 2012.

[2] Also known as a "bounding approach" or a "bounding scenario."

[3] 2000 CanLII 15291 (FC) at para 71, 191 FTR 20, [2000] FCJ No. 682 (QL).

Toronto Law Journal

What is Astroturfing, and Why Do I Care?

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Many things found on the internet may not be exactly what they seem. In late October the Canadian Competition Bureau reminded us that this truism has legal implications with regard to online reviews.

For some time the Canadian Competition Bureau has indicated that it has concerns with respect to a number of on-line marketing practices, including "flogging" ("fake blogging") — which involves people promoting a product or service in blogs, without revealing ties to the supplier of the product; and "astroturfing" — purported grass roots user reviews of products which are in fact supplied by persons interested in the product rather than disinterested product users.

On October 14, 2015 the Competition Bureau announced it had entered into a Consent Agreement with Bell Canada to resolve concerns that certain Bell employees were encouraged to post positive reviews and ratings of the "MyBell" mobile app and the "Virgin My Account" app. The Bureau concluded that these reviews and ratings created the general impression that they were made by independent, impartial consumers, rather than by Bell employees. The results of these reviews affected, for a time, the overall ratings for the apps.

In resolving the Bureau's concerns Bell agreed to enhance its corporate compliance program with a specific focus on prohibiting ratings and rankings by its employees and contractors, and also agreed to pay an Administrative Monetary Penalty of $1.25 million. This even though both of these apps were free to users!

While the Bureau has expressed concern about these practices for some time, this is the first major enforcement action focused specifically on the astroturfing issue. It is a timely reminder for those who rely on online reviews of their products that care must be taken to ensure that what purports to be an unbiased independent review really is so.

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Chevron Corp. v. Yaiguaje: Canadian Law and the New Global Economic and Environmental Reality

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In *Chevron Corp. v. Yaiguaje*,[1] the Supreme Court of Canada clarified the law regarding the recognition and enforcement of foreign judgments in Ontario. The Court addressed the following two questions: (1) Do the courts of Ontario have jurisdiction to recognize and enforce an Ecuadorian judgment where the foreign judgment debtor, Chevron Corporation ("Chevron"), claims to have no connection to the province, whether through assets or otherwise? (2) Do the Courts of Ontario have jurisdiction over a Canadian subsidiary of Chevron, Chevron Canada Limited ("Chevron Canada"), technically a stranger to the foreign judgment for which recognition and enforcement is sought? The Court answered yes to both questions. In so doing, the Court has brought Canadian law further in line with the new global economic and environmental reality. Perhaps even more important, however, is the Court's veiled hint at the future of Canadian corporate law.

Background Facts

In 2011, the plaintiffs, residents of the Lago Agrio region of the Ecuadorian Amazon, obtained judgment against Chevron to pay damages of approximately $18 billion for the environmental and public health injuries caused by Chevron's corporate predecessor, Texaco and its subsidiary Texaco Petroleum; Texaco, in partnership with Ecuador's state-owned oil company Petroecuador, engaged in oil extraction in the Ecuadorian Amazon from 1964 until 1992.

Chevron's activities in the Ecuadorean Amazon and its pitched conflict with the residents of Lago Agrio is a tale "among the most extensively told in the history of the American federal judiciary."[2] In 1993, the Lago Agrio plaintiffs filed suit against Texaco in the U.S. District Court for the Southern District of New York, alleging a variety of environmental, public health, and other tort claims relating to Texaco's oil extraction activities. The District Court dismissed the Lago Agrio plaintiffs' claims on grounds of international comity and *forum non conveniens*, but the Court of Appeals for the Second Circuit reversed and required Texaco to submit to the jurisdiction of the Ecuadorian courts, which it did. While litigation was ongoing in the Southern District of New York, Texaco entered into a settlement agreement with the Ecuadorian

[1] *Chevron Corp. v. Yaiguaje,* 2015 SCC 42 [*Chevron Corp.*].
[2] *Chevron Corporation v. Naranjo,* 667 F.3d 232 (2d Cir. 2012) at 234. For a highly readable overview of the history of this case, see William Langewiesche, "Jungle Law," *Vanity Fair*, May 2007.

government and Petroecuador and provided funds – approximately US$40 million – for environmental remediation.

Following the dismissal of the New York lawsuit, the Lago Agrio plaintiffs brought suit against Chevron in Ecuador. Following seven years of highly contentious litigation, an Ecuadorian trial court in 2011 found Chevron liable for US$8.6 billion in damages and ordered Chevron to pay an additional US$8.6 billion in punitive damages unless it agreed, within 14 days of the order to apologize. Chevron refused. A final judgment of US$17.2 billion was entered against Chevron, which was subsequently reduced to US$9.5 billion by the Ecuadorian National Court of Justice.

Chevron responded by seeking a preemptive global anti-enforcement injunction against the Lago Agrio plaintiffs in the U.S. District Court for the Southern District of New York, alleging that the Ecuadorian trial court judgment was obtained by fraud. The District Court granted the injunction, but the Court of Appeals for the Second Circuit reversed, holding that judgment debtors can only challenge a foreign judgment's validity *defensively*,[3] as a shield but not as a sword.

The Court of Appeals for the Second Circuit further affirmed what has long been trite in the law of judgment recognition and enforcement, noting that "[t]he [plaintiffs] hold a judgment from an Ecuadorian court. They may seek to enforce that judgment in any country in the world where Chevron has assets."[4]

Meanwhile, the Ecuadorean trial court's decision was upheld in early 2012 by an intermediate court of appeal, the Appellate Division of the Provincial Court of Justice of Sucumbíos, making the trial judgment final for the purposes of recognition and enforcement.

Soon after, in early 2012, the Lago Agrio plaintiffs commenced an action in the Ontario Superior Court of Justice (Commercial List) – among other courts in countries where Chevron has subsidiaries and/or assets – seeking the Court's recognition and enforcement of the Ecuadorean court's final judgment. The plaintiffs named both Chevron and its wholly owned subsidiary Chevron Canada, both of which brought motions to set aside service of the originating process and to stay the enforcement action on jurisdictional grounds.

Regarding the Ontario enforcement action, Chevron boasted on record that "[w]e will fight until hell freezes over and then fight it out on the ice."[5] A more apt metaphor, however, may have been offered by the lawyers who had up until the spring of 2013 defended the Lago Agrio plaintiffs' U.S. attorney, Steven Donziger, whom Chevron

[3] *Ibid* at 234, 245-246.
[4] *Ibid* at 245, quoted with emphasis by Brown J. in *Yaiguaje v. Chevron Corporation*, 2013 ONSC 2527, 361 D.L.R. (4th) 489 (Commercial List) at para. 8. [*Chevron Motion Decision*].
[5] *Chevron Motion Decision, supra* note 4 at para. 111.

sued for racketeering in the District Court for the Southern District of New York.[6] Mr. Donziger's lawyers obtained the Court's leave to withdraw from the case because they could no longer afford to defend Donziger against Chevron's "litigious bullying" and "scorched-earth litigation."[7]

In the courts below, the motion judge found that the Ontario courts had jurisdiction over both Chevron and Chevron Canada.[8] Despite these findings, however, the motion judge stayed the proceeding on the Court's "own initiative" pursuant to s. 106 of the *Court of Justice Act* on the ground that Chevron did not have assets in Ontario capable of satisfying the foreign judgment. The Court of Appeal reversed the stay, and upheld the motion court's findings of jurisdiction over Chevron and Chevron Canada.[9] Chevron and Chevron Canada appealed to the Supreme Court of Canada.

Comity Comes of Age

Before getting to the Court's analysis of the jurisdictional issues raised by Chevron's appeals, the Court noted that it agreed with the Ontario Court of Appeal's reading of the scope of certain of the Supreme Court's previous rulings. In particular, regarding the application of the "real and substantial connection" test to the recognition and enforcement of foreign judgments, the *sole* question – as decided by the Court in *Beals*[10] – is whether the foreign court had properly assumed jurisdiction, "in the sense that it had a real and substantial connection with the subject matter of the dispute or with the defendant."[11]

The Court also agreed with the Court of Appeal that the Supreme Court's decision in *Van Breda*[12] applies only to actions at first instance, not to actions for recognition and enforcement.[13] This is a basic but nonetheless critical distinction.

Finally, the Court disagreed with Chevron that the Court's judgment in *Pro Swing*[14] imported the real and substantial connection test into legal test for the recognition

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[6] On March 4, 2014 the U.S. District Court for the Southern District of New York found that the Ecuadorean judgment against Chevron was "obtained by corrupt means." The District Court further found that Mr. Donziger had been in "ultimate command" of a "criminal enterprise" to extort Chevron. It is important to note, however, that the District Court's ruling does not affect the Ecuadorean Court's final judgment. Nor did the District Court pass any comment on the merits of the Lago Agrio plaintiffs' claims against Chevron. See *Chevron Corp. v. Donziger,* 974 F. Supp. 2d 362 (S.D.N.Y. 2014). That judgment, moreover, was not before the Supreme Court of Canada in the case at bar.

[7] Gavin Brody, "Donziger Attys Quit, Blaming Chevron 'Scorched-Earth' Tactics," Law360, May 3, 2013.

[8] *Chevron Motion Decision, supra* note 4 at paras. 82, 87. For a critical review of this decision, see Jason MacLean, "The Cult of Corporate Personality: *Yaiguaje v. Chevron Corporation*" (2014) 55 Canadian Business Law Journal 281.

[9] *Yaiguaje v. Chevron Corporation,* 2013 ONCA 758, 118 O.R. (3d) 1 (Ont. C.A.). For a review of this decision, see Jason MacLean, "Litigating Corporate Personality in Hell, Frozen Over: *Yaiguaje v. Chevron Corporation*" (April 2014) Toronto Law Journal.

[10] *Beals v. Saldanha,* [2003] 3 S.C.R. 416 [*Beals*].

[11] *Chevron Corp., supra note* 1 at para. 20.

[12] *Club Resorts Ltd. v. Van Breda,* [2012] 1 S.C.R. 572 [*Van Breda*].

[13] *Chevron Corp., supra note* 1 at para. 21.

and enforcement of foreign judgments. Now, it is true that the Court did explain in *Pro Swing* that "[u]nder the traditional rule, *once the jurisdiction of the enforcing court is established*, the petitioner must show that he or she meets the conditions for having the judgment recognized and enforced."[15] Chevron's error, however, lies in its assumption that the only way for the enforcing court to establish jurisdiction is to show that there exists a real and substantial connection between the foreign judgment debtor and the Canadian forum. Rather, as the Court explains,

> [J]urisdiction in an action limited to recognition and enforcement of a foreign judgment within the province of Ontario is established when *service* is effected on a defendant against whom a foreign judgment debt is alleged to exist. There is no requirement, nor need, to resort to the real and substantial connection test.[16]

Having clarified the meaning and scope of its previous judgments in *Beals, Van Breda*, and *Pro Swing*, the Court proceeded to set out the principles underlying actions for judgment recognition and enforcement: (1) the crucial (and self-evident) difference between an action at first instance and an action for recognition and enforcement being that in the latter case the action is to facilitate the fulfillment of a pre-existing obligation; and (2) the notion of comity "militates in favour of generous enforcement rules."[17] It is the latter principle that drives the Court's judgment in the case at bar.

The Court explained in *Morguard* that comity refers to "the deference and respect due by other states to the actions of a state legitimately taken within its territory" and "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."[18]

In a global economy, a liberal conceptualization of comity takes on even greater importance. As Walker notes:

> The security of crossborder transactions rests on the confidence that the law will enable the prompt and effective determination of the effect of judgments from other legal systems. For this reason, there are no separate or jurisdictional requirements, such as the residence of the defendant or the

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[14] *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. 612 [*Pro Swing*].
[15] *Ibid* at para. 28.
[16] *Chevron Corp., supra note* 1 at para. 36.
[17] *Ibid* at para. 42.
[18] *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 at 1095-1096 [*Morguard*], quoting approvingly the U.S. Supreme Court's foundational articulation of the concept of comity in *Hilton v. Guyot*, 159 U.S. 113 (1895) at 163-164.

> presence of the defendant's assets in the jurisdiction, for a court to determine whether a foreign judgment may be recognized or enforced.[19]

Following this reasoning, the Court observed in *Beals* that the doctrine of comity "must be permitted to evolve concomitantly with international business relations, cross-border transactions, as well as mobility."[20]

In *Chevron Corp.*, the Court extends this reasoning. Observing that cross-border transactions and interactions continue to multiply, the Court concluded that "comity requires an *increasing willingness* on the part of courts to recognize the acts of other states. This is essential to allow individuals and companies to conduct international business without worrying that their participation in such relationships will jeopardize or negate their legal rights."[21]

Reading between the lines, the Court is essentially saying that Chevron and its ilk cannot have it both ways. Comity is a cornerstone of the global economy and critical to the flow of capital and people that make transnational corporations viable in the first place. Corporations cannot simply dispense with comity when it proves inconvenient. Comity is part and parcel of the global economic reality.

Notably, however, comity may also become part and parcel of the new global *environmental* reality, as the factual background of this case portends. In our globalized world, the "flow of wealth, skills and people across borders" also produces negative externalities in the form of pollution and other environmental harms. Canadian courts will increasingly be called on to facilitate the recognition and enforcement of foreign judgments allocating liability for those externalities. Comity – and its legal incidents of order and fairness – will make increasingly difficult demands on Canadian courts.

Conclusion: A Veiled Hint at the Future of Canadian Corporate Law?

If the Court's analysis and further elaboration of the doctrine of comity were all that *Chevron Corp*. stood for, it would remain an important judgment in the area of private international law, one that helps clarify the purposive and liberal approach to facilitating the recognition and enforcement of foreign judgments in Canada. But that is not all the Court's judgment offers.

Instead, the Court offers a tantalizing glimpse into the corporate law doctrine of separate legal personality and the so-called corporate veil. Writing for a unanimous Court, Gascon J. is careful to "take no position on whether Chevron Canada can

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[19] Janet Walker, *Castel & Walker: Canadian Conflict of Laws,* 6th ed. (Markham, ON: LexisNexis, 20015) at 14-1.
[20] *Beals, supra* note 10 at para. 27.
[21] *Chevron Corp., supra* note 1 at para. 75 [emphasis added].

properly be considered a judgment-debtor to the Ecuadorian judgment."[22] But Justice Gascon proceeds to note that, contrary to Chevron's submissions before the Court, "this is not a case in which the Court is called upon to alter the fundamental principle of corporate separateness as reiterated in *BCE Inc. v. 1976 Debentureholders,* 2008 SCC 69, [2008] 3 S.C.R. 560, *at least not at this juncture*."[23]

Given the Court's progressive acknowledgement of "a world which business, assets, and people cross borders with ease,"[24] it remains an open and intriguing question as to whether the Court is finally prepared to consider the function, rather than the form, of corporate relationships in order to follow the money.[25]

Note: A longer version of this comment will be published in the Canadian Business Law Journal.

[22] *Ibid* at para. 95.
[23] *Ibid* [emphasis added].
[24] *Ibid* at para. 1.
[25] MacLean, *supra* note 8 at 288-294.

Toronto Law Journal

Who Cares about Legal Research? – An Update

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This is an update of my article "Who Cares about Legal Research?" published in this journal at the beginning of this year.[1] Since then, a couple of recent pertinent cases have underscored the importance of legal research and have said counsel may charge for it. In contrast to Belobaba J.'s controversial statements in a series of earlier decisions, these cases should exhilarate research lawyers and those using their services.

Recall that in five class action decisions[2] released together in November 2013, Belobaba J. acknowledged "legal research is obviously essential". Belobaba J. also said:

> In my view, lawyers (who are already billing very high, monopoly-based, hourly rates for their legal knowledge) should not be charging for "legal research." Customers should not have to pay anyone who charges by the hour, whether lawyers or plumbers, to learn on the job. Legal research is essential, but it should not be a chargeable disbursement.

More recently an opposing view has been expressed by members of the same court, specifically, Perell J. and Newbould J., as follows.

In ***Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp***,[3] a multifaceted class action, Perell J. said:

> ***6. The Exclusion of a Claim for Legal Research***
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> 149 As noted above, Mr. Chan challenges the Plaintiffs' assertion that they have not charged for legal research, and he has identified dockets, for instance, for reviewing case law.
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> 150 I do not know why Class Counsel did not charge for legal research, which is an appropriate charge. While legal research charges may be reduced if they are excessive or unreasonable or unnecessary given what a lawyer may be assumed

[1] Toronto Law Journal, January 2015.
[2] *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).
[3] 2015 ONSC 6354, 2015 CarswellOnt 15742 (October 15, 2015).

> to already know about the law, legal research is a proper matter for a lawyer to charge to his or her client.
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> 151 The law is constantly changing and developing and the law about class actions is very much a work in progress. In litigation, the court relies on the parties' lawyers to bring the relevant authorities to the court's attention and there is a professional duty on the lawyers to do so. The need to undertake legal research and the extent of it will be case-specific, but there certainly is legal research work that needs to be done in the area of securities class actions. There is nothing wrong in a lawyer charging a fee for undertaking necessary legal research, which is a valuable and often necessary service for the client.

Similarly, in *8527504 Canada Inc. v Liquibrands Inc.*,[4] Newbould J. recently affirmed in a costs endorsement:

> [5] 852 [the Plaintiff company] incurred a disbursement of $1,363 for legal research required because of the issue I raised regarding credit bidding. As the case law on the subject in Canada was limited, research on U.S. law was done. Mr. Reider takes the position that time for legal research should not be permitted and cites *Brown v. Canada (Attorney General)*, 2013 ONSC 6887 (CanLII) in which Justice Belobaba stated that with lawyers charging "very-high, monopoly-based, hourly rates for the legal knowledge" should not be charging for legal research. I respectively decline from such a view. It is unrealistic to expect lawyers to know all law on a subject and legal research is the stuff of all litigation. Courts rely on counsel providing the law on matter in issue and do not expect counsel to just cite legal principles off the top of their head. Clients would be ill served if their lawyers did no legal research in every case and if the work has to be done there is no reason why it should not be charged. The notion that hourly rates covers all legal research would reward those who do little legal research and would inevitably lead to higher hourly rates for those cases in which more legal research was required. I note that the position taken by Mr. Reider on this issue is inconsistent with the bill of costs of his lawyers who have included time for "researching and drafting factum".

These recent decisions set the record straight: necessary research is valuable and recoverable. If questioned, you might wish to cite them when making costs submissions and explaining your bill to clients.

[4] 2015 ONSC 6853 (CanLII) (November 5, 2015).