Toronto Law Journal

Under The Family Law Lens: Expert's Duties and Ethics

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Overview

The Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, concluded that a properly qualified expert must be independent, unbiased, and impartial and that the expert's opinion must be the result of independent and uninfluenced judgment. These principles have also been applied in family law, which can be seen from the survey of the case law below. The case law demonstrates the standard of ethics required by an expert, including when an expert is allowed to resign from their position where they would be unable to fulfill their duty to be independent, unbiased and impartial.

Case Law: Analysis

Hodgkinson v Hodgkinson, 2011 BCSC 634 highlights the dangers of an expert being personally connected to a party and should serve as a warning that the relationship between an expert and a party should be at an arm's length distance. In this case, the parties each retained an expert to determine the father's income for child support purposes. The plaintiff's counsel argued that the reports of the defendant's expert should be rejected because of a few reasons: (a) there was bias; (b) the reports did not contain the certification required by Rule 13-2 of the *Supreme Court Family Rules*; (c) the plaintiff's counsel advised that she happened to stop at Il Giardino, a restaurant, the previous evening where she saw the expert dining with the defendant and his wife.[1] The judge had warned the defendant's expert not to discuss the case with anyone during the adjournment. The plaintiff's counsel argued that there was bias because the father's expert was in a relationship for many years with Ted Kozub, the father of the defendant's current wife and a business associate of the defendant. The expert technically was the stepmother of the defendant's current wife even though she was already an adult when the father's expert started living with Mr. Kozub. The defendant's expert had no relationship with either Mr. Kozub or the defendant's current wife since 1999 when she and Mr. Kozub ended their relationship.

While Grauer J. determined that there was no bias on part of the defendant's expert, he concluded at paragraph 49 that it was "strongly discouraged" for a party to choose to retain an expert with whom they had a previous connection, regardless of the expert's abilities. Grauer J. also decided to accept the defendant's expert's explanation in terms of having dinner with the defendant and his wife. The defendant's expert explained that she was only catching up with the defendant and his wife socially before she had to return to Kelowna. Grauer J. noted at paragraph 50 that this opportunity to catch up with the defendant and his wife "would have

[1] *Hodgkinson v Hodgkinson*, 2011 BCSC 634, 1 RFL (7th) 82 at para. 47.

been best been passed up." Finally, Grauer J. did not disregard the defendant's expert's report for failing to include the required certification because the rule had only been introduced recently and the litigation had proceeded in an "unsatisfactory manner" with respect to the exchange of expert evidence for both parties.[2] Grauer J., however, held that the court "[would] not be so lenient again in this regard. The certification is not optional."[3]

Sehota v. Sehota, 2012 ONSC 848 sheds light on the duties of a parenting coordinator when a party would like to use them as an expert. The father brought a motion to seek primary residence of the children, to stop the children's relocation, to ask that counselling be ordered for the children, and to reduce the child support related to any order if he has primary residence of the children. The parties had hired a parenting coordinator who wrote a report that was strongly in favour of the father's position.

Rogers J. found that the parenting coordinator was not a qualified expert and that the expert's reporting letter was not admissible as an expert report or as a factual basis that the court could rely upon.[4] To come to this conclusion, Rogers J. determined that the parenting coordinator was not fair, objective, and non-partisan because she had relied on much "hearsay and [the parenting coordinator's] recommendations that go far beyond the mandate of a parenting coordinator [had] caused [the mother] to feel she was not being fairly treated."[5] Rogers J. also concluded that a parenting coordinator had to be unbiased and also "appear to be unbiased."[6] Moreover, the parenting coordinator lacked the required qualifications to make conclusions about someone's mental health, which should have indicated to herself that she was not capable of making such conclusions.[7] The parenting coordinator also sent an undated letter to the court that was received after the motion submissions. Rogers J. determined that the parenting's coordinator's attempt to communicate with a judicial officer about this proceeding was "very concerning" and that "[w]orse still, counsel for the litigants had no knowledge of this unacceptable effort."[8] Rogers J. explain the role of parenting coordinators while referring to the Association of Family and Conciliation Courts' Guidelines and also emphasized that parenting coordinators should not be heavily involved in evidence gathering. Rogers J.'s conclusions with respect to the role of parenting coordinators alludes to the fact that experts have a duty to give expert evidence based on their duties/roles set by their professional bodies.

In *Carmen Alfano Family Trust v. Piersanti*, 2012 ONCA 297, the Ontario Court of Appeal concluded that for an expert to provide its duty to be fair, non-partisan, and objective evidence, the expert must be neutral and independent and cannot become an advocate for the position of the party who retained them. The appellants argued that the trial judge erred in ruling to refuse to admit the evidence of their expert witness, Ronald-Cartwright, as he lacked

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[2] *Ibid* at para. 51.
[3] *Ibid.*
[4] *Sehota v. Sehota*, 2012 ONSC 848 at paras. 34-35.
[5] *Ibid* at para. 8.
[6] *Ibid*.
[7] *Ibid* at para. 10.
[8] *Ibid* at para. 23.

independence and objectivity. The Ontario Court of Appeal concurred with the trial judge's decision to refuse to admit Mr. Anson-Cartwright's evidence due to its lack of independence. In coming to this conclusion, the Ontario Court of Appeal at paragraph 108 re-iterated the principle of experts being independent and impartial: "[E]xpert opinion should always be the result of the expert's independent analysis and conclusion" and "[w]hile the opinion may support the client's position, it should not be influenced as to form or content by the exigencies of the litigation or by pressure from the client." The Ontario Court of Appeal at paragraph 108 also concurred with the trial judge who noted that "the fundamental principle in cases involving qualifications of experts is that the expert, although retained by the clients, assists the court." The Ontario Court of Appeal examined the emails between Mr. Anson-Cartwright and Mr. Piersanti and determined that these email exchanges were concerning. Some examples of the emails from Mr. Anson-Cartwright that were concerning to the Ontario Court of Appeal are:

- "Further I wanted the plaintiff to admit that there is no executed lease with Ontario Power to bolster your position that the occupation rent should be a fair market rent not the rent paid by a non-arms length party ... so yes, I'm trying to make them look bad"
- "Could you please explain how the Alfanos rationalize that they had an 87 percent interest in Osler and 87 percent interest in Puslinch? Can you tell me succinctly why they are wrong?"
- "I find the critique of Deloitte's[7] cash flow analysis to be not as powerful as it could be. Try to prioritize the "killer" points, otherwise a judge might be overwhelmed by a series of small technical points. What are the three to five points which destroy or invalidate the Deloitte loss of cash flow estimate?"

Serafini v. Serafini, 2013 ONSC 2472 not only suggests that draft expert reports may be accepted by the court if the other party's expert report is not fair, objective, and non-partisan, but also suggests that personal connections between the party and their expert can lead to the court questioning the expert report's impartialness and objectivity. Van Melle J. refused to qualify Mr. Pettinelli as an expert in valuing of businesses as the expert was not able to provide conclusions that were fair, objective and non-partisan as required by Rule 20.1 of the *Family Law Rules*. First, Mr. Pettinelli admitted that he did not follow the Chartered Business Valuator's guidelines for his valuation report. Second, he was the companies' accountant and was also Mr. Pettinelli's cousin. Third, his one-page letter report did not set out the basis upon which he made his calculations. Fourth, he did not explain how he determined the minority interests' values. Fifth, his email to Mr. Grunwald with the updated values of the companies was not entered into evidence.[9] Van Melle J. also decided to accept a draft expert report prepared by Melanie Russell, the expert appointed by Corbett J. to conduct a review of the business valuations conducted by Mr. Pettinelli, because it was "thorough and well annotated" and "there was no evidence to significantly challenge the conclusions reached by Melanie Russell."

[9] *Serafini v. Serafini*, 2013 ONSC 2472, [2013] W.D.F.L. 3838 at para. 46.

In *M. (M.) v M. (R.)*, 2016 ONSC 7003, Minnema J. found that the husband's expert was not allowed to give opinion evidence regarding the husband's income for support purposes because the expert evidence was unnecessary and the wife raised realistic concerns with respect to the expert's duty to be impartial and independent. Minnema J. noted that the husband's expert was the husband's accountant long before he was asked to provide his opinion, which meant that the husband could not ensure that his expert knew about his role and duties as an expert "at the outside of [his expert's] engagement".[10] Minnema J. also held that an expert's neutrality required there to be distance between the party and the party's information and because the husband's expert was the "source of the financial information being relined on, and also the architect of the arrangements relating to the [husband's] income and compensation", "it [would be] impossible to untangle this longstanding work and suggest that his opinion is now somehow impartial."[11]

In *Rosati v Reggimenti*, 2016 ONSC 7013, Sloan J. held that the expert could be "independent, fair, and non-partisan in giving her evidence."[12] The expert was "a fully qualified accountant, business valuator and forensic accountant" and had reviewed several documents with respect to the applicants' business interests and finances and home life real estate.[13] She also reviewed what was relevant to determine whether fraud had been committed by one or both of the respondents and many of these documents she reviewed had been provided by the applicants.[14] Moreover, the expert's work noted the negligence which Mr. Rosati admitted during his testimony with respect to certain financial transactions.[15]

In *Cameron v. Cameron*, 2018 ONSC 2456, Kurz J. noted that the practice of "retaining one's own professional as an expert to provide 'evidence in related to case under the [Family Law Rules], as opposed to a 'participant expert', must be strongly discouraged."[16] In this case, each party had retained their own business valuators and accountants to determine the other party's income for support purposes.[17] Kurz J. emphasized the experts' duty to provide evidence with respect to the issues before the court that is impartial, fair, and non-partisan and within the experts' expertise. Kurz J. also found that this standard is hard to meet "when the expert's firm also provides services to a party or his non-arm's length corporation."[18]

If experts believe that they are unable to fulfill their duties of providing evidence that is impartial, unbiased, independent, then they are allowed to resign on short notice. In *Lakhtakia v. Mehra*, 2022 ONSC 201, the parties disagreed with the respondent's income. The applicant retained a financial expert and the respondent hired Mr. Andrew Cochran from Ernst & Young

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[10] *M. (M.) v M. (R.)*, 2016 ONSC 7003 at para. 16.
[11] *Ibid.*
[12] *Rosati v Reggimenti*, 2016 ONSC 7013, 262 A.C.W.S. (3d) 901 at para. 54 [*Rosati*].
[13] *Ibid* at para. 51.
[14] *Ibid*.
[15] *Rosati* at para. 53.
[16] *Cameron v. Cameron*, 2018 ONSC 2456 at para. 100.
[17] *Ibid* at para. 99.
[18] *Ibid.* at para 101.

("E&Y") as his financial expert to respond to the applicant's expert. However, the respondent's expert, Mr. Cochran, resigned the night of the trial. The respondent advised Shore J. about this and made an adjournment request to Shore J. who dismissed it. The respondent subsequently brought a motion to adjourn the trial to retain a new expert. Pinto J., who heard this motion, dismissed the respondent's adjournment motion and the trial proceeded as scheduled.

Pinto J. found that the respondent's expert, Mr. Cochran, resigned for "good faith and legitimate reasons consistent with his professional and ethical responsibilities under the CBV Institute Code of Ethics" and that "[h]e resigned on the basis that he had not received proper or full disclosure from the respondent."[19] Pinto J. found that Mr. Cochran had resigned because he believed that the respondent had concealed material information from him and gave him many documents that contradicted the respondent's ownership of his corporations, preventing Mr. Cochran to determine the respondent's income.[20] In fact it was not until the applicant's expert provided Mr. Cochran in November 2020 with hundreds of documents that the applicant had obtained through court orders in New York and Tennessee about the respondent's businesses that Mr. Cochran realized that he had been left in the dark.[21] Pinto J. at paragraph 69 also rejected the respondent's claim that Mr. Cochran had "a reputation as a quitter" and found that this was "a complete fabrication offered to distract the court from Mr. Cochran's stated reasons for resignation." Pinto J. at paragraph 69 "found the respondent's claim to be utterly preposterous that someone in E&Y's New York office spoke to him and denigrated the professional reputation of another member of the firm based in a completely different office and country."

The respondent tried to mislead the court by filing an affidavit sworn by the articling student that claimed that Mr. Cochran believed that disclosure requires from the applicant's expert, Ms. Barrett, were disproportionate and that the respondent had already fulfilled the applicant's expert's request for disclosure. The Ontario Court of Appeal determined at paragraph 70 that this affidavit was "a serious misrepresentation of the reasons why Mr. Cochran resigned." Mr. Cochran had explained to the respondent and his counsel why he resigned by the end of January 2021 and had stated that Ms. Barrett's disclosure requests were legitimate.

Lakhtakia v. Mehra, 2022 ONSC 201, also stands for the proposition that a party cannot adjourn a hearing on the basis that their expert resigned if the party can reasonably expect that their expert will resign. Pinto J. at Appendix A found that while the respondent claimed that Mr. Cochran resigned on January 19, 2021, "the respondent knew, or ought reasonably to have known, as early as December 8, 2020 that Mr. Cochran was unlikely to testify at trial." Mr. Cochran had previously told the respondent of his resignation on December 8, 2020 and then confirmed in an email on January 19, 2021 to the respondent and his counsel that he was

[19] *Lakhtakia v. Mehra*, 2022 ONSC 201, 2022 CarswellOnt 181 at para.68 [*Lakhtakia*].
[20] *Ibid.*
[21] *Lakhtakia, supra* note 19 at para. 173.

resigning.[22] Mr. Cochran had only attended a court meeting with Justice Shore on December 9, 2020 as there was an order for another meeting to discuss disclosure.[23]

Conclusion

In the context of family law, an expert is expected to have a certain level of ethics. This involves having a non-arm's length distance with the party retaining the experts. Moreover, an expert should not interfere with the court's process and be an advocate for the party. The expert is expected to follow the guidelines of their professional bodies and if the expert is unable to fulfill their duty of being non-partisan, objective, and independent, then they can resign from their position.

[22] *Ibid* at para. 62.
[23] *Ibid.*

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From Closers to Closing Submissions: When Baseball and Litigation Intersect

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Litigation and baseball have a lot in common. Both are governed by arcane rules—MLB's run 160 pages—and both have vernaculars that are jargon-laden and sometimes rife with incomprehensible abbreviations. Ballgames, like lawsuits, can be long affairs featuring appeals and reviews subject to amorphous standards of review. And just as in baseball a pitcher's goal can be to strike out a batter, a litigator's goal may be to strike out a pleading. So intertwined are the two that the Chief Justice of the United States, John Roberts, famously quipped at his confirmation hearing, "it's my job to call balls and strikes, and not to pitch or bat."

I am a litigator and lover of the old ball game, so I wanted to see what happens when the action at the stadium makes its way to the courthouse. Get your peanuts and crackerjacks ready. Here's what I found.

The Blue Jays drew roughly 33,000 fans a game last year. In the early '90s, the average attendance hovered closer to 50,000. This put tickets in high demand. And with high demand came a black market for secondary ticket sales at premium prices. In *Toronto Blue Jays Baseball Club v. John Doe*,[2] the Blue Jays sought to address this. The club applied for an order for interim recovery of "an unknown quantity of tickets" from a class of proposed defendants described by the court as "itinerant and anonymous" individuals who "ply their trade in person on game day in the immediate vicinity of Skydome" and "tend to disappear at the first sign of the presence of authority." The motion turned, in part, on some "very fine print" on the back of the tickets that prohibited resale above face value.

Obtaining an injunction, like hitting a nasty breaking ball, is hard though. Here, the Blue Jays swung and missed.

The court declined to recognize the validity of the fine print, finding no evidence before it that the would-be defendants knew of—let alone agreed to—the terms it contained. "As a factual matter", the motion judge observed, "I doubt if one ticket buyer in ten thousand would be prepared for the avalanche of technicality" in the fine print. Unsurprisingly, then, the court also refused to take judicial notice of any "notoriety or custom" in relation to the fine print, such that knowledge and acceptance might be inferred. The fine print had none of the notoriety of other matters the court expressed a willingness to take notice judicial notice of, e.g., "that

[1] This article was inspired by (a) "The Stanley Cup: The Unintended Legal Impacts of Hockey's Greatest Prize" by Stephen N. Libin published in this journal last summer and (b) the columns of David Pannick collected in *I Have to Move my Car: Tales of Unpersuasive Advocates and Injudicious Judges*.
[2] 9 O.R. (3d) 622 (Ont. Ct. Gen. Div.).

fans for generations have been warned that baseball clubs are not liable for injury caused by balls projected into the stands; that admission could be refused or the patron evicted for misconduct upon refund of the purchase price; [and] that if a legal game was not played a 'rain check' would be provided". None of this was of any assistance to the Jays.

Though the motion was dismissed, the Jays weren't left licking their wounds for long. Months later, they won their second straight World Series championship.

Minute Made Park (née Enron Field) is home to the Houston Astros, who cheated their way to a World Series title in 2017. For years its playing field uniquely featured a small hill in dead-centre field that included a flagpole. A far cry from this was diamond number 4 at Globe Park in Hamilton, which at one point in time included a less dignified feature. I speak, of course, of goose excrement, which found itself at the centre of a personal injury suit in *St. Anne (Litigation Guardian of) v. Hamilton (City)*.[3]

The plaintiff had been playing second base in a slow-pitch game in the city employee league. The batter hit a blooper to shallow right-centre field. The plaintiff raced for it, lost his balance, and "and the next thing he knew he was flying through the air". He landed awkwardly, breaking two vertebrae and tearing his rotator cuff in the process. He then sued the city, claiming that he slipped on goose excrement and that the city breached its duty to provide a safe playing area.

There was little dispute in the case that "there were quantities of goose excrement ... in the outfield area of diamond number four." As the court dryly noted, "It is a fact of life that Canada Geese are found in certain open areas in the City of Hamilton and a further fact of life that they deposit their excrement in those areas", including Globe Park.

Still, the court dismissed the plaintiff's claim. The court disagreed with the plaintiff that the city ought to have "posted warning signs about goose droppings in the outfield", finding no reason to think the plaintiff, a "keen and competitive baseball player" would have acted any differently had a warning sign been in place. The plaintiff's own testimony did him in: "[I] give everything, my all, when I'm playing sports." One of his teammates was even more compelling: "It is second nature when the ball is hit, to go after it".

"It is as likely as not", the court concluded, "that the unfortunate injury sustained by the plaintiff was the result of a sporting accident not caused or contributed to by the defendants." Unfortunate indeed, but there's a moral to this: Watch your footing during gameplay, especially in fowl territory.

[3] 2001 CarswellOnt 1599 (ON SC).

The average length of a baseball game in the 2022 MLB season was just over three hours. According to *Cheek v. R.*,[4] though, "there are only 16 to 18 minutes when there is actual 'motion' on the field such as (i) a pitcher delivering a pitch from the mound; (ii) a base runner attempting to steal a base; or (iii) a batter hitting a particular pitch thereby causing the ball, the batter, any base runner and all fielders to be in motion." For many, the game's leisurely pace is the perfect antidote for our hyperactive era. For broadcasters, it means a lot of dead airtime to fill.

Cheek turned on whether, in filling that airtime, the long-time "voice of the Blue Jays", Tom Cheek, was an "entertainer" and, as such, responsible for certain taxes.

The case offers a detailed analysis at the broadcaster's challenge 162 days a year: "hold[ing] the attention and interest of the radio audience during the down time when there is no motion on the field." To do so, broadcasters share "their knowledge of the game and its rules, their experience, their knowledge of current and historical statistics, biographical information on players, team managers, coaches, and other prominent persons connected with the game, and historical information on each team." In short, they share "stories, anecdotes, statistics and strategy."

Yet, for all this, the court held that Cheek was not an "entertainer", but a "reporter"—one "reporting what the players are doing as they do it". The players, the court reasoned, are the real entertainers. "Fans purchase tickets and attend games to see" the players. They watch games on TV for the same reason. And they tune into the game on the radio "to know how the performance of those same highly skilled players affects a game play-by-play." The players perform; the broadcasters merely describe their performance.

While the lawyer in me may agree with the court's reasoning, the fan in me isn't so sure. What distinguishes the great broadcasters, Cheek included, is their skill at storytelling. And Cheek told a pretty good story to the court to convince it he was not an entertainer.

Hitting the ball out of the park usually results in a home run. In *Legacy et al. v. Thunder Bay (Corporation) et al.*,[5] it resulted in a negligence suit.

The minor league Duluth Huskies had been taking batting practice at Port Arthur Stadium in Thunder Bay before a game there against the hometown Border Cats. Just as the plaintiff was driving along the street running next to the stadium, one of the Huskies smashed a pitch over the left-field wall, through or above some protective netting, and right into the driver-side window of the plaintiff's car.

[4] 2002 CarswellNat 247 (TCC).
[5] 2018 ONSC 0758

After the unlucky driver sued, the Huskies moved for summary judgment. As its lawyer put it, "it is not negligent for a baseball player to hit a homerun". In support of their motion, the Huskies relied on a House of Lords decision involving similar facts, albeit in a cricket match. There, Lord Porter dismissed the claim, reasoning, in part, that "the object of every batsman to hit the ball over the boundary if he can". Briefly put, there's no tort in sport.

The court, however, found the Huskies' submissions to be a bit of a wild pitch. In dismissing the motion, the court largely relied on "photographs showing large holes in the netting" separating the ballpark from the city street and evidence from the Huskies' hitting coach that "a number [of] baseballs were hit out of the stadium during batting practice by different players, which is normal". Noting that negligence hinges on foreseeability, the court concluded that the Huskies' players could be liable if they knew they were hitting baseballs "onto a busy city street" because of the defective netting. The motion, in the circumstances, was premature.

After the incident, the Border Cats' manager remarked that, till then, a batted ball had never travelled towards the road like that. With hitters like those, the Huskies were probably winning on the field, at least, even if not in court.

The field of play, as its name suggests, is reserved for those playing on it. One could say Joe [Fan] balked at this convention during a game early in the Jays' 2013 campaign when, according to a Toronto Police Services synopsis, he "ran into the field 'interrupting' the game" and "giving Jays fans a brief respite from their season long agony." He was, the synopsis continued, "subsequently placed under arrest to applause" and then charged with mischief to property under s. 430 of the *Criminal Code*, which prohibits "obstruct[ion], interrupt[ion] or interfere[nce] with the lawful use, enjoyment or operation of property".

Joe retained a slugger of the criminal defence bar, my colleague Matt Gourlay, who then delivered a curveball.[6]

Gourlay wrote to the Crown Attorney arguing that Joe's "vigorous jog from the first base to third base side of the diamond" hardly interfered with anyone's enjoyment of the property when, in the TPS's own synopsis, Joe actions gave the Jays' faithful "a brief respite from their season long agony". As Gourlay put it, the Jays "were off to a horrendous start, languishing in the AL East cellar", and their fans "were beginning to transition from worried concern to full-blown distress."

Nor, the letter continued, was there any real interruption. Here, Gourlay cited as authority former Jays' star Jose Bautista, who was known to comment that the fans are what the game

[6] The happy client has posted all about this misadventure on his website, Running the Field, available at https://www.runningthefield.com/.

is all about. Needless to say, the fans most certainly approved of Joe's performance, as indicated by their heartfelt applause on its conclusion.

Joe, the letter concluded, had already "suffered enough" as a Jays fan. In light of this, Gourlay asked for the charge to be withdrawn; in exchange Joe would agree to stay away from home games for the rest of the season. But, Gourlay wrote, if a guilty plea was necessary, "I think an appropriate sentence to achieve the proper degree of denunciation and deterrence would be to make Joe buy Blue Jays' seasons tickets."

Perhaps sensing that requiring Joe to buy season tickets for the Jays (who finished in last place that year) might veer a tad cruel and an unusual, the Crown had a better idea: It suggested a donation to a charitable cause. Joe, aptly, contributed to the Jays Care Foundation, and the charges were withdrawn. A nice double play.

Fans are cautioned at ballgames and told to stay alert and be aware of their surroundings because bats and baseballs may be thrown or hit into the stands. For lawyers, as all this may show, there's another reason still: You might just find your next client.

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Bill 50: Diversity Disclosure in Ontario

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Introduction

On November 29, 2022, Stephanie Brown, representing Don Valley West riding, introduced Bill 50, *Building Better Business Outcomes Act, 2023* (“**Bill 50**”). Bill 50 would amend the *Securities Act* (Ontario), proposing that publicly traded companies adopt and make publicly available a written policy respecting the director nomination process. This policy would require the identification of candidates belonging to diverse groups, including women, persons who are Black, Indigenous, or racialized, persons with disabilities, and persons identifying as LGBTQ+.

Brown noted that the creation of a policy regarding diversity disclosure was one of the outstanding recommendations of the Capital Markets Modernization Taskforce (“**Taskforce**”).

As of March 1, 2023, on second reading, the bill did not pass a vote in the Legislative Assembly of Ontario.

Background

Since 2014, TSX-listed companies have been required to disclose their approach to gender diversity.[1] As of January 1, 2020, the ‘comply or explain’ approach was replaced with legislative requirements governing corporate disclosure for companies governed under the *Canada Business Corporations Act* (“***CBCA***”). Under the *CBCA*, all public companies must report the representation of the aforenoted groups on the board of directors and in senior management to their shareholders and Corporations Canada.

Bill 50 sought to introduce similar requirements at the provincial level, through amendments to the *Securities Act* (Ontario). Although Bill 50 failed in the legislature, leaving the ‘comply or explain’ regime intact, continued efforts and discussion are likely to take place. If future amendments succeed, the *CBCA* requirements will presumably serve as a template for said implementation.

Disclosure Requirements under the *CBCA*

Under the *CBCA*, distributing corporations must report on the representation of four designated groups defined in the *Employment Equity Act*, on their board of directors and senior management teams. The four designated groups are: women, Indigenous peoples (First Nations,

[1] Walied Soliman, Rupert Duchesne, Wes Hall, Melissa Kennedy & Cindy Tripp, “Capital Markets Modernization Taskforce – Final Report” (January 2021). Retrieved from: https://www.ontario.ca/document/capital-markets-modernization-taskforce-final-report-january-2021

Inuit, and Métis), persons with disabilities, and members of visible minorities. Under Bill 50, the disclosure would expand to include individuals identifying as LGBTQ+. Although not required, companies are encouraged to disclose information about any other groups they believe contribute to the diversity of their boards and senior management teams.[2]

Further, under the *CBCA*, companies are required to disclose whether they have adopted a written policy relating to the identification and nomination of directors from the designated groups, and if such policy is adopted, it must disclose the following information:

- A summary of the policy's objectives and key provisions;
- The measures taken to ensure that the policy is effectively implemented;
- A description of progress made toward achieving the objectives of the policy during the year, and since implementation; and,
- Whether the board or its nominating committee measures the effectiveness of the policy and, if so, a description of how it is measured.[3]

A company that does not adopt a written policy bears the onus of explaining the reasons for their failure to do so.

In addition to the written policy requirement, companies must disclose their targets for representation on the board and amongst senior management, the expected timeframe for achieving their targets, and the progress made towards achieving said targets during the year and since adoption.

By the Numbers

In its first year of implementation, 2020, Innovation, Science and Economic Development Canada (**"ISED"**) identified 669 distributing corporations and reviewed 469 proxy circulars filed between January 1, 2020, and December 31, 2020. These findings have been published in the Diversity of Boards of Directors and Senior Management of Federal Distributing Corporations – 2020 annual report.[4] Among the findings, ISED noted that:

- 50% of corporations have at least one woman on the board of directors, 16% have at least one member of a visible minority, 1.7% have at least one Indigenous person, and 1.7% have at least one person with a disability;
- Women hold 17% of board seats, members of visible minorities hold 4%, and persons with disabilities and Indigenous persons hold 0.3% each;

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[2] Government of Canada, "Diversity of boards of directors and senior management" (July 2022). Retrieved from: https://ised-isde.canada.ca/site/corporations-canada/en/business-corporations/diversity-boards-directors-and-senior-management#s2

[3] *Ibid.*

[4] Innovation, Science and Economic Development Canada, "Diversity of Boards of Directors and Senior Management of Federal Distributing Corporations – 2020 annual report" (May 2021). Retrieved from: https://ised-isde.canada.ca/site/corporations-canada/en/data-services/diversity-boards-directors-and-senior-management-federal-distributing-corporations-2020-annual#s1

- Women hold 25% of all senior management positions, members of visible minorities hold 9%, persons with disabilities hold 0.6%, and Indigenous persons hold 0.2%;
- 14% of distributing corporations have set targets for the representation of women on their boards, and 1% have set targets for at least one of the other designated groups; and
- 32% of distributing corporations have adopted written policies relating to the identification and nomination of women on their boards, and 26% have adopted similar policies relating to Indigenous peoples, members of visible minorities and persons with disabilities.[5]

The 2020 annual report established a baseline to measure future progress. In the 2021 annual report, the findings showed slight improvements to the levels of diversity on the boards and amongst senior management of federal distributing corporations. Additionally, there was a 6% increase in for corporations adopting written policies for identifying and nominating women for directors.[6]

Impact of the *CBCA* On Future Amendments to the *Securities Act*

The impact of the *CBCA's* requirements regarding disclosure of the diversity of boards and senior management will have considerable influence on any future legislation and regulations relating to diversity disclosures under Ontario law. The recommendations of the Taskforce include diversity targets and maximum tenure limits, with strict timelines following any legislative amendment. While Bill 50 is not progressing at this time, the operation of the *CBCA* model, and the data obtained since its implementation, will provide a blueprint for future adoption of subsequent models in Ontario.

[5] *Ibid.*
[6] Innovation, Science and Economic Development Canada, "Diversity of Boards of Directors and Senior Management of Federal Distributing Corporations – 2021 annual report" (April 2022). Retrieved from: https://ised-isde.canada.ca/site/corporations-canada/en/data-services/diversity-boards-directors-and-senior-management-federal-distributing-corporations-2021-annual

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Why a Franchisor Wants to be an 'Owner'

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Most franchise agreements contain a provision stating that the parties are independent contractors, and that the franchisee is operating its business for its own account. Although there is no dispute that the franchisor owns the "franchise system", ownership of the franchised business is always vested in the franchisee. However, in respect of expropriations, there is a benefit to a franchisor being deemed to be an "owner" for it to claim compensation. To the author's knowledge, this is the first time that a court has addressed this issue.

In fact, this is the result of a recent decision in *AW Holdings Corp.* v 1 2022 ABLPRT 1365 ("**AW**"). In AW, the Tribunal held that a franchisor was an "owner" entitled to compensation under the Alberta *Expropriations Act* arising from the expropriation of a franchise location, despite that the franchisor: (i) did not own the property, and (b) was not a party to the lease.

FACTS

The franchisor, AW Holdings Corp. (the "**Franchisor**") granted its franchisee (the "**Franchisee**") the right to operate a Booster Juice franchise (the "**Franchised Business**") at certain premises (the "**Premises**") in the City of Edmonton (the "**City**"). Typical of many franchise structures, the lease for the Franchised Business was between a corporation which was affiliated with the Franchisor (the "**Sublandlord**") as tenant, and the landlord. In conjunction with the grant of the Franchise:

A) the Franchisor and the Franchisee executed the Franchisor's standard-form franchise agreement (the "**FA**"); and

B) the Sublandlord and the Franchisee executed the Sublandlord's standard-form sublease agreement (the "**Sublease**").

The City commenced an expropriation of the Premises, and it was left to the Tribunal to determine the compensation payable to the various parties. The City accepted the claims of the landlord, the Franchisee and the Sublandlord but rejected the claim of the Franchisor on the basis that it did not meet the definition of "owner" under the *Expropriations Act*, RSA 2000, c. E-13 (the "***Act***").

ANALYSIS AND DECISION

Under the Act, the definition of owner includes, *inter alia*, any person who:

a) is in possession or occupation of the land; or

b) is known by the expropriating authority to have an interest in the land.

The City argued that the Franchisor did not have "possession" of the Premises urging the Tribunal to interpret the word "possession" very narrowly. However, the Tribunal held that since the Franchisor had a certain amount of control over the Premises (land) arising from the terms of the Sublease and FA, it enjoyed 'possession' of the Premises, through this control.

The Tribunal acknowledged the broad, remedial purpose of the Act. As a result of this acknowledgement, the Tribunal accepted that there are interests in land that are not tied to property ownership. The degree of control exercised by the Franchisor over the Premises and Franchisee, through the Sublease and the FA, and the fact that the Franchisor had a continuing interest in the Franchised Business, meant that it also had an interest in the land being expropriated. Since the City was aware of the FA, the Franchisor was eligible to claim compensation under the Act because of it meeting the definition of "owner".

WOULD THIS APPLY IN ONTARIO

The definition of "owner" under the *Expropriations Act*, RSO 1990, c E.26 (the "Ontario Act") is as follows:

> "owner" includes a mortgagee, tenant, execution creditor, a person entitled to a limited estate or interest in land, a guardian of property, and a guardian, executor, administrator, or trustee in whom land is vested;

The definition of owner under the Ontario Act does not include either of the phrases "possession or occupation of the land" or "is known by the expropriating authority to have an interest in the land". However, it does include the phrase "a person entitled to a limited estate or interest in land". An interest in land involves rights which do not rise to the level of "ownership", but which give meaningful, and often valuable, rights or entitlements to the holder thereof, which includes a right to possess or occupy. Further, under the Ontario Act, the definition is not stated to be exclusive or exhaustive since it defines "owner" as including persons holding various interests.[1]

[1] The author is in the process of claiming compensation from the City of Toronto on behalf of a franchisor with respect to the expropriation of a franchised business. To date, there has been no argument from the City of Toronto that the franchisor is not entitled to compensation.

CONCLUSION

Franchisors have a clear business interest in the continued operations of franchises. Provided that franchisors have the proper supporting documentation, this interest can be used by a franchisor to claim compensation as an "owner" arising from the expropriation of a franchised business. Given the various infrastructure projects throughout Ontario, franchisors should be cognizant of their right to claim compensation and the documentation required to support such claim.