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Big money still changes hands but not nearly as much as before

Softwood lumber peace dividend cuts civil law bill

CRISTIN SCHMITZ
OTTAWA

Ottawa's spending on the private-sector lawyers handling its civil work fell by 43 per cent in 2013 — contributing to a steep three-year decline, internal Department of Justice records disclose.

Law firms last year billed the federal government a total of $15.6 million (including disbursements), down from $27.5 million the year before, reveal records obtained under the federal *Access to Information Act*.

The 2012 tab was itself a 32 per cent drop from 2011, which in turn was down 11 per cent from 2010.

The single biggest contributor to Ottawa's dramatically reduced legal bills in 2013 was the hard-won peace in the U.S. softwood lumber war.

In 2013, Hughes Hubbard & Reed of Washington, D.C., remained the No. 1 Crown agent, billing nearly $2.8 million — $2.2 million of that to the Department of Foreign Affairs, and the balance to the RCMP.

That was a 56 per cent drop from $6.3 million in 2012, which in turn was a drastic decline from the $10.7-million bill (including significant disbursements) the top-tier American firm handed Ottawa in 2011.

The smaller 2013 tab reflects a string of recent victories won by Canadian trade law expert Joanne Osendarp and her Hughes Hubbard team. In 2012, the team persuaded an inter-

Sum total, Page 2

Clarke Hunter of Norton Rose Fulbright's Calgary office, seen above in Ottawa, is part of the team defending Canada in a multibillion-dollar lawsuit. Three Indian bands say the Crown mismanaged their oil and gas reserves. ROY GROGAN FOR THE LAWYERS WEEKLY

Feds suffer stiff rebuke in expat case

MICHAEL BENEDICT

The Court of Appeal for Ontario has delivered another stiff rebuke to the federal government's efforts to curtail the voting rights of expat Canadians.

In *Frank v. Canada (Attorney General)* [2014] O.J. No. 2981, Justice Robert Sharpe denied a government request for a stay from a lower court decision that declared unconstitutional a law banning Canadians from voting if they have lived outside the country for more than five years.

If granted, the stay would have prevented untold Canadians from voting in last month's four federal by-elections.

The contested legislation was passed in 1993, but interpreted loosely until 2007. Up until then, any brief home visit home constituted a break in the five-year period. In the interim, Elections Canada asked the government to rescind the voting prohibition on some 1.4 million Canadians, a recommendation backed by an all-party parliamentary committee.

Meanwhile, when two academics living in the United States learned two years ago that they would be denied the right to vote in the next federal election, they launched a legal challenge. An Ontario Superior Court judge

Fair, Page 5

INTERNATIONAL TRADE

Modernizing NAFTA deal

While trade has evolved, NAFTA has stayed static

PAGE 14

BUSINESS LAW

Trend toward full disclosure

Privilege is not a given in internal corporate probes

PAGE 10

BUSINESS & CAREERS

Don't hide from media

They'll do the story with or without your input

PAGE 20

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News

Special-case rule requires consensus, court says

CHRISTOPHER GULY

The B.C. Court of Appeal has underlined the need for both parties to come to agreement on the facts to ensure the application of special-case rules aimed at promoting pre-trial resolutions.

British Columbia's Supreme Court Civil Rules set out a special case procedure under Rule 9-3 in which "the parties to a proceeding may concur in stating a question of law or fact" to the court. But in *JEKE Enterprises Ltd. v. Philip K. Matkin Professional Corp.* [2014] B.C.J. No. 1180, the appellate court stressed that both parties have to be on the same page in order for the court-efficiency tool to work.

The appellants are among those who hold about 18,950 timeshares in a resort owned by Northmont Resorts Properties Ltd. that was represented by trustee Philip Matkin, a Calgary-based lawyer who served as the petitioner-respondent in the action.

To fund significant renovations to the resort, Northmont last year gave timeshare holders the option of paying either a renovation project fee or a cancellation fee. The appellants disputed the respondent's ability to impose those fees and argued that Northmont's application to dispose of the matter under Rule 9-3 was not appropriate because of an absence of consensus on the facts.

B.C. Supreme Court Justice Linda Loo proceeded with the special case, noting in her ruling — *Philip K. Matkin Professional Corp. v. Northmont Resort Properties Ltd.* [2013] B.C.J. No. 2492 — that to do otherwise would result in "thousands of separate actions against owners who do not pay the renovation project fee…[and require] an enormous amount of time, expense, and involve many in unnecessary litigation," while "time" and "money" were "running out." She concluded that Northmont was entitled to levy the cancellation and renovation project fees.

On appeal, the timeshare owners argued that the application was based on a hypothetical assumption that the timeshare agreements were valid, and was based on highly contested evidence.

In setting aside Justice Loo's order in a unanimous ruling, the Court of Appeal held that her decision to proceed by way of special case was "fundamentally ill-conceived" and allowed the timeshare owners' appeal.

"The chambers judge's quest for efficiency overwhelmed her analysis and failed to give proper effect to the Rule [9-3] and the rights of the time share Owners," said Justices Pamela Kirkpatrick, Daphne Smith and Nicole Garson in the court's written reasons. "This proceeding did not favour access to justice — it precluded it."

> A court should not be entertaining hypotheticals and rarely entertain assumed fact, and should have both parties signing off on the agreed statement of facts upon which the court will make a ruling. But if one party doesn't agree, it occasions some unfairness to that party.
>
> **Bryant Mackey**
> University of Victoria

A question of law in a special case must be unambiguous and supported by a statement of facts agreed to by the parties to an action, according to Bryant Mackey, who teaches civil procedure at the University of Victoria.

"A court should not be entertaining hypotheticals and rarely entertain assumed fact, and should have both parties signing off on the agreed statement of facts upon which the court will make a ruling," said Mackey. "But if one party doesn't agree, it occasions some unfairness to that party."

B.C.'s appellate court said the agreements were "assumed…to be valid and enforceable, thus placing the opinion in hypothetical terms, contrary to the jurisprudence."

The special-case process was designed to address a dispute between parties over what evidence "means, not what it is," explained John Alexander, co-counsel for the appellants and a partner with Cox, Taylor in Victoria.

"Under the rule, parties forward an agreed-upon statement of facts and documents, but may not agree on the effect of those documents and facts and ask the court to draw inferences from them as an efficient way of resolving an issue."

He said Justice Loo used the "wrong tool" in trying to "shoehorn" some 400 pages of disputed affidavits and about 1,000 pages of documents not agreed to by the appellants into a special case, when she should have used a "hammer" under Rule 9-7 and disposed of the action by way of a summary trial.

The Court of Appeal held that "once it became apparent that the validity and enforceability of the Agreements was in issue, and that the respondents intended to have the case decided on the basis of disputed evidence, the chambers judge should have directed a trial on that issue in whatever manner was most efficient."

Counsel for the respondent did not respond to an interview request.

Mackey, a lawyer with the constitutional and administrative law group at B.C.'s Justice Ministry, said that while Northmont relied on the proportionality principle, in the context of access to civil justice, highlighted earlier this year by the Supreme Court of Canada in *Hryniak v. Mauldin* [2014] S.C.J. No. 7, the defendant missed a key point in that unanimous ruling.

"Proportionality is inevitably comparative," wrote Justice Andromache Karakatsanis in *Hryniak*. "Even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative."

Mackey said the top court's message is that forcing some pre-trial resolution procedure could result in an injustice for one of the parties in dispute.

Alexander said that special cases are seldom used, but he has relied on them in municipal litigation cases where courts have been asked to interpret a question of law or fact involving a bylaw.

As Mackey added, "while parties might agree on controlling a set of legal principles to animate a court decision, they don't often agree on a statement of facts, which is why special cases are less commonly used than other procedures, such as summary trial applications."

Fair: Feds say expatriate voting exclusion 'reasonable'

Continued from page 1

granted their motion on May 2, declaring that the legislation violated their *Charter* right to vote. On May 11, Prime Minister Stephen Harper called four by-elections for June 30, and on June 2 the government launched an appeal of the *Charter* decision. At the same time, the attorney general requested the stay.

In rejecting the government's motion, Justice Sharpe said it failed to demonstrate that allowing these expats to vote would cause irreparable harm or that a stay was justified on a balance of convenience. Sharpe also rejected the government's claim that it has "something approaching an automatic right to a stay due to a presumption of irreparable harm…"

Said Sharpe: "A court will only grant a stay where it is satisfied, after careful review of the facts and circumstances of the case, that the public interest and the interests of justice warrant a stay."

Observers agreed that the judgment's significance lies mainly in its rejection of the presumption argument. "The court has provided important clarification on how to apply the test for a stay," said Brendan van Niejenhuis of Stockwoods in Toronto, and an adjunct professor of administrative law at Osgoode Hall. "It says there must be a critical examination of the precise harm alleged and that the government must introduce concrete evidence to support its claim of harm.

"The government seems to have rested its case on the strong presumption of irreparable harm. The judge said that was not enough."

As Justice Sharpe put it, "I cannot agree with the Attorney General that there is a presumption approaching an automatic right to a stay in every case where a court of first instance has ruled legislation to be unconstitutional." He added, pointedly, that "…the decision to grant or withhold a stay lies in the discretion of the court."

In this case, a stay would have disenfranchised those voters who had registered for the by-elections following the lower court decision. "If the government got a stay, it would fully decide the case in their favour for these voters," said Toronto lawyer Shaun O'Brien. "The expats would have lost the right to vote that they had just won."

O'Brien, who has been handling the case pro bono at Cavalluzo Shilton McIntyre Cornish, wondered why the Harper government is continuing to pursue the issue, given the strength of the lower court decision.

"I don't understand the public policy reasons why they are pursuing this," she said. "In a globalized world, we should be fostering connections with Canadians living abroad. Why are we pushing away rather than drawing in Canadians like Mark Carney and Wayne Gretzky?"

Vancouver immigration lawyer Rudolf Kischer of Maynard Kischer Stojicevic went one step further. "It's disappointing and unfortunate that the government feels it is necessary to pursue this case when it has little chance of success," he said. "It's a waste of taxpayers' money and unfair because the government has unlimited resources, and it is difficult for the other side to get its costs."

Mary Liston, of the University of British Columbia Faculty of Law, agreed with Kisher's sentiment that the stay motion and pending appeal of the original decision reflects a lack of respect for the judiciary. Liston said the government "overreached" in asserting a near-automatic presumptive right to a stay.

Asked whether the government will appeal the stay order, a justice department spokesperson instead referred *The Lawyers Weekly* to an earlier statement by Minister of State for Democratic Reform Pierre Poilievre in which he expressed disappointment that a stay had been refused. Despite the lower court ruling to the contrary, Poilievre described the five-year voting limit as "fair and reasonable."