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L'avvocato

CANADIAN ITALIAN ADVOCATES ORGANIZATION

www.ciaocanada.com

President's Message/ Messaggio del Presidente

Vince A. Pileggi

What's Inside

Welcome to another edition of L'Avvocato, the newsletter of the Canadian Italian Advocates Organization.

Last year, our Board made every effort to keep this organization current, accessible and true to its original mandate. Now in our 31st year, I am proud to say that C.I.A.O. is as vibrant and relevant as the day it was conceived. This was only made possible through the tireless efforts of our committed Board of Directors.

When I began my presidency, I put forward novel ideas to ensure our membership would grow, that our members would be well served, and that this organization would continue to be immersed in public legal education and in the community at large.

Several years ago, C.I.A.O. is proud to have sponsored the Chief Justice of Ontario Fellowship in Legal Ethics and Professionalism whose goal was to develop uniquely Canadian materials in this important discipline. Our most recent continuing professional development seminar titled Learning Professionalism in Practice, was led by 2 well-respected professors (Dr. Erika Abener and Dr. Shelley Kierstead from Osgoode Hall Law school). They delved into the exploratory research they had conducted into learning professionalism, ethics and civility in the legal workplace which made for a most enlightening evening.

Seminars such as this one, and the close to 25 other

Vince A. Pileggi

programs we have offered our members over the last four years have not only revitalized interest in our organization but have also served to showcase the tremendous talent of our membership. It is our Board's intention to continue to deliver these programs over the coming year.

We also continue to work hand-in-hand with the Toronto Lawyers' Association with whose assistance we became a founding member of the

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Events & News

Upcoming Events

Nov 17, 2016 **Meet and greet with Osgoode Hall students:**

Dec. 2, 2016 **Festa di Natale**
Tickets can be purchased at ciaocanada.com

Apr. 2017 **TBD Mock Criminal Bail Hearing and Mock Criminal Trial**

C.I.A.O.'s New Board of Directors

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Caterina Licata

newly formed Roundtable of Diversity Associations (R.O.D.A.). In this capacity, we recently played an important role in putting together the first annual diversity conference titled: "THIS IS HOW WE DO IT: SUCCESSFUL AND DIVERSE". Spearheaded by LawPro, some of the topics covered at this all-day event included a discussion of the unique challenges facing lawyers of diverse backgrounds and the realities of practicing in a diverse world. The discussions which ensued are critically important and will certainly inform all of our respective practices.

Our Board also had the pleasure of meeting with the Law Society's Working Group responsible for compiling the much-anticipated consultation paper titled 'Developing Strategies for Change: Addressing Challenges Faced by Racialized Licensees'. We were grateful for the opportunity to provide candid, genuine, and thought-provoking input on the many challenges and issues affecting our members. We look forward to the release of the report.

I would be remiss if I did not thank the many members of this organization, including members of the judiciary, who have selflessly volunteered countless hours to serve as mentors to new lawyers, who have advocated for many causes affecting the Italian-Canadian Community, who have lobbied for diversity on the bench, and who continue to host mock bail hearings and mock criminal trials with a view to educating high school students about trial advocacy and procedure.

Although proud of our achievements, much work remains. We have ambitious agenda over the course of the coming months which we can only accomplish with our continued support. Please consider becoming involved in this organization.

Best wishes, Vince A. Pileggi
President,
Canadian Italian
Advocates Organization

An Update on Ontario's Construction Lien Act Reform

Erin Rubin, Richard Wong, Rocco Sebastiano, Osler, Hoskin & Harcourt LLP

In February 2015, the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure launched an expert review of Ontario's Construction Lien Act. The Act was last revised in 1983, with its key provisions including statutory lien rights, trust obligations, holdback obligations, and dispute resolution procedures. When the Ontario Legislature rejected Bill 69 – Prompt Payment Act, 2013 based on its unintended consequences, the government vowed to review the current Act, validating concerns about payment delays and its imperfect application to complex project structures like public-private partnerships.

Rocco Sebastiano
Senior partner in Osler's Construction and Infrastructure Group. He is also a qualified and experienced professional engineer. Rocco's practice concentrates on the delivery of major infrastructure projects with an emphasis on engineering, procurement, construction and project finance.

To address these and other substantive issues, the review has consulted with approximately 60 stakeholder organizations, such as the Ontario General Contractors Association, each offering suggestions for improving the Act through meetings and written submissions. The review will consider approximately 15 areas of reform, each outlined in its published Information Package. Some of the key considerations include the following:

Prompt Payment: A number of groups, including contractors and subcontractors, seek protection against payment delays and the ability to enforce payment for work completed. For other stakeholders, including owners, prompt payment provisions can cause administrative burdens, or restrictions on the freedom to negotiate favourable payment terms. The review will contemplate how

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payment delays can be addressed through legislation, while considering the effect that regulation may have on the freedom of contract.

Holdbacks: The "holdback" regime under the Act requires payors on the contract (such as owners and contractors) to retain 10% of the price of services and materials supplied to the improvement. This holdback creates a fund for lien claimants who cannot recover from the defaulting party with whom they hold a contract. The review will consider changing the holdback amount and revising the minimum requirements for substantial performance. Given the length of large-scale projects including alternative financing and procurements/P3s, the review will also consider whether certain stakeholders would benefit from a phased release of holdbacks.

AFP/P3: The AFP/P3 model has reshaped the traditional owner-contractor-subcontractor structure contemplated by the Act. Basic definitions under the Act, including that of an "owner", fail to capture projects where the entity operating the project does not have a legal interest in the land, and where multiple parties hold "powers" of the owner. AFP/P3 projects are also often built in phases over many years under a single contract. The review will consider how the Act applies to the unique elements of these and other large-scale infrastructure projects, including ownership structures and phasing issues, and contemplate how holdbacks, prompt payment and dispute resolution mechanisms should adapt to these project structures.

Dispute Resolution: The review acknowledges the need to consider alternative methods of resolving construction disputes. Alternative procedures, including adjudication, mandatory mediation, arbitration, and dispute review boards, will each be contemplated, with the goal of preventing project delays by keeping disputes out of court.

The final phase of the review (a report by the review committee to the government with recommendations) is currently expected in the first quarter of 2016.

Planning a staff party?

Recent case provides warning to employers hosting social events for employees.

Sabrina Serino

Sabrina is a lawyer in the Employment and Labour group at Dentons Canada LLP. Her practice involves a broad range of employment and labour matters, including: employment standards, discipline and termination, human rights, and labour relations.

Sabrina Serino

With the holidays approaching, the Ontario Superior Court of Justice's decision Lorion v. 1163957799 Quebec Inc. c.o.b. as Calypso Water Park Inc., provides important considerations for employers who are planning to host staff social events. In Calypso Water, the Court considered whether an employer can be vicariously liable for the actions of an employee at an employer-hosted event. The defendant employer, Calypso Theme Park ("Calypso"), held an end-of-season staff party on its premises, a water park. Calypso provided food and drink and allowed employees to use its facilities and bring alcohol into the park.

During the party, the Plaintiff, Kayla Lorion, a 19 year old employee in the maintenance department, alleged that her co-worker, the Co-Defendant, Curtis Strudwick, sexually assaulted her. After the party, Lorion brought a claim for damages against both Strudwick and Calypso for sexual harassment, sexual assault, assault, battery, false imprisonment and intentional and/or negligent infliction of mental suffering. Lorion claimed that Calypso was vicariously liable for Strudwick's actions as well as liable for its own negligence. Some of Lorion's allegations included that Calypso:

- allowed for an unstructured and unsupervised staff party on its premises where alcohol was permitted to be consumed by the staff;
- created and/or enhanced the risk that assault, sexual assault and battery would occurred in the workplace by permitting alcohol and consumption at an unsupervised staff party; and
- failed to supervise, properly or at all its employees at staff functions, when it knew or ought to have known that employees, servants and agents were not qualified or competent to act appropriately in a work place setting.

Calypso brought a motion for an order striking Lorion's pleadings on the basis that they disclosed no reasonable cause of action and for an order dismissing the action against Calypso.

The Court applied the two-step test established by the Supreme Court of Canada in Bazley v. Currey to determine employer vicarious liability. Applying the first step, the Court reviewed whether existing case law established, unambiguously, whether Calypso should be held vicarious liability. The Court found that the precedent cases were factually distinguishable from the case at hand and, as such, inconclusive.

On the second prong of the test, the Court considered the essential

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question from Bazley: whether Calypso materially increased the risk that the unauthorized acts of sexual assault and/or assault would occur. The Court noted that staff parties are very connected to employers as employers have a direct interest in, and derive a benefit from, hosting events for their employees. By throwing the party in the manner that it did, it was "arguable" that Calypso materially enhanced the level of risk for employees at the party. Supervision at the party was inherently difficult and employees could easily become isolated and vulnerable at the facilities. Additionally, the Court noted that Calypso could have taken measures to control alcohol consumption at the event, such as hiring a bartender. In dismissing Calypso's motion to strike Lorion's pleadings and claim based on Calypso's vicarious liability, the Court stated:
"While it may be true that the plaintiff will face obstacles in proving her claim, I do not think that, at this point, it is plain and obvious that the claim has no reasonable prospect of success."
This case acts as a clear warning for employers who plan to host staff parties. In order to minimize liability, employers should effectively supervise and control staff get-togethers so that everyone has a safe and enjoyable time. In addition, if alcohol is being served, employers should remind its employees to drink and act responsibly. A little planning will go a long way to ensuring that everyone has a safe and enjoyable time at the next work social.

Insurers Have an Obligation to Act in the Best Interest of the Insured

All is Not Lost if a Limitation Period is Missed

Kaitlyn MacDonell
Associate, Howie, Sacks & Henry LLP

Brad Moscato
Partner, Howie, Sacks & Henry LLP

Insurers have an obligation to ensure that they are acting in the best interests of the insured when adjudicating their cases. There has been a relatively recent trend by the Courts across Canada in calling these insurers to task by awarding high punitive damages when insurers are falling short of their obligations.

In Branco v. American Home Assurance Co. et al., the plaintiff was denied both his worker's compensation and long-term disability benefits as it related to an injury that left him disabled and unable to work. It was found by the Court that the insurers took advantage of the vulnerability of the insured. The insurer had offered unreasonably low settlement offers and had exerted prolonged financial pressure on the insured to help foster a settlement that would be in favour of the insurance company.
The Saskatchewan Court of Queen's Bench awarded a total of $4.5 million in punitive damages against the two insurers for their conduct. The Court in emphasizing the importance of deterring improper conduct of insurers: "It is hoped that this award will gain the attention of the insurance industry. The industry must recognize the destruction and devastation that their actions cause in failing to honour their contractual policy commitments to the individual insured."
In June 2015, the Court of Appeal for Saskatchewan reduced the collective value to $675,000.00.
In assessing the blameworthiness of an insurer, the Court will look to the following factors:

1. Whether the Defendant's misconduct was planned and deliberate;
2. The intent and motive of the defendant;
3. Whether the defendant persisted is the outrageous conduct over a lengthy period of time;
4. Whether the defendant concealed or attempted to cover up the misconduct;
5. The defendant's awareness that its conduct was wrong;
6. Whether the defendant profited from the misconduct; and
7. Whether the interest violated by the misconduct was known to be deeply personal to the plaintiff.

For more information regarding your rights regarding long term disability matters in general, please contact Kaitlyn MacDonell at 647-260-4498 - kmacdonell@hshlawyers.com; or Brad S. Moscato at 416-646-7655 - bmoscato@hshlawyers.com.

Know your limits – Guaranteeing Real vs. Personal Property Debts

Joseph J. Bellissimo
Joseph J. Bellissimo is a partner with the Restructuring and Insolvency Group at

Eleonore Morris

Joseph Bellissimo & Eleonore Morris

The Take-Away:

Not all guarantees are governed by the general two year limitation period provided under the Ontario Limitations Act, 2002.

The decision in The Equitable Trust Company v. Marsig, 2012 ONCA 235 held that guarantees contained in mortgages are governed by the ten year limitation period prescribed by the Ontario Real Property Limitations Act, rather than by the usual two year period.

Accordingly, mortgagees looking to recover from a guarantor should be aware that the limitations clock ticking on their right to commence an action has a much longer battery life than might otherwise be expected.

The Facts:

In February 2005, Equitable Trust ("Equitable") made a loan to 2062277 Ontario Inc. ("Borrower") secured by a real property mortgage. The mortgage contained a guarantee from Ernest Marsig ("Guarantor"). Following default, Equitable issued a notice of sale under the mortgage in December 2007, and served both the Borrower and the Guarantor.

The property was sold under power of sale, but there was a deficiency. In September 2010, Equitable commenced an action to recover the deficiency from the Borrower and the Guarantor.

In a motion for summary judgment, the Guarantor took the position that the action against him was statute barred because (i) his guarantee was a demand obligation and (ii) all demand obligations are subject to the general two year limitation period of the Limitations Act, 2002.

The motion was dismissed. After concluding that the guarantee was not a demand obligation, the motion judge more importantly held that the action was subject to the ten year limitation period prescribed by the Real Property Limitations Act, rather than the two year period of the Limitations Act, 2002. The Court of Appeal did not find it necessary to deal with the demand obligation issue, and in a clear judgment held that the ten year limitation period would apply to the guarantee whether or not it was payable on demand.

The Law:

The case serves as an excellent reminder of the existence of the real property-related limitations regime created by the Real Property Limitations Act, which co-exists with the regime created by the Limitations Act, 2002 for limitation periods other than those affecting real property.

As the decision illustrates, the former Limitations Act was made up of definitions and Parts I through III. Parts II and III were repealed in 2002 and replaced by the Limitations Act, 2002 to deal with limitation periods that do not affect real property. The definitions and Part I continue today as the renamed Real Property Limitations Act and deal exclusively with real property limitations.

The case turned on the proper interpretation to be given to Section 43 of the Real Property Limitations Act, the relevant part of which reads as follows:

43.(1) No action upon a covenant contained in an indenture of mortgage or any other instrument made on or after July 1, 1894 to repay the whole of part of any money secured by a mortgage

shall be commenced after … the expiry of 10 years after the day on which the cause of action arose.

Relying on, among other things, the unreported decision of Montreal Trust Co. of Canada v. Vanness Estate,1 the motion judge had no difficulty in concluding that guarantees found in a mortgage are governed by the Real Property Limitations Act. The Court of Appeal agreed, referring to a 1924 decision of that Court which concluded that the ten year limitation period contained in a predecessor statute governed guarantees contained in

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real estate mortgages.

While the Equitable Trust decision dealt with a guarantee contained within the body of a mortgage, the ten year limitation period should apply as well to any guarantee of a mortgage obligation, including guarantees contained in a separate instrument. This would result from the language of Section 43(1)(a) of the Real Property Limitations Act which refers not only to "a covenant contained in an indenture of mortgage" but also to "any other instrument made…to repay the whole or any part of any money secured by a mortgage".

As the Court of Appeal indicated, while the decision certainly confirms that lenders have additional time to sue guarantors of mortgage loans, it may paradoxically assist guarantors. Given the ten year period in which lenders can bring an action, they may decide to first realize on their mortgage security and then demand that the guarantor only pay any deficiency, rather than rush to sue the guarantor for the entire mortgage debt. From a practical standpoint, this approach may also benefit the lender since a claim for the smaller deficiency balance may lead to a quick resolution of the matter and avoid litigation.

Workplace investigations: Key reasons for hiring an external investigator

Lisa Corrente

Lisa Corrente, Torkin Manes LLP*

Various situations arising in the workplace can trigger the need for an investigation – alleged discrimination or harassment, workplace bullying or abuse, inappropriate use of the internet or social media, theft of company property, fraud, policy breaches, statutory violations, allegations of just cause and so forth. Often times, employers try to resolve minor issues informally through discussions with the individuals involved. When the allegations are more serious, employers may rely upon company managers to conduct internal investigations. However, in many situations, having an employer deal directly with the problem is not the best approach – informal discussions can easily breakdown and basic investigative steps may be overlooked by inexperienced mangers, making matters worse.
An invaluable skill for any employer is recognizing when a formal investigation by an external investigator is appropriate. Some of the most important reasons for hiring an external investigator include the following:

The Allegations are Serious

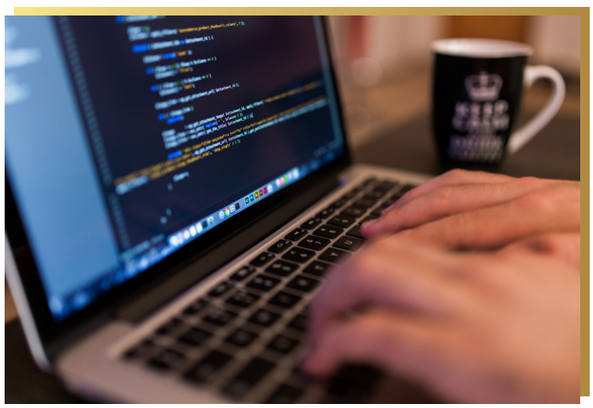
Serious allegations of employee misconduct can carry significant consequences. The reputations of the individuals involved are often at stake. As well, accused employees may be at risk of losing their jobs or facing criminal prosecution. Therefore, it is not uncommon for an employee to insist upon representation by his or her own lawyer in such cases. Also, the more serious an allegation (especially one that may amount to criminal conduct), the more vigorously lawyers, arbitrators, courts and tribunals will scrutinize the investigation. Not only will the allegations themselves be closely examined by lawyers and adjudicators, but the investigative process that was followed will also be dissected. If the investigation was flawed, employers can be exposed to legal liability. Therefore, in cases involving serious allegations, it is prudent to hire a trained and experienced investigator to conduct a fair and thorough investigation capable of withstanding intense scrutiny.

The Stakes are High

When allegations are made against an employee, the employer's business and reputation may be on the line. For instance, a violation of law or policy by an employee may expose an employer to civil or criminal liability. In regulated industries, an employer can potentially lose its operating license, have terms and conditions imposed upon its license, be required to take corrective action or pay considerable fines as a result of employee wrongdoing. When the stakes are high, employers need an independent investigator who is skilled in identifying the pertinent issues, gathering the relevant evidence, maintaining control of the investigation, providing an objective assessment of the situation and making helpful recommendations. This kind of an investigation can go a long way toward demonstrating that an employer is taking the matter seriously and hopefully, minimize the potential losses to business and reputation.

The Need for Impartiality

One of the hallmarks of a proper investigation is that it has been conducted impartially – the parties must feel that they have been treated fairly throughout the investigative process. An impartial investigation (real or perceived) is more likely achieved where the investigator has no personal or other connection to the parties and can objectively consider the evidence. Certainly, it is far easier to accuse an investigator of being biased if he or she works directly for the employer – an external investigator is more likely to be seen as neutral. Selecting a neutral investigator is crucial for many reasons. For instance, individuals are more likely to be forthcoming with information if they believe that



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they will be treated with an open mind. Anyone scrutinizing the investigation will be less inclined to challenge its outcome if they feel that the investigation was unbiased. As well, employers will be in a better position to make necessary changes within their organizations in response to recommendations made by an independent investigator, as opposed to an employee who may feel pressured to report what his or her employer wants to hear.

Lack of Training and Experience

Investigating is not an easy task. Cases can be complex and an investigator can run into a variety of challenges. Aside from basic investigative techniques such as interviewing witnesses and gathering relevant documents, an investigator must be adequately trained and experienced to evaluate the evidence and reach a conclusion supported by the evidence. In most cases, the investigator is unlikely to uncover the proverbial "smoking gun". Therefore, he or she must be skilled in assessing credibility and weighing corroborative, circumstantial and similar fact evidence. The investigator must also be able to figure out when forensic expertise is required to gather, preserve and analyse evidence. In addition to evidentiary issues, the investigator must know how to appropriately deal with unexpected hurdles such as uncooperative witnesses, possible retaliation against a party, privacy issues, and third parties seeking to meddle in or control the investigation. The more convoluted and thorny the case, the more necessary it is to hire a seasoned investigator.

Lack of Time or Resources

Time is of the essence in every investigation. Delay in commencing an investigation can only lead to pitfalls including witnesses that can no longer be reached, memories that have faded or documents that have been lost or destroyed. Further, failure to investigate a complaint as soon as it becomes known to the employer can suggest that the employer is also responsible for the misconduct and can negate a defence of due diligence. However, if complaints are to be investigated promptly and thoroughly, an employer needs sufficient resources. For an internal investigation, this means allocating an adequate number of employees to gather and review all of the evidence quickly and thoroughly. This can be challenging, especially when internal investigators have other work-related duties and responsibilities which can distract their focus away from the investigation. Therefore, an external investigator should be retained whenever an employer does not have the internal resources to conduct a speedy, yet comprehensive, investigation.

Dealing with the Media

Scandalous allegations such as those involving discrimination, harassment or abuse often attract unwanted media attention. In these cases, investigators must ensure that information regarding the investigation is not prematurely disclosed to the public or they risk compromising the integrity of the investigation. It is not hard to imagine leaks of information in cases where an incident is being investigated by management within the workplace. Having an external investigator in control of the investigation can help to minimize the information which is disseminated both inside and outside of the organization. An external investigator can also act as a "buffer" for the employer who may be able to avoid answering tricky questions from reporters if the organization is not directly involved in the investigation.

Maintaining Privilege

The fact that an investigation is conducted by a lawyer does not automatically mean that privilege (or confidentiality) attaches to the investigation. However, in situations where an employer wishes to conduct a privileged investigation, hiring a lawyer as the investigator can help to protect privilege. The lawyer-investigator can advise employers on how the investigation should be structured and planned in an effort to protect privilege. The lawyer-investigator can also conduct investigations while at the same time provide their employer clients with legal advice, ensure that communications with them remain confidential, and prepare for anticipated litigation. Although the law does not guarantee that a workplace investigation conducted by a lawyer is privileged, privilege is far more likely to apply to a lawyer's investigation than an investigation undertaken by an internal investigator.

Simplifying Litigation

Investing in an external investigator can help employers save money in the long run. When litigation is commenced by a complainant, a comprehensive investigative report, if it is favourable to the employer, can be used to shut down legal disputes at an early stage. Adjudicators can rely upon the findings of a sound investigation to swiftly determine issues of employer liability. For example, human rights adjudicators have accepted the findings of an investigator in order to dismiss complaints of workplace discrimination using a summary dismissal procedure. As well, investigative reports may be accepted into evidence by adjudicators avoiding the need to call direct evidence from witnesses. These options available to adjudicators can streamline litigation and save employers the considerable time and expense of a full-blown hearing. However, if an investigative report is going to be accepted by an adjudicator, it must stem from a well-conducted and impartial investigation – that is, the kind which is typically completed by an external investigator.

Avoiding the Consequences of a Flawed Investigation

In the same way that a well-conducted investigation can help an employer save money, a flawed investigation can have expensive repercussions. A biased or negligent investigation can subject employers to lawsuits for wrongful dismissal, infliction of emotional distress, breach of privacy, defamation and other claims. Even referring suspicions of non-violent criminal activity to police (such as theft or fraud) can be a costly proposition for employers if the suspicions turn out to be unfounded and the employee sues for malicious prosecution and punitive damages. Hiring an external investigator to conduct a proper investigation can help minimize the potential damages arising from legal proceedings.

Rebuilding Trust and Morale Complaints of wrongdoing by employees can seriously hurt workplace morale

An employer who fails to conduct a fair and thorough investigation into allegations of wrongdoing risks creating more toxicity in the workplace. In order to maintain a positive and safe environment for workers, employees must feel comfortable reporting incidents to management and know that their concerns will be taken seriously. When an employer engages the services of an external investigator, it can go a long way toward inspiring employee confidence and rebuilding trust.

* Lisa Corrente is a partner with the Employment and Labour Group at Torkin Manes LLP. She conducts neutral workplace investigations into all types of matters, offering timely and thorough expertise from the start of the investigative process through to providing comprehensive written reports and recommendations. Please feel free to contact Lisa at (416) 643-8800 or lcorrente@torkinmanes.com.

Court advisor, not advocate

With expert witnesses, independence matters

Domenic Marino
Partner of PwC's Valuations, Modelling and Disputes practice.

Domenic Marino

When it comes to business disputes that result in litigation, often legal counsel will advise their clients to retain expert witnesses to help inform the court on matters that relate to the case but that require a level of subject matter expertise to understand and clearly explain. The challenge comes when people don't consider that the first duty of an expert witness is to the court – not to the lawyer or organization paying their bill.

In Canada, expert witnesses have had a role in court proceedings for many years – a responsibility that has always included a primary duty to the court. Among expert witnesses, however, this specific duty has not always been appreciated or understood.

Here in Ontario, the government amended the Rules of Civil Procedure in 2010 to clarify the duty of experts in court proceedings. Specifically, Rule 4.1 sets out that the duty of an expert is to, "Provide opinion evidence that is fair, objective and non-partisan; to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and to provide such additional assistance as the court may reasonably require to determine a matter in issue." The rule goes on to state unequivocally that the above rules take precedence over any obligation the expert has to the party that engaged them.

This requirement for expert witnesses to be independent is a matter that can't be overlooked. In a 2012 decision related to Gould v. Western Coal Corporation, Justice Strathy took exception to evidence provided by an expert witness for the plaintiff, suggesting that the individual extended his opinion to matters well beyond the scope of his expertise. "The willingness of an expert to step outside his or her area of proven expertise raises real questions about his or her independence and impartiality. It suggests that the witness may not be fully aware of, or faithful to, his or her responsibilities and necessarily causes the court to question the reliability of the evidence that is within the expert's knowledge."

Since the Gould decision, expert witness testimony has come under even more intense scrutiny. In April 2014, Justice Wilson's decision in Moore v. Getahun suggested that lawyers reviewing and providing feedback on the draft reports of expert witnesses was unacceptable. In June 2014, Justice Healey's decision in the case of Bailey v. Barbour showed willingness on the part of the courts to levy costs directly on a lawyer as a result of the use of an expert who was clearly not unbiased. In awarding the costs, Justice Healey stated that there was no reason the lawyer involved, "could fail to recognize that the expert was too personally involved to objectively comment upon the other expert's methodology and conclusions."

The ramifications of the aforementioned decisions may be troubling to some legal counsel, especially in cases where expert witnesses have subject matter expertise but little experience presenting facts or evidence in court. If Moore v. Getahun holds up (the decision is under appeal), any ability for legal counsel to provide guidance on report writing will be severely constrained. This could introduce significant issues for all involved in a case, as many expert witnesses are not experienced report writers.

Without guidance, the reports of some expert witnesses could lack completeness from a factual perspective, include inaccuracies that could create dissent among trial parties and be poorly presented or difficult to understand. Should a lawyer provide comments on the structure, detail or accuracy of specific components of a report, it could result in accusations of bias with respect to the expert witness and a negative opinion of information presented.

At the same time, the enhanced focus on independence highlights the critical importance of expert witness testimony in legal proceedings – and provides a strong warning that "hired guns" will not be tolerated. Such a warning is not necessarily bad. In reality, it's often the independence of experts that provides the strength to back a decision related to a given case.

But where's the line? How can legal counsel be confident an expert witness is stating the facts effectively – without being seen to have a bias toward one side or another? In reality, should the view of an expert witness be deemed bias, it's not just their reputation on the line – it's also the reputation of the legal counsel relying on their position. That's not to say a lawyer – or their clients – can't get a strong expert opinion without crossing the line and risking their professional integrity. To obtain an appropriate expert witness, lawyers need to consider how a legal proceeding might unfold, given the assumption a case will proceed to court. Given that an expert witness's duty to the court will supersede their duty to their client, consider that as a part of the litigation, the expert witness's interactions related to report development and/or their testimony could also be reviewed (e.g. emails, memos, phone records) and evaluated in order to determine whether their opinion is, in fact, independent. This determination could make or break a case.

When thinking about the potential consequences of perceived bias, the importance of expert selection becomes clear. Reputation, experience in court and the ability to write objective, un-biased reports and interact professionally in all communications with clients and their legal counsel will likely give the opinion of an expert witness more weight than otherwise.

Before you retain an expert witness for a particular case, know what you are getting into. Have a frank discussion with the proposed expert regarding your expectations, the scope of their expertise and how they will conduct their investigation. Recognize that your ability to influence their position will be limited and possibly highly scrutinized. You should know before you hire them that theirs is an opinion that both you – and the courts – can trust.

Why join C.I.A.O.?

Who are we?

Established in 1984, the Canadian Italian Advocates Organization (C.I.A.O.) is a not-for-profit association of volunteer lawyers who share a common heritage.

What do we do?

C.I.A.O. has, over the years, accomplished a great deal to enhance access to justice and to promote public education. We make every effort to support our members in their professional endeavours. Some of our activities include:

We have hosted and continue to host a series of robust continuing legal education symposia

For example, over the last several years we have hosted the following cpds: **Protect Your Practice and Your Clients; Practice Management; Privacy and Cybersecurity Best Practices; Insurance Smorgasbord; What every lawyer should know; Learning Professionalism in Practice; The New Criminal Rules of the Ontario Court of Justice; Employment Law Primer; The Employment Contract and Human Rights in the Workplace; Understanding Financial Statements for Lawyers; Practice and Risk Management; Effective Legal Research and Written Advocacy; What Every lawyers needs to know about Bankruptcy and Insolvency Law; Real Estate and Estates Cross-over Issues; Health Law Summit; Best Practices – Sentencing in Criminal Law; Cybercrime; The Art of Articling.**

Public Legal Education

We host an annual Mock Criminal Trial for high school students during Law Week in commemoration of the entrenchment of the Canadian Charter of Rights and Freedoms.

Scholarships

We have raised funds for scholarships/fellowships at various law schools;

Social Events

We host our much-anticipated annual Festa Di Natale (Christmas Dinner); We hold an annual Judges' Night allowing our members to meet with members of the judiciary; We have provided input to the Law Society and other public bodies on various issues and initiatives; and networking opportunities.

Member Services

We provide a variety of member services and benefits including discounts from preferred suppliers.

Mentorship

A mentorship program allowing junior members of the Bar to consult with seasoned professionals. We also have a student division to support students with their educational and professional needs.

We invite you to consider renewing your membership today!

Membership is FREE for students. Check us out at www.ciaocanada.com
You can contact Vince A. Pileggi at president@ciaocanada.com or by calling 416.744.9595

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It doesn't pay to delay

Review Officer's Order Rescinded By Pay Equity Hearings Tribunal

Lisa Corrente

Despite rumours to the contrary, pay equity has not come to a quiet end in Ontario. The Pay Equity Act (the "Act") continues to require employers to ensure that their compensation practices provide for pay equity for all employees in female job classes. However, in a recent decision, the Pay Equity Hearings Tribunal (the "Tribunal") found that delay in filing and processing a complaint about an employer's pay equity plan amounts to an abuse of the pay equity system.

In Maitland Manor Health Care Centre v. Mattuci et al., the Employer (a nursing home) took issue with an order issued by a Review Officer in November 2009. The Review Officer concluded that the Employer's non-union proxy pay equity plan (the "PPEP") (which

the Employer had posted in 1995) did not comply with the Act. As a result, the Review Officer ordered the Employer to prepare a new proxy pay equity plan and provide employees with any additional pay equity wage adjustments. The Employer commenced an application to the Tribunal challenging the Review Officer's order.

The Employer's position before the Tribunal was that the PPEP complied with the Act. The Employer also argued that there was unreasonable and inordinate delay by the complainant (an anonymous employee) in filing his complaint with the Pay Equity Office (the "PEO"), as well as undue delay by the PEO in processing the complaint after it was received. These periods of delay – that is, 9 years to file the complaint and 5 years to process it – resulted in substantial and irreparable prejudice to the Employer which amounted to an abuse of process and brought the pay equity system into disrepute. The Employer requested that the Tribunal permit it to remedy the resulting prejudice by retroactively characterizing wage increases provided to employees over the years as pay equity wage adjustments or, alternatively, revoke the Review Officer's order.

The Tribunal found that pursuant to the Statutory Powers Procedure Act, it had the power to make orders or give directions in order to prevent an abuse of its processes. The Tribunal also held that an unacceptable administrative delay may amount to an abuse of process when significant prejudice results to a party, even where the fairness of the hearing has not been compromised. The Tribunal determined that whether delay amounts to an abuse of process depends on contextual factors including the nature of the case and its complexity, the facts and issues in dispute, the purpose and nature of the proceedings, whether the party seeking a remedy contributed to the delay, and the various rights at stake in the proceedings.

The Tribunal applied the contextual factors to the facts of the case and held that the 14-year delay amounted to an abuse of process. According to the Tribunal, the Act clearly sets out time frames within which employees may submit comments or object to an employer's pay equity plan. Thus, the process for employees to make timely complaints to the PEO is not complicated. Also, the issue raised in the complaint (i.e. whether the PPEP complied with the Act) was not a matter of such complexity as to justify a 5-year delay in issuing the Review Officer's order. The Tribunal further recognized that the Employer had not meaningfully contributed to the delay.

The Tribunal was also satisfied that the rights of the Employer had been considerably and irreparably prejudiced by the delay. For instance, had an objection been made by the anonymous employee within the prescribed period, the Employer could have amended the PPEP as necessary and characterized future wage increases as pay equity wage adjustments. Further, had the Employer been advised of the complaint and the PEO's position in that regard in a timely manner, it could have mitigated its potential liability by characterizing all wage increases provided to the employees since the complaint was filed as pay equity wage adjustments. However, due to the delay, the Employer was deprived of these options, as well as others.

Apart from the substantial prejudice to the Employer, the Tribunal held that abuse of process arising from delay can also occur in in-

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stances where the administrative system itself would suffer disrepute. According to the Tribunal: "There is a strong public interest in promoting the timely and final resolution of pay equity disputes. The workplace parties are entitled to have their disputes resolved without undue delay…If the Tribunal allows the anonymous employee's complaint to proceed in this case, there is a real risk that other complainants will feel emboldened to raise objections long after a pay equity plan has been "deemed approved". The Tribunal should discourage the raising of such ghosts from the past." Having found that the delay caused significant prejudice to the Employer and brought the pay equity system into disrepute, thus amounting to an abuse of process, the Tribunal proceeded to consider the issue of remedy. With respect to the Employer's request for an order permitting it to retroactively characterize wage increases as pay equity wage adjustments, the Tribunal found that such an "extraordinary remedy" was not warranted (assuming that the Tribunal had the jurisdiction to grant it). Instead, the Tribunal rescinded the Review Officer's order.

Congratulations

Joseph Di Luca

On behalf of the Board of Directors of the Canadian Italian Advocates Organization, hearty congratulations are extended to Joseph Di Luca who was (on October 20, 2016) appointed a judge of the Superior Court of Justice in Newmarket to replace Mr. Justice R.G.S. Del Frate (Sudbury).

His Honour has been actively involved in our organization for many years. His selfless dedication to mentoring other lawyers and to public legal education is much appreciated. We wish him the very best on this most deserving appointment.

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