EXPLANATORY NOTES ON THE REPORTED CASES OF LINDA H. KOLYN

by Linda H. Kolyn

Areas of Law Considered in this case: Negligence - Tort - Suits against Government - Proceedings Against the Crown Act - Civil Litigation

1. Heighington et al. v. The Queen in right of Ontario et al. (1987)
60 O.R. (2d) 641; [1987] O.J. No. 725

The Ontario government built a low-income housing subdivision on the old Ivanenko farm in Scarborough, on what had been a radium removal and recycling site after WWI. Along with two other lawyers I represented the Ontario government, (known in civil litigation as The Queen in right of Ontario).

George Heighington, and a number of the other residents of Malvern [in the precursor to class action lawsuits] claimed that the Ontario government was negligent since the Ministry of Labour through its Atomic Energy department knew of the location of the radium removal and recycling site, and did not advise or warn the prospective purchasers of the homes. The residents further claimed that information from the Atomic Energy Commission of Canada was available and that the builders of the homes were negligent in not making inquiries.

The residents claimed that they suffered damages to their health, {which in most cases were unsubstantiated} and a loss in property value [which the court found had been substantiated or proven]

This case received press coverage. The Attorney General was asked questions in the Ontario Legislature {which we had prepared the Attorney General's answers for}

Areas of Law Considered in this case: Statutory Interpretation - Family Benefits - Appeals - Civil Litigation - Family Benefits Act

2. Re Howell and Director of Family Benefits Branch of Ministry of Community and Social Services (1986) 56 O.R. (2d) 773; 32 D.L.R. (4th) 145; [1986] O.J. No. 943

An allowance under the Family Benefits Act was cancelled by the Director of Family Benefits because Howell's 14 year old daughter ceased to be a "dependent child" within the meaning of Section 1 of the Family Benefits Act. Ms. Howell appealed the cancellation of the allowance by the Director to the Social Assistance Review Board. The Board dismissed Ms. Howell's appeal. Ms. Howell appealed to the Divisional Court. I represented the Social Assistance Review Board in the Divisional Court.

Howell's 14 year old daughter was placed in a Supervised Alternative Learning for Excused Pupils Programme by the Board of Education. Under the Programme the daughter was to obtain full time employment. The daughter worked briefly and then was unemployed.

The appeal was dismissed by the Divisional Court, albeit for different reasons than the Social Assistance Review Board had relied upon. {However, I was ready to argue, and did argue on the alternate grounds the Divisional Court ultimately decided upon}

In preparing for a Court appearance, as counsel I have to consider all possible characterizations of the situation and all angles of argument in order to fully and properly represent my client.

Statutory definitions are important in determining outcomes of appeals.

Areas of Law Considered in this case: Residential Tenancies - Landlord and Tenant - Appeals - Statutory Interpretation - Residential Tenancies Act

3. Re Koressis et al. and Turner et al. (1986) 54 O.R. (2d) 571; [1986] O.J. No. 287

In this residential tenancy appeal, under the Residential Tenancies Act, I represented the decision-maker, the Residential Tenancy Commission. My role was to state the case to be considered by the Divisional Court, and to assist the Court in understanding and interpreting the legislation governing the Commission's decision.

An appeal panel of the Residential Tenancies Commission imposed the burden of showing that the apartment building, which was the subject of whole building rent increase, was not exempt from rent control, on the tenants.

In Divisional Court this was corrected. The burden of showing that the apartment building, which was the subject of whole building rent increase, was not exempt from rent control, should have been imposed on the landlord.

Also, the appeal panel declined to deal with an estoppel argument. The Divisional Court stated that this was incorrect, as the estoppel argument arose on the facts before the appeal panel. The appeal panel should have reviewed the law on this argument, and then applied it to the facts before them.

In this instance, this case was sent back to the Commission, to be dealt with in accordance with the Court's reasons.

Areas of Law Considered in this case: - Residential Tenancies - Landlord and Tenant - Appeals - Statutory Interpretation - Administrative Law - Appeals - Residential Tenancies Act - Statutory Powers Procedures Act

4. Re Vance and Hardit Corp. et al., (1985) 53 O.R. (2d) 183; [1985] O.J. No. 1007 (H.C.J.) (Divl. Crt.)

I represented the Residential Tenancies Commission who became a party to this judicial review of three rulings involving a landlord and a residential tenant. The landlord had been granted the right, by three different appeal panels of the Residential Tenancies Commission, to increase the rents in each of three residential buildings. Sections 16 of the Statutory Powers

Procedures Act, and s 105 of the Residential Tenancies Act were considered in this appeal mandated by statute.

In the first decision, the commissioner stated that he had made certain findings of fact based on the evidence presented, and as a result of his own investigations. The parties were not advised of the additional information, nor were they allowed to ask questions or make submissions relating to the additional information.

The Court properly held that the commission had erred in the manner in which it had treated the evidence of the commissioner's own investigation, and allowed the appeal.

Since the second and third decisions depended in part on the findings made in the first decision, all three decisions were sent back to the Commission for rehearing.

Areas of Law Considered in this case: - Statutory Interpretation - Artificial Insemination - Appeals - Family Benefits Act

5. Re Clifton and Director of Income Maintenance Branch, Ministry of Community & Social Services, (1985) 53 O.R. (2d) 33 (Divl. Crt.)

Sometimes the most innocuous-looking statutory appeals turn into the most interesting cases, both legally and practically. This one certainly did, and had an interesting anecdotal ending, and sequela.

Deborah Clifton had applied for a family benefits allowance as the sole support mother to a thirteen-month-old child. She refused to give any information as to the identity of the father, as required under the Family Benefits Act. In fact, Ms. Clifton filed a statutory declaration before the Social Assistance Review Board stating that she was unaware of the father's identity. Ms. Clifton was denied an allowance.

Ms. Clifton appealed the denial of the allowance to the Divisional Court. In her factum, or written argument, her counsel argued that the inquiry into the paternity of the child was an irrelevant invasion of her privacy. Her counsel

also may have argued that Ms. Clifton's rights under the Canadian Charter of Rights and Freedoms were violated.

Although Ms. Clifton did not wish to tell the Director, or the Social Assistance Review Board about the circumstances surrounding the conception of her child, she did tell our national radio station, which told all of Toronto that listens.

Not stopping at radio publicity, Ms. Clifton and child were also the subject of a full-page article, complete with a charming picture of the child, in one of Toronto's daily newspapers.

This publicity appeared after the written arguments were filed, but just before, or on the day of the oral arguments in Court.

In the factum, or written argument required to be filed by each party in the appeal, I argued that the Director had discharged his duty, under the Family Benefits Act and Regulations, to inquire into, and verify any statements in an application, especially where the information is necessary to determine eligibility for an allowance.

Since the matter was newsworthy, the Osgoode Hall correspondent was in Court. I was pleased to assist him at break, explaining the arguments of both sides, and answering his questions about Court procedure. I explained to him that it was extremely unlikely that either of the counsel, or any member of the Judge's panel, would mention the press coverage, or the circumstances surrounding the child's conception. No mention was made in Court of the press coverage, or the facts disclosed in the press coverage.

Ms. Clifton had not wanted any male to have any paternity claims on her child, according to the press. So, she had collected sperm donations from three men who met her criteria for intelligence, physique and looks, and mixed the sperm donations together.

Then, she artificially inseminated herself, using a sterilized turkey baster, as recommended in the Artificial Insemination section of Every Woman's Medical Encyclopedia, the press reported.

Mr. Justice Steele's reported decision uses verbatim, entire sections of my written argument, as set out in my client's factum.

This is the greatest compliment that any Judge or Justice can give counsel; the argument is so persuasive that the Justice cannot improve on the argument at all so it is reproduced in the Justice's decision verbatim.

The statute authorized the invasion of the privacy of Ms. Clifton because she applied for a benefit. There was a right to refuse the application for lack of information. Ms. Clifton's appeal was dismissed.

I returned to my office to a message asking me to report to the Photocopying Room. When I did, the photocopying clerk told me that she had a present for me, but that if I accepted the present she was not able to tell me whom the present was from. I agreed to these terms.

I was handed a brown paper bag. There were a lot of my colleagues at Crown Law Civil standing in the hall outside the Photocopying Room at this time, and peering into the Photocopy Room to see what was happening.

I opened the bag to find that I had been presented with A STERILIZED TURKEY BASTER.

Raucous laughter erupts from the hall. The photocopy clerk tells me that my great win should be celebrated with a little momento.

It seemed that every counsel and employee of the Attorney General's staff congratulated me, or spoke to me about this case for the next few weeks.

I took the turkey baster home, and put it in the bottom drawer of the stove.

Years later, while my mother was basting the turkey for Christmas dinner, her turkey baster broke. Mom consulted with her sister, my aunt, and my sister, the surgeon. Where could Mom get another turkey baster on Christmas Day, when all the stores were closed?

Mom telephoned me to inquire as to whether I still had the sterilized turkey baster that had been presented to me after I won that artificial insemination case. I replied that I still had the sterilized turkey baster. Had it been used for anything, Mom asked. No, I replied, its still in the package sterilized and sealed. I was asked to hurry up and arrive at my mother's with the sterilized turkey baster. I did.

Four generations took turns basting the turkey that year. The circumstances of this case, and how I had been gifted the turkey baster were recounted. All twenty-four of us at the dinner table that year were agreed on one thing: that turkey was the best we had ever had.

Areas of Law Considered in this case: - Public Access to Records - Civil procedure – Appeals - Rules of Civil Procedure - Rules of Practice(Ont.) - Judicature Act - Courts of Justice Act, 1984(Ont.)

6. Howes v. Accountant of the Supreme Court of Ontario et al. (1986) 58 O.R. (2d) 345 (S.C.C.); (1984) 49 O.R. (2d) 121 (C.A.) and [1984] O.J. No. 1474.

I represented the Accountant of the Supreme Court of Ontario in this challenge to his authority to not publish or provide information from his records, to inquiring third parties. Howes was an " heirs locator " who claimed it was the public's right to access the Accountant's records and therefore Howes's right as well under Rules 222,522, 524 and 732 of the Rules of Practice (Ont.) – replaced by Rules 37.13(2); 59.05(1), (2), (3), (5), 73.02(2), (3) of the Rules of Civil Procedure, and under s. 129 of the Judicature Act- now replaced by s 147(3) of the Courts of Justice Act.

Howes wanted the names and addresses on file for the children who had been awarded moneys as minors or infants in court actions. In Ontario, moneys awarded to children under the age of majority are paid into court until the child reaches the age of majority. Although the court files relating to these actions are public and subject to search, the Accountant's records, to that point in time, had been restricted from public viewing.

In the late afternoon on the New Year's Eve before Rule 732 of the Ontario Rules of Practice governing the Accountant was to be changed, I was in court arguing this case before Mr. Justice Maloney. My arguments were based on the best interests of children and the supervisory jurisdiction of the courts relating to children's best interests, privacy, and public interest. My arguments on behalf of the Accountant of the Supreme Court of Ontario prevailed before Mr. Justice Maloney. Howes appealed this case all the way up the appellate ladder through to and including the Supreme Court of

Canada. My arguments on behalf of the Accountant of the Supreme Court of Ontario were accepted by each of the successive reviewing appellate courts.

Areas of Law Considered in this case: - Car Insurance - Limitation Periods - Insurance Act - Appeals - Civil Litigation

7. Schmidt v. Janitsch et al., (1984) 45 O.R. (2d) 11 (H.C.J.)

This was a car accident case in which the two-year limitation period for commencing legal action relating to collection of monetary damages under the Highway Traffic Act had expired. I represented the insurance company defending the driver at fault in the accident, not usually the party that judges have the most sympathy for.

The fault in missing the two-year limitation period lay with the law firm representing the plaintiff. My arguments stressed this, and the irreversible " prejudice" that my client would suffer if this case were allowed to proceed.

Although I did not mention it in legal argument, {as it would have been legally irrelevant}, I remember thinking how unfair it was that the secretary " responsible" for the limitation period follow up, had been fired once the mistake in missing the two year limitation period had been discovered by the law firm.

My arguments prevailed and the case was dismissed against my client, who was ecstatic about the result, and about establishing a useful precedent for the insurance industry [since the insurance company client was an integral part of the insurance industry].

Areas of Law Considered in this case: - Car Insurance - Limitation Periods - Insurance Act, Schedules C and E - Civil Litigation - Appeals

8. Peacock v. Gore Mutual Insurance Co. (1983**)** 42 O.R. (2d) 359 148 D.L.R. (3d) 665 (Divl. Crt.)

I represented the insurance company in this case, which was an appeal from a trial decision awarding Ms. Peacock insurance benefits under her automobile accident policy of insurance.

The court had to consider the statutory wording of Schedule C of the Insurance Act and determine whether Ms. Peacock, who was unemployed on the date of the car accident, but who had earned employment income for six months during the year prior to the accident, had suffered a "loss of income from employment."

Mr. Justice Trainor decided that where an accident benefit claimant was deemed to be employed under Schedule C of the Insurance Act, it was unnecessary to establish an actual loss of income, in order to receive these " no fault" car insurance benefits.

Areas of Law Considered in this case: - Lawyer's Negligence - Fraud - Guarantees - Business Law - Civil Procedure - Misrepresentation - Civil Litigation

9. Lochwin v. Wasserman, [1997] O.J. No. 1113 (Gen. Div.)

In a civil lawsuit, there are sometimes court appearances prior to trial, to decide procedural and tactical issues. These court appearances are called motions and are governed by the Rules of Civil Procedure, and the cases decided under each of the Rules of Civil Procedure.

In this case, my client sued her former lawyers for malpractice in the sale of a commercial building. Other defendants were sued for other contract and tort and misrepresentation claims. Evidence surfaced prior to trial, which required a substantial reworking of the Plaintiff's narrative and allegations [pleadings] in the Statement of Claim against the former lawyers, as well as another defendant.

Since the Rules of Civil Procedure require the consent of all of the parties, or a court order, and at least one of the defendants would not consent [although they would not oppose and did not appear] bringing a motion was necessary.

I obtained an order allowing the amendments, and persuaded the Judge to order that one of the defendants, who had not fulfilled the undertakings [or promises under oath] that he gave on his oral examination for discovery, was required to answer the outstanding undertakings.

Areas of Law Considered in this case: - Family Law - Variation of Support - Child Support - Divorce Act - Child over the Age of Majority - Family Law Act, Family Support Plan Act

10. **Orzeck v. Orzeck ,** [1995] O.J. No. 3443

My client, the mother of four children applied for an increase in child support for the three children who were still in high school and attending university. This was the first court appearance after the divorce some thirteen or so years earlier. I did not handle this client's divorce. Child support had been agreed upon in a separation agreement, and so it was necessary to prove a material change in circumstances in order to have the child support varied under s. 33 and 34 of the Family Law Act.

There was still tremendous acrimony between my client and her former spouse, which was evident from their demeanour both in the courtroom and in the witness stand.

The father had not had much contact with the children after he left the family to continue a relationship with one of his co-workers. He had made the child support payments required under the separation agreement, however. The father requested that the Court order that his child support obligations cease.

Responsibility for the father's lack of contact with the children was the subject of heated cross-examination of both parties, and all of the children.

At that time there was a conflict in the caselaw as to whether a father's obligation to continue support of children over the age of majority would continue if the children were not in touch with the father.

The trial judge ordered that the father did not have to pay child support for the three children over the age of 21, as he had had no meaningful relationship with them for over eight years.

However, the trial judge increased the child support payable for the youngest child until she reached 21.

Areas of Law considered in this case: - Family Law - Jurisdiction of the Provincial Court and the General Division - S. 107 of the Court of Justice Act, and s. 2(2) of the Family Law Act

11. Deronov v. Agathocli, [1994] O.J. No. 551

My client, the mother brought an application in the Provincial Division for an increase in child support for her high school aged daughter. The daughter was gifted musically. The daughter's father claimed that he had no money to pay increased child support since he had a wife, and other children to support.

It was discovered that the father had assets out of the country, and had made rrsp contributions, and investments in the wife's name.

The wife then brought an application to seize and freeze some of the father's assets, as security for child support. Some of these assets were out of the country, and some other assets were registered in the name of the father's new wife.

The jurisdiction of the two levels of court in which family law matters can be brought is the reason that there were two separate applications.

Since it made sense to have all matters decided in one court, at one time, I brought a motion on behalf of the wife in the General Division, to have the Provincial Division application transferred to the General Division.

The father's lawyer objected, saying the relevant legislation required that the motion should have been brought in the Provincial Division. Madam Justice Epstein agreed with the father's lawyer, and the General Division motion was dismissed. There had been no judicial interpretation of this aspect of section 2(2) of the Family Law Act to this point in time.

Needless to say the father was asked to consent to an order in the Provincial Division transferring that application to the General Division. He refused.

An order was obtained from the Provincial Division, and the proceedings continued, to a successful conclusion, in my client's favour, in the General Division.

Areas of Law considered in this case: - Residential Landlord and Tenant - Grounds for Termination of Lease & Eviction - Writ of Possession - Landlord and Tenant Act

12. Haschyc v. Crowley, [1990] O.J. No. 446 (D. C.)

In this landlord and tenant dispute, I represented the landlord, successfully. The landlord applied to terminate the tenancy, and collect rent arrears and obtain possession of the property by obtaining a writ of possession under Section 113 of the Landlord and Tenant Act.

The tenant cross-applied for an abatement or reduction of rent [because a part of the house could not be used due to the defective heating system] and her recovery of the cost of certain repairs. The terms of the tenancy agreement permitted the tenant to set off the cost of certain necessary repairs against rent owing.

The tenancy was declared terminated. The costs of heating and plumbing repairs were set off against rent owing. The tenant was not entitled to rent abatement since the rent had not been increased for six years.

Areas of Law considered in this case: - Solicitor Client Assessment - Rule 58 of the Rules of Civil Procedure

13. Kolyn and Lalka [1991] O.J. 490 (Assessment Officer)

On a solicitor client account where there is no written retainer, the Assessment Officer considers the complexity of the matter, how experienced the solicitor is, was unnecessary work performed, what results were achieved, and could some of the work billed by the solicitor have been done by a paralegal.

Where both the solicitor and the client are lawyers, and have divergent views on the success and conduct of the mechanics lien motion involving a receivership, another lawyer can give evidence as an expert witness, which the Assessment Officer considers.

Once the client removes the files from the solicitor's care the client accepts full responsibility for file management.

As the solicitor was entrusted with the preliminary work on the file by the client, she was entitled to be paid, despite the client's objections to the contrary.

Areas of Law considered in this case: - Business Law - Misrepresentation - Purchase of Professional Practice - Enforcement of Restrictive Covenant - Trials - Civil Litigation

14. Kronick v. Lamarche-Craven, [1991] O.J. No. 907 (Gen. Div.)

My client, a dentist, bought a dental practice from an older dentist who told her that he was retiring from dental practice, and who had instructed that this phrase appear in the appraisal report of his dental practice. There was a non-competition clause in the Agreement to Purchase the Dental Practice. The older dentist stayed on in my client's practice, as an associate, and continued to treat his own patients.

After the three-year period specified in the non-competition clause had expired, the older dentist changed his mind about retiring and set up an office within the five-mile radius prohibited in the non-competition clause.

The trial judge believed that the older dentist had changed his mind about staying with my client's practice until retirement, as a result of professional differences of opinion between them. These differences were perhaps no more than generational differences, he found.

The older dentist sued my client for moneys allegedly owing. At trial this figure amounted to $1,222.64.

My client counterclaimed for damages for misuse and theft of confidential information, or alternatively for breach of fiduciary obligation. The older dentist had been seen giving his clients little white slips of paper as they left his examining room, just before he left my client's practice.

Sometimes commencing an action for an insignificant amount of money gets you a really complicated lawsuit in return. I always consider cross actions and counterclaims with clients when we discuss whether they should commence litigation.

Areas of Law considered in this case: - Application for Judicial Review - Barrister's conflict of interest - Civil Procedure - Civil Litigation

15.Foreman v. Ontario (Police Commission), [1984] O.J. No. 611 **(H.C.J.)**

A barrister, who was alleged to have confidential information about the two police officers under investigation by the Ontario Police Commission, did not wish to withdraw from representing the local police force in the investigation conducted by the Ontario Police Commission under the Police Act. The barrister denied that he had received any confidential information.

The lawyer representing the two police officers brought an application for judicial review for an order that the barrister be restrained from representing the local police force in this investigation, since the barrister would use the information that he had about the two police officers, against the police officers, creating a conflict of interest.

I represented the interests of the Ontario Police Commission on this urgent, interesting and then popular motion. One of the counsel with whom I appeared on this motion was shortly thereafter appointed to the Bench [became a Justice]

Areas of Law considered in this case: - Sheriff's Interpleader - Rule 13.05(2) of the Rules of Civil Procedure - Business Law - Civil Litigation

16. Danbrie Agri-Products Mfg. Ltd. v. Martens Pipe Products Inc., [1987] O.J. No. 1401 January 30, 1987

Interpleader is an underused and very effective remedy where the Sheriff, or any other party, has received competing claims to money or goods or other

valuables. Rule 13.05(2) of the Rules of Civil Procedure governed in this case.

My client the Sheriff had seized goods in the execution of a writ of seizure and sale [one of the enforcement mechanisms that Rule 60.07 of the Rules of Civil Procedure provide after Judgment is obtained]

Not only did another company claim ownership of these goods, but the Ontario Development Corporation claimed a first mortgage on the goods.

Other execution creditors also joined the proceedings, and appeared at the hearing.

The presiding Judge ordered the Sheriff's liability respecting the property be extinguished. The Sheriff was awarded his costs against the company from which the goods were seized.

After procedural concessions were made, the Judge heard evidence as to the competing claims to ownership of the goods. The Judge found that one of the claimants had established ownership of the goods.

As the Sheriff had sold the goods, in accordance with Rule 60.07 of the Rules of Civil Procedure, the moneys received were directed paid out of court to the owners. The owners were also awarded costs payable by the company, which had had possession of the goods on their premises.

Since there were many parties, and the amount of money involved was not large enough to warrant a pretrial and then a trial of the issues, I persuaded the presiding judge to dispense with the pretrial, and determine the matter on a final basis, which he did.

Areas of Law considered in this case: - Variation of Life Insurance - Trusts - Estates - Children's' Claims - Civil Litigation - Protection of Children's' Interests - Parens Patriae Jurisdiction of the Supreme Court of Ontario - Trustee Act - Variation of Trusts Act - Succession Law Reform Act - Children's Law Reform Act - Surrogate Courts Act - Judicature Act

17. Sloan v. Sloan , [1989] O.J. No. 682

The young widow was separated from her husband, when he died in a single car accident early one Sunday morning. The young widow was living with the son-in-law of her husband's parents at the time her husband died. I remember the young widow telling me that she and Stewart became friends as they would often talk at the family weekend parties held at the grandparents' cottage, since they were often the only two not drinking heavily by the end of the evening.

I remember seeing the police pictures taken at the scene of the accident. How graphic and tragic this young man's death was!

The widow's husband had left the proceeds of his life insurance policy to his two young children. The husband's father was named the sole trustee of the life insurance proceeds, which the law characterized as trust funds.

I brought an urgent interim court application before Mr. Justice Reid the first winter after the husband's death. The young widow had been forced to send her eldest son, Daniel, to school in a snowstorm, in his running shoes that had holes in them. The grandfather had refused to give the young widow any money to pay for necessities for the children, despite many requests.

Mr. Justice Reid ordered an interim support payment immediately and monthly thereafter, based on the amount of income that the investments the grandfather had made were generating. This was within his discretion as Judge to award, but very rarely done, especially on an interim application, as Madam Justice Van Camp noted in her reasons for judgment in the main application.

I had appeared many times before Mr. Justice Reid since he often sat in Divisional Court, on statutory appeals and judicial reviews and I was often in Divisional Court as Counsel for the Attorney General on statutory appeals and judicial reviews. Mr. Justice Reid almost always understood my client's position from the written argument or factum that was required. My client usually prevailed. I had never had occasion to have Mr. Justice Reid raise his voice or show any annoyance with me as counsel.

However the day that Mr. Justice Reid granted the interim order setting the young widow's allowance for the two young children Mr. Justice Reid was

really exasperated, and all of the other counsel sitting in court waiting to be heard on other cases knew that.

Mr. Justice Reid wanted to fully determine all of the issues raised in the application at one time so that justice could be done. So he raised his voice in exasperation and told me that although he recognized that this was an emergency application, he wished that I had filed a factum, in order to give him the jurisdiction [or power] he needed under the legislation in question, and the Rules of Civil Procedure, to make a final disposition of all of the issues in the matter.

From that day forward, unless the client instructs to the contrary, I have never appeared in a court matter that ultimately required a factum without one.

On a happier note, the problems that Madam Justice Van Camp noted in her decision that the eldest child was having were soon resolved. The eldest child went to see a " talking doctor" as he called his child psychiatrist, and played some games and did some puzzles. His grades in school improved.

The young widow and Stewart were eventually married. Stewart adopted the children. The blended family was getting along well.

The wisdom of Mr. Justice Reid in establishing the interim allowance, and resulting from Madam Justice Van Camp's wisdom in removing the grandfather as trustee, leaving the funds in court until the children each reach the age of majority and appointing the Official Guardian as trustee instead of the grandfather made funds available to send both of the children to college or university, or establish them in careers of their own.

From the senseless tragedy that was the father's death that early morning on the highway, his children now have the assurance that they can pursue higher education, or career interests, since the wisdom of counsel and the judges involved in this case salvaged all the benefit that could possibly accrue to the children, through the legal process.

Areas of Law considered in this case: - Proceedings against the Crown - Civil Litigation - Vexatious Litigation Proceedings - Civil Procedure -

Rule 39 of the Rules of Civil Procedure - Proceedings Against the Crown Act

18. Khan v. Leluk, [1985] O.J. No. 578

At the relevant time the Honourable Nicholas Leluk M.P.P. was the provincial Minister of Correctional Services and Kay Burford was a senior civil servant in the Ministry of Correctional Services. Pamela Khan represented herself, and sued Leluk and Burford for false imprisonment, intentional infliction of mental suffering, punitive damages and damages for loss of privacy.

As is evident from the reasons of Mr. Justice Gray, there were two court appearances, and one adjournment before Mr. Justice Gray disposed of my clients' motion under Rule 39 of the Rules of Civil Procedure to have the actions against them dismissed.

As one of my three points of argument, I argued a valid and technical defence to Ms. Khan's action against the provincial government. Ms. Khan had not complied with the requirement to give notice under section 7(1) of the Proceedings Against the Crown Act. That section said that all actions commenced against the provincial government, without notice were nullities, [or legally invalid].

Ms. Khan then responded that section 7(1) of the Proceedings Against the Crown Act contravened the Canadian Charter of Rights and Freedoms and was therefore unconstitutional [and of no legal force and effect] therefore she did not have to give the notice that section 7(1) of the Proceedings Against the Crown Act requires.

When called upon for reply to Ms. Khan's argument I brought to the attention of the Judge, as an officer of the Court, and as Counsel from the Crown Law Office – Civil, the Rule that requires all litigants and their counsel, to deliver notice to the Ministry of the Attorney General that they are raising a constitutional challenge to the government's legislation. Ms. Khan had not delivered such a notice.

Mr. Justice Gray also dismissed or struck out Ms. Khan's lawsuit because the written record, satisfied him that Ms. Khan was abusing the process of the court by continuing to issue and serve lawsuits.

It is usually very difficult to convince a judge that a litigant is litigating for improper motives. In this case, the extensive written record filed helped Justice Gray made the order that my client was seeking. Where possible, I have always filed an extensive written record in order to fully advocate my client's position, and provide the Judge with every possible bit [scintilla in legalese] of evidence on which to find in my client's favour.

Despite resounding success on my clients' behalf, Mr. Justice Gray exercised his discretion [for reasons that he did not mention specifically, and which he was not required to mention] and did not award any costs payable by Ms. Khan, although the general rule of thumb is that the loser should pay some portion of the winner's costs. Collecting costs has always been, and still remains, a challenging part of every lawsuit.

Areas of Law considered in this case: - Appeal - Civil Litigation - Order dismissing action for want of prosecution - Delay - Governmental Responsibility - Rule 24 of the Rules of Civil Procedure - Rule 61 of the Rules of Civil Procedure

19. Hatt v. Ontario , [1985] O.J. No. 1084

This was an appeal from a discretionary order of the Honourable Judge Lawson which dismissed Hatt's action against the provincial government for want of prosecution or delay [failing to move the action through the required stages set out in the Rules of Civil Procedure, culminating in a trial]. Rule 24 of the Rules of Civil Procedure sets out the relevant grounds. Rule 61 of the Rules of Civil Procedure details the procedures to be followed on appeal.

On appeal, the appeal Judges do not usually disturb the decision of the judge hearing the matter at first instance, unless there is some clear error [usually involving the law, although sometimes involving facts]

I cannot remember if I obtained the order before Judge Lawson at first instance, or if one of my other colleagues had. Whoever obtained the order was very persuasive before Judge Lawson.

However, the law that underlay Judge Lawson's order was not properly applied and reasoned through by Judge Lawson. This is why, despite my best efforts, the order of Judge Lawson was reversed on appeal.

Areas of Law considered in this case: - Employment/Labour arbitration - Judicial Review - Administrative Law - Hospital Labour Disputes Arbitration Act – Judicial Review Procedure Act

20. Nel-Gor Castle Rest Home v. London and District Service Workers' Union, Local 220 , [1985] O.J. No. 830

This case involved a determination as to whether a judicial review, under s. 4 of the Judicial Review Procedure Act should proceed forward and conclude whether the facility in question, the Nel-Gor Castle Rest Home, was or was not a hospital under the Hospital Labour Disputes Arbitration Act, before an arbitration, [or decision of rights between union and management] could deal with a specific application that had been filed before the board of arbitration.

It was a preliminary point, and a procedural one, that was being argued. It was also an argument that the Crown wanted to participate in [as often the Crown did not participate if there was no public interest]. The order of what issue was determined first would have great tactical advantage and importance in how the matter might ultimately resolve in the public interest.

As Crown Counsel, I attended the Divisional Court on this day with the Senior Counsel of the Labour and Employment Relations Group from the Crown Law-Civil Office. We represented the government's interest as the regulatory authority, in this otherwise private dispute between the union and the owners of the rest home.

I was new to the office, and had done the research on, and drafting of the argument. Senior Counsel told me to gown, and asked me if I was ready to argue our position, should the need arise. Of course I said yes. When asked by the Registrar, and then by the President [the Senior Justice] of the panel which of us would argue the case, Senior Counsel advised that I would probably be arguing for the Crown, and that he was there only to assist.

{I had signed in as counsel, as instructed by my Senior. But Senior Counsel was present. The custom is that usually if Senior Counsel is present they argue.}

Senior Counsel was a Queen's Counsel, and was sitting in the front part of the courtroom, in front of the bar, which is where Queen's Counsel customarily sit. As barrister, I was sitting behind the bar, and close enough to Senior Counsel to pass and receive notes and confer verbally if the need arose.

Counsel for the applicant home commenced his argument. He set out the facts that supported our public interest argument. It was now the perfect time to make the strategic jurisdictional argument that I had worked on, provided the Court would recognize, and hear Crown counsel. I sat looking at the distinguished gray hair on the back of my Senior's head. He was not moving at all. He should have been getting to his feet so the Court would notice him and ask him why he was standing. There was no time to pass him a note. He was sitting too far forward for me to speak to him without being discourteous and interrupting applicant's counsel.

I rose to my feet and waited. The President of the panel acknowledged me standing and inquired why I had risen to my feet. With the appropriate curial deference, and the standard comment about not wishing to interrupt the flow of counsel's argument [which you do whenever you stand up when it is not your turn to speak, so there is always a tactical risk associated with standing in this fashion] I succinctly summarized the key to our argument in one sentence, suggesting that a decision on our argument might determine the entire matter, and shorten the time that would be needed to resolve this case.

Senior Counsel sat in front of me absolutely motionless, and speechless. The President said that he wished to confer with the other two judges on the panel as to their opinion. He did. They all thought that the Crown's argument should proceed first. {Usually the Crown's argument on public interest issues proceeds last} The President then asked Senior Counsel who would be presenting the Crown's argument. Senior Counsel said that he thought that I should, subject to the wishes of the Court, as he thought that I was doing a remarkable job so far. The President agreed and I presented the Crown's argument. The panel agreed with the Crown's argument and the matter proceeded as we had hoped that it would.

This case proved to be a benchmark in my development as a litigator with Crown Law Office-Civil, although I did not realize it at the time. Senior Counsel was allowing me to develop my own judgment as to how to argue and when to intervene. He was also testing my courage as a litigator. He could not have put me in a more difficult situation. From that point forward, with only two exceptions, I was allowed to work on my cases independent of any supervision. I had " won" my place as one of her Majesty's Crown counsel.

Advocacy is as much about knowing when to say what you need to say, as it is about having the right things to say on behalf of your client.

Areas of Law considered in this case: - Car Accidents - Limitation Periods - Civil Litigation

21. Atkins v. Holubeshen, [1984] O.J. No. 309

In this case I acted for the insurance company who was representing the defendant in this car accident.

Justice Henry was extremely sympathetic to the Plaintiff, who had had her earlier action against the defendant dismissed for her former lawyer's failure to answer medical undertakings and produce medical documentation. The Plaintiff was not kept informed by her former lawyer as to the true state of her lawsuit, Mr. Justice Henry found, and this proved fatal to my client's request for dismissal, although my client had no complicity in the former lawyer's failure to properly represent his client.

The plaintiff's new lawyer answered the outstanding medical undertakings and set the matter down for trial. My client objected and requested a dismissal of the action.

After writing that I had ably presented the case for the defendants at paragraph 11 of his decision, Mr. Justice Henry proceeded to distinguish each of the legal precedents that supported my client's position for dismissal, and allowed the Plaintiff's lawsuit to continue to trial on an expedited basis.

This case is a good example of how, despite having the law on your client's side, a judge will do equity and justice in a matter based on the judge's sense of fairness.

Areas of Law considered in this case: - Fraud - Guarantees - Business Law - Civil Litigation - Trials - Appeals

22. Canadian Hobbycraft Ltd. v. Roy, [1983] O.J. No. 2014 (C.A.)

In this case there was a business arrangement that was supported by a guarantee in writing, allegedly signed by my client, who was a third party to the business dealings, and a third party to the lawsuit.

However, my client denied ever signing a guarantee, and denied what appeared to be his signature on the guarantee that Canadian Hobbycraft had.

At trial, the evidence of a handwriting expert hired and produced on behalf of my client, was that the signature on the guarantee was not the signature of my client, it was a poor forgery of my client's signature.

The Ontario Court of Appeal's response to a list of complaints [called errors in appeal] that Canadian Hobbycraft said merited a new trial, was to state that the Court of Appeal was in agreement with the trial judge.

This appeal illustrates the importance of presenting the client's case, in a full and complete manner, and in the most positive light, at trial.

Areas of Law considered in this case: - Car Accidents - Insurance Law - Trustees - Civil Litigation

23. Abernethy v. Recht Estate, [1983] O.J. No. 217 (H.C.J.)

This case involved the Court's interpretation of a new version of s. 226 of the Insurance Act which allows an insurer who denies liability under a motor vehicle policy of insurance to be made a third party in any action to which the insured is a party.

The Court set aside the original order and allowed the insurance company to be made a third party to the action that its insured [now deceased] was a party.

The Court also allowed the solicitors for the Administrator's estate to be removed as solicitors of record for the Administrator's estate, as they preferred to represent the insurance company which had been made a third party.

Areas of Law considered in this case: - Residential Tenancies - Appeals - Landlord- Tenant - Statutory Interpretation - s. 117 of the Residential Tenancies Act - Ss. 17© and 46(2)(a) of the Judicature Act - Jurisdiction of the Divisional Court

24. Rank City Wall Canada Ltd. v. 6 Forest Laneway, Willowdale (Tenants of), [1982] O.J. No. 1227 (Divl. Crt.)

Here a group of tenants of a residential apartment complex appealed a decision under the Residential Tenancies Act to increase their rent by allowing a " whole building" review application by the landlord.

The tenants' appeal was filed in time, but was not perfected and so the Registrar of the Court, in accordance with his statutory power, dismissed the tenants' appeal as abandoned.

I represented the tenants in the second appeal before the Divisional Court appeal panel.

This case is significant because it established that no appeal lies to the Divisional Court from an order of a single judge of the Divisional Court dismissing an application to set aside a certificate of the registrar dismissing an appeal as abandoned.

The case was so significant that it was listed that year, and for subsequent years, in the leading text interpreting sections 17© and 46(2)(a) of the Judicature Act and the Rules of Civil Procedure.

Areas of Law considered in this case: - Employment/Labour Law - Seniority under a Collective Agreement - Contract Work - Arbitration

25. OPSEU (J. Konya) v. The Crown in Right of Ontario, Decision 494/83 of the Crown Employees Grievance Settlement Board - Affirmed November 26, 1986 (Ont. Divl. Crt.)

During the boom period in electrical design services in the GTA during 1974-78 the government hired Mr. Konya to work for it through a technical overload company. The government had a contract with Mr. Konya's personal corporation.

Mr. Konya applied to the Ontario civil service in 1978, was awarded a position, and passed his probationary period. All his documentation listed his date of hire as July 1 1978. Mr. Konya first objected to his date of hire as July 1 1978 in June of 1983, and asked that his seniority date back to 1974.

The Grievance Settlement Board, and then the Divisional Court considered the seniority article in the collective agreement, and the definition of public service under the Public Service Act, as well as other jurisprudence interpreting public service under the Public Service Act.

Neither the collective agreement, nor the Public Service Act, nor the other jurisprudence supported Mr. Konya's position for seniority back to 1974. Therefore Mr. Konya's grievance, and the appeal from that grievance, were dismissed.

This case illustrates that labour boards, other decision making tribunals, and courts must follow the framework set out in the collective agreement, the applicable legislation and other cases that are " on point" – i.e. the same or similar to the facts of the case being decided.

Areas of Law considered in this case: - Employment law - Discrimination in Employment - Human Rights Act - Administrative Law - Human Rights - Record of Offences discrimination

26. Re Lancaster, Ontario Human Rights Commission v. Zellers Inc. (1986)10 C.C.E.L. 249

A loss prevention officer had alleged that he had been discriminated against in employment because of his record of criminal offence, for which he subsequently received a pardon. This officer had worked for the company previously and had been fired from the company for theft of $50.00 worth of merchandise.

When he applied for the loss prevention officer's position, after completing college training in loss prevention, he did not disclose on his employment application that he had been convicted of a criminal offence for which he had not [at the time] received a pardon. Nor did he disclose that he had worked for the company previously and been fired for stealing $50.00 worth of merchandise.

The company had a policy not to rehire persons dismissed from its employment because of theft.

When the company found out that the complainant had worked for it previously and had been fired for stealing $50.00 worth of merchandise, the company fired the complainant again. The company argued that this action accorded with its corporate policy, and was also justified as the complainant had lied on his application for employment.

The Board accepted the company's evidence that the company had decided to fire the complainant before the company became aware of the criminal conviction for theft. Since there was no discrimination against the complainant because of his record of offences [which were subsequently pardoned] there was no discrimination in employment under the Human Rights Code, the Board found.

Areas of Law considered in this case: - Business Law - Labour Relations - Sale or lease or transfer of a business - Crown transfer - Administrative Law

27. OPSEU v. Dolan, Wilson and the Crown in Right of Ontario [1986] O.L.R.P. Rep. 331

As a result of a tender, the operation of the Fitzroy Provincial Park was transferred to Dolan and Wilson's company in 1985, pursuant to a written agreement.

The provincial government union filed an application alleging that the Crown had transferred the undertaking of the park and therefore the OPSEU collective agreement with the government should govern the park employees of the new company. The new company disagreed.

The new company and the Crown responded that the Crown had merely contracted out of the management function of the park.

The Ontario Public Service Labour Relations Tribunal examined the Labour Relations Act, and the Successor Rights Crown Transfers Act, as well as other cases involving somewhat similar circumstances, and the majority of the Tribunal concluded that in this instance a transfer of an undertaking had occurred.

The facts of this case were unusual and no directly analogous case precedent existed at the time.

As you might expect, this decision had a tremendous effect on the provincial government initiatives to sell off, or transfer out various types of government services to private businesses.

Areas of Law considered in this case: - Employment/Labour Law - Discharge - Just Cause - Arbitration

28. OPSEU(J. Issayevitch) v. The Crown in Right of Ontario, Decision 711/85 of the Crown Employees Grievance Settlement Board

Under the OPSEU collective agreement there is a right to grieve one's discharge from government service. The Ontario Crown Employee's Grievance Settlement Board has the power to reinstate a discharged employee back into their job, and often does.

Working conditions had changed in the grievor's case, and he was not able to adapt his work style, or modify his own personal standards to accommodate the change in the working conditions.

In this case however, the Board found that my client, the employer could not be faulted. Over a long period of time, with consummate patience, management attempted to find another solution besides discharging the grievor. This evidence was carefully and thoroughly to the Board.

Based on the evidence presented the Board found that my client had just cause to discharge the grievor/employee. There was no reinstatement back into the employee's original position ordered.

Employers who want to successfully terminate someone's employment for just cause are required to move through an escalating process of offering assistance and progressive discipline, and must properly document their actions, whether in the union environment, or in private enterprise.

Areas of Law considered in this case: - Planning Act - Severance consent - Ontario Municipal Board Practice - Administrative Law

29. Re Section 52(12) of the Planning Act, 1983, and Richard Olson, Ontario Municipal Board Decision M870015

This was a part lot severance application of some very desirable cottage lakefront land on Big Basswood Lake. Mr. Olson, who owned approximately thirty acres, had requested the Ontario Municipal Board's permission to create three lakefront cottage lots and transfer these to each of his three sons.

I represented the Ministry of Natural Resources and the Ministry of Municipal Affairs.

There was a significant lake trout fishery on Big Basswood Lake. The District's Land Use Guidelines and the Official Plan specifically stated the commitment to maintain the lake trout fishery, while noting Big Basswood Lake's sensitivity to additional development.

The Municipal Council had also restricted the creation of new lots on Big Basswood Lake in order to protect the lake trout.

The District Biologist for the Ministry of Natural Resources gave expert evidence that the ratio of fisherman in the lake area, to the fish population of Big Basswood Lake, was proper. Other methods of fishery management had been tried and had proved unsuccessful in maintaining the lake trout fishery optimally.

The Ontario Municipal Board accepted the evidence presented on behalf of my clients, and found that Mr. Olson's application did not conform to specified sections of the Official Plan. The proposed development was found not to be in the public interest as it conflicted with the Municipal Council's actions. As the proposed development did not safeguard the lake trout habitat at Big Basswood Lake, and the lake trout habitat was found to be an economically valuable resource under the Official Plan, the Ontario Municipal Board denied its consent to the severance proposal presented by Mr. Olson.

The expert evidence, properly presented through a professional planner, and the District Biologist, had allowed the Board to act in favour of the environment and deny the request for development.

{I had arrived early enough the day before the hearing to experience a boat tour of Big Basswood Lake, enjoy a swim in this calm lake, and to view the proposed site of the severance of the waterfront lots. The waterfront cottage lot severance proposal presented involved some very desirable waterfront.}

Areas of Law considered in this case: - Business law - Contract Dispute - Arbitration - Interpretation of Contract

30. AquaNorth Farms Inc. and Ontario Ministry of Natural Resources, Arbitration of the 1987 and 1988 Excess Rate, Report of the Arbitrator

This commercial arbitration involved the interpretation of a contract to grow and provide trees to the Ontario Ministry of Natural Resources. I learnt how complicated growing trees for forest planting can be as a business enterprise.

My client turned insights gleaned from the Arbitrator's decision into improvements for the standard form tree-growing contract for subsequent years.