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Civil Litigation

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Recent Developments in the Law of Limitations: *HSBC Securities (Canada) Inc. v. Davies, Ward & Beck* — A Case Comment

Sean Lawler*

In *HSBC Securities (Canada) Inc. v. Davies, Ward & Beck*¹ (“*HSBC*”), the Ontario Court of Appeal was asked whether a defendant could start a third party claim for contribution and indemnity after the expiry of the limitation period governing the main action. In *HSBC*, a tolling agreement between the plaintiff and the defendant permitted the plaintiff to start the main action after the expiry of the limitation period. Could the defendant then third-party someone who was not part of the tolling agreement?

Under the new *Limitations Act, 2002*² (the “Act”), the question would not even have arisen because the new Act does not permit tolling agreements.³ In any event, the Act prescribes a straightforward limitation period: a claim for contribution and indemnity must be started within two years after it is ‘discovered’.⁴ A claim for contribution and indemnity is ‘discovered’ when the defendant is served with the claim in respect of which contribution and indemnity is sought.⁵ However, the limitation period in *HSBC* was governed by the old regime, which still applies to causes of action that were discovered before January 1, 2004.⁶ The answer to the question in *HSBC* is therefore more complex.

The *Negligence Act*⁷ governs all claims for contribution and indemnity, which is not available at common law. Section 1 of the *Negligence Act* creates the right to contribution and indemnity. S. 5 provides that a joint tortfeasor can be added as

a party to an action either as a defendant or third party. S. 8 states:

Where an action is commenced against a tortfeasor or where a tortfeasor settles with a person who has suffered damages as a result of a tort, within the period of limitation prescribed for the commencement of actions by any relevant statute, no proceedings for contribution or indemnity against any other tortfeasor shall be defeated by the operation of any statute limiting the time for the commencement of an action against such other tortfeasor provided, [emphasis added]

(a) *such proceedings are commenced within one year of the date of the judgment in the action or the settlement, as the case may be; and*

(b) *there has been compliance with any statute requiring notice of claim against such tortfeasor.*

The facts of *HSBC* are: In 1993 Gordon Capital (“Gordon”) (the predecessor to the plaintiff HSBC Securities) made a claim under a fidelity bond (the “Claim”). The insurer denied the Claim on the basis that Gordon had missed the limitation period prescribed by the bond. Gordon had hired Davies Ward & Beck (“Davies”) to assist it with the Claim, and alleged that Davies was negligent for missing the limitation period. Gordon and Davies

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agreed that Gordon would, (i) sue its insurer, and (ii) await the outcome of that action before proceeding with any litigation against Davies (the “Tolling Agreement”). KPMG, whom Davies had hired to assist with the Claim, and whom Davies would later seek to join to the action as a third party, was not a party to this Tolling Agreement. The Supreme Court of Canada ultimately dismissed Gordon’s claim against its insurer.

Gordon commenced an action against Davies in April, 2000, after the six-year limitation period for an action for professional negligence had expired.⁸ Without the Tolling Agreement, Gordon’s suit against Davies would have been statute-barred. Eighteen months later, in October 2001, Davies commenced a third party action against KPMG for contribution and indemnity. KPMG brought a motion for summary judgment to dismiss the third party claim on the basis that Davies had commenced it outside the limitation period prescribed by Section 8 of the *Negligence Act*.

KPMG argued that the third party claim was brought out of time because the main action had not been commenced “... *within the period prescribed for the commencement of actions by any relevant statute ...*”, i.e. within the six year limitation period for claims in negligence. KPMG was not a party to the Tolling Agreement and asserted that it should not be bound by it. Davies argued that the third party claim should proceed because s. 8 applied only to third party claims where the plaintiff and defendant had settled, or where there had been a judgment in the main action. Davies’ further submitted that its claim against KPMG was based on s. 5 of the *Negligence Act*, which (i) authorized a defendant to add a joint tortfeasor as a third party; and (ii) has no limitation period.

S. 8(a) of the *Negligence Act* states that the third party claim must be “*commenced within one year of the date of the judgment in the action or the settlement, as the case may be*” [emphasis added]. Davies argued that there had been no settlement or judgment in the main action, and accordingly, s.8 did not apply. The Court of Appeal rejected this argument. After reviewing the legislative history of the *Negligence Act*, the Court of Appeal held that s. 8 was intended to apply to all claims for contribution and indemnity, not just those that were commenced after the main action had been resolved.

The original *Negligence Act*, enacted in 1930, only allowed the plaintiff to make a joint tortfeasor a party to the action by making him a defendant. If the plaintiff did not sue the joint tortfeasor, then the neither could the defendant. What is now s. 5 of the

Negligence Act changed this by allowing defendants to add joint tortfeasors as third parties. What is now s.8 of the *Negligence Act* was added in 1948, to address limitation period problems. Before the introduction of s.8, a third party was protected by the limitation period applicable to the main action. This created unfairness where, for example:

(i) the limitation period governing the third party claim was shorter than that governing the main action. For instance, the plaintiff in a car accident could sue the tortfeasor within two years of the accident. However, unless the driver was sued within six months of the accident, the driver could not claim contribution and indemnity from a municipality for failure to salt the roads; and

(ii) the plaintiff served the statement of claim at the end of the limitation period. Where a claimant sued her accountant, for instance, on the last day before the expiry of the six year limitation period, the accountant would not have enough time to start, and serve, a third party claim for contribution against the plaintiff’s lawyer.⁹

The Court of Appeal held that the *Negligence Act* was meant to be a complete code for claims for contribution and indemnity. Ss. 5 and 8 simply filled holes in this code. Therefore, the Court concluded, (i) s.8 applied to all claims for contribution and indemnity, and (ii) such claims could not be stopped by any limitation period so long as the claim met the criteria in s.8 of the *Negligence Act*.

This general principle is subject only to the exception in *Giffels v. Eastern Construction Limited*.¹⁰ In that case, the roof of a building collapsed more than one year after construction. The owner sued both the general contractor and the engineering firm that designed the building. The engineering firm cross-claimed against the contractor for contribution and indemnity. The contractor’s contract with the owner contained a clause limiting liability to damages sustained within one year from when the project was completed. The plaintiff’s claim against the contractor was dismissed based on the contractual limitation period, because the roof of the building failed more than one year after the construction was completed. The Supreme Court of Canada held that if the contractor was not liable to the owner, then it could not be liable for contribution to the engineering firm.

The motions judge in *HSBC* interpreted the decision in *Giffels* to mean that, generally, a defendant could not claim contribution from a third party unless that third party was also liable to the plaintiff directly. The Court of Appeal interpreted *Giffels* more narrowly. It focussed on the following facts: (i) the limitation period in *Giffels* was contractual, not statutory, and therefore not covered by s.8 of the *Negligence Act*, and (ii) the limitation period specifically precluded liability from any damages suffered more than one year after the project was completed. The Court of Appeal held that *Giffels* applied in construction cases to situations where a contractual limitation period only allowed claims for damages that arose within a period of time after the work was completed.

The *HSBC* decision should be a reminder to defence counsel to ensure that tolling agreements incorporate all possible third parties. Although the Tolling Agreement between Davies and Gordon permitted Gordon to delay the commencement of its action, the ‘clock kept running’ as between Davies and any prospective third parties. Therefore, in general, once the limitation period governing the main action expires, the prospective defendant will be unable to start a third party claim. The new *Act* does not allow tolling agreements¹¹ so, presumably, it will not be possible to vary one that is already in place. Defence counsel who have not included a potential third party in a tolling agreement may have to terminate the agreement, so as to, (i) compel the plaintiff to start an action, in order to (ii) enable the defendant to commence a third party claim.

In summary, the three most important points of the decision in *HSBC* are:

- (i) every claim for contribution and indemnity is subject to the limitation period prescribed by s. 8 of the *Negligence Act*,
- (ii) where the main action remains outstanding (i.e.: there has been no judgment and no settlement), then, with one exception, a defendant may start a third party claim for contribution and indemnity so long as the main action was commenced within the applicable limitation period, and
- (iii) where a prospective plaintiff and defendant have entered into a tolling agreement, the limitations ‘clock’ will still run for any claim for contribution and indemnity the defendant may bring against a third party.

The *Limitations Act, 2002* has obviously changed the landscape of civil litigation in Ontario. However the ‘old’ regime is still with us. Lawyers must be sensitive to the vagaries of that limitations regime when considering claims that arose before January 1, 2004.

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¹ January 31, 2005, docket #C41118

² S.O. 2002, c. 24, Schedule B

³ S.22 of the *Act*

⁴ S.4 of the *Act*

⁵ S.18 of the *Act*

⁶ S.24 of the *Act*

⁷ R.S.O. 1990, c. N.1, as amended

⁸ Pursuant to s.45(1)(g) of the old *Limitations Act*, the limitation period for a claim in negligence is 6 years.

⁹ S.8 was added to the *Negligence Act* before the introduction of the discoverability principle in Canadian law – see Supreme Court of Canada’s decision in *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2.

¹⁰ [1978] 2 S.C.R. 134

¹¹ s. 22 of the *Act*. However, tolling agreements that pre-date January 1, 2004, are grand fathered.

Recent Court of Appeal Decision on Costs: *Celanese Canada v. CNR* – Case Comment

*Ken Hood**

On March 30, 2005, the Court of Appeal released its decision in the case of *Celanese Canada v. CNR* (C39868). Counsel should be aware of this case because of the many cost issues raised.

The claim arose out of an accident that took place at the Celanese factory in Belleville. Celanese claimed damages of \$300,000.00. CN denied liability for negligence but did agree that Celanese had incurred damages of approximately \$240,000.00. It contested a loss of profit claim of approximately \$60,000.00. Following a six day trial, the judge found CN negligent and awarded the full amount of damages plus interest and costs, fixed in the amount of \$191,000.00. The trial judge ordered partial indemnity costs and substantial indemnity costs from the date of an offer that was not accepted.

The appeal dealt with many issues including pre-judgment interest and the fixing of costs. Justice Borins provided lengthy reasons on both these issues and in the result reduced the costs to approximately \$106,000.00. Justices Feldman and Simmons, in brief reasons, agreed with Justice Borins' reduction of the costs to approximately \$106,000.00 but did so on a slightly different basis.

Offer to Settle

Justice Borins found that the offer made prior to trial of \$290,000.00 by Celanese, being a compromise of about 3%, did not contain a sufficient element of compromise so as to invoke Rule 49.10 (1), especially since the parties were in agreement as to almost \$240,000.00 of the damages. Accordingly, the plaintiff was only entitled to have its costs on a partial indemnity scale throughout.

Hourly Fees

Justice Borins felt that the rate claimed of \$350.00 per hour for Celanese's senior counsel, being the maximum rate permitted, ought not to have been allowed by the trial judge as "the maximum rate is reserved for the most experienced counsel doing the most important cases." He applied a rate of \$250.00. Justices Feldman and Simmons disagreed. They held that "Although there

is case law from the Superior Court that suggests that the maximum rate in the cost grid is reserved for the most experienced counsel and the most important cases, we do not agree that only a small, elite group of lawyers in the province arguing the most financially significant cases is entitled to that rate. Instead, the trial judge is to assess the seniority of counsel and the significance of the case in monetary, jurisprudential and procedural terms, and to decide on a case-by-case basis the appropriate rate for senior and junior counsel on the applicable scale." They allowed the claimed top rate of \$350.00 and held that the trial judge made no error, especially as he had found that it was due to counsels' skill and determination that this case was won for their client.

Counsel Fee and Preparation During Trial

There was a substantial claim for trial preparation during the trial itself. CNR's counsel argued that the block counsel fee encompassed any preparation during trial. Justice Borins held that in certain circumstances it may be appropriate to have preparation during trial and to claim costs for this in addition to making a claim for the counsel fee at trial and allowed the claim although at reduced hourly rates as per his earlier finding. Justice Feldman and Simmons did not comment. Interestingly, in reviewing the bill of costs Justice Borins found a mathematical error, in that the amount claimed for preparation during trial omitted approximately \$24,000.00 in fees. The error, while over-looked by both counsel and the trial judge was included by Justice Borins in his re-calculation of the bill of costs "in fairness to Celanese".

Counsel Fee

Justice Borins considered the question as to whether or not both senior and junior counsel for Celanese came within the block counsel fee for trial. There were cases holding that only one counsel fee is allowed and cases holding that two are allowed. Justice Borins held "that the per diem counsel fee rates make an allowance for a second counsel fee within the maximum, particularly when a discount is applied to any rate available to a second counsel." He therefore allowed only one counsel fee but at the maximum weekly and per diem

amount. However, he did go on to say that he felt that the omission of a second counsel fee in the cost grid likely reflected an oversight on the part of the Civil Rules Committee and should be corrected. Justices Feldman and Simmons did not comment.

Fair and Reasonable

In accordance with the other Court of Appeal decisions in *Boucher* and *Moon*, Justice Borins then looked at whether the reduced counsel fee, as a result of the reduced hourly rates, the fact that the costs should be on a partial indemnity scale throughout, allowing only one counsel fee at trial, but adding in the mathematical error represented a fair and reasonable amount of costs for CN to pay in the circumstances of the case. He held that the case had its complexities, that Celanese was required to establish liability and to prove certain damages and it was appropriate for Celanese to be represented by two counsel. He also stated that there was no suggestion by CN that Celanese's counsel had devoted excessive time to their preparation, except during the trial. It was not a case that was "over-lawyered". He held that perhaps somewhat high, the adjusted costs of almost \$106,000.00 met the reasonableness test. In this Justices Feldman and Simmons concurred. In their view, the trial judge erred in accepting the bill of costs of Celanese without conducting an analysis of the amount awarded against CN. They held that the adjusted fee represented a fair and reasonable amount of costs for CN to pay in the circumstances of the case even though the calculated amount, on their reasons, would have been higher after utilizing the increased senior counsel rate.

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I Laughed, I Cried, I Failed, I Passed: *Veni, vidi, velcro, vici**

*Eugene Meehan, Q.C.***

I wrote the U.S. bar exams last summer. OK, wrote them the summer before too; failed. Practise law in Canada obviously, and speak French, figure Spanish is do-able too, so spent two years studying part-time from cassettes and manuals and CD's; elected not to take the two-month private-provider crash course in the U.S. because of what was coming down at home and at office, though did go down to Arizona for two weeks to cram and take a four-day crash course. Wasn't enough. Crashed. Got 393 when needed 410 to pass – pass mark is two-thirds, and over a third fail. I was on the wrong side of that equation.

Though real bummed out, I started back into it January of this year, going through all of my old notes, sending away for fresh materials and CD's, registering for a 6-day prep-course before the real course. Signed up for the two-month crash course, also the 4-day simulated exam (two days exam, two days going over the answers with profs) – working my way up the ice to the tip of the iceberg at the end of the summer: the 2-day 12-hour exam.

The Arizona Bar Exam, which used to be three days – they now cram it into two – is a physical and mental ordeal designed by sadists for the benefit of masochists. It's the Stanley Cup Playoffs of bar exams, where more than a third of those writing get played off the ice – the four toughest U.S. bars are California, New York, Michigan, and Arizona – and the California pass rate has gone as low as 23% in some years.

The physical ordeal: four-hour lectures a day, six days a week, two months straight, with homework from the lectures, reading for the next day, practice exams to be done overnight, practice essays to be written every weekend as well – and the other double bed in my hotel room is so stacked full of reading material that I (and everybody else) acknowledge simply cannot be read. Even if you could physically work 24 hours a day for two months straight you just couldn't read it all. Yet it all sits there, barking, just looking at'cha, like an unexploded landmine.

Plus, I'm away from home. Stuff happening at home. Stuff happening at work. When I show up for the first class, all six hundred people seem to have spent three years forming close study bonds, plus I speak funny and

am way balder and older than anybody else. Feel as out-of-place as a tattooed Goth in a Gap commercial. My desk mate is Lindsey, born three years after I graduated from law school. I'm an astronaut whose umbilical cord to the mother ship has been severed by a passing asteroid and I'm just starting to drift away. As if to enhance the learning experience, the two-month course is offered at the peak of the desert summer heat: 110-115°F on average. A manhole cover will in fact fry an egg (didn't eat it though). This is no iceberg, it's roast & toast.

A mental ordeal too. The rest of the class have just completed a three-year law degree. Me, I've done my own two-year part-time home-schooling: between making dinner, picking the kids up from swimming, figuring out who's got homework and who's fibbing, cajoling anyone just anyone to put at least some dishes in the dishwasher. Who sprayed those guys with housework deterrent? And got my day-job too of course. The people in the class all know each other, I'm not sure if I can find my way back to the hotel.

If the profs and their lectures are correct, Law School is a complete hoax: all of Constitutional Law is taught in three mornings of lectures, two full semesters of Torts become eight hours, and Wills & Trusts is done and over with in four. If all of this is true, we could start law school on the cross-Canada Via train in Vancouver and we'd all graduate by the time we got to Halifax, with a happy hour every evening.

The profs, mainly law school professors making extra money to take them & their families away for an expensive end-of-summer-vacation (which I'm paying for) are either hired on the basis of their ability to entertain (but impart little knowledge) or their ability to put to sleep. All speak at a rate that is nearly impossible to follow, never mind write down. One big-ego big-name professor makes a point of talking for three hours straight, on the class-side of the lectern in the middle of the auditorium, without a single note or piece of paper, and without a single bathroom break.

And speaking of bathrooms, while on the way to get coffee with a group of classmates, one asked "who feels so pressured you study with books on your knees while on the can" – all did, him as well, me too.

Multi-tasking gone silly. I now read all my O.R.'s one-handed (preferably in the handicap washroom because of that handy shelf).

The lectures at Arizona State University in Phoenix begin amid anticipation, excitement, and light-hearted joviality, that I correctly forecast will conclude in an atmosphere of truculence, outright hostility, and don't-talk-to-me leave-me-alone solipsism.

As the seeming familiarity fades over the course of the two months, in the last couple of weeks before the exam date everyone's on their own, in a last ditch effort to cram any microscopic particle of knowledge into their own un-hinged widely-flung universe. Nobody appears sane. Even the super-happy ones seem to be either in their manic up phase or doing too many chemicals. Some develop a deep throaty loud laugh, like the sound a dog makes just before it throws up. Others look as if they've one child, but put that child in one of those strollers for twins, then run around the mall looking frantic. If I smoked, I'd be chain-smoking. If I drank, I'd be a drunk. Fortunately I do neither.

The pressure U.S. law grads are under is incredible: a \$75-150K US debt load is quite normal. Twice that's semi-normal too. And many states limit how many times you can write – some jurisdictions have a three strikes and you're out policy (Arizona does) – as a result there's a near-subculture of U.S. law grads working in law firms/in-house law departments who've yet to pass a bar exam. Some fail in one state then move next door to try there.

I can't figure out why anthropologists aren't tracking and researching our group as part of a human lab: everyone is grinding away in such utter solitude and abject misery that many feel compelled to find solace by studying overnight at Starbucks and living on caffeine: "You can get a lot done during the night, and because the barristas are lonely, they'll fill up your coffee for free". Two guys who study together tell me they "never went to bed before 4 a.m. and got their best work done at night because their heads were clearer" – and of course classes begin at 8:30/9 a.m. Neither passed. Everybody's just about nutzoid, and I'm starting to wonder whether I am too. Or maybe they're all OK and it's me that's losing it. Who knows. Reality, and unreality, merge, at least temporarily. Maybe it's the first phase of Alzheimer's: C.R.A.F.T. disease (can't remember an f'ing thing – and sometimes I can't).

I called a classmate the night before day 1 to wish her the best, and she'd decided not to write. Said I hoped to

see her next morning. Sleep-deprived and smoked-out (though not smoked-up), she was there. She passed.

As the exam date draws near, a strange psychological phenomenon emerges: a sense of relief, but coupled with a simultaneous heightened anxiety – like smiling through clenched teeth. The anxiety takes a lot to control: it's not at all comforting to dwell on the approaching 2-day assault course, the sole object of which is to determine whether you were a complete fool to even think of writing that stupid LSAT test 4 years ago, let alone waste basically three months (or in everybody else's case 3 years) stuffing your brain in a desert oven.

Clogged with mnemonic devices, caffeine pills and what I'll politely refer to as non-prescriptive jet fuel, we all move en masse as a kind of disembodied brain into a massive windowless uncarpeted convention-centre conference room – all of us with the same enthusiasm of a post-pubertal canine on it's way to the vet. Or if you're more the cat-type, as nervous as a long-tailed feline in a room full of rocking chairs. Or if you grew up around cows, you feel hustled along like a dawdler in an abattoir cattle chute.

A few years ago in California there was power failure and out of 2,000 people writing, only one person had a flashlight, and he kept on writing. Brought a flashlight with me. So did four others.

The published exam instructions specifically say "No weapons allowed" (I'm not making this up) but the six police officers patrolling the aisles as monitors clearly didn't have to follow those instructions.

How can I possibly describe the 12-hours two days of exams, in the morning and afternoon of both days, where just about every question is so tough as nails you figure you've got to be writing the wrong exam, and at the same time have to keep writing like a crazy fiend – I developed two ganglions in my writing hand (basically carpal tunnel syndrome) by the end of the second day, which I still have six months later. Two people actually fell asleep during the exam, several left after an hour, and when the lights were flickering during a summer thunderstorm on day two I was reaching for that flashlight.

Some observations about whether to/or not, do a U.S. bar exam:

- \$ (after all, Scots are supposed to have a certain fiscal frugality):
 - cost of courses: \$ 3K US
 - application and exam fees: \$ 850 US
 - hotel: \$2.5K US
 - meals: \$1K US
 - airfares: \$3.5K Can.
 - miscellaneous (photocopies, smoothies, gym fees, etc.): \$750 Can.
 - lost client billings: \$100K Can.
 - beer, cigs and other stuff: \$0 (I boringly don't do any).
- Is it worth it? Who knows. I don't.
- Ask your law firm for time off? They might say no, so I followed the Nike ad advice: I just did it.
- Bust your ass at your law firm on files and billings for the first two quarters of the year before you go, and the last quarter when you get back – if you make budget does a Managing Partner really care if you pass a bar or pass out in a bar?
- The application process before you can even start studying is long, complex and time consuming, and may involve a court application (did in my case, as I had to satisfy the Arizona Supreme Court I'd be the "substantial equivalent" of an ABA-approved law degree – with four law degrees [you're right, I'm educated beyond my intelligence] I was able to do that).
- Be prepared to list where you've stayed – addresses and references – since age 21 (easy if you're 24, more challenging if you're 52), ditto with regard to all jobs you've ever had, and in addition, all criminal/traffic offences (including moving traffic violations such as speeding tickets [I was Mr. Vanilla with only a single speeding ticket, so I didn't need the extra paper]). If you've done stuff (and you know what I mean) don't apply.
- Good idea to contact a Canadian lawyer who's done the transition. If they say "it's easy, anyone can do it, even you", find someone else who'll talk to you straight.
- Bring a big can of Tim Horton's with you (don't bother if it's decaf).

- Involve your immediate colleagues and immediate family members: it's a good idea to have a practice and a marriage when you come home.

And if you're so brave/foolish (it's a thin line) to do the exam, a few tips and observations:

- Put your other life on hold for 2-3 months, check out of the human race, tell people you're in rehab or you'll go postal (that might assist them in backing off a wee bit), acknowledge to yourself it's gonna feel like going underwater for several years (and you'll probably have the wrinkles to prove it).
- Keep a routine: eat, sleep, exercise; don't eat poutine.
- During breaks in the exam itself, run away from anyone who discusses any of the exam questions; sue them later for intentional infliction of emotional distress (it's a tort in most jurisdictions in the U.S., as you'll learn).
- It's usually two to a table in the exam, so if they reach for their water bottle (allowed), place a protective forearm in front of your exam booklet for when they knock the bottle over and send a water wave in the direction of your "Subsidiarity Principle and the Commerce Clause, Compare and Contrast" completed answer.
- In terms of the exam itself, be aware that "he needed killin'" is not a valid defence to intentional homicide, including in Arizona.
- Bring extra pens and pencils, but don't sit beside anyone that looks as if they've got more than 50 (you don't need Mr. OCD as a buddy on exam day).
- Bring a flashlight – it'll eliminate that particular nightmare in the 12 hours before the exam (don't worry, other nightmares will replace it – the recurring one I had was I got the exam dates mixed up).
- To maintain your personal sense of grace, style and poise, retain a mental picture of the most idiotic, unkempt, unexercised lawyer you've ever had a file with (pick Canadian

or American, doesn't really matter), with or without underwear (does matter) and equate this into your personal if-he-can-do-it-so-can-I scenario.

- And last, sure you might fail, but if you don't take the shot, you'll never score the goal; and measure the exam against the other more permanent realities of: your health, your family, the last meaningful funeral you went to. If you were listening to your own obituary, would passing/failing really matter? Ultimately it's not that important. And if you think it is, it's only temporarily so.

Two last things: One, went down to Phoenix in December with Giovanna (still got that marriage thing) to get called, and appeared before the Chief Justice of Arizona, The Honourable Charles Jones, in open court. Met him after at a reception – guess where he's from? Lethbridge, Alberta. Born and grew up in Canada, and went to Stanford University, then stayed. Weird, eh? And a good guy too.

Two, when got home, kids (got them as well) wrote me a congrats card. The thing that was most special was what the youngest, Morgan 12, wrote: "Dad, you lost once but then you tried again and you got in. I'm proud of you." I'm way more proud of Morgan for both recognizing and writing that. When I'm 112 and wheeling myself around the Peaceful Lodge Old Farts Home that card'll be taped to the inside of my cribbage locker.

And one final thing: a lawyer down there told me a Bar exam's really like a glorified IQ test: if you pass, no big deal; if you fail, you're an idiot.

I'm both.

** I came, I saw, I stuck with it, I passed.*

*** Eugene Meehan, Q.C., Lang Michener LLP (613) 232-7171 x132, emeehan@langmichener.ca.*

Addendum

1. Lindsey passed. She's now an attorney in Washington D.C.
2. Above based on own experience and also riffing with Tom Ryan, Lewis & Roca in Phoenix.

Update - Amendments to the *Rules of Civil Procedure* effective January 1, 2005

*Brett D. Moldaver**

Rule 1.07 – practice directions, previously published in the *Ontario Reports*, have been posted on the court’s web site (www.ontariocourts.on.ca);

Rule 1.09 – unless the court orders otherwise, all out of court communications by counsel with judges and masters must be consented to in advance by all parties;

Rule 4 – the form for a Notice of Constitutional Question has been amended;

Rule 14.03.1 – the simplified procedure (Rule 76) *shall* be used in actions to which subrule 76.02(1), (2) or (2.1), applies and may be used in other actions pursuant to subrule 6.02(3);

Rule 15.07 – if an out-of province lawyer practices law in Ontario and represents a party to a proceeding, any party may move for directions for the conduct of the proceeding;

Rule 25.03.(4) – a party who serves a pleading must, at the same time, serve copies of all documents referred to therein;

Rule 30.01(1)(a) – the definition of “document” for the purposes of discovery now includes Information in electronic form”;

Rule 31.03(2) and (3) – the subrules identify the deponents for oral examination for discovery with respect to corporations, partnerships, and sole proprietorships;

Rule 37.10(10) – parties moving to compel compliance with undertakings or to compel satisfaction of refusals, given at examinations or cross-examinations must use a chart listing the issue and the request in connection with undertakings and refusals (see Form 37C) on motions;

Rule 37.14 – the rule for setting aside, varying, or amending orders, is available to both a “person” and a “party”;

Rule 38.11(1) – the rule for setting aside judgment on an application made without notice applies to both a “person” and a “party”;

Rule 74 – amendments to certain of the forms under this Rule should be noted;

Rule 75.1 – As of January 1, 2005 Form 75.1 has been amended, the territorial application of this Rule has been expanded, remedies for non-compliance have been amended to include reference to a Judge in the County of Essex and the City of Ottawa;

Rule 76.02(2.1) – in actions involving multiple defendants (as was the case previously with multiple plaintiffs), the simplified procedure shall be used for determining whether the plaintiff’s claim against each defendant meets the requirements of Rule 76.02(2);

Rule 76.13(1) – regardless of the outcome of the actions, if the simplified procedure applies consequent to an amendment of the pleadings under subrule 76.02(7), the amending party shall pay substantial indemnity costs incurred by the opposing party up to the date of the amendment that would not have been incurred had the claim originally complied with subrule 76.02(1), (2), or (2.1), unless the court orders otherwise;

Rule 76.13(3)(b)(ii) – the plaintiff who obtains judgment shall not recover any costs unless the court is satisfied that it was reasonable for that plaintiff to have allowed the action to be continued under the ordinary procedure or under Rule 77, by not abandoning claims or parts of claims that do not comply with subrule 76.02(1), (2), or (2.1);

76.13(7) – in an action that includes a claim for real or personal property, if the defendant objected to proceeding under the simplified procedure on the basis that the property’s value exceeding the threshold as the date of commencement and the court does not so find, the defendant shall pay substantial indemnity costs to the plaintiff that would not have been incurred had the claim originally complied with subrule 76.02(1), (2), or (2.), unless the court orders otherwise;

Rule 77.09.1(5)(d) – the factor for assignment of a judge now includes whether a party is unrepresented.

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Please mark your calendar for the...

Civil Litigation Award Dinner

The OBA Award for Excellence in Civil Litigation was created to recognize outstanding contributions and achievements by members of the Ontario Bar Association.

Each year, the award recipient is honoured at a very special dinner. This year's award dinner will be held on **October 19, 2005** at the **Royal York Hotel**. The featured keynote speaker is **His Excellency Allan Rock**, Ambassador and Permanent Representative of Canada to the United Nations.

The Honourable R. Roy McMurtry, Chief Justice of Ontario, has graciously agreed to present an original work of art, painted by himself, to the Award winner.

Watch for more information in the upcoming issue of *Briefly Speaking*.

The articles that appear in this publication represent the opinions of the authors. They do not represent or embody any official position of, or statement by the OBA except where this may be specifically indicated; nor do they attempt to set forth definitive practice standards or to provide legal advice. Precedents and other material contained herein are intended to be used thoughtfully, as nothing in the work relieves readers of their responsibility to consider it in the light of their own professional skill and judgment.

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