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New policy addresses historic issues that divided membership

CBA reform outstrips controversial case

BY JUDY VAN RHIJN
For Law Times

The Canadian Bar Association has researched, drafted, and approved its new court intervention policy, while the case that inspired the change is still moving slowly through the court system.

A hasty decision by the CBA executive to intervene in the Supreme Court`s hearing of *Chevron Corporation et al v. Yaiguaje et al* prompted a pushback by CBA members that led to a full-scale revision of the policy and process of future interventions, adopted by the CBA last month.

"It was necessary to have a new policy. It clarifies that there is to be more fulsome consultation. Previously, it was hit and miss. The new policy ensures the process is more uniform," says David McRobert, an environmental and aboriginal lawyer from Peterborough, Ont., who was one of many members to register their disapproval of the decision to intervene in the *Chevron* case.

"You may not get consensus, but at least people have a chance to say their piece. There is a great degree of confidence that no one is left out."

The new policy requires that intervention requests must be submitted to the CBA president and the director of legislation and law reform at least four weeks before the application for leave to intervene is due and must include a feasible plan for robust consultation.

The Intervention Policy Review Committee stipulated that notifications have to be robust enough so that failure to respond can safely be taken to mean a lack of interest in the issue.

"The committee found a desire among members to have as broad a consultation as possible," says Michele Hollins, CBA past president. "Every proposed intervention goes to every constituent group. They don't all have to consent, they don't all have to reply, but they all have the opportunity to comment."

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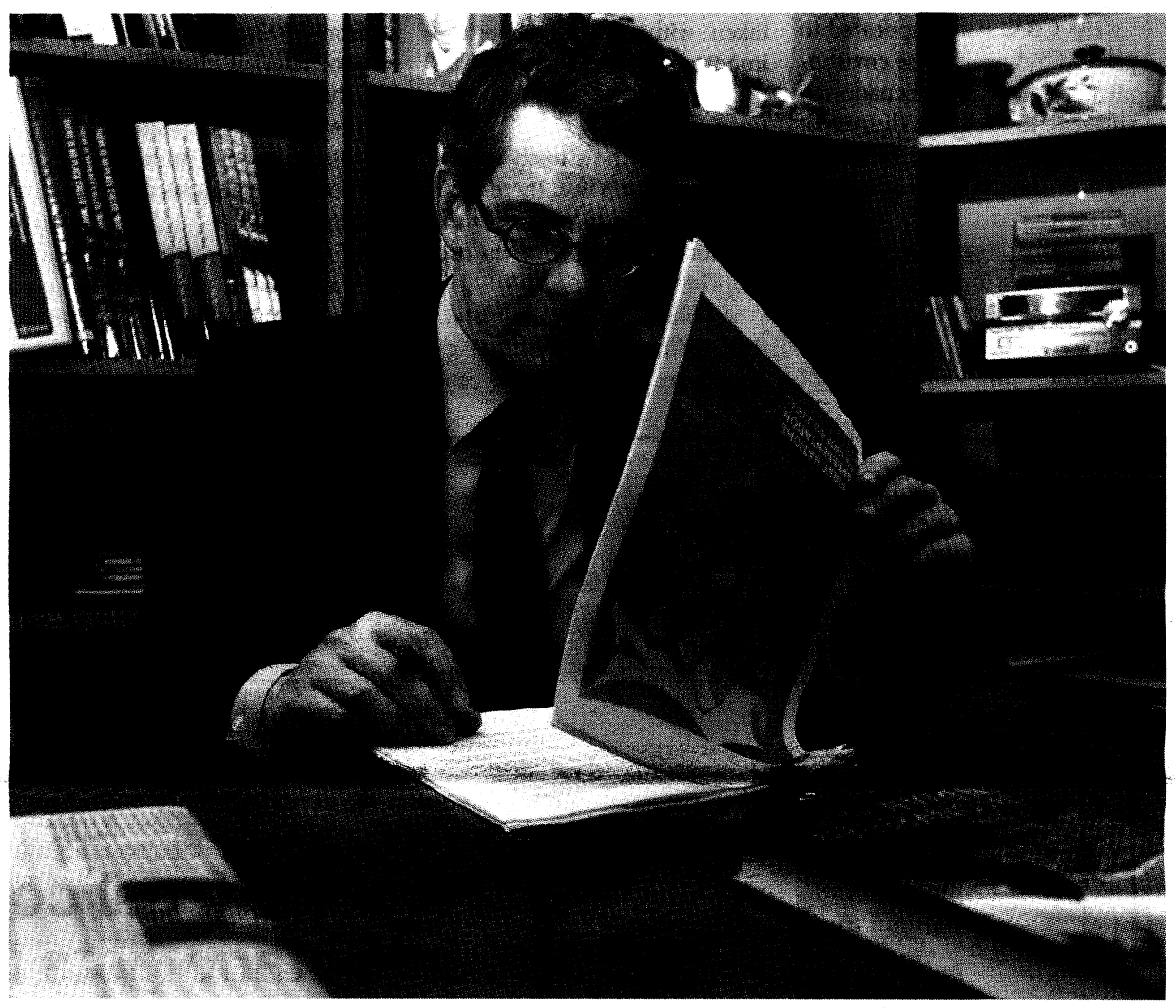
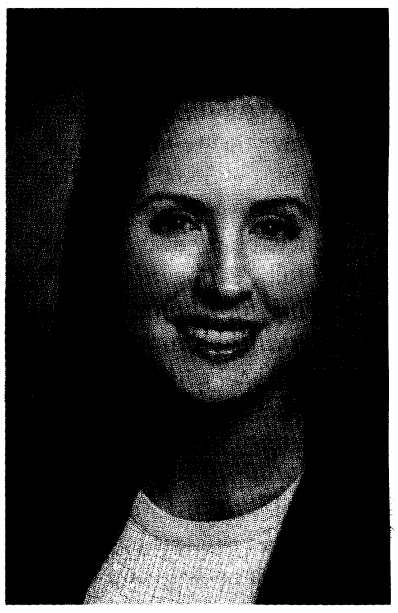


David McRobert says a new court intervention policy was a necessary step for the CBA. *Photo : Laura Pedersen*

Off-duty conduct increasingly under scrutiny: lawyers



Nicole Simes says there is a 'nuance' to establishing that there has been harm to the employer's reputation in labour law cases.

BY SHANNON KARI
For Law Times

A judge has ordered a manufacturing company in southwestern Ontario to pay 10 months severance to a longtime employee after it fired him for cause upon learning the 66-year-old labourer was facing sexual assault charges involving underage complainants.

Superior Court Justice Donald Gordon granted summary judgment in favour of Keith Merritt and against Tigercat Industries Inc., ordering the company to pay nearly $42,000 in damages for wrongful dismissal after more than 12 years of employment.

The judge concluded that Tigercat did not take the necessary steps to justify dismissal with cause.

"No independent investigation was conducted. No reports were generated. The only knowledge management has is that Mr. Merritt was charged," wrote Gordon, in the ruling issued Feb. 19.

The sexual assault trial is not scheduled to take place until this fall.

Criminal charges for so-called "off-duty conduct" are not sufficient for dismissal, said the judge.

"There must be a justifiable connection to the employer or the nature of employment," Gordon explained.

Matthew Lambert, who represented Merritt, says there was no credible evidence put forward by the company that linked the criminal charges to his client's place of employment.

"It was as if they decided my client was guilty [before any trial]," says Lambert, a partner at Ballachey Moore LLP in Brantford, Ont.

"If you are going to do this, you have to conduct a thorough investigation first."

Off-duty conduct by employees is facing increased attention, in part because of social media, say lawyers. They say deciding what to do, whether it involves criminal charges or comments posted online, can be a tricky area for employers.

Erin Kuzz, a partner at Sherrard Kuzz LLP in Toronto, says a company must first assess whether to pay an employee in lieu of notice, or dismiss the person with cause, which could result in litigation.

See **Suspension**, page 5

LSUC investigation caused trauma, counsel says

Lawyer may not practise again after delay in case

BY MICHAEL MCKIERNAN
For Law Times

A sole practitioner who spent a decade in career limbo while the Law Society of Upper Canada investigated and then prosecuted a disciplinary case against him may never return to the practice of law despite finally managing to get the conduct application tossed for delay, according to his lawyer.

Eugenio Totera, a Richmond Hill, Ont. lawyer, first got word that he was under investigation when a law society official contacted him in March 2006 and told him he was suspected of involvement in fraudulent activity. However, it wasn't until five years later, in February 2011, that the law society issued its notice of application, alleging misconduct by Totera relating to 12 fraudulent mortgage deals.

A hearing began before a disciplinary panel in February 2012, but Totera convinced them that the case should be dismissed for inordinate delay. That result was overturned by a law society appeal panel in October 2014, before finally, on March 8, the Divisional Court sided with Totera, and restored the original hearing panel decision.

"He's relieved that it's all over," says Brad Teplitsky, a Toronto litigator who acted for Totera at the Divisional Court and the earlier law society hearings. "He's happy that his reputation is at least not as impaired as it was, and that he has the option of being able to continue as a lawyer if he wishes."

However, Teplitsky says it's unlikely Totera will ever take up that option, thanks to the trauma of the last 10 years.

"He no longer really works as a lawyer. His primary occupation is as a butcher in the family business, because of this experience with the law society. It's a very unfortunate situation," Teplitsky says. "But he has the dignity of having that right to continue maintained, which was important to him."

The law society declined to comment on the Divisional Court ruling, and spokeswoman Susan Tonkin said it has yet to decide whether or not to request leave to appeal the decision to the province's highest court.

Totera had an earlier stint at the family butcher shop in the early 1990s while applying to law school, before earning his JD in the U.S. at a Louisiana university. He later returned to Canada and was called to the bar in Ontario in 2000.

According to the Divisional Court ruling, he practised family law at a small firm before striking out alone in 2002 because the work was too stressful. A mentor from his previous firm referred Totera work, including the real estate transactions that would ultimately land him in trouble.

Totera had already reported himself to LawPRO when the law society opened its investigation in March 2006, believing he and the bank had fallen victim to a mortgage fraud ring. He turned over a number of files to the law society when asked for them in May 2006, but it was February 2008 before he heard from anyone again about the matter, when a new investigator was assigned to the case. She copied a large number of Totera's files and asked to meet with him, but the meeting did not actually happen until another two years had passed, in September 2010. A notice of application accusing Totera of participating or knowingly assisting clients in fraudulent conduct followed in February 2011.

Although he was allowed to continue practising, Totera said in an affidavit filed with the hearing that his "mental and physical health began to deteriorate" from the moment of the law society's first contact in 2006.

The hearing panel found Totera made no contribution to the delay, blaming "systemic problems" with the law society's under-funded mortgage investigation unit. In fact, he had been a co-operative subject, it noted, and even testified on behalf of the Crown in criminal proceedings related to the frauds.

Panel chairman James Wardlaw wrote that the five-year delay in proceeding with the notice of application was "unacceptable and inordinate," adding that the public interest would not be harmed by the dismissal for a number of reasons, including that none of the lenders had complained about his conduct. In addition, he said the panel would have cleared Totera of the most serious allegations anyway, having heard all the evidence on the merits of the application.

"The Society has an obligation to protect the public. It also has an obligation to treat its licensees in a fair manner," Wardlaw wrote in the January 2013 decision.

The delay amounted to an abuse of process, the panel concluded, because it exacerbated Totera's pre-existing anxiety disorder "in a serious and profound manner."

A law society appeal panel then overturned the decision and ordered a fresh hearing before a new panel after finding that the original one had failed to consider evidence from Totera in cross-examination that weakened his case that he had suffered psychological harm as a result of the delay.

However, the Divisional Court ruled on March 8 that the appeal panel had overstated the importance of the missing cross-examination evidence, and failed to show deference to the hearing panel's decision.

"With or without the evidence on his cross-examination, the unchallenged expert evidence and the evidence of the Appellant before the Hearing Panel was that he suffered serious psychological and physical harm resulting from the inordinate delay in this investigation," wrote Ontario Superior Justice Julie Thorburn on behalf of a unanimous three-judge panel.

Teplitsky says the decision has implications well beyond law society hearings, with applicability to a swathe of administrative tribunals. **LT**

Suspension safest route for unhappy employers?

Continued from page 1

"Just being charged criminally does not get you there. You have to conduct your own investigation to prove the person did what they are accused of on the standard of a balance of probabilities," says Kuzz. "An employer must also determine if it is possible to do a proper investigation."

Another option is to wait for the outcome of the court proceeding if there is a criminal charge.

As well, the employer should determine if the conduct could harm the reputation of the company.

"Can they show a nexus," Kuzz explains.

A frequently cited ruling on this issue is *Kelly v. Linamar*.

In 2005, Ontario Superior Court Justice Casimir Herold found that it was appropriate for a company to dismiss an employee after learning he had been charged with possession of child pornography.

While each case turns on its specific facts, "the degree or responsibility exercised by the employee will be a significant issue," the judge wrote.

"So too will it be necessary to examine the company's notoriety and the degree to which if at all, its reputation in the community will likely be affected," he stated.

Nicole Simes, a lawyer at the MacLeod Law Firm in Toronto, says there is a "nuance" to establishing that there has been harm to the employer's reputation.

"It needs to be serious misconduct that goes to the heart of the relationship between the employer and the employee," says Simes.

If it is off-duty conduct that is not criminal and may be found on social media, for example, she says a "progressive discipline policy" should be in place.

Many of the previous decisions in this area have been in the context of a union workforce, she notes.

As a result, the collective agreement and other provisions may govern what actions employers can take.

For example, three Toronto police officers charged more than a year ago with an off-duty gang sexual assault of a female parking enforcement colleague continue to be suspended with pay pending trial.

In that case, the employer is restricted by the Police Services Act, notes Simes.

The provincial statute does not distinguish between on- or off-duty misconduct and only permits suspensions without pay if an officer is convicted of a criminal offence and sentenced to a jail term. In a non-union setting, a company may want to include terms in its employment contracts that permit a paid suspension in certain circumstances, such as a criminal charge, says Ellen Low, a partner at Whitten & Lublin LLP in Toronto.

"Depending on the nature of the charge, the employer may say we don't want you in the workplace," says Low. "A suspension may be the safest route."

Employers tend to take action more swiftly if the conduct has been publicized in the media, says Low. In that case, if there is a criminal charge as well, an individual "may need an employment lawyer as well as a criminal lawyer, as soon as possible," says Low.

The lawyer representing Tigercat in the Merritt litigation did not respond to a request for comment. **LT**