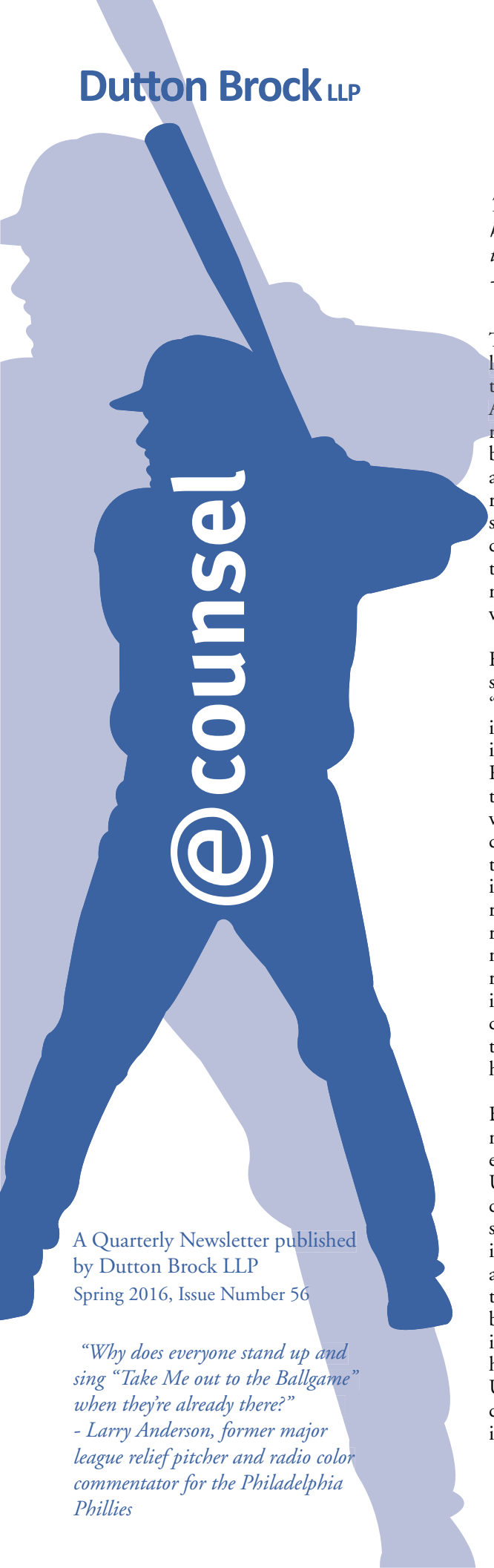
Dutton Brock LLP



WHO'S ON FIRST WHAT'S ON SECOND

There are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know. -Donald Rumsfeld

The sharing economy caught lawmakers completely off guard. As technology firms such as Uber and Airbnb progressed through various rounds of capital-raising, crossed borders and gained widespread adoption, the people making the rules governing the services offered stood flat-footed. Even after the concept of ordering a ride or a room through an app became the new normal, politicians and bureaucrats were slow to respond.

From their vantage point, the sharing economy is case-in-point an "unknown unknown"—a concept introduced to the public in 2002 into popular culture by Donald Rumsfeld, then United States Secretary of Defence. The expression, which garnered considerable commentary the moment it entered the news cycle, is actually common in some management circles and refers to things so far removed from reality that they show up on nobody's radar screen. For whatever reason, the notion that the hospitality and transportation industries could one day be liberalized from the control of government seems to have crossed nobody's mind.

Before we go any further, it is worth noting that the term "sharing economy" itself is a misnomer. Uber, for example, is not a co-operative and its drivers are not sharing rides. They are arguably independent contractors, providing a service and receiving a fee. With this in mind, there is little difference between an Uber driver and an independent house painter or handyman, other than the fact that Uber has upended a highly inefficient and anti-competitive taxi industry.

As far as liability and insurance are concerned, the matter up until now has been that most Uber drivers have not been insured as commercial vehicles. The taxi industry rightly argues that by being mandated to purchase commercial insurance, they are at a competitive disadvantage. Uber's own $5 million policy in March 2015 was disclosed to be a commercial general liability policy with an endorsement for standard non-owned auto coverage, as opposed to a policy specifically to protect drivers and their passengers.

Toronto Uber driver Tawfiqul Alam learned this following an accident in which he was not at fault, but that caused serious damage to his vehicle and injuries to himself and his passenger. After submitting his claim to his insurer, Mr. Alam was denied coverage because he was not insured to use his personal vehicle to drive passengers in exchange for money. Mr. Alam has hired a lawyer to pursue Uber for compensation.

In the future, these situations should be less frequent, as the insurance industry has begun to respond to drivers such as Mr. Alam. British-based Aviva's Canadian division is now offering policies for part-time drivers in Ontario.

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"Why does everyone stand up and sing "Take Me out to the Ballgame" when they're already there?"
- Larry Anderson, former major league relief pitcher and radio color commentator for the Philadelphia Phillies

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"With ride-sharing on the rise, consumers have new options available to them, however there is a gap in insurance coverage which potentially leaves them without appropriate protection and benefits. When consumer needs change, we must evolve our insurance solutions to respond," said Aviva's President and CEO Greg Somerville in January. It stands to reason that Aviva's competitors will follow suit.

An additional set of issues, for example the employment status of drivers and the collection and remittance of taxes, pale in comparison to the dilemma in which Uber has placed municipal politicians, licensing authorities and law enforcement agencies. The taxi industry and its supporters argue that Uber is acting outside the law—and it is, but no more so than an individual or entity that contravenes another municipal bylaw. Even if a heavy-handed response from law enforcement were warranted, with 15,000 drivers in Toronto alone, it would be practically impossible to ticket Uber out of existence.

The challenge facing municipalities, should they seek other legal remedies to prohibit Uber from operating, is that they would be acting against the public interest. Uber is wildly popular and has made travelling faster, more convenient, less expensive and arguably safer. Courts would find no more rationale in compromising the public good only to benefit the interests of the taxi industry than they would to mandate the horse and buggy back into existence to protect the interests of manure shovellers.

Further, from a public relations point-of-view, the taxi industry has lost. Poor vehicle conditions and discourteous drivers have hardly built up good will among the public. And while drivers protest (as though theirs are the only jobs entitled to be protected from obsolescence), Uber drivers are delivering hot lunches and visiting offices with kittens to benefit the local humane society.

The irony is that the disruption has only begun. Theoretically, Uber drivers themselves will become obsolete in less than a generation with the introduction of self-driving cars. For insurers and their litigators, this future is also concerning. Surely automated vehicles will present interesting legal questions, moral dilemmas and opportunities for the development of new insurance products, but the impacts will also be significant. Risk will drop dramatically, along with premiums. So too will the number of accidents and corresponding volume of work for adjusters and lawyers.

These individuals may one day join the parking lot pavers, traffic police, and the blacksmiths in finding their jobs disrupted by progress. Hopefully they will have taken a lesson from the taxi drivers and have seen it coming.

Lisa Marie Buccella is an associate whose practice includes tort and coverage work. While her knowledge of insurance law is vast; her knowledge of the strike zone is unparalleled.

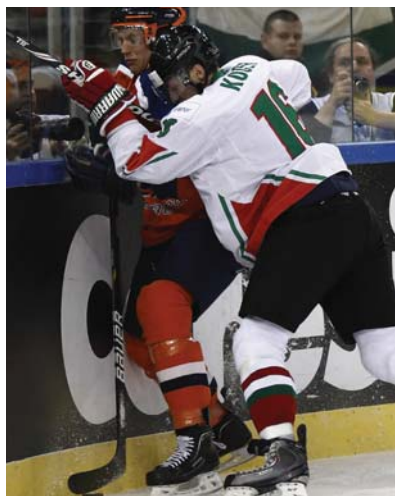
No Free Passes, Intentional Walks Or Waivers

On its face, the law of waivers in Canada burdens the Defendant. It is the Defendant's responsibility to prove that a waiver is valid, with any ambiguity being read against him or her.

Digging a little deeper, proving validity is the easy requirement. The greater burden lies on the Plaintiff to understand the document before signing. The responsibility to read and understand a waiver still lies on the signatory. Save for any particularly onerous terms or reason to believe that the signatory does not understand its significance, the Defendant has no duty to explain a waiver to him or her; not reading or understanding a waiver is rarely a valid claim to nullify its effects. *Levita v Crew,* 2015 ONSC 5316 continues this tradition.

The plaintiff, *Levita*, played hockey in a league run by the Defendant, True North Hockey Canada ("True North"). The league was a competitive no-contact men's league. True North imposed rules established by the Canadian Amateur Hockey Association, making some changes to make the league safer.

To play in the league, each player had to sign a waiver of liability. This waiver identified the risks inherent in playing hockey in a no-contact league, even including physical contact with other players causing injury. Every player in the league had to sign the waiver at the beginning of each season. The practice was for one copy of the waiver to be passed around the locker room before the start of the first game of the season. It was also available on True North's website. The waiver was never explained to the players.



On November 20, 2006, Levita's team, the Buds, faced the Defendant Crew's team, the Gold Members. Levita alleged that Crew intentionally charged at him and cross-checked him from behind into the boards. Levita claimed Crew either intentionally injured him or negligently did so and that

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True North was negligent in letting Crew play. Levita argued that the waiver does not apply because it was never explained to him. He also alleged that this 'battery' went beyond the scope of the waiver.

Justice Firestone found that "the waiver is a complete defence to claims against [True North]." Even if True North was otherwise negligent, the waiver would have absolved it of liability. The contact was not beyond the scope of the waiver, and Levita must have understood the legal effects of signing the waiver. If he did not, it was his responsibility to raise any concerns before signing; he could not argue that he voluntarily signed something he did not understand or read.

Levita is yet another case enforcing a waiver in the face of a plaintiff claiming no understanding of it. A defendant can readily rely on a well-worded waiver to absolve him or her from liability. So long as a waiver is clear and has sufficient scope to cover the incident, the Plaintiff will have a difficult time thwarting it. As we become more litigious, we see more waivers in our daily activities. It is difficult for a reasonable person to claim unfamiliarity with them and what they cover. This was particularly true in this case, as the Plaintiff himself was a lawyer.

Corey Critch is a student-at-law at Dutton Brock. His legal research skills are second only to his ability to throw a nasty knuckleball.

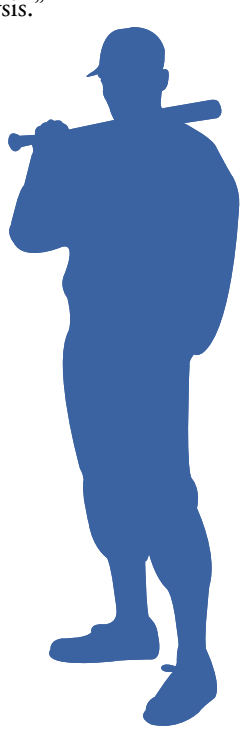
Adverse Costs Insurance: Taking The MVP To Salary Arbitration

In *Shah v. Loblaw Companies Limited,* 2015 ONSC 5987, the Court determined that a legal costs protection insurance plan is only a factor to consider in determining whether to order a plaintiff to pay security for costs into Court. It will depend on the circumstances of the case and the terms of the policy to be sure of the effect that such a policy will have on a security for costs analysis.

The Defendant, Loblaw, brought a motion for security for costs as the Plaintiff resided in India and had no assets in Ontario. The Plaintiff, Shah, obtained a BridgePoint Indemnity Company ("BICO") Legal Costs Protection Plan and asserted that this insurance policy was adequate security for costs. Adverse costs protection insurance plans are somewhat new to Canada. BICO Legal Costs Protection Plans purport to provide access to justice for plaintiffs in "Canada's loser pays [justice] system." Essentially, the insurance plan covers a costs award if the Plaintiff is not successful at trial.

In his Endorsement, Justice Lemon considered the test for awarding security for costs. Rule 56.01(1) of the *Rules of Civil Procedure* sets out that the court, on a motion by the Defendant in a proceeding, may make such order for security for costs as is just where it appears that, among other things, the Plaintiff is ordinarily resident outside Ontario. Justice Lemon noted that the Plaintiff failed to show that he was impecunious. In rendering his decision, Justice Lemon also considered the merits of the case and made an order "as is just".

Justice Lemon went on to consider the effect of the adverse costs protection insurance plan on the analysis. His Honour stated that although these insurance policies are a factor to consider in security for costs motions, "it will depend on the circumstances of the case and the terms of the policy to be sure of the effect that such a policy will have on the [security for costs] analysis."



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Justice Lemon considered the policy's various exceptions and exclusions raised by Loblaw, namely insurance proceeds will not be paid if the Plaintiff does not accept his counsel's recommendations to accept an offer to settle. It also would be impacted if the Plaintiff changes counsel and BridgePoint does not agree with the new counsel; should the Plaintiff fail to advise of an adverse costs award within 15 days; or if the contingency fee agreement entered into between the Plaintiff and his counsel will not be materially amended during the pursuant Plaintiff's claim.

Other exceptions adversely affecting coverage were noted to include the Plaintiff deciding to represent himself; the Plaintiff failing to attend a defence medical; Plaintiff failing or delaying to provide instructions to or fails to cooperate with counsel; and the Plaintiff providing BridgePoint misleading information.

Justice Lemon agreed with Loblaw in that the Defendant has no control over the above-noted exclusions and accordingly, the policy does not provide sufficient protection to the Defendant. Interestingly, the subject adverse costs protection plan does not cover costs awarded as the result of a security for costs motion. In the end, Loblaw successfully argued that the BICO Legal Costs Protection Plan is not adequate security for costs.

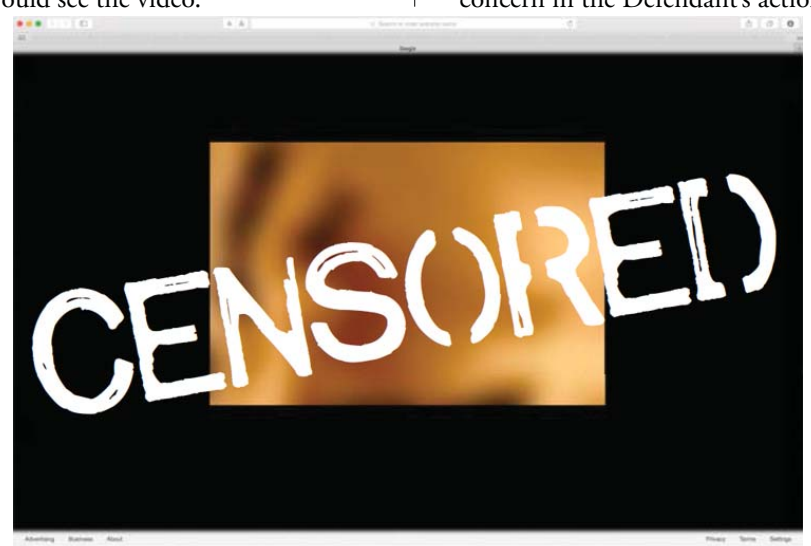
Justice Lemon's decision sheds some much needed light on the effect of adverse costs protection insurance plans on security for costs motions. Note as well that leave to appeal to the Divisional Court was denied.

Melissa Miles is a first year associate at Dutton Brock. A little known fact about Melissa is that she caught Joe Carter's World Series home run ball, despite being a toddler at the time.

It's Not Just A-Rod Who Posts Explicit Photos

The recent Ontario Superior Court decision, *Jane Doe 464533 v. X,* has recognized the new privacy tort of "public disclosure of embarrassing private facts about the Plaintiff". Justice Stinson presided over the case and engaged the use of the tort, to offer a remedy for the harm caused by the unauthorized release and publication of the Plaintiff's intimate video. Justice Stinson stated that the case raised legal questions about the availability of a common law remedy for victims of such conduct and the legal basis upon which such claims might be founded.

The facts revealed that the parties had dated while in Grade 12. They ended their relationship and the Plaintiff left for university. The parties, however, continued to communicate. The Defendant persuaded the Plaintiff to make and send a sexually explicit video of herself to him. The Defendant assured the Plaintiff that no one else would see the video.



The Defendant posted the video to an internet pornography website, where it remained for approximately three weeks. There was no available information on the number of times the video had been viewed, downloaded, copied or re-circulated. The Plaintiff's friends became aware of the video and the Defendant had shown it to young men with whom the parties had attended school.

The Plaintiff suffered both physical and psychological consequences, including serious depression and emotional upset, for which she sought medical attention. Justice Stinson stated the elements of the cause of action as follows:
one who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of the other's privacy, if the matter publicized or the act of the publication
(a) would be highly offensive to a reasonable person; and
(b) is not of legitimate concern to the public.

The Judge found that the element of the cause of action had been met, as the Defendant had been posted on the Internet, a privately-shared and highly personal, intimate video recording of the plaintiff. In doing so, the Defendant had made public an aspect of the Plaintiff's private life. A reasonable person would find such activity to be highly offensive. There was no legitimate public concern in the Defendant's action.

The Judge also found the elements of the tort of breach of confidence and that of intentional infliction of mental distress had been met. Justice Stinson awarded damages in the maximum amount available under the Simplified Procedure and included an award not only for general damages, but also aggravated and punitive damages. Damages were assessed analogous to those for sexual assault and battery cases. In applying a functional approach to the award of damages, Justice Stinson found that the actions of the Defendant offended and compromised the Plaintiff's dignity and personal autonomy and that the award of damages should "demonstrate, both to the victim and to the wider community, the

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vindication of these fundamental, although intangible, rights which have been violated by the wrong-doer."

In his reasoning for recognising the new tort, Justice Stinson noted that there was an absence of legislation providing civil resource for violation of an individual's privacy rights of this nature. Justice Stinson adopted the reasoning of the Court of Appeal, in *Jones v. Tsige*, 2012 ONCA 32, that: "the explicit recognition of a right to privacy as underlying specific Charter rights and freedoms, and the principle that the common law should be developed in a manner consistent with the Charter values, supported the recognition of a civil action for damages for intrusion upon the plaintiff's seclusion, (the privacy tort specific to that case.)"

Given the nature of the default judgement proceedings in this case, it was not necessary for the Court to provide definitions of the elements of the tort. We expect that courts will be called upon to do so in the future. We would also anticipate seeing cases that relate to the issue of conflict of privacy interests versus freedom of expression. However, as it stands, the Ontario Superior Court has responded to the need for civil recourse, for violation of the privacy rights of victims who have suffered harm, from the unauthorised publication of intimate photographs on public media sites.

Rosalind Eastmond is an associate in Dutton Brock's accident benefits group. In her big league career, she has won two Gold Glove awards and threw a perfect game.

WEB CONTEST

January's E-Counsel's trivia quiz regarding Superman and global warming was answered by our usual Baker Street irregulars and some new faces. Congrats to Lee Rumleski, John Breen, Mark Sones, Stuart Wright, Anita Huyer, Jennifer Massie, Jennifer Bethune, Ken Jones, and Katherine Daley.

This issue's theme is, of course, baseball, mixed in with music. It is fitting that in the first year the Blue Jays took flight, the song "The Boys Are Back in Town" was a chart-topper. What was the name of the Irish band which performed that song?

There are of course some famous songs about baseball, including two songs released in 1984 by Don Henley and Bruce Springsteen. Before moving on to the tough questions below, name the baseball inspired songs.

In 1985, the Jays won the AL East pennant with a record of 99 wins and 63 losses, before losing the AL League championship to the KC Royals. A former "Revival" member had a baseball oriented song topping the charts that year. Who was the musician and what was the song name?

Now for the tough part. In 2003, a band from Glasgow, Scotland, released another baseball song. First, this band had a song on the movie soundtrack for High Fidelity, a movie based on a 1995 British novel by Nick Hornby. This author also wrote another novel about growing up a die-hard Arsenal fan, which was made in to a movie in the US about growing up a die-hard Red Sox fan in 2005. What was the name of the novel and movie? Who starred in the movie version?

Returning to the Glaswegian musicians above, what is the name of the band, and the song about a baseball player? What Canadian-made movie was the song featured in?

BONUS SPORTS QUESTION FOR THE LESS MUSCIALLY INCLINED: We know what happened with the Jays in 1992 and 1993, but did you know that in an 8 year span from 1996 to 2003 Jays' pitchers won 4 Cy Young awards. Can you name the player and the year of each one?

Email your answers to dlauder@duttonbrock.com. Do NOT email answers by hitting reply to this email address, as it will get lost in spam-limbo.

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