Most significant cases of 2002

Top picks clarify debate on issues relating to practice

BY DAVID GAMBRILL
Law Times

Some of the "most significant cases" of 2002 will be remembered for clarifying debates about issues in the practise of law.

Law Times conducted an informal poll of several leading lawyers in their fields, asking them to name their 'Top 3' decisions of 2002. Respondents were asked to select cases on the basis of their impact on lawyers practising in specific areas — including civil litigation, criminal, family, corporate/commercial, and labour and employment law.

Selected cases reflect practical concerns in the areas of written judgments, jury trials, similar-fact evidence, the difference between civil and criminal audits, and concerns about a new cost grid in Ontario, among others.

Choices varied with the respondents. There didn't appear to be any single case in 2002 that ranked well above others in terms of its overall importance to the bar or Canadian society. Here is a sample of what we found:

John Rice

Thomas W. Teahen

LABOUR AND EMPLOYMENT LAW

For labour and employment lawyers, the Supreme Court of Canada's decision in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages* ranked as a runaway favourite for "most significant ruling of 2002."

A Saskatchewan labour union, engaged in a nasty lockout and strike with Pepsi-Cola, was the target of a court order that prevented the union from picketing Pepsi-Cola's Saskatoon office. Undeterred, the union ordered employees to strike at "secondary" locations, such as retail outlets where Pepsi was delivered and the homes of Pepsi's management personnel.

The Supreme Court ruled the secondary picketing was not, *per se*, illegal. "Pepsi-Cola should only be allowed to initiate injunction proceedings where it has been subjected to a tort or a crime — not where it has merely been the target of peaceful secondary picketing," the court ruled.

"It cleared up a lurking confusion that had been in the law of picketing that has been around for the last 20 years or so," observed John Rice of McInnes Cooper in Halifax. "There was this stray decision from the Ontario Court of Appeal, back in the 1960s, which had said that secondary picketing is illegal — always and without question. What the Supreme Court did in *Pepsi Cola* is they finally killed off that Ontario precedent."

Pension surpluses — more specifically, who gets them — was a key issue in the Ontario Court of Appeal in 2002. The court released its much-anticipated judgment in *Monsanto Canada Inc. v. the Superintendent of Financial Services* in November.

In 1997, Monsanto Canada proposed a partial windup of its defined benefit plan, which had a surplus of $3.1 million.

"The issue was whether or not, on a partial windup of a defined benefit plan, the employees affected by the partial windup were entitled to a distribution of the surplus as if it was a full windup," says Thomas Teahen of Sherrard Kuzz LLP in Toronto. "And the Court of Appeal says they were."

Monsanto may force the provincial government to rethink proposed amendments to the Pension Benefit Act, Teahen predicted.

Last, but certainly not least, *Simpson v. Consumers Association of Canada* made it clear the Ontario Court of Appeal has a zero-tolerance policy against sexual harassment in — or outside — the workplace. Company CEOs can be terminated for sexual harassment even if the alleged episodes are consensual or occur beyond the work site, Ontario Court of Appeal Justice Kathryn Feldman wrote for the court.

The decision was "significant in that it's obviously [just] cause [for termination] if somebody's harassing employees," says Teahen. "But it also emphasized, I think, an onus on employers to be very scrupulous about eliminating harassment in the workplace."

CRIMINAL LAW

In criminal law, 2002 is characterized by judgments advocating "good housekeeping" practice issues.

For example, judges in criminal law cases should always write "meaningful" reasons that explain their decisions, Supreme Court of Canada Justice Ian Binnie wrote in *R. v. Sheppard*.

Criminal lawyers consistently ranked this decision among the most significant of the year.

Newfoundland resident Colin Sheppard was charged for possession of stolen property — two windows worth $429 — after a jilted girlfriend reported him to police two days following the couple's separation.

The trial judge found Sheppard guilty and wrote the following in support of his decision: "Having considered all the testimony in this case, and reminding myself of the burden of the Crown and the credibility of the witnesses, and how this is to be assessed, I find the defendant guilty as charged."

Binnie found the judge's reasons were "so 'generic' as to be no reasons at all."

"Essentially, you have to provide a judgment that makes your reasons transparent, to the extent that you have to explain why you're sending people to jail," says Toronto criminal defence lawyer Brian Greenspan.

"Importantly, you have to give a judgment that permits appellate review."

Because of their helpful advice on similar-fact evidence, *R. v. Handy* and *R. v. Shearing* made the "most influential" list of Frank Addario of Sack Goldblatt Mitchell in Toronto.

Handy, says Addario, "is probably the clearest judgment that attempts to explain similar-fact evidence that the Supreme Court's given in the past 20 years."

Similar-fact evidence includes allegations of prior misconduct against an accused that are not immediately relevant to the case at bar. The Supreme Court says such evidence should be admitted at trial only in exceptional circumstances, when "the probative value of the similar fact evidence outweighs its potential for prejudice."

The Supreme Court also cleared up the difference between civil audits and criminal investigations in the companion cases, *R. v. Chee Ling* and *R. v. Warren James Jarvis*.

The cases are based on information compelled from two men during routine tax audits conducted by the Canada Customs and Revenue Agency (CCRA). Subsequently, the CCRA tried to use the information obtained during the audit for the purpose of criminally prosecuting the two men for tax offences.

The Supreme Court nixed this practice. "It became necessary for the court to say, 'Well, uh, actually fellas, we're going to apply a functional test to determine whether or not this is a criminal versus an administrative audit,'" says Addario.

CIVIL LITIGATION

Hunt v. The Sutton Group was the talk of the town long before the Ontario Court of Appeal ordered in August 2002 that the case be re-tried.

The parties subsequently reached a settlement, ending the matter at the provincial appellate level.

Linda Hunt sued her employer after the Sutton Group's Barrie, Ont., office held a Christmas party in December 1994. Hunt attended the party and then drove to PJ's Pub with a few of her colleagues. After spending about two hours at PJ's, Hunt was involved in a serious car accident on the way back to her home in Wasaga, Ont.

Hunt was subsequently convicted of drunk driving.

The trial judge, Ontario Superior Court Justice Clair Marchand, held the Sutton Group 25-per-cent responsible for Hunt's accident. She assessed Hunt's damages to be worth $1.1 million, and ordered the company to pay $288,104.

Marchand also discharged the jury on the grounds that the case was complex and public commentary might interfere with the outcome of the case.

Teahen says Hunt is obviously significant because of its assessment of a company's liability. "Certainly in our practice, it became an issue of huge interest, particularly through the holiday season," he says. "Everybody wanted to talk about what their potential liabilities were and what they could do to limit them."

But the case is also relevant because of its discussion about the importance of juries, says James Morton of Steinberg Morton.

"It's a strong endorsement of keeping juries, and I think, based on this decision, you could see more juries selected and kept through to trial," says Morton. "If that is the case, that could be quite a significant change in civil litigation here in Ontario."

Speaking of changing the way law is practised in Ontario, how about the new cost grid, which was implemented Jan. 1, 2002? The grid was supposed to streamline and systematize the way judges calculate lawyers' costs in civil cases.

Several 2002 decisions addressed the application of the costs grid, and at least one criticized the value of the grid itself. In *Toronto v. First Ontario*, for example, a trial judge found the grid rewards "lawyers who work more slowly than others and decide to put more time in a matter than it really needs."

Later, in November 2002, the Ontario Court of Appeal found the grid should apply to events that took place prior to its enactment.

"The issue of application of the new cost grid in cases where most or not all of the relevant [legal] services were rendered prior to January 2002 has been considered in several cases," noted Orlando Da Silva of Borden Ladner Gervais. "The approach taken in those cases has not been uniform." LT

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