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By in-house counsel, for in-house counsel™

IN-HOUSE REPORTER

President's Message

Brenda MacDonald

The circumstances of the past two years have been uniquely challenging and difficult and I hope that you, your families and friends are safe and well.

During this time, ACC has been evolving to meet your needs through a broad range of virtual programming, resources and networking opportunities. I want to thank our sponsors and our members for your participation in continuing to make these events so valuable to our collective in-house practice.

On the programming front, we are pleased to have held 20 programs in 2021! Highlights of our programming include, programs offering practical advice and insight into the key issues affecting our day to day practice such as: *How They Affect Your In-House Practice*, *Recent Developments in Corporate Law*, *The Changing Landscape of Privacy Regulation in Canada and Environmental, Social and Governance (ESG) Trends and Developments for Counsel*. We also tailored our programming to assist in the specific challenges many of us

faced in 2021 including *Mental Health and Wellness: Coping Strategies during COVID 19* and *An in-house guide to getting back in the workplace...or not?* Our programming also included the Securities Law Committee's day-long Symposium, a Tech Round table discussion on: *Emerging Practice Issues for In-House Technology Counsel* and the Chapter celebrated the launch of the Energy Law Committee.

A cornerstone of ACC's mandate is to promote diversity and inclusiveness within ACC and the in-house community as a whole. As such, in 2021 the Chapter was proud to host a number of EDI programs. The Chapter was sponsor of "Race and Identity in the Law", which was a day-long symposium held last December by the South Asian Bar Association (Toronto) with programs on *Truth and Reconciliation*, *Imposter Syndrome*, and *Women's Empowerment*. The Chapter also participated as a promoter of the Asian American Bar Association of New York (AABANY) event last April, "The Surge in Anti-Asian Violence: Corporate Social Responsibility and Action". This program was a discussion to combat



the surge in anti-Asian violence by looking at corporate social responsibility and action.

During the late summer and Fall, the Chapter was fortunate to host several in-person social events where our members had the long overdue opportunity to network in person at several fantastic outdoor venues! Keeping safety in mind, in the coming months, we hope that we will be able to host similar social events.

During 2022, we are committed to continue to evolve and meet your needs through a robust range of programming and networking events. We would love to hear your feedback and input. If you would like to share ideas or get involved with the Chapter please let us know by [emailing us](#).

On behalf of the Board, I look forward to continuing to serve our members and to keep you connected to one another.

Getting the most from your patent litigation counsel – Five Tips

By: Brian Daley, Senior patent litigator, Norton Rose Fulbright Canada

If you are an in-house IP lawyer you probably fear and loathe patent litigation in equal measure. If your company is a defendant, it may be forced to stop using core technology and may have to pay ruinous damages for past infringement. If it is the plaintiff, key patents may be at risk of invalidation. In either case senior management will be keenly interested in how you are managing the file. At the same time, you need to manage a limited litigation budget while dealing with complex technology, gigabytes of discovery data, expensive expert witnesses and large teams of pricey IP counsel.

This is a daunting challenge, especially if you are new to the role. These five tips can make it easier.

1. Define your objectives and litigation strategy at the outset.

One key to successful litigation is knowing what you want to accomplish and how. Discuss your objectives with your legal team and develop a strategy with them.

Take away: Have your counsel prepare a litigation strategy memo early on and revise it as the case develops.

2. Choose a fee arrangement, set a realistic budget and review it regularly.

How to avoid nasty billing surprises? Whether you choose billable hours or an alternative fee

structure, ask for a detailed budget that identifies key team members, major steps in the litigation, a projected timeline and lists all assumptions.

Our legal project management team uses data from past litigation to prepare realistic budgets. One-page monthly budget reports provide early warning if the budget needs to be adjusted.

Take away: An early trial date is one of the best ways to control costs. Lawyers won't have the time to fight over every issue. Parties are more likely to settle when trial is top of mind.

3. Schedule regular calls.

Regular calls ensure that tasks are assigned and that everyone is aware of upcoming deadlines. Following up with minutes and a task list ensures accountability.

Take away: Weekly or biweekly calls of 20 minutes or less work well.

4. Inform your counsel of changed circumstances promptly.

Has the allegedly infringing product been redesigned? Does another entity hold the legal or beneficial interest in the IP as a result of a re-organization? Your counsel should be told ASAP.

Take away: Schedule a regular internal review to identify changed circumstances.

5. Provide feedback, positive or negative early and often.

If you are unhappy with any aspect of your counsel's work, let your lead counsel know immediately. Many problems arise from a misunderstanding of the client's expectations. For example some clients want to be copied on every email to opposing counsel, others don't want their inboxes to be inundated. Good counsel appreciate the feedback and will do their best to fix the issue.

Take away: A note of appreciation, particularly to junior members of the team, is a great morale booster.

The wait is over – judicial guidance on employer vaccination policies arrives November 25, 2021 By: Andy Pushalik, Partner, Dentons LLP

On August 5, 2021, Prime Minister Trudeau announced that he had asked the clerk of the Privy Council to look at mandatory vaccinations for federal employees. In the three months since that announcement, we have watched as businesses across all industries and sectors established varying forms of mandatory vaccination policies. The wait then began to see how judges and arbitrators would approach these new workplace rules. However, it would appear that our wait for judicial guidance is now over.

Over the last several weeks, judges and labour arbitrators have issued a flurry of decisions considering the enforceability of mandatory vaccination policies. Not surprisingly, the key takeaway for employers from these early cases is that the analysis of whether an employer's mandatory vaccination policy will be legally enforceable will turn on the specific facts of the case.

The court injunction cases:

While we are still waiting to have a court decision on the merits of an employer vaccination policy, the courts have issued several decisions in response to injunctions brought by employees to prevent the enforcement of these policies pending a hearing before an arbitrator.

In *Blake v. University Health Network*, 2021 ONSC 7139, the Ontario Superior Court of Justice initially granted the unionized plaintiffs an interim injunction to

preserve the employment status quo and halt the enforcement of the hospital network's mandatory vaccination policy. Under the policy, employees who were not fully vaccinated by October 22, 2021 would be dismissed. However, on October 28, 2021, the Court dissolved the interim injunction on the basis that the unionized plaintiffs did not have standing to pursue the matter before the courts. With respect to non-union employees, Justice Dunphy noted that it was hard to see how any employee who is not in a union could allege irreparable harm arising from threatened termination of employment. In those circumstances, while the employee is not entitled to get their job back, they are entitled to money.

Similarly, in *Amalgamated Transit Union, Local 113 et al v. Toronto Transit Commission and National Organized Workers Union v. Sinai Health System*, 2021 ONSC 7658, the Ontario Superior Court of Justice declined to grant interim injunctive relief preventing employers from enforcing their mandatory vaccination policies pending the results of the grievance arbitration process. Under the TTC policy, unvaccinated employees who did not have an approved exemption would be placed on unpaid leaves of absence beginning on November 21, 2021; if they remained unvaccinated their employment would be terminated effective December 31, 2021. Sinai Health's policy required its employees to be fully vaccinated by December 9, 2021, failing which their employment would be terminated.

In dismissing both injunctions, Justice Akbarali clarified the "harm" at issue for the impacted employees. In Justice Akbarali's view, the employer policies were not "forcing" employees to get vaccinated; rather, the employees were being forced to choose between getting vaccinated and continuing to have an income on the one hand, or remaining unvaccinated and losing their income on the other. On that basis, arguments and evidence regarding the safety of the vaccines was not relevant to the issue at hand. Further, with respect to the TTC case, Justice Akbarali held that failing to grant the injunction would not result in any irreparable harm to the employees or the arbitration process. Moreover, the balance of convenience (i.e. which party would suffer greater harm from the granting or refusal of the injunction) tipped in favour of the employer. To this end, Justice Akbarali noted that cases have recently begun to rise in Toronto; the TTC's ridership includes vulnerable people; and the TTC has experienced outbreaks.

Finally, in *Wojdan v. Canada*, 2021 FC 1244, a group of employees from the Core Public Administration of the Federal Government sought an interim injunction staying the operation of the "Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police" issued by the Treasury Board of Canada.

Keep Reading...

ACC Ontario Chapter Event Photos

ACC Ontario's Summer on the Patio Social | September 8th, 2021



One More Time...on the Patio at Harbourfront | September 30th, 2021



ACC Ontario's Toronto Holiday Party | December 20th, 2021



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LIST OF RESOURCES:

Economic Sanctions ACC & Sponsor Resources:

<https://www.acc.com/chapters-networks/chapters/canada/ontario-chapter/economic-sanctions-acc-sponsor-resources>

In Your Corner: Mental Health and Wellbeing:

<https://www.acc.com/chapters-networks/chapters/canada/ontario-chapter/your-corner-mental-health-and-wellbeing>

Interested in sharing your legal expertise? Sign up for our Speakers Roster to be considered to present at future ACC Ontario programs by [clicking here](#).



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