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Inside

THE NEW APOLOGY ACTS – CAUTION STILL APPLIES WHEN SAYING YOU ARE SORRY

Bryan J. Buttigieg
Toronto
416.595.8172
bbuttigieg@millerthomson.com

Many consider it a quintessentially Canadian trait to be willing to apologise. One would hardly expect we needed help from legislation. But of course anyone seeking legal advice will invariably be cautioned that an apology could be admissible in court and taken to be an admission of liability. Several provinces have now passed "Apology Acts" designed to make it easier to apologise without fear of civil liability. But caution must still apply to understand the limits of the protection afforded by these new laws.

The purpose of this type of legislation is laudable. There have been a number of instances, often in the medical malpractice field, in which Plaintiffs have expressed the view that they would not have felt any need to go through litigation had the tortfeasor apologised for their actions. Yet the legal implications of an apology have often deterred people from doing so while in a potentially litigious situation for fear of the apology being seen to be an admission of liability. The legislation is intended to remove this fear by declaring that any such expression of regret is not admissible in court as evidence of civil liability or an admission of fault.

To date, seven Canadian provinces have adopted legislation of this sort. British Columbia passed the first Canadian *Apology Act* in 2006. Saskatchewan adopted similar legislation in its *Evidence Amendment Act, 2007*. Alberta followed with an amendment to its *Evidence Act* in 2008. Other provinces that have adopted similar legislation to date are Manitoba, Newfoundland and Nova Scotia.

It is important to be aware however that the Acts only provide immunity from civil liability. They do not apply to criminal proceedings or *Provincial Offences Act* matters. The legislation in Ontario for instance states that :

"Nothing in this Act affects,

> (a) the admissibility of any evidence in
>
> (i) a criminal proceeding, including a prosecution for perjury, or
>
> (ii) a proceeding under the *Provincial Offences Act*; …"

So a person apologising immediately after a car accident cannot have that apology used against him in a personal injury action by the victim. But the same apology can be used in a provincial highway traffic prosecution and even in a criminal prosecution. In that context, the apology will still be admissible as an admission against interest, perhaps even a confession of guilt.

Corporations must balance a number of interests in deciding whether to publicly apologise. The very high profile example of Maple Leaf Foods during the listeriosis outbreak in Ontario in 2008 is one instance where the CEO took what many in the public considered to be a courageous stance. In doing so however, the company must have been aware that several civil actions were pending and there was always the possibility of an investigation under either provincial legislation or the criminal code.

One wonders whether the Act will have any major effect on the behaviour of individuals or corporations. Will corporations and individuals be more likely to apologise now that they no longer face the possibility of civil liability from the apology? Or will the ongoing fear of prosecution under provincial or federal legislation remain an insurmountable barrier to such action? Should the legislation have gone further and also made apologies inadmissible in criminal and quasi criminal proceedings? Would the ability to secure a conviction by other readily available evidence be materially hampered if an apology by the accused were inadmissible?

When there is the potential of litigation, an apology is not easy. The new legislation, apparently made with the best of intentions, may have helped ease the way somewhat. Whether it has gone far enough remains to be seen.

CBSA INSPECTION OF MAIL, SEARCHES AT THE BORDER AND COMPUTER SEARCHES

Daniel L. Kiselbach
Vancouver
604.643.1263
dkiselbach@millerthomson.com

Introduction

Persons importing goods into Canada via mail or bringing goods into Canada via ports of entry should be aware of the rights of Canada Border Services Agency ("CBSA") officers to inspect and search persons and goods, and computer hard drives.

There are special rules that apply to the inspection of mail. Further, CBSA officers have broad authority to conduct searches of goods, conveyances and persons at a customs port of entry. These powers in many ways exceed the powers that domestic police authorities have to search persons, goods or conveyances in Canada. The issue of searches of computers has been raised, particularly by individuals who have a right to claim privilege in respect of documents and information contained on computers. A brief outline of the law and the policy published by CBSA is set out below.

Inspection of Mail

International mail is presented by Canada Post to CBSA. CBSA officers inspect each piece of mail to determine its admissibility into Canada and to confirm whether it contains dutiable or taxable goods. If a CBSA officer determines that a mail item is not prohibited from entering Canada and is not subject to duties or taxes, the item is released to Canada Post for immediate delivery. Prohibited goods include obscene materials, hate propaganda, dangerous materials and narcotics.

CBSA officers have the authority to examine goods pursuant to section 99 of the *Customs Act*. Pursuant to subsection 99(2) of the *Customs Act*, a CBSA officer may not open any mail items that weigh less than 30 grams without the consent of the addressee or sender. See CBSA Memorandum D5-1-1.

Pursuant to section 17 of the *Proceeds of Crime* (*Money Laundering*) *and Terrorist Financing Act*, a CBSA officer may examine any mail that is imported and open or cause to be opened, any such mail that the officer suspects on reasonable grounds contains currency or monetary instruments of a value equal to $10,000. Subsection 17(2) indicates that the officer may not open or cause to be opened any mail that weighs 30 grams or less without the consent of the addressee or the sender. See CBSA Memorandum D19-14-1.

Border Searches

With respect to the ability of CBSA officers to search at the border, the law has been established in the

cases of *R. v. Jacoy* [1988] 2 SCR 548 and *Simmons v. Her Majesty the Queen* [1988] 2 SCR 495. In both cases, the Supreme Court of Canada indicated that the CBSA officers have a right to inspect persons or goods who enter Canada's ports of entry. Further, it indicated that CBSA officers have broader rights of search for the reason that individuals who cross international boundaries do not have a reasonable expectation of privacy and that governments have the right to search individuals and goods in order to protect against the importation of contraband or the entry of undesirable persons. This means that the CBSA has the right to conduct a personal search of persons, their baggage and conveyances, to the extent necessary to ensure that they are not importing prohibited goods and that the importation of goods into Canada is not unlawful.

Computer Searches

It appears that, in Canada, the issue of the right to search is covered by the *Jacoy* and *Simmons* cases. The result in these cases suggests that computer searches may be undertaken by the CBSA officials to the extent necessary to ensure that a computer does not have any contraband loaded on it (e.g. obscene material, child pornography or hate literature). See CBSA Memorandum D9-1-1. Further, a computer may be inspected for the purpose of ensuring that it does not contain any unsafe or dangerous items or that the importation of the computer is unlawful for any other reason. See CBSA Memorandum D19-13-5. US Immigration and Customs Enforcement ("ICE") issued a directive (7-1.6) (the "US Directive") respecting the border search of electronic devices. The US Directive titled "Border Searches of Electronic Devices" indicates that:

> Searches of electronic devices are a crucial tool for detecting information concerning terrorism, narcotics smuggling, and other national security matters; alien admissibility; contraband including child pornography; laundering monetary instruments; violations of copyright or trademark laws; and evidence of embargo violations or other import or export control laws.

Recommendations

In circumstances where a person is carrying a computer, personal handheld device or electronic item at a port of entry and the CBSA wishes to search that device, it is recommended that:

1. The individual carrying the item state to the CBSA officer that the item contains privileged documents and information and that the person asserts the claim of privilege in respect of the documents and information contained on the computer, personal handheld device or other electronic item.
2. The person claiming privilege indicate to the CBSA officer that because the documents and information are privileged, they should not be disclosed to the CBSA officer and instead turned over to a legal officer for the Department of Justice for the purposes of dealing with the claim of privilege.
3. If the CBSA officer insists on viewing the documents and information over which the person claims privilege, the person note the time and circumstances of the privilege claim and contact legal counsel immediately for the purposes of addressing the claim to privilege. This is consistent with the approach set out in the US Directive which indicates that the ICE Office of the Chief Counsel or appropriate US Attorney's Office should be contacted where agents encounter legal information.
4. The person claiming privilege should not refuse to provide the item to a CBSA officer if it is demanded for inspection. A refusal might be treated by the CBSA officer as an instance of non-compliance, leading to further complications with CBSA.

AVOIDING THE BUSINESS CRIME CHARGE (RATHER THAN DEFENDING IT AT TRIAL) PART 2

Roderick M. McLeod, Q.C.
Markham
905.415.6707
rmcleod@millerthomson.com

In the spring 2007 issue of Miller Thomson's Criminal Law, Regulation and Enforcement Newsletter we dealt, in PART 1, with avoiding the business crime or regulatory offence charge in situations where it was "safe" to make early voluntary defence disclosure (with written argument where appropriate). To us, it is only "safe" to do so when we are satisfied that:

a) we know the full extent of the evidence available to the Crown;

b) that evidence, together with our client's potential testimony and other defence evidence suggest Crown Counsel will conclude there is no reasonable prospect of conviction; and

c) there is virtually no downside risk to early voluntary defence disclosure and early written argument.

The cases where these conditions can be met will be rare but, as pointed out in PART 1, they were met in the case of our client, the Honourable Greg Sorbara, who had been named by the RCMP as a target in an investigation relating to the Royal Group where he had been an independent director. He was successfully extricated from the investigation and returned to Cabinet.

The more difficult and more common case is where it is not possible, at least initially, to meet these three conditions.

In such cases, it is equally important to start the approach as early as possible - at the first hint that an enforcement or regulatory agency may be thinking of laying charges. An early start is critical in every case but especially so if the facts suggest the enforcement or regulatory agency may have a choice as between two or more potential accused. For example, between our client and the person on the other side of the business transaction under scrutiny, such as where the offence under consideration is an unlawful secret commission under section 426 of the *Criminal Code*. Under this section, the Police have the options of charging the "giver" or the "receiver" of the benefit, or both. They do not ordinarily charge both. Their case against the "receiver" of the corrupt benefit will be much stronger if they have the "giver" of that benefit as a Crown witness. The reverse is equally true.

In such cases there is an obvious strategy of trying to be the "first to the altar" and avoid a charge by being treated as a witness rather than having to go to trial to defend a charge as an accused.

In other cases, both criminal and regulatory, where there are not the same "two sides' to the transaction under scrutiny but there are multiple potential accused, the same opportunity may arise if it is recognized early. The Crown's case will usually be stronger if the Crown has one of the "insiders" as a Crown witness. If there are multiple potential accused persons, the one to take the first initiative to cooperate usually (not always) has the best chance of becoming a witness rather than an accused. As distasteful as it may be to be providing evidence against recent "business partners," it is usually better than going to trial as an accused.

Another possibility, if it is a criminal investigation, is to make an attempt to convince the investigator and/or Crown Counsel to consider the laying of a regulatory charge rather than a criminal charge. If the investigation is regulatory at the outset, the parallel option is to try to convince the regulator to use a mandatory abatement option such as an "order" rather than prosecuting.

In all of these scenarios, neither the Enforcement/Regulatory Agency nor Crown Counsel is likely to do anything favourable without first seeing detailed information about the company's "side of the story."

But, how do you go about it if you can't meet the three risk avoidance conditions referenced above? You are not confident you know the "whole case." Accordingly, you can't be sure, yet, a voluntary defence disclosure will show the Crown there is no reasonable prospect of conviction. Lastly, there is, at this early stage, too big a downside risk of "filling in the holes" in the Crown's case if you make that disclosure.

The answer, we think, is still to start early but to do so slowly and incrementally. If it is public knowledge, or at least industry or company knowledge, where there is an investigation and that charges are being considered, there is usually nothing to lose by contacting the Enforcement/Regulatory agency as soon as possible to advise them of the company's desire to cooperate. Depending on the circumstances/personalities/relationships/ect. This can be done by either the client or counsel and again, depending on the circumstances, the inquiry can be of the Agency or of Crown counsel. At this very early stage, we generally prefer a client to Agency inquiry especially in the Regulatory field. If it is a criminal investigation, an inquiry by counsel of the Police or the Crown is usually better.

At the initial contact, after expressing the desire to cooperate, the company or its counsel should try to find out as much as possible about what charge(s) are being considered, what evidence has already been gathered, etc. The desire to cooperate, including agreeing to be interviewed, should be repeated but with care so as to not create the false impression that the cooperation will be without conditions. The safest way to be careful, at this early stage, is to say the offer to be interviewed is something the Company will have to discuss with its counsel before arrangements can be made.

Our preference is for counsel to have the next discussion - with the investigator and/or advising Crown counsel to see what "ground rules" they are willing to follow. The following are some of the more common questions to which we seek answers:

1. Will the Investigator/Crown agree to Company counsel giving them, on a "without prejudice" basis, an oral summary of what evidence company officials could give so as to permit the Company's counsel and Crown Counsel to move ahead to discuss the possibility of a company official(s) agreeing to be interviewed. The preffered interview would be on the basis that, as long as the investigator was satisfied the company official(s) was/were telling the truth, the content of the interview would be used solely to assist Crown counsel and the investigator in deciding whether a charge should be laid against the company and/or any of its officials? The statements of the official in the interview would not be admissible because it was induced and therefore could not be used by the prosecution if the negotiations were not successful and the company and/or any official was charged and prosecuted.
2. If so, will the Crown permit Company counsel time to prepare a "Draft Will Say" for each company official to be submitted on the same basis followed by the "protected" (same basis) interview (even cross-examination) of the company official(s) by the investigator? (We would far rather maximize control over the content and the precise wording of a statement by doing the draft.)
3. Whether the Investigator/Crown will agree to step 2 or not, will they agree that if the interview takes place on a protected basis, (as long as the truth is told) no use will be made of the statement against the person giving it?
4. If they are satisfied they would rather have the official as a witness, will they grant immunity from prosecution if s(he) agrees to provide them with an otherwise usable (i.e. against other people) statement?
5. If there are difficulties getting to and through step 4, and there usually will be, and if funding is available, consider the possibility of asking the Crown/Investigator for time to have your investigator get more information. This can be expensive but also very useful. We have had success retaining former senior investigators (where possible, a retiree, from the Enforcement/Regulatory Agency involved in the case). We sub-retain him/her to, in effect, re-investigate the transaction under scrutiny, interview and take statements from company officials (for use at step 3 above) and other witnesses for the preparation of a voluntary defence disclosure package including "Draft Will Says" of all relevant witnesses. It is important to use "Draft Will Says" because the final "Will Say" must be the work product of the investigator.
6. As we proceed through steps 1 to 5, we will hopefully gain sufficient information to be able to say:

(a) we have sufficient knowledge of the Crown's case;

(b) there is no reasonable prospect of conviction; and

(c) any risk in providing voluntary defence disclosure and supporting written argument is manageable.

If we can say that, we can submit a Voluntary Defence Disclosure Brief.

None of these steps/suggestions is foolproof. Nor is the list purported to be exhaustive. Hopefully it will at least provide a starting point for the type of analysis and innovative strategy needed because every fact situation is different from the one before.

R. V. BRUCE POWER: BREACH OF SOLICITOR-CLIENT PRIVILEGE RESULTS IN THE DISMISSAL OF WORKPLACE SAFETY CHARGE

J. Bruce McMeekin
Markham
905.415.6791
bmcmeekin@millerthomson.com

Solicitor-client privilege is recognized in Canadian law as a principle of fundamental justice protected by the *Charter of Rights and Freedoms*. The basis for the principle is rooted in the constitutional guarantee of procedural fairness for companies and individuals who are under investigation by a law enforcement agency or have been charged with offences. In order for a potential defendant or defendant to properly exercise its rights to retain and instruct counsel and to be presumed innocent, it is essential that the defendant have the right to communicate information to counsel on a confidential basis without fear that the communicated information and legal advice be disclosed.

Recently, the Ontario Court of Appeal had occasion to review the principles governing privilege within the context of an Ontario Ministry of Labour (MOL) prosecution. In *R. v. Bruce Power*, a subcontractor's employee had been seriously injured when he fell at the defendant's facility in Tiverton, Ontario. Shortly after the accident occurred, on the advice of external counsel, in-house counsel created an internal investigation team tasked with the responsibility of investigating the accident and preparing a confidential written report for use by the company's lawyers in defending the company in the anticipated prosecution of offences by the company and its employees for offences contrary to the *Occupational Health and Safety Act* ("*OHSA*"). Written terms of reference were created for the investigation, which expressly provided that the investigation was undertaken in contemplation of litigation and that documents created *during the investigation*, including the investigation report, were to be placed in the custody of the company's legal department to ensure the report's continuing confidentiality.

The investigation team interviewed a number of people who were all informed that, prior to the interview, any report of the interview would remain confidential for use by the company's legal team and that information obtained during the interview would not be disclosed to any third party, including the MOL.

After the company was charged for offences contrary to the OHSA, the MOL Inspector who had laid the charges and the Crown prosecutor obtained a copy of the investigation report from an employee who had represented the bargaining unit on the investigation team. Both the Inspector and Crown, in addition to the employee, understood that the report was subject to a claim of privilege. Yet, the Crown advised the company that at trial it intended to call the authors of the report and to tender the report as a Crown exhibit.

At trial, the company succeeded with its application to have the charges against it stayed (or dismissed) as an abuse of process. The trial court agreed that the Crown had illegally accessed the report causing irreparable prejudice to the company's fair trial right. This finding was subsequently upheld by the Court of Appeal.

Corporate internal investigations can be an essential tool for external and/or in-house counsel providing legal advice to companies who are concerned they and their employees may have committed regulatory or criminal offences. Reports can be highly prejudicial to the corporate interest, however, if they are not

completed in a manner that ensures confidentiality a claim of privilege cannot be successfully sustained. Absent written terms of reference stressing the confidential nature of the investigation and its purpose, the outcome for Bruce Power may not have been as favourable.

It should also be stressed that reports like that in *Bruce Power* can only be used to protect documents created during the investigation. A claim of privilege cannot be used to prevent the disclosure of routine business documents generated as part of an alleged illegal act or transaction which may be material in proving elements of the suspected offences.

Privilege is available to legal communications between both internal and external counsel and their corporate clients. In order to sustain a privilege claim, therefore, it is not necessary that external counsel be retained from whom the request for a completed report originates. What is important, however, is that:

1. the request for a confidential investigation and report originate from counsel;
2. confidential terms of reference are drafted for the investigation stressing its confidential nature and purpose to assist the company in obtaining legal advice;
3. the investigation team acknowledge receipt of the terms in writing;
4. employees who meet with the team are advised as to the confidential nature of the process; and
5. all copies of the report, marked Privileged and Confidential, are provided to counsel.

Following these basic rules will go a great distance in protecting confidentiality and sustaining claims of privilege.

IT'S NO LONGER A CRIME (BUT IT MAY STILL NOT BE A GOOD IDEA): RECENT AMENDMENTS TO THE *COMPETITION ACT*

Andrew J. Roman
Toronto
416.595.8604
aroman@millerthomson.com

and

Justin Chan, Student-at-Law
Toronto

On March 12, 2009, Canada's newly-amended *Competition Act* [1] came into force with the most significant changes since the 1986 amendments. The recent amendments have particular significance for businesses because some business conduct that used to be criminal is no longer so. The decriminalized activities include: (i) less serious forms of anti-competitive agreements that are not outright conspiracies and (ii) the former offences of price maintenance, price discrimination and predatory pricing. The new changes reflect the principle that criminal law – with its risk of stigma, fines and imprisonment – should apply only to conduct that can be defined by clear standards and is clearly harmful to competition[2]. Because it was very difficult, even with costly and sophisticated economic analysis, for businesses to assess how their arrangements would affect competition in the market, they were usually not able to know in advance whether they were acting lawfully. The decriminalization of the above offences helps reduce, to some degree, the risk of criminal liability in a legal area where there are sometimes few clear answers. Although the prospect of severe penal consequences may be gone, significant risks of non-criminal enforcement remain. What was formerly a crime may now be simply a bad idea – unless carefully crafted to withstand close scrutiny by the Competition Tribunal.

1 *Competition Act,* R.S.C. 1985, c. C-34.

2 Competition Policy Review Panel, *Compete to Win: Final Report – June 2008* (Ottawa: Public Works and Government Services Canada, 2008) at 58.

Introduction of a Non-Criminal Law Review of Agreements

After several years of review and discussion and the report of the recent Wilson Task Force[3], Parliament amended the law by breaking the former conspiracy offence into two categories of agreements or arrangements that reduce competition. In broad terms, these would be (i) the covert and obviously criminal activities of bid rigging or price-fixing, through "hard-core cartels" and (ii) non-criminal written or oral agreements or arrangements that, while reducing competition to some degree, may provide efficiency gains for the economy that would make the overall situation beneficial or at least harmless. The first category would be dealt with through criminal prosecution in the courts, as before, while the second category would be dealt with through review by the Competition Tribunal to determine whether to permit or prohibit the continuation of the agreement or arrangement.

The new section 45, the criminal law provision, makes all agreements between competitors that deal with price fixing, market allocation or output restrictions a *per se* offence, whether or not the parties had sufficient market power to restrain or injure competition "unduly." This broad scope, if read literally, could criminalize even some forms of cooperation between small businesses that clearly cannot have any impact on the market.

The second category of agreements covers all other agreements between competitors which could reduce competition. These agreements would be reviewed, if brought by the Competition Bureau before the Competition Tribunal, in accordance with economic principles and business logic rather than criminal law criteria. If the agreements are found likely to lessen or prevent competition substantially, the Tribunal may prohibit the agreement from continuing in force. This review process does not come into effect until March 12, 2010, an important date for which businesses should be prepared, by conducting their own reviews of any agreements or arrangements they might have with actual or potential competitors.

The Decriminalization of Price Maintenance, Price Discrimination and Predatory Pricing

For many years, suppliers committed the offence of price maintenance if they attempted to influence retailers to increase or maintain higher selling prices. Section 61, which created the offence, has now been repealed, but a new section 76 was added. This permits the Commissioner (or in rare cases, a private applicant) to apply to the Competition Tribunal for an order to prohibit this type of conduct if it adversely affects competition[4]. In some cases, price maintenance does not harm competition because if the supplier of one brand of products pressures its distributors to maintain higher prices than they otherwise would charge, consumers are likely to shift their purchases to other suppliers. The price maintenance would primarily harm the price-increasing supplier and its distributors, not competition in the marketplace. The result will often be a reduction in price by the price-increasing supplier to restore profitability.

Price discrimination (charging different prices to similarly situated customers without making the lower price available to all of them) and predatory pricing (pricing unreasonably low to drive a competitor out of business or discipline him) have also been repealed. They have not been replaced with new sections in the *Act*. Contrary to popular misconception, predatory pricing is not merely selling below cost, even for an extended period of time. The prosecution also had to prove the intention of squeezing out its competitors. In bad times, all market participants in certain industries may well be selling below cost until market conditions improve. The Bureau, however, continues to recognize that firms setting prices below their average avoidable costs may be engaging in predatory pricing. The Bureau has announced that it will review allegedly anti-competitive discriminatory and predatory pricing practices under s.79, the abuse of dominance provision[5]. Of course, if there is no dominant position, there is nothing to abuse, so s. 79 should be understood as limited to firms with sufficient market power to be able to lessen or prevent competition substantially in a market.

Businesses should note that with the repeal of the pricing offences discussed above, criminal penalties no longer apply. These pricing practices may at most lead the Tribunal, in a successful application, to issue a

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3 *Supra*, note 2.

4 Price maintenance under the new non-criminal review process is limited to vertical arrangements; typically, a supplier and its retail distributors. Horizontal price maintenance would be price-fixing among competitors, and would be caught by the *per se* criminal provision in section 45.

5 An abuse of dominant position is established if a firm with sufficient market power acts anti-competitively so as to likely lessen or prevent competition substantially in a market.

prohibition order, or in some cases, an order to take corrective action. Where the Tribunal finds that these practices have occurred in the context of a firm abusing its dominant position, however, the Tribunal is authorized under s.79 to impose an administrative monetary penalty (really, a fine under another name) of up to $10 million for a first order[6]. Thus, what may no longer be a crime may still not be a good idea.

6 Though price maintenance is generally reviewed under s.76, the Bureau may make an application under the abuse of dominance provisions instead: see s.76 (11).

MILLER THOMSON LLP CRIMINAL LAW, REGULATION AND ENFORCEMENT GROUP

Toronto/Markham

Douglas Best 416.595.8588
dbest@millerthomson.com

Bryan J. Buttigieg 416.595.8172
bbuttigieg@millerthomson.com

David W. Chodikoff 416.595.8626
dchodikoff@millerthomson.com

Robert England 416.595.8566
rengland@millerthomson.com

Roderick M. McLeod, Q.C. 905.415.6707
rmcleod@millerthomson.com

J.Bruce McMeekin 905.415.6791
bmcmeekin@millerthomson.com

Andrew Roman 416.595.8604
aroman@millerthomson.com

Stuart Rudner 905.415.6767
srudner@millerthomson.com

Adam Stephens 416.595.8572
astephens@millerthomson.com

Katherine Xilinas 416.595.8165
kxilinas@millerthomson.com

Vancouver

Daniel L. Kiselbach 604.643.1263
dkiselbach@millerthomson.com

Donald J. Sorochan, Q.C. 604.643.1214
dsorochan@millerthomson.com

Dwight M.D. Stewart 604.643.1248
dstewart@millerthomson.com

Calgary

Fred R. Fenwick, Q.C. 403.298.2421
ffrenwick@millerthomson.com

Edmonton

Daniel C.P. Stachnik, Q.C. 780.429.9761
dstachnik@millerthomson.com