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E-NEWSLETTER

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1. *Fortune-Ozoike v. Wal-Mart Canada Corp.*, 2023 ONSC 421

On December 26, 2013, the plaintiff, Jameela Fortune-Ozoike (the "Plaintiff"), went shopping at a Wal-Mart. While shopping, she tripped over a hanger on the floor, and fell to the ground. The fall resulted in a dislocated left knee. The Plaintiff was transferred to hospital where she developed compromised blood flow in the leg, which required vascular surgery. Unfortunately, an alleged delay in the surgery resulted in the Plaintiff's leg being amputated above the knee.

The Plaintiff commenced an action against Wal-Mart, alleging a failure to meet the standard of care required of it under the Occupiers' Liability Act. Additionally, on the basis of alleged medical malpractice, she named the various medical professionals that treated her post-accident, along with the Humber River Regional Hospital. By the time that the trial commenced, the only defendants remaining in the action were the two physicians involved in the Plaintiff's care. Wal-Mart and various other defendants had entered into a Pierringer agreement with the Plaintiff. Damages had been agreed upon. The only issue before the court was liability.

The court considered the applicable standard of care required of the physicians that treated the Plaintiff post-injury; the negligence of Wal-Mart; and the appropriate apportionment of fault as between them.

With respect to the doctor defendants, the court found that the Plaintiff's treating emergency room physician breached the applicable standard of care on the basis that, while he was aware of the risk of the Plaintiff developing compartment syndrome, he failed to conduct a proper physical examination to exclude same. He also breached the applicable standard of care by failing to notify the attending orthopaedic surgeon of his concern that the Plaintiff was developing compartment syndrome. Had the attending orthopaedic surgeon been advised, her condition could have been properly managed and monitored. The Plaintiff's attending orthopaedic surgeon was also found in breach of the applicable standard of care on the basis that he failed to ensure that the Plaintiff's physical examination had been adequately performed. On the issue of causation, the court found that the breaches of the standard of care caused injury to the Plaintiff.

After concluding its analysis of the negligence of the physician defendants, the court considered the liability of Wal-Mart. As part of that assessment, it reviewed the conditions that lead to the fall which included the weather (which was inclement but non-contributory); the Plaintiff's footwear (running shoes); and her pre-loss observations of the premises floor (no hazards had been observed). The court also considered the Plaintiff's post-loss observation of a clear hanger on the floor where she had fallen. It was noted by the court that all reporting contemporaneous with the loss was consistent with the Plaintiff's belief that she had fallen as a result of slipping on the hanger.

As part of its analysis of Wal-Mart's potential liability, the court stated:

- The duty required of an occupier under the *Occupiers' Liability Act*, is "to take sure care as in all the circumstances of that case is reasonable to see that persons entering onto the premises .... are reasonably safe";

- The determination of whether an occupier satisfied the duty will be case specific;

- That liability is to be imposed by a court where an occupier's conduct created a risk of harm that was "objectively unreasonable";

- The analysis of an occupier's liability includes consideration of whether an occupier has instituted reasonable policies and procedures for the inspection and maintenance of a premises, and whether they are followed; however, the mere departure from a policy is not prima facie evidence of negligence; and

- While a policy can be used as a factor to evaluate the applicable stand of care, any departure from a policy must be viewed in light of what was reasonable and prudent conduct in the circumstances.

Turning to Wal-Mart's policies and procedures for addressing store safety, the court noted that it:

- Had a system for training Wal-Mart newly hired employees;

- Required employees in their assigned area to perform "Safety Sweeps" a minimum of 5-8 times per day, with additional sweeps conducted during inclement weather and when there was increased customer traffic;

- Had a policy that placed responsibility on all employees for immediately addressing any hazard observed, even if outside of their assigned area;

- Announced scheduled Safety Sweeps over the store P.A. system;

- Required employees to complete a sweep log;

- Reviewed the sweep logs on a weekly basis to identify any missed sweeps, and in the event of a missed sweep, required store assistant managers to make inquiries of the relevant associates for explanations as to why the sweeps were not conducted; and

- Provided authority to assistant managers to discipline associates for violating the store Safety Sweep practices.

The court then considered whether Wal-Mart had adhered to its policies and procedures on the date of loss. On December 26, 2013, safety sweeps were completed at 7:00 am, 11:00 am, 5:00 pm, and 7:30 pm. There was a scheduled sweep that was to occur at 2:00 pm that did not appear to have been conducted. During the 5:00 pm and 7:30 pm sweeps, no hazards were noted. The employee assigned to the area, however, advised that it might be difficult to see a clear hanger if one had fallen onto the floor. Wal-Mart admitted at trial that less than the minimum number of acceptable sweeps

had been completed on the date of loss. It was further admitted that, given the increased customer traffic that day, and inclement weather, there ought to have been more than 5-8 sweeps completed.

The court found that, if there was to be any breach of the standard of care on the part of Wal-Mart, it would be with respect to the missed safety sweep at 2:00 pm and the failure to conduct additional safety sweeps as a result of increased customer traffic and inclement weather. However, the court accepted the evidence of Wal-Mart that, at the time that the loss took place, it was not busier than other days in the evening. The was no evidence before the court that the inclement weather required additional sweeps, and there was no evidence to suggest that a missed 2:00 pm sweep caused the Plaintiff's injury.

Moreover, there was no evidence before the court that Wal-Mart's Safety Sweep policy was unreasonable, nor was there any evidence tendered to establish routine non-compliance with the policy. To the contrary, the evidence on new-hire training, recording of sweeps, regular announcements for sweeps to be conducted, and weekly review by managers, showed that Wal-Mart had implemented mechanisms to ensure compliance.

Wal-Mart was not liable for the Plaintiff's loss.

2. *Wilson v. 356119 Ontario Ltd. et al.*, 2023 ONSC 600

The plaintiff, Debbie Lee Wilson (the "Plaintiff"), slipped and fell in the parking lot of the Brockville 1000 Island Mall (the "Mall"), on January 27, 2016, fracturing her right elbow. As a result of her injuries, she commenced a claim against the Mall's property management company, Strathallen Property Management Inc., and Strathallen's winter maintenance contractor Ken Miller Excavating.

The Plaintiff was a 58 year old school bus driver. On the date of loss she completed her daily bus route and headed to the Mall, arriving at 8:00 am. The weather was -4 degrees, and at some point that morning, it had started to snow. The Plaintiff parked the school bus in the middle of the parking lot and headed towards the mall entrance. After a short distance, she slipped and fell. The Plaintiff described there being an inch of snow on the ground, with ice underneath the snow. Post-fall she attended in the Mall. She did not advise anyone that the fall had occurred. She returned home and completed her afternoon bus route. That evening, she was seen in hospital where she was diagnosed with a displaced fracture of the right elbow. The fall was reported to the Mall the following day.

The Plaintiff's fracture did not require surgical intervention. She attended for 8 weeks of physiotherapy and remained off work to September 2016. After a brief return to work she took a second absence until November 2016. The Plaintiff continued to receive regular cortisone injections at the time of the trial and had some limited range of motion in the right arm. She continued to work as a bus driver.

In conducting its liability analysis, the court considered the duty placed upon an occupier under section 3 of the *Occupiers' Liability Act*. In doing so, it also undertook a thorough review of prior case law that considered slips and falls in snowy and icy conditions. The court highlighted the following decisions and principles espoused by Ontario courts:

- The Supreme Court of Canada decision in *Waldick v. Malcolm*, [1991] 2 S.C.R. 456 was cited as being the leading case in slips and falls that occur on snow and ice. As per that decision, slip and fall cases are highly fact driven. Relevant factors include the weather, the time of year, the size of the parking area, the cost of preventative measures, the quality of the footwear worn by the visitor, the length of the pathway, and the nature of the property.

- The positive or affirmative duty that is imposed on an occupier does not extend to the removal of every possible danger; and does not require an occupier to maintain a constant surveillance or lookout for potential danger - *Garofalo v. Canada Safeway Ltd.,* [1998] O.J. No. 302 (Ont. Gen. Div.).

- When a Plaintiff is injured on premises, to succeed in an occupier's liability claim, they must be able to pinpoint some act, or failure to act, on the part of the occupier that caused their injury - *Nandlal v. Toronto Transit Commission,* 2014 ONSC 4760.

- The *Occupiers' Liability Act* does not impose strict liability, and the presence of a hazard does not itself lead inevitably to the conclusion that an occupier breached its duty to take such

reasonable care to see that persons on the premises are reasonably safe - *Nandlal v. Toronto Transit Commission,* 2014 ONSC 4760.

- It is important for the court to use common sense when applying the *Occupiers' Liability* statute - *Nandlal v. Toronto Transit Commission,* 2014 ONSC 4760.

- Where a defendant has a reasonable system in place to protect customers and on the day of loss the system was operating properly, an occupier did not breach its duty - *Winters v. Loblaws Supermarkets Ltd.,* [2005] O.J. No. 3406 (Ont. S.C.).

- A reasonable system is one that is carried out in a timely fashion, and takes into account the business hours of operation - *Dhalla v. North York (City)* (2001), M.P.L.R. (3d) 84 (Ont. S.C.).

- The realities of winters in northern Ontario should be considered in determining whether an occupier had a reasonable policy to provide winter maintenance for a parking lot - *Cannon v. Cemcor Apartments Inc.,* 2016 ONSC 2828, aff'd 2017 ONCA 378.

- The *Occupiers' Liability Act* does not impose a strict liability regime - *(Canada) Attorney General v. Ranger,* 2011 ONSC 3196.

- Where an occupier regularly removed snow on a walkway in the morning and evening, and sprinkled salt on icy patches on along the entire walkway when they observed ice forming, the measures were deemed sufficient to discharge their obligations under the Act.

The court also highlighted the following cases where liability has been found against occupiers in similar circumstances involving ice and snow on a parking lot surface:

- *Musa v. Carleton Condominium Corporation No. 255 et al.,* 2022 ONSC 1030, where a defendant contractor omitted to apply salt in an appropriate and timely manner which breached a common law duty to carry out snow and ice responsibilities to the best practices guidelines and standards required of a commercial winter maintenance contractor; and

- *Chambers v. Remnant Tabernacle,* 2022 ONSC 1482, where an occupier church did not maintain its salt supply, only purchased salt once per year, and ran out of salt prior to an ice/snowstorm.

Against the backdrop of the cited jurisprudence, the court considered whether the defendant Mall had a reasonable system in place in to ensure the Plaintiff's safety. Expert evidence was not called by either party to address the applicable standard of care. While the court stated that expert evidence can be helpful, it was within the ability of the court to take a "common sense" approach based on the available evidence.

The assessment of the reasonableness of an occupier's system begins with a review of the provisions of the applicable winter maintenance contract, followed by consideration of whether the system was

properly functioning on the date of loss. The court's assessment is also guided by the following legal tenets:

- Neither perfection nor unrealistic precautions against known risks is required (*Kerr v. Loblaws Inc*., 2007 ONCA 371 at para. 19)

- The duty of an occupier does not extend so far as to require a defendant to remove every possibility of danger. (*Garofalo v. Canada Safeway Ltd*., 1998 CarswellOnt 339 (Ont. Gen. Div.) at para. 28)

- The test is one of reasonableness and not perfection. (*Garofalo* at para. 28)

- The duty that is imposed upon an occupier does not extend to the removal of every possible danger. It does not require an occupier to maintain a constant surveillance or lookout for potential danger. (*Garofalo*, at para. 31).

- Occupiers are not insurers. (*Salman v. Desai*, [2015] ONSC 878 at para. 39)

- A winter maintenance system and its implementation does not need to be "foolproof". (*Gardiner v. Thunder Bay Regional Hospital*, 1999 CarswellOnt802 (Ont. Gen. Div.) at paras. 34, at p. 8; upheld on appeal at 2000 CarswellOnt124 (Ont. C.A.))

In the case at hand, the court found that the defendant Mall had a reasonable system in place to provide proper winter maintenance for the parking lot. The system included a contract with clear contractual duties including priority areas, when maintenance was to commence and when it was to be completed by (7:00 am), and it addressed both snow removal and the application of salt (or a salt/sand mixture depending on conditions). The maintenance contractor was required to keep maintenance logs. The Mall property manager arrived at the Mall prior to opening and would drive through the property to ensure that the Mall and parking lot were in order. A second employee also conducted an inspection of the parking lot prior to the Mall opening. Finally, on a daily basis, the co-owner of the maintenance contractor also inspected the premises parking lot to both ensure that maintenance had been carried out properly and to check on conditions generally. The system was found to have in place reasonable checks and balances, and the involvement of experienced employees in the system on behalf of the Mall provided for transparency, accountability, and oversight.

With a reasonable system in place, the court then considered whether the system was functioning properly on the date of loss. All parties agreed that there was snow on parts of the parking lot at the time of the fall; that there were icy conditions that required the application of salt; and that the mall had opened at 7:00 am to allow customers into the Mall. It was the position of the defendants that there was not enough snow to plow, and only salting was required.

The court was tasked with considering whether the salt application was completed in a proper and timely way. The evidence before the court was that the contractor arrived at the Mall at 7:30 am.

Salting operations were commenced, with all salt reserves used by 8:15 am. The contractor returned to its yard to obtain additional salt and arrived back at the Mall by 8:45 am to salt areas that had not yet been salted. The contractor gave evidence that it can take between 15 and 45 minutes for salt to begin to melt snow.

The court concluded that, on the day of the loss, the parking lot was not completely clear. Parts remained covered in snow. While salting had commenced at 7:35 am, it would not have activated to melt the snow until sometime between 7:50 am and 8:20 am. Salt had not been fully spread on all areas prior to the Plaintiff's arrival just after 8:00 am. The court concluded that (a) either the area of the Plaintiff's fall had not been salted at the time that the fall took place, or (b) the salt had not yet activated the process of melting the snow and ice. The contractor had not met the contractual provision that all snow removal and/or salting be completed by 7:00 am. As the Mall doors opened at 7:00 am, it was foreseeable that there could be risk of harm to Mall users if snow removal and salting did not occur in a timely fashion. On the balance of probabilities, the defendants had failed to ensure that the parking lot was safe for its customers. The failure to apply salt in a time manner constituted negligence.

Despite the fact that the Plaintiff was wearing new proper winter wear, was not moving in a hurry, and wasn't carrying many objects, the court found her to be 25% contributorily negligent on the basis that she was "well aware of the conditions". The Plaintiff had not taken any special precautions despite her experience with the winter conditions that morning, and despite observing the condition of the parking lot.

Turning to damages, based on a fractured radial head and the court's acceptance that the Plaintiff was at risk of developing post-traumatic arthritis in the elbow, $50,000 in general damages were awarded. $10,000 was awarded for future housekeeping and lawn maintenance. The parties had agreed that the Plaintiff was owed $10,345 in past income loss, however her claim for future income loss was dismissed. Finally, $6,000 was awarded in future care (cost of over the counter medications), and $2,773.11 was payable to address OHIP's subrogated interest.

With a 25% reduction for contributory negligence applied, the Plaintiff was awarded a total of $59,338.58 plus pre-judgment interest, and costs to be agreed upon.

3. *Addy v. Goulet*, 2023 ONSC 1265

On September 18, 2015, the plaintiff, Emily Addy (the "Plaintiff"), attended at a pub in Ottawa to celebrate her 30th birthday. She was seated with friends at an outside table, when she was struck in the back of the head by a bocce ball that had been thrown by the defendant, Pierre Goulet ("Goulet"). As a result of injuries sustained, the Plaintiff commenced a claim against Goulet, Local Pub and Eatery (Lansdowne Park), Lansdowne Retail GP Inc., and Lansdowne Retail Partnership (collectively the "Lansdowne Defendants"). Prior to trial, the Plaintiff had settled her claim against the Lansdowne Defendants by way of a Pierringer Agreement.

The Plaintiff's position at trial was that Goulet was entirely responsible for her injuries. Goulet alleged that the Lansdowne Defendants should share in the responsibility for the loss, with his portion of liability limited to 75-90 percent.

The liability of the Lansdowne Defendants was couched in the duty of care under both sections 3(1) and 3(2) of the Occupiers' Liability Act, which provides that the duty prescribed in section 3(1) applies whether the danger is caused by the condition of a premises, *or* by an activity carried out on the premises. Goulet argued that the Lansdowne Defendants should have done more to ensure the Plaintiff's safety, as it was foreseeable that someone would throw a ball from the bocce court into the seating area. Moreover, it was known that individuals playing bocce ball at the pub where likely to be drinking, which would lower inhibitions. Goulet took the position that a barrier should have been placed between the bocce court and the seating area.

In assessing the standard of care applicable to the Lansdowne Defendants, the court stated that relevant factors to consider in their assessment included whether the risk of injury was reasonably foreseeable, the likelihood of the damage caused, and the availability and cost of preventative measures.

The facts relevant to the court's analysis of the issues of standard of care and damages included:

- The pub bocce court flanked the outdoor patio seating;
- The bocce court is covered in green outdoor carpet and has a wooded border made of beams similar in appearance to railway ties;
- A pergola style roof covered the bocce court;
- While there were chains, waist high, along the side of the court that flanked a courtyard on the one side the court, there was nothing dividing the side of the court that flanked the outdoor patio seating, other than the wooden border;
- The Plaintiff's table was located two tables over from the bocce court;

- The Plaintiff was seated with her back to the court;
- Prior to attending at the pub, Goulet had been at a music festival where he had been drinking;
- Goulet continued to consume alcohol at the pub;
- Goulet had played bocce ball before and was familiar with its rules;
- Goulet threw the subject bocce ball at an acquaintance of the Plaintiff's, using an underhanded grip, with the expectation that the acquaintance would catch the ball;
- Prior to throwing the ball, Goulet had not been told by any pub staff that he was misbehaving or was too boisterous;
- Goulet acknowledged that throwing a bocce ball into a crowded pub was dangerous;
- Goulet was asked to leave the pub after the incident; and
- The year following the loss the pub erected a sign instructing players to ensure that bocce balls remained below waist level and within the confines of the court.

Turning to its consideration of the likelihood of a known or foreseeable harm, the court framed the question before it as whether it was reasonably foreseeable that someone would throw a bocce ball to another person at the pub, and that someone would be injured as a result. There had been no evidence before the court that anyone had been injured by a bocce ball at the pub previously. However, bocce balls had only been present at the pub since 2015, the year of the loss. No evidence had been tendered on how common bocce ball injuries were generally, or of other instances where a person was injured by a bocce ball in a similar restaurant setting.

While the court accepted Goulet's argument that bocce balls were intended to be thrown (or rolled), it found that they were not intended to be thrown to other people. There was insufficient evidence before the court to support a finding that it was reasonably foreseeable that bocce balls would be flung from the bocce court and into the adjacent seating area on a regular basis. However, the court was satisfied that it was reasonably foreseeable that an "exuberant" bocce player, "lubricated by alcohol" would throw a bocce ball out of bounds from time to time. It was also reasonably foreseeable that if a ball was thrown from the bocce court into the seating area, that a patron could be injured.

Goulet argued that the standard of care expected by the pub required a plexiglass or other barrier between the bocce court and the seating area. There was no evidence put before the court about the burden that would be associated with such a barrier, nor was their evidence

relating to its potential impact on other infrastructure and service of customers, or cost. The court also considered the burden and cost associated with erecting a sign that set out rules of the game, including a prohibition on tossing the balls. It found that neither the burden nor cost of a sign would be significant.

On the issue of the standard of care, the court found that it was reasonably foreseeable that a person would be injured at the pub if someone threw a bocce ball from the court into the seating area, which could result in potentially severe injuries. It further found that the cost of installing a sign instructing players to ensure that bocce balls remained below waist level and within the confines of the court would not have been significant. Consequently, a sign should have been in place at the time of the loss. By failing to have a sign in place, the Lansdowne Defendants failed to exercise the standard of care expected of a reasonable and prudent person in similar circumstances. The court did not make any finding on whether a barrier was required due to insufficient evidence before it on the issue.

Turning to causation, the court was not convinced that, if it were not for the Lansdowne Defendants' failure to have posted a sign with the bocce rules, that the Plaintiff would not have been injured. On this basis, although the Lansdowne Defendants did not exercise the expected standard of care by failing to post a sign, its breach was not the cause of the Plaintiff's injuries.

Goulet was found 100% liable for the Plaintiff's losses.

With liability concluded, the court considered the Plaintiff's damages.

The Plaintiff did not present with any pre-existing health issues. She held a BSc in Human Kinetics. At the time of the loss, she worked as a sales consultant for a medical supply company, earning $110,000 per year.

As a result of the accident, the Plaintiff was diagnosed with a mild traumatic brain injury. Post-accident she complained of headaches, sensitivity to noise, fatigue, mood swings, suicidal ideation, inefficiency, forgetfulness, and slowed processing speed. She was prescribed medication and underwent neurotherapy, vision therapy, and massage therapy. Her recreational pursuits were limited by her headaches, and her social life was limited by anxiety. As of the time of the trial, her symptoms ebbed and flowed. It was accepted by the court, based on lay and expert evidence, that the Plaintiff suffered from mild cognitive deficits caused by the accident. $125,000 in general damages were awarded.

The Plaintiff returned to work a month after the accident on a part-time basis. She increased her hours to full time by December 2015. Her ability to perform her employment was impacted by her inefficiency. She forgot appointments and was not inputting orders and quotes as quickly as she had previously. She continued to work, albeit with ongoing symptoms, until 2020, when she went on maternity leave. While on maternity leave, she obtained employment with a new employer.

She continued to work up until the time of the trial. The Plaintiff was awarded $228,093 for past loss of income (based on lost work time and the effect of her injuries on her ability to earn income). The Plaintiff was also awarded future income loss based on a loss of earning capacity in the amount of $18,500 for 2022, $35,000 for 2023, and $50,000 for each year from 2024 until she reaches the age of 65, less 20 percent (*the total figure was not quantified by the court and was subject to a gross-up).

$142,272.68 was awarded in future care costs (*subject to a gross-up), which was comprised of $57,032.84 for psychological counselling to age 65, $3,120 for occupational therapy, $53,364.22 for indoor housekeeping and home maintenance, and $28,755.32 for snow removal and lawn care.

$23,733.80 was awarded for out-of-pocket expenses.

Q1 Occupiers' Risk Management Tip

As an occupier, you may be faced with the unfortunate occurrence of an individual falling on your property. The steps that you take following an incident on your property will directly impact the ability of either your insurer, or counsel, to defend an occupiers' liability claim.

In the event that someone slips, trips, or falls on your property, an occupier should:

1. Provide immediate assistance to the injured person, including calling an ambulance if necessary.
2. Record the name of the injured person, their contact details, information pertaining to the injuries that they allege to have sustained, and any information they may offer on how the loss occurred. This information should be recorded, if possible, in a verbatim manner.
3. Record the names and contact information of any witnesses, including a description of how the loss occurred.
4. The loss area should be thoroughly inspected and documented with photographic evidence immediately following the loss. This includes documenting any alleged hazard that caused or contributed to the loss.
5. Complete a formal Incident Report which should include, at a minimum, the date and time of the incident, the date and time the incident was reported, the weather conditions, the specific location of the loss, the name of the individual completing the form along with their title and contact information, names and contact information of any witnesses, a description of the incident by the person completing the form, a description of the incident from the injured person or witness, a description of any injuries and assistance provided, whether an ambulance was called, a description of any corrective action taken, and the signature of the individual completing the report. The report should also indicate whether an ambulance was called to the scene. Whether photos of the loss area were taken, if the loss was captured by CCTV footage, and whether said CCTV footage was preserved.

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Jennifer is a member of the firm's Insurance Group and is based in Alexander Holburn's Toronto Office. She defends matters relating to complex personal injury, occupier's liability, CGL claims, municipal liability, professional negligence, D&O claims, product liability and recall, property claims, and subrogated claims. Jennifer also handles coverage disputes, and fraudulent claims. She works for insurers, and private clients alike. Jennifer is committed to working with her clients in a collaborative approach to develop a litigation strategy that is mindful of their goals, and needs, as an organization. She is client focused and customer service driven, and is dedicated to understanding her clients' business objectives, in an aim to not only deliver high quality work, but also an exceptional client experience. Jennifer has completed a certificate in Risk Management holds a Canadian Risk Management Designation. As a value-added service to her clients, she can provide advice on risk mitigation and financing, and strategies to reduce claims.

ABOUT ALEXANDER HOLBURN BEAUDIN + LANG LLP

Alexander Holburn is a leading full-service, Canadian law firm with offices in Vancouver, British Columbia and Toronto, Ontario. We have operated in British Columbia for nearly 50 years and opened our Ontario office in 2019. With over 100 lawyers, we provide a full spectrum of litigation, insurance, business, and personal law services for clients based in Canada, the United States, and Europe.

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