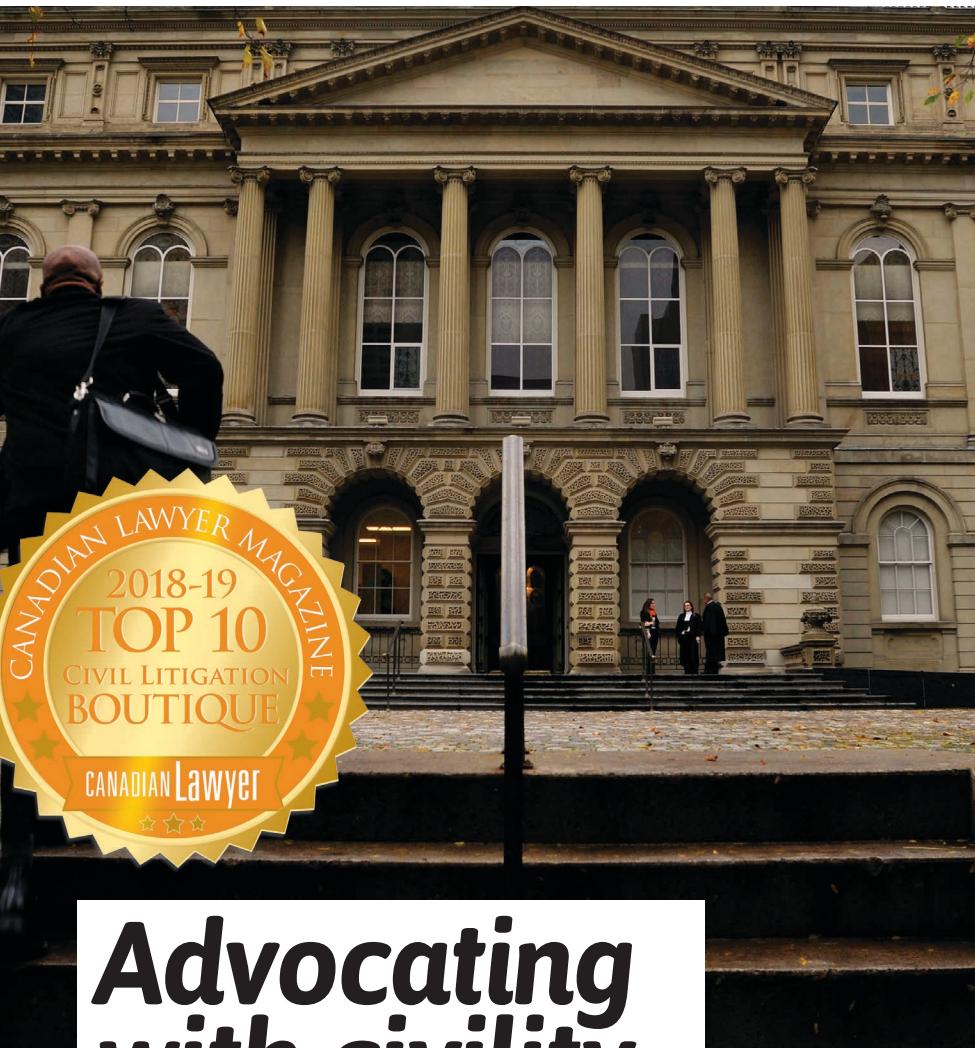


★★★ TOP BOUTIQUES ★★★



Advocating with civility

The top civil litigation boutiques are grappling with complex issues that can wind their way through the courts for many years

By Aidan Macnab

The top civil litigation boutiques are both using and litigating over new technology and charting courses in new territory with unpredictable terrain.

The allegedly imminent marijuana legalization will create opportunities for businesses, formerly only enjoyed by the Hells Angels and other extra-legal entrepreneurs. Turning it legitimate will wrap weed production and sale in red tape, opening the door for civil litigators to enter a unique industry.

Luisa Ritacca of Stockwoods LLP says that, as the pot market ascends from the underworld, there will be businesses trying to enter the game and others adjusting from the current legal grey area to whatever legal marijuana looks like.

“What’s likely to happen on the civil litigation side and the regulatory side is that . . . people who are either already in the industry or people who are interested in

getting into the industry are going to need advice as to how to navigate this new regulatory world,” she says.

“I think there are people who are within the grey market that are going to need to figure out how to exist and how to run their business and decide whether they can in a profitable way once it becomes [a] more legal but heavily regulated market,” she says.

Stockwoods acted for the BC Civil Liberties Association, which intervened in *Google v. Equustek*, a case that Ritacca says has significant implications for freedom of expression on the internet.

In *Google v. Equustek*, the industrial automation firm wanted the global behemoth search engine to remove websites that were selling products developed via theft of intellectual property.

Equustek said that a former distributor for the company had nipped its trade secrets to develop and sell a competing product. It was selling these allegedly ill-designed products with the help, Equustek argued, of the Google search engine. Google, as a third-party facilitator, had an obligation to remove search results that aided the thieves.

Google was willing to remove search results from google.ca but not outside of Canada. With a B.C. court injunction, Equustek demanded a global takedown. Google appealed to the Supreme Court of Canada, with the BCCLA as an intervenor.

Through the Supreme Court, the tech giant with borderless reach was stymied by a ruling that stretched beyond Canadian jurisdiction. Google is responding by filing an application in its native California to have an American court block the Canadian order. Their hope is to be protected by the First Amendment and the Communications Decency Act.

A litigator with plenty of experience in communications law is Ryder Gilliland, who left Blake Cassels & Graydon LLP and started DMG Advocates LLP with two other Blakes alum: Hugh DesBrisay and Kate Manning. Despite being hatched just this January, DMG was voted as a top civil litigation firm.

"We're obviously a young firm with lawyers that come from a large firm environment," says Gilliland, whose practice spans commercial litigation, defamation and privacy law.

Gilliland says he also does a lot of litigation for clients in the auto-manufacturing business and transportation, including class actions.

Having a three-person boutique spawned out of a large firm like Blakes, Gilliland says, is a collaboration that's new to him and an asset to his firm.

"It's not like, in a large firm, I'd be a few steps removed in many cases from working with younger associates. Here, of course, we're working together directly," he says. "That's an important distinction for younger associates. I think it's common not to boutiques generally but to smaller boutiques like ours."

Gilliland has a wide commercial litigation practice, is the former president of the Toronto Commercial Arbitration Society and has experience advising clients in privacy and cybersecurity. But he is most recognizable to the public for his representation of media companies, including the *Toronto Star* during the Rob Ford crack scandal.

More recently, Gilliland represented Metroland Durham Media Group in its successful opposition of a sweeping publication ban on the trial for the Pickering murder of Carmela Knight. The lawyers for one of the two men charged in the murder sought a publication ban on his client's co-accused so as to prevent those proceedings from affecting his client's case, arguing that it might create bias and harm the accused's right to a fair trial.

Gilliland argued that blacking out the whole trial was extreme and juror vetting and the standard instructions to disregard media reports and focus on the evidence would suffice, according to Metroland Durham Region.

Recent highlights for top civil litigation firm Lenczner Slaght Royce Smith Griffin LLP both involve civility. One is the professional misconduct proceedings against prominent securities litigator Joseph Groia; the other is the uncivil use of Chief Wahoo, the red-faced, wide-eyed mascot of the Cleveland Indians baseball team.

Lenczner Slaght litigates a broad range of areas, with commercial litigation, health law and intellectual property being its three biggest areas of practice.

"We're mostly a group of generalists," says managing partner Tom Curry. "We have some specific practice areas, but we like to maintain a generalist's approach. That's a big advantage, I think. I would also say that, within the civil litigation bar, we like to be in court. So, we have that actual experience — courtroom experience — to draw on."

Lenczner Slaght litigators are serving as counsel to Douglas Cardinal, the Ontario architect who has filed human rights complaints in Ontario and federally against Major League Baseball, the Cleveland Indians and Rogers Communications.

Cardinal argued that subjecting Indigenous Canadians to the image of the grinning, feather-donned Chief Wahoo and the name "Indians" is racial discrimination and counter to human rights codes, which prohibit discrimination in the delivery of a service. Cardinal also unsuccessfully sought an injunction during the 2016 ALCS between the Jays and Indians, to prevent any broadcast of the mascot and team name in Canada.

Curry took over the role of managing Lenczner Slaght in January. He says the case will continue through 2018, but the Cleveland Indians have recently added to the drama, announcing they will no longer use Chief Wahoo.

Lenczner Slaght is also involved in the 17-years-and-counting civility battle between Groia and the Law Society of Ontario.

In 2011, the law society found he engaged in incivility while defending John Felderhof of Bre-X Minerals and the Ontario Court of Appeal affirmed the ruling. Civil or not, Groia's defence of Felderhof was successful, as he was

acquitted of insider trading and authorizing misleading news releases.

The case highlights the balance between courtroom civility and the right of those accused of crimes to have fearless and zealous advocates, as well as between law societies and trial judges, when it comes to regulating the courtroom. Part of the controversy is born from the fact that the trial judge didn't make a complaint; the law society took it on itself to get involved.

"That appeal has gone all the way to the Supreme Court of Canada on the question of civility, the responsibility of a lawyer to behave in accordance with the rules of professional misconduct and the issue is whether those duties are inconsistent with the responsibility of a lawyer to be a zealous advocate," Curry says.

Citing an arbitration that has lasted almost as long as Groia's, Irwin Nathanson of Vancouver's Nathanson Schachter & Thompson LLP says that, although more clients seek arbitration these days, its benefits are not always what they seem.

"The benefit of arbitration is you get to pick your judge, you get to have a much earlier hearing, we have the theory that it will be quicker, but it isn't necessarily so for complex matters," Nathanson says.

He points to *JEL Investments Ltd. v. Boxer Capital Corporation, Yanco Management Ltd. and Chung Properties Ltd.* as an example, the case taking 13 years to resolve. But, he says, the case is a testament to the service his firm provides.

"Most litigants can't manage a 13-year battle," Nathanson says.

He says that the volume of documents involved in cases now is a "marked departure" from 20 years ago and technologies such as e-discovery are increasingly necessary.

"It's very important and big cases, you know, one can get overwhelmed with

HOW WE DID IT

Canadian Lawyer asked lawyers, in-house counsel and clients from across Canada to vote on the top civil litigation and criminal law boutiques. They were asked to rank their top firms from a preliminary list, with a chance to nominate a firm that was not included on the list. To be considered in the vote, firms were required to have at least 80 per cent of their business come from civil litigation or criminal law. The final rankings were determined through a points system, in which firms were rewarded on a sliding scale for the number of first to 10th-place votes received.

handling documents, document production, document discovery; the costs can be extraordinary," he says.

"At the end of the day, the senior lawyer or the senior and the junior have to know what's in those documents and that's the ultimate challenge, how to separate the wheat from the

chaff. And you know there's a lot of chaff," he says.

What distinguishes Nathanson's shop, he thinks, is "practical and candid advice," a strategy to deal with the case efficiently and clear advice on risks and opinions, he says.

"It's not uncommon to find [that] a

client gets some pretty bullish advice early on and then within the shadow of the trial the lawyer says you know this is going to be very difficult," Nathanson says, "And the client says, 'I've been at this for two or three years and I'm now being told for the first time that there are problems or difficulties. This isn't right!'"



TOP 10 CIVIL LITIGATION BOUTIQUES

Babin Bessner Spry LLP, Toronto
babinbessnerspry.com

Founded in 2009 by Ed Babin, a former senior litigation partner with Torys LLP and Davies Ward Phillips LLP, Babin Bessner Spry LLP welcomed Cynthia Spry, formerly from Davies and Osler Hoskin & Harcourt LLP, in 2010, and Ellen Bessner, formerly from Gowling Lafleur Henderson LLP and Cassels Brock & Blackwell LLP, in 2014. The firm acts for a wide range of individual, institutional and corporate clients, including Rogers Communications Inc., Sleep Country Canada, the Commissioner of Competition and several major national and local securities dealers. Its practice areas include securities litigation and regulation, corporate governance, director and officer liability, shareholder oppression, fraud, competition, class actions, advertising law, professional liability and discipline and employment. The firm also regularly acts in a variety of public interest and *pro bono* matters.




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