

News

Awards

- **Jean-Paul Bisnaire**, who retires at the end of the year after a decade as senior executive vice-president and general counsel at Manulife Financial, has been named this year's recipient of the Lifetime Achievement Award at the Canadian General Counsel Awards. Prior to joining Manulife, Bisnaire was a senior partner at Davies Ward Phillips & Vineberg.
- **Philippa Samworth**, a partner at *Dutton Brock* in Toronto and one of the country's leading insurance defence lawyers, will receive the 2014 Advocates' Society Medal at a ceremony in Toronto in September. The medal is given to a society member who has made significant contributions to the legal profession and within the community. Also among Advocates' Society awards, *Paliare Roland Barristers* partner **Robert Centa** was to receive this year's Laidlaw Medal, awarded every three years, at the society's end-of-term dinner in Toronto June 19.
- **Frank Iacobucci**, senior counsel at the Toronto office of *Torys LLP*, has received an honorary degree from Lakehead University. The former Supreme Court of Canada justice was recognized for his work related to First Nations, including negotiations that led to the Indian residential schools' agreement of 2005, and his Ontario review last year of First Nations representation on juries.

Appointments

- Halifax labour and employment lawyers **Lisa Gallivan**, a partner at *Stewart McKelvey*, and **Tara Erskine**, partner at *McInnes Cooper*, have been appointed part-time members of the Canadian Human Rights Tribunal for a three-year term.

Federal judge reverses Treasury Board ruling

Major's \$88,000 loss in cross-country housing transfer covered

MICHAEL BENEDICT

When Major Marcus Brauer won his action against the Treasury Board, he also gained a rare victory. Clearly frustrated by Brauer's predicament, Federal Court Judge Richard Mosley awarded him costs on a full-indemnity basis.

"Obviously, there was a certain measure of censure in awarding full costs," says Ottawa military and administrative lawyer Michel Drapeau, a former colonel in the armed forces.

While the case involves a judge interfering with an internal decision, it also raises a troubling issue for at least one administrative law expert.

Brauer, who has been in the military for 26 years, lost \$88,000 on the sale of his house when he was transferred in 2010 from Edmonton to Halifax, where he still serves. When transferred in 2007 to Canadian Forces Base Edmonton, Brauer was unable to obtain housing on the base for his family, including three children and a pregnant wife. As a result, he purchased a home for \$405,000 in Bon Accord, a town of some 1,000 people about 40 kilometres outside of the city.

Between 2007 and 2010, the Bon Accord housing market collapsed, reflecting the global recession in general and the postponement of several anticipated major energy projects in the area. After dropping the listing price twice, Brauer sold his home for \$317,000, a 21.7 per cent loss.

Relying on a Treasury Board policy that allowed for 100 per cent reimbursement of house sale losses in "depressed" markets, Brauer applied for full compensation. The military, however, rejected his request after being informed by the Treasury Board that there were



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Ron Ellis

Administrative lawyer and author

no designated depressed markets in Canada.

Brauer grieved, and the Canadian Forces grievance board took up his cause. It asked the Treasury Board to reconsider favourably his application. But the board upheld its original finding, saying Bon Accord did not qualify as a separate "community" under its policy. Instead, it included Bon Accord in the Greater Edmonton Area where housing prices had declined by only 2.9 per cent between 2007 and 2010, far short of the policy's 20 per cent "depressed" threshold.

Brauer asked the federal court in Halifax to review the decision, and Justice Mosley ruled in *Brauer v. Canada (Attorney General)* [2014] FC 488 that the Treasury Board had acted unreasonably and sent the case back for reconsideration.

"I find that the TBS [Treasury Board Secretariat] decision was unreasonable in the sense that it was not justified and was outside the range of acceptable outcomes defensible in light of the facts and the law," Mosley said.

He also found unreasonable the Treasury Board's failure to consider Bon Accord as a dis-

tinct community and suggested that its decision was "motivated, in part, by oblique considerations related to potential claims by other CF members and not to the applicant's situation in Bon Accord."

Mosley added: "It was reasonable for him [Brauer] to expect that in making the move, he and his family would be protected... That expectation... was not well-founded."

"The employer, through its agent, the TBS, expects the family to bear most of the cost of a dramatic downturn in the market value of their home when they were again posted to a new base. This was clearly not what was intended when the policy was devised by the government."

For Drapeau, the decision shows the courts are prepared to redress arbitrary decision-making. But administrative law authority Ron Ellis, who for 12 years chaired the Ontario Workers' Compensation Appeals Tribunal, said he was concerned about the judge's rationale, although not with the result. Ellis maintains that the Treasury Board exercised an adjudicative function when it ruled on whether Bon Accord was a "community" and

whether it was a "depressed" market. As a result, he added, Justice Mosley was wrong to apply the reasonableness instead of the correctness standard to the Treasury Board ruling.

"How can a court extend deference of respect to a tribunal exercising an adjudicative function when it acknowledges the tribunal is not independent and impartial?" said Ellis, whose *Unjust by Design: Canada's Administrative Justice System* was shortlisted for this year Donner Prize. "The Treasury Board in this case was the ultimate decision-maker and not independent of Brauer's employer."

The danger, added Ellis, is that governments might see this ruling as acknowledging their right to assign adjudicative functions to institutions that have a pro-government bias or are in a conflict situation, believing that the courts will extend them the same deference given to impartial tribunals.

"There would then be no reason to establish independent tribunals to decide these matters," he says.

Meanwhile, Brauer's lawyer, Daniel Wallace, had argued against the court applying the "reasonableness" test, because he feared that would have allowed the Treasury Board more discretion to make its findings. The fact that Justice Mosley rejected Wallace's urging to adopt a "correctness" perspective, but still ruled in Brauer's favour is "an even greater victory," Wallace says. "It makes the decision that much stronger."

Asked whether an appeal was under consideration and for comment on the decision, a Treasury Board spokesperson said, "We are reviewing the decision carefully to determine our next steps with respect to the judgment."

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