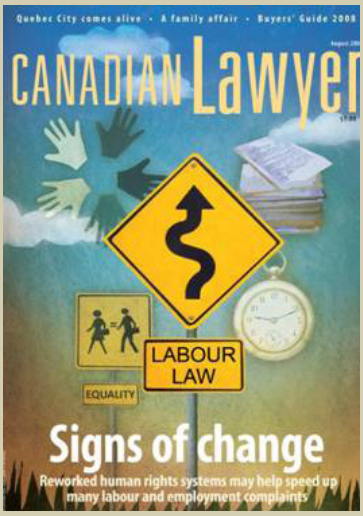

Farris Partner, Al Hudec, features in the August 2008 issue of Canadian Lawyer magazine.

The Right Forum for Commercial Disputes?

With little business law expertise, is the Supreme Court really the best court to decide complex matters like the BCE case?

As appeared in the August 2008 issue of Canadian Lawyer magazine by Philip Slayton.

What a circus! On the morning of June 17, while the Supreme Court of Canada was hearing BeE v. A Group of 1976 Debentureholders, the trading volume of BCE shares doubled, and the stock price moved with every question asked from the bench. The courtroom was full of people with BlackBerrys thumbing out updates, and the market responded in real time to every nuance of the debate. Thirty people had stood in line most of the night as paid sitters, holding spots for lawyers or hedge fund executives. I don't think the Supreme Court has ever seen anything like it, and it reminded us all that the court does much more that decide Charter of Rights cases.

As everyone who has been awake for the last few months knows, in May the Quebec Court of Appeal, in a 5:0 decision, held that a special committee of BCE's board of directors failed to give proper consideration to the interests of certain bondholders when it approved a leveraged buyout. Corporate types and their clever lawyers inveighed against the Quebec court's decision from the moment it was released. The smartest corporate lawyer I know, AI Hudec of Farris, Vaughan, Wills & Murphy LLP in Vancouver, wrote in The Globe and Mail: "I do not believe there is a mergers and acquisitions lawyer in Canada who, before the Court of Appeal decision, would have advised the BCE special committee that it had a duty to balance the interests of BCE's shareholders and bondholders...." The Supreme Court, sitting seven judges (mysteriously, justices Morris Fish and Marshall Rothstein were absent), unanimously overruled the Quebec Court of Appeal and, predictably, the world (or most of it) applauded.

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I'm one of very few who think the Court of Appeal may have got it right (I should disclose that I own some of the bonds in question), but I don't want to get into that. I want to look at how the Supreme Court handled this matter from a procedural point of view - a largely overlooked aspect of the whole drama - and whether the Supreme Court is an appropriate venue for deciding this kind of business law problem. The Quebec Court of Appeal handed down its "shocking" (according to the newspapers) judgement on May 21. All commentators agreed that, were the decision to stand, the BCE buyout was dead. Under various agreements, the transaction had to close by the end of June. The only hope for BCE was to obtain leave to appeal to the Supreme Court, argue the appeal, and have the appeal decision overruled - in less than six weeks.

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How likely was that? Very, was my initial view. First of all, it would be a strong judicial statement for the Supreme Court even to grant leave to appeal from a unanimous Court of Appeal sitting five judges - a normal panel is three - let alone to overrule its decision. Second, the facts and legal arguments were complex. At the 28-day trial, there were thousands of exhibits, tens of thousands of pages of affidavits and other documents, over 1,000 pages of written arguments, and 25 volumes of authorities. How could the Supreme Court possibly make sense of all that in the time available? Thirdly, the Supreme Court is not a strong commercial court. Only one or two of the justices has knowledge and experience in the area. The temptation to duck must have been strong. And, finally, summer is coming and judges want to go to their cottages as much as anybody else.

Immediately following the Quebec Court of Appeal's decision, BCE sought leave to appeal to the Supreme Court. A few days later, the court gave the parties until May 30 to file the application for a hearing and responses, and said it would hear the case on June 17 if leave were granted. On June 2, leave was given; the appellant was instructed to file its papers by June 6; the respondent, by June 10. The hearing was on June 17, and judgement was given on June 20, with "reasons to follow."

Contrary to what I expected, the Supreme Court moved decisively and with unprecedented speed. Was it right to do so? Most think the court had to give leave, notwithstanding the 5-0 decision of the appeal court; after all, the hubbub created by the decision below presumably meant that the legal issues were important. And, because of the deal's timetable, granting leave to appeal would be meaningless unless the court was ready to dispose of the matter on its merits by the end of June. Hats off to the Supreme Court, many said; it understands the real world! One senior corporate lawyer e-mailed me: "They did everything that could have been asked of them in responding under impossible timelines, and then getting it right."

But wait a minute. Another way of looking at it is that judges who don't know much about corporate law gave a final answer to a crucial and complex question without having had enough time to carefully consider the matter - and did it to meet the timetable of leveraged buyout artists and hedge fund managers. Is that a responsible approach for a final court of appeal?

There is unease about the Supreme Court's role in business law. Some suggest we need a separate commercial court system, filled to the brim with corporate and commercial expertise, that enjoys the complete confidence of the business community. Or should business law issues be shifted into the world of arbitration, perhaps finding a home at the International Chamber of Commerce's International Court of Arbitration?

The court has a vacancy at the moment. Instead of fussing about whether the new judge should be completely bilingual, shouldn't we be concerned about whether he or she understands the commercial world and business law?