

## Runaway Litigation

# Lawyers and cabbage | Marcel Strigberger

By **Marcel Strigberger**



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(October 7, 2019, 8:41 AM EDT) -- I am often asked how a lawyer who retired two years ago, spends his day. How about cabbages? That's right. Buying or trying to buy a cabbage.

I attended a mammoth American superstore in the GTA, with my wife the other day. Shoshana is a fiend for price match deals. She runs through the daily deals on some Flipp app and once at a store with a price matching policy, she proudly waves her mobile at the competitor's cashier.

Her recent treasure find were cabbages, on sale at a local supermarket for \$1.99 apiece. This behemoth store advertises that it price matches competitors. It had these large and handsome cabbages stocked nicely selling for 97 cents per pound. I picked up one of these suckers and it definitely weighed more than two pounds. It did not take Arnold Schwarzenegger to see that it had the weight of a hardy sized medicine ball. It was probably big enough to make enough cabbage rolls to feed a whole province in eastern Europe.

And given the price match (we anticipated), it was a steal at \$1.99 all in. Shoshana put it into the shopping cart, but I lifted and hauled it as that day I had not yet gotten my exercise at the gym.

We arrived at the cashier, with large smiles. As the cashier was about to weigh the prize cabbage, Shoshana whipped out her cell phone and proudly waved the display at her, noting that it should be a flat \$1.99.

The cashier examined the mobile evidence and replied "Price match does not apply as the deal is different. They sell by piece and we sell by weight."

After a couple of moments of this banter, seeing Shoshana getting nowhere with this adjudicator, I decided to come out of retirement. I got fired up. I recalled those literary lines from Lewis Carroll's *Through the Looking Glass*: " 'The time has come,' the Walrus said 'to talk of many things. Of shoes and ships and sealing wax, of cabbages and kings.' "

I mustered my legendary legal eloquence and said to the cashier, "A cabbage is a cabbage. It's all the same."

This argument went up like a lead balloon. Or should I say a lead cabbage? As I realized her ruling was decisive, my instincts told me there was likely an appellate process. I asked to speak to a manager.

The cashier left her post and soon returned with a manager. Before I could present my case, this person of higher authority said to me that she listened to what the cashier had told her, and she agrees that there would be no price match here.

I was flabbergasted. Firstly, I hadn't lost an appeal in over two years. And now I got my appeal dismissed, and the appellate justice did not even bother hearing from the appellant's lawyer. Bada bing, bada boom.

We left that beautiful specimen of a cabbage behind. Alas!

I was really fired up now. I was not done yet with cabbage court. I did some legal research online. I found out there was recourse to a higher branch of appeal. I had to e-mail my arguments to some customer service department.

Presumably this was a tribunal of final resort, to wit, the superstore's Supreme Court of Canada. I wasn't sure how many "judges" would be hearing this matter. I was optimistic.

Given my years of superlative drafting skill experience while at the bar, I sent off an articulate and impassioned e-mail. I summarized what transpired at the hearing of first instance and at the first appellate level.

I even included the ad from the competitor, (exhibit A).

Within a day I received a decision. I should have guessed where this was going, from their e-mail address, the prefix being, "heretohelp."

It was a rather generic ruling. Their e-mail did not address our specific issues at all. It set out the mammoth, giant, behemoth retailer's "ad match policy," noting among other things, that it does not apply to "used or refurbished items." One thing for sure, that cabbage did not look used or refurbished.

It concluded with the words, "Please do not reply to this e-mail."

It did list an 800 number and noted that you can call them seven days a week, "if this issue was not resolved to your satisfaction."

It seemed there was yet another appellate forum. I called and went through a multiple choices voicemail menu. These included, store hours, return policy and looking for a career with that store.

None of them even came close to anything like, "Press seven if you're having problems with our cabbages." OK, I did not quite expect that option but, "disgruntled former customer" would not have been unreasonable.

I eventually did reach a gentleman who when I asked him where he was, replied "offshore." I thought to myself that I never argued a case before in the World Court. This may not be The Hague, but it was good enough.

He listened to me and then put me on hold to confer with his fellow adjudicators. He soon returned and advised me that there was no match as basically a piece does not equal a pound. Appeal dismissed. I did not bother asking if any of his confrères dissented.

Notwithstanding the result, I must say it felt good stepping into the ring again.

However, it occurred to me that while in practice I ran into my share of lawyers who litigated vigorously and endlessly, steaming like a runaway locomotive, without regard to proportionality. It reminded me of the wise words in Kenny Rogers' song, *The Gambler*, where he says, "You've got to know when to hold 'em. Know when to fold 'em, know when to walk away."

Who would have ever thought I'd be relearning a serious professional lesson, but it became clear to me that too many lawyers let their ego or financial needs run their case decisions, totally ignoring value to client. Maybe that's part of the reason many folks are unable to afford legal services and the legal profession often draws raised eyebrows.

I suppose I was able to afford this luxury game. But I don't recommend my colleagues trying it in their practice.

So, to answer that initial question, this is one way a retired lawyer spends his day. At least I got a good workout carrying that cabbage to the cashier.

*Marcel Strigberger retired from his Greater Toronto Area litigation practice and continues the more*

*serious business of humorous author and speaker. Visit [www.marcelshumour.com](http://www.marcelshumour.com).*

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