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BLG MONTHLY UPDATE

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The BLG Monthly Update is a digest of recent developments in the law which Neil Guthrie, our National Director of Research, thinks you will find interesting or relevant – or both.

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ABORIGINAL/CONSTITUTIONAL/ CIVIL PROCEDURE

River gains legal personality in New Zealand

In a framework agreement signed in August by the Crown and the Whanganui Iwi, a local Maori people, the Whanganui River has been recognised as 'an integrated, living whole from the mountains to the sea' and a legal entity with the rights and capacity of a natural person. Portions of the riverbed which are owned by the Crown will vest in the entity, known as Te Awa Tupua, and will be under the guardianship of two persons, one appointed by the Crown and the other by the Whanganui Iwi. A 'set of Te Awa Tupua values' to guide decision-makers will be developed, and will form part of a comprehensive strategy for the development and conservation of the river. New Zealand is not the first country to do this sort of thing: articles 71-74 of the 2008 constitution of Ecuador grant rights to the natural environment, which may be enforced by (human) individuals or groups.

[Link available **here, here, here** and **here**].

ADMINISTRATIVE

Municipality's sale of surplus property quashed

Halifax Regional Council decided to sell a surplus school property, but initially did not allow local community non-profit groups to make submissions before selling it to a developer – and for a price that was significantly below the market value of the property. Community groups were later able to make proposals, but as part of the RFP for private developers. Four community groups challenged the decision to sell the property to JONO Developments. The council rescinded that decision pending review of the sale process, but subsequently upheld the award to JONO. The community groups then sought judicial review: *North End Community Health Association v Halifax (Regional Municipality)*, 2012 NSSC 330.

MacAdam J held that the municipality owed a duty of fairness to the community groups; this required the municipality to follow its own process and afford local community groups the right to make submissions *before* other parties were asked to submit bids. Failure to follow an established procedure was a violation of procedural fairness and the legitimate expectations of the community groups. It wasn't necessary to show that the latter had actually relied on the fact that the procedure would be followed; as long as there is a procedure, it must be followed. The community groups were also successful in demonstrating that the municipality had breached its governing legislation in approving a sale at a price that was significantly below market value. The standard of review of the council's decision was correctness, the judge concluded, although he thought the determination of price was to be reviewed on a standard of reasonableness. The sale price was clearly unreasonable, given that it was $1 million less than market value and evidence that JONO was prepared to pay market value if need be. On a correctness standard, the sale could not be upheld because the governing legislation provides that a sale of surplus property at less than market value may be made only to a non-profit organisation.

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ARBITRATION/CLASS ACTIONS/ CONSUMER PROTECTION/ PERSONAL PROPERTY

Arbitration clause upheld in virtual pets case

Slide Inc., subsequently acquired by Google, offered consumers the ability to adopt, care for and interact with virtual pets on an online platform. Basic access was free, but consumers had the option to spend real money on their virtual pets through the purchase of 'gold', which could then be used to buy 'virtual items in order to customize a pet's environment', as well as VIP subscriptions with exclusive content not available to ordinary users.

(PT Barnum had a line about this sort of thing, didn't he?) When Google bought Slide, it announced some changes to the scheme: after a certain date, no more gold would be available for purchase, any credit in gold accounts would be forfeited to Google and VIP subscriptions would cease to be sold. A few months later, the whole scheme was terminated. Christalee Abreu brought class proceedings against Google, arguing that the decision to suspend gold purchases and VIP memberships caused basic users to sign up for VIP access while they could and to stockpile virtual items purchased with gold for future sale to other users. The decision to terminate the game deprived users of their property rights in the virtual pets and the items bought for them, rendering them essentially worthless. Google countered by pointing to the arbitration clause in the user agreement, which pre-empted litigation.

The California district court upheld the arbitration clause, in spite of the plaintiffs' argument that it was unconscionable: *Abreu v Slide Inc*, 2012 US Dist LEXIS 96932 (ND Cal, 12 July 2012). Alsup J concluded that the clause was not 'so one-sided as to shock the conscience' of the court, even though it permitted Google to seek injunctive relief but precluded a consumer from seeking the same remedy, required a $125 filing fee by a consumer with a claim under $10,000 and mandated a 30-day informal negotiation process before arbitration or any court proceeding could be initiated. Google's motion to compel arbitration was granted. Maybe on appeal, if there is one, there will be more discussion of the legal nature of virtual property.

CIVIL PROCEDURE

Costs order can take parties' financial situation into account, Ontario judge reminds

Both parties in *Thompson v Gilchrist*, 2012 ONSC 5154, 'behaved reasonably throughout' the proceedings (a custody and access case). Minnema J noted, however, that he was, in considering 'any other relevant matter' under Ontario's costs rule, entitled to consider the relative financial positions of the parties. In this case, Gilchrist had no ability to absorb her own costs, and while Thompson's means were limited, this did not 'afford him immunity to a costs order'. Thompson was ordered to pay $12,000 in costs, inclusive of disbursements and GST, enforceable as support. See also *Murray v Murray* (2005) 79 OR (3d) 147 (CA).

[Link available **here** and **here**].

'For wine, timing is critical. The same is true for causes of action'

So said Koeltl J of the 2d Circuit in dismissing claims brought by William Koch against Christie's, the auction house, for its alleged part in a scheme to sell wine that was fraudulently described as having come from the private stock of Thomas Jefferson (new wine in old bottles, essentially): *Koch v Christie's International plc* (2d Cir, 4 October 2011). Hardy Rodenstock claimed to have discovered the wine in a bricked-up cellar in Paris in the 1980s. Doubts were expressed about the authenticity of the wine pretty much from the get-go, including in a report commissioned by the curator at Monticello, Jefferson's house in Virginia, in 1985. Koch alleged that Rodenstock had a 'longstanding and symbiotic relationship' with Michael Broadbent, the in-house wine expert at Christie's, which initially offered the wine for sale at auction. Koch's purchases of some of the 'Jefferson' wine in 1987 and 1988 were from Rodenstock or other wine dealers, but allegedly in reliance on representations made by Broadbent in Christie's materials. In the face of mounting doubts about the provenance of the wine, Koch considered legal action in 1993 and 1995, but did nothing; scientific tests he commissioned in 2000 proved in his view inconclusive. In 2006, Koch obtained a copy of the 1985 Monticello report and sued Rodenstock 18 months later. Rodenstock, a German resident, did not appear and default judgment was entered against him. In 2010, Koch went after Christie's.

The district court dismissed Koch's claim as time-barred: he was sufficiently on notice of a potential claim when he submitted his bottles for testing in 2000, and limitation periods under both the *Racketeer-Influenced and Corrupt Practices Act* and New York common law had passed. On appeal, the 2d Circuit agreed. Koch's claim accrued on discovery of his injury, and this had clearly occurred in 2000 (if not earlier). Both the statutory and common-law limitation periods are triggered when a plaintiff has reasonable notice that there may be a claim but fails to investigate it. In 2000, Koch clearly had sufficient 'storm warnings' to put him under a duty of inquiry, and sufficient knowledge of facts that would suggest to a reasonable person that there had been injury. The 2000 tests had indicated, in fact, that there was a more than 90% probability that the wine was fake. Koch's lack of reasonable diligence in investigating a potential claim also deprived him of the argument that alleged fraudulent concealment on the part of Christie's suspended the limitation period.

Ontario judge criticises 'motions culture' as waste of scarce judicial resources

Justice David Brown of the Ontario Superior Court of Justice isn't shy about criticising what he sees as problems with the civil justice system. In *Kaptyn v Kaptyn*, 2011 ONSC 542, he lambasted the parties' waste of court time in a four-day trial that involved 14 pre-trial motions and racked up $4.4 million in costs; then in *Romspen Investment Corp v 617666 Canada Ltée*, 2012 ONSC 1727, he characterised 'the systemic failures and delay' of the court's document-management and case-scheduling systems as 'a scandal'. In *George Weston Ltd v Domtar Inc*, 2012 ONSC 5001, Brown J decries a 'motions culture' which prefers to consume chronically scarce judicial resources with process-related skirmishes instead of proceeding to an actual trial on the merits. Hearing two matters together in *George Weston*, Justice Brown declined to schedule summary judgment motions for either of them, imposing timetables to get things 'moving ... along to final adjudication'.

Chris Bredt, Markus Kremer and Matthew Furrow of the Toronto office of BLG represented George Weston Ltd.

[Link available **here, here** and **here**].

Towards a taxonomy of vexatious litigants

In a judgment that is exhaustive and amusing (when it isn't faintly depressing), Rooke ACJ of the Alberta Court of Queen's Bench provides a taxonomy of vexatious litigants, which he puts under the general heading of those who rely on an Organized Pseudolegal Commercial Argument (OPCA): *Meads v Meads*, 2012 ABQB 571.

By this the judge means the litigants who waste court time with the 'your laws do not apply to me and violate *Magna Charta* anyway' kind of argument. Sub-species of the OPCA litigant include Detaxers ('tax laws, in particular, do not apply to me'), Freemen-on-the-Land and Sovereign Men ('all state action is slavery'), the Church of Ecumenical Redemption International and other self-styled religions that just want to smoke weed, and Moorish law advocates (a 'mad and delusional' amalgam of the Nation of Islam and aboriginal concepts, it would appear), but the class of OPCA litigants – sadly – does not appear to be closed to new varieties.

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CONSTITUTIONAL

Public-interest standing in constitutional cases

The Downtown Eastside Sex Workers United Against Violence Society and Sheryl Kieselbach, a former prostitute now working as a violence-prevention counsellor, want to bring a constitutional challenge to the *Criminal Code*'s provisions on prostitution.

At issue in *AG v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, was whether they had standing to do so. As Cromwell J notes in the opening of the judgment, limitations on standing are necessary to weed out marginal cases and busybody litigants. The test that has emerged for standing in a case involving public law is whether (a) the case raises a serious justiciable issue, (b) the party seeking standing has a real stake or genuine interest in the outcome and (c) whether the proposed suit is a reasonable and effective means to bring the case to court. The three elements are 'interrelated factors that must be weighed together'.

Justice Cromwell decided in favour of the respondents on all three points, affirming the decision of the BC Court of Appeal (which had reversed the judge at first instance). The analysis of the three elements of the standing test should be flexible and purposive. The last, in particular, has tended not to be considered rigidly and should be applied purposively. The respondents clearly raised a serious justiciable interest, and both the Society and Kieselbach have a genuine interest in the outcome of the litigation, being 'deeply engaged' in the lives of sex workers on the streets of Vancouver. The judge at first instance took an overly rigid approach to the third element in concluding that a constitutional challenge to prostitution laws would be more appropriately advanced in the context of the criminal prosecution of an individual charged under them – for example the *Bedford* case which was on-going at the time (*Bedford v Canada (AG)*, 2010 ONSC 4264, rev'd in part 2012 ONCA 186). While the existence of actual or parallel litigation is relevant, it is not necessarily a sufficient basis for the denial of standing. *Bedford* was happening in another province and would not be binding in BC; it therefore might not provide a full response to a plaintiff in the latter. It also dealt with different constitutional issues and not the entire legislative scheme. A summary conviction proceeding for prostitution offences might not be ideal for a constitutional challenge. The judge also underestimated the difficulties that someone in the Society's constituency would face in mounting a constitutional challenge: these are people whose families and friends may not know what they do for a living and who fear the violence of their customers or the potential loss of custody of their children. The marginal nature of what they do may make it impossible for them to take part in constitutional litigation. The respondents could, in contrast, bring an effective challenge to the legislative scheme as a whole, without adversely affecting anyone with a more personal or direct stake in it. Letting them proceed with the challenge also had the benefit of conserving scarce judicial resources.

[Link available **here, here** and **here**].

CONTRACTS

Clause acknowledging contract's ambiguities not enough to render it unenforceable

Some unusual drafting in the pre-nuptial agreement signed by James and Judy Newman just before they got married in 2007: a handwritten addition stated that 'there are certain ambiguities contained [within] the body of this document which each party agrees to clarify and re-write within 30 days of the date of execution hereof'. Judy filed for divorce four years after signing, and wanted to enforce the pre-nup's provisions on dividing up their property. James argued that the handwritten language made the rest of the document an unenforceable agreement to agree.

The Supreme Court of Georgia agreed that a mere agreement to agree would be unenforceable, but didn't think the pre-nup fell in that category: *Newman v Newman* (SC Ga, 1 October 2012). Nothing in the rest of the document indicated that it was 'incomplete or tentative' at the time of execution, James could not identify any essential term that was left to future negotiation and the contract as a whole appeared to contain all the key terms of the couple's bargain (including how their property was to be divvied up on divorce). This left the court to conclude that it was some non-essential term that had been left to be resolved, but nothing that rendered the agreement as a whole unenforceable.

Take notice of notice provisions

A dispute over notice provisions in a contract took the parties in *Ener-G Holdings plc v Hormell*, [2012] EWCA Civ 1059, to the English Court of Appeal, and deprived one of them of a £2 million claim relating to a sale of shares. Under the sale contract, Ener-G as buyer of the shares was required to notify Hormell, the seller, of a claim for breach of warranty, but the claim would lapse if Ener-G failed to serve court documents on Hormell not more than a year after notifying him of the breach. The agreement provided that notice was to be provided in writing, going on to say that it 'may be served by delivering it personally or by sending it by pre-paid recorded delivery post'. Any notice delivered personally was deemed to be received when delivered; if sent by recorded delivery post, two days after posting. The agreement also stated that court documents could be served in accordance with the notice provisions or 'in any other manner allowed by law'. Ener-G realised that it had a claim for breach of warranty and notified Hormell in two ways: (1) a process server delivered a notice to his house on 30 March 2010, leaving it in the front porch because no one was home; and (2) an identical notice was sent by recorded delivery post the same day. Ener-G did not serve a court claim form on Hormell until 29 March 2011, when a process server put it through the letter-box at Hormell's house. Hormell read the notice left at his house on the day of delivery; the notice sent by mail was deemed to have been received on 1 April 2010. Under the rules of court, service of the claim form occurred on 31 March 2011. The central issue was whether Ener-G's claim had lapsed because it had not been served within the one-year window: Ener-G needed to establish that notice had been served on or before 2 April 2010 and that the claim form had been served no more than a year after that date.

The trial judge concluded that Ener-G's claims failed, and a majority in the Court of Appeal agreed. Lord Neuberger of Abbotsbury MR held that delivering the notice 'personally' meant service on Hormell personally, not service by the server personally. The second issue was whether the methods of notice set out in the contract were permissive or exclusive: given the use of 'may', they were permissive. Neither the first notice nor the court claim form was delivered personally; but, given the permissive nature of the notice provisions, the first notice was nevertheless validly served on 30 March 2010 and the claim form deemed to have been served on 1 April 2011. This had the effect of putting Ener-G out of time by a day. Ener-G couldn't rely on the second notice as retrospectively causing the first notice to have been invalidly delivered. As Gross LJ (concurring with the Master of the Rolls) said, 'by leaving service [of the claim form] until so late in the day, the Appellant has been the author of its own misfortune'. Longmore LJ, on the other hand, while agreeing about 'personal' delivery, dissented on the methods of delivering notice. They were exclusive, not permissive: notice 2 was therefore good in his view, and the claim form within time.

[Link available **here**].

CONTRACTS/DERIVATIVES

The case of the multi-million dollar hyphen

We've seen a case where an extra comma made a million-dollar difference: *AMJ Campbell Inc v Kord Products Inc* (2003) 32 BLR (3d) 90 (Ont SCJ); now there's one involving a hyphen potentially worth a great (but unspecified) deal more. Concessionária do Rodoanel Oeste SA borrowed $895 million from a group of banks and entered into interest-rate swaps with a further group of hedge providers in order to protect the parties from sudden spikes in interest rates. The swaps were governed by the 2002 ISDA master agreement and the related schedule. Interest rates plunged, making the swap agreements very favourable to the hedge providers. Rodoanel gave notice of its intention to prepay the loans, which it could do under the loan documentation without penalty. The hedge providers pointed to the ISDA master agreement, which requires payment of 'Close-out Amounts' on early termination, including (a) the costs of liquidating and replacing the terminated transactions and (b) the value of remaining rights under the terminated transactions (the mark-to-market (MTM) amount, or net present value of expected future cash flows from the swap). Rodoanel pointed to the ISDA schedule, which provides that 'no Close Out Amount' (note the absence of a hyphen) is due on pre-payment. In an action for breach of contract, the hedge providers contended that the schedule relieved Rodoanel of the obligation to pay the liquidation cost but not the MTM amount, arguing that the difference in punctuation between the ISDA master agreement and the schedule created an ambiguity that could be resolved only through extrinsic evidence.

The New York Supreme Court appears to have bought that argument, but the Appellate Division did not. Consideration of the entire swap agreement favoured Rodoanel's position that 'Close-out Amount' and 'Close Out Amount' were intended to mean the same thing. The ISDA master sets out a number of early termination events (not including pre-payment) which are subject to the payment of 'Close-out Amounts', but the schedule goes on to add others (including pre-payment) which are not (even if the punctuation of the defined term is different). The hedge provider's argument that the MTM amount was still payable was simply 'irrational' and their breach of contract claim had to fail. If they had wanted Rodoanel to be on the hook for payments on early termination, they could (as commercially sophisticated parties) have simply negotiated that and expressed it clearly. Ultimately, 'the words and not the punctuation guide us' in contractual interpretation; obvious mistakes in grammar, spelling or punctuation should not vitiate otherwise clear statements of contractual intention.

Banco Espírito Santo SA v Concessionária do Rodoanel Oeste SA (NY App Div, 1st, 18 September 2012)

[Link available **here**].

CONTRACTS/EMPLOYMENT

Collateral warranty defeats subsequent written terms

Thinc Group recruited Ashley and Helen Armstrong as independent financial advisers. During the course of protracted oral negotiations,Thinc offered the Armstrongs a payment of 50% of their previous year's gross income, as an inducement for joining the company and bringing their significant customer base with them. The only condition was that they had to remain with Thinc for 3 years. The parties then entered into a written agreement (which did not contain an 'entire agreement' clause), which provided that the upfront payment would be repayable on the occurrence of a 'repayment event', including termination of the contract by Thinc for any reason. As you have by this point expected, Thinc terminated the Armstrongs' employment within 3 years and asked for the repayment of the inducement.

The English Court of Appeal has upheld the trial judge's finding that the oral representation was a collateral warranty which overrode the written terms: *Thinc Group v Armstrong,* [2012] EWCA Civ 1227. Thinc's oral assurance to the Armstrongs that there were 'no other conditions' precluded it from relying on subsequent terms which were at odds with that. Looking at the commercial realities, it was clear that the inducement was intended as the price of the goodwill of the Armstrongs' previous business, and the fact that the written agreement did not address the transfer of their client base suggested that it did not represent the whole of their bargain with Thinc. The written agreement did contain a 'no reliance' clause stating that the parties had not relied on earlier representations, but Thinc conceded that this did not preclude the existence of a collateral warranty. There was an odd clause in the written agreement allowing Thinc to resolve ambiguities between that document and 'any other contract or agreement', but Thinc's reliance on it was what Rix LJ called an 'own goal': the clause effectively recognised that there might be other agreements between the parties out there, including a collateral warranty.

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CORPORATE GOVERNANCE

Use of mobile devices during board meetings a breach of fiduciary duties?

So argues Mark Rogers, a US corporate governance wonk, in a recent article. In his view, too much time spent on mobile devices at directors' meetings prevents board members from exercising their duties of care and skill, which is ultimately not in the best interests of the corporation they serve. A complete ban on mobile devices at meetings may not be workable, however: it might turn away gadget-addicted potential directors, inhibit emergency access to individual directors and prevent legitimate use of tablets as a way to review board materials during a meeting. (Directors should, however, probably be discouraged from using tablets to take their own notes of meetings.)

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CORPORATIONS/SECURITIES

BC Court of Appeal reverses problematic decision on empty voting

Telus wanted to consolidate voting and non-voting shares into a single class. Mason Capital, a US hedge fund, objected to the proposal, arguing that it would confer a windfall on holders of the non-voting shares at the expense of holders of the voting shares (which have traditionally traded at a premium). In response to the company's proposal, Mason hedged its risk by taking long and short positions on the two classes of shares. It also requisitioned a shareholder meeting to prevent the share consolidation – or, rather, it caused CDS (the registered holder of Mason's shares) to do so. Under the BC *Business Corporations Act*, only a registered shareholder with a beneficial interest in the shares may requisition a meeting. Because Mason was a beneficial but not a registered shareholder, it was not, in Justice Savage's view, a true party to the requisition. Without knowing 'precisely' who had requisitioned the meeting, Telus was unable to exercise its statutory duties to respond to the requisition. The judge also clearly expressed sympathy with the view that shareholder democracy is subverted when a shareholder whose economic interests are 'not aligned' with other shareholders is allowed to requisition a shareholder vote. The judge seems to suggest that there could be circumstances where a board would be justified in refusing to hold a meeting requisitioned by an 'empty' voter – that is, one with economic interests that are at odds with those of other shareholders.

Sensibly, the BC Court of Appeal has reversed. Groberman JA held that the chambers judge 'erred in reading into the statute a requirement that the beneficial owners of shares be identified in a requisition'; the legislation refers to a requisitioning 'shareholder' and CDS qualified, as registered holder. A company does need to know whether the requisitioning shareholder has the required level of holdings and be able to communicate with it, but Telus was certainly in a position to know and do this vis-à-vis CDS. There is nothing in the legislation to suggest that Telus needed to look behind CDS to the underlying beneficial holder. Much less to question the motives of a beneficial shareholder like Mason Capital, as 'nothing in the [relevant provisions] allows a court to disenfranchise a shareholder on the basis of a suspicion that it is engaged in "empty voting".' Mason Capital's position that the historic premium attached to its shares should be preserved was a 'cogent' one that could be advanced by any shareholder. While Mason Capital's hedging activities were cause for 'a strong concern that its interests are not aligned with the economic well-being of the company', there is nothing in the statute which prohibits this activity or which allows a court to intervene on equitable grounds. If empty voting is something that subverts shareholder democracy, then it's up to legislatures and securities regulators to fix that.

Gordon Johnson of the Vancouver office of BLG acted for CDS.

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CRIMINAL/DEFAMATION/SOCIAL MEDIA

UK Director of Public Prosecutions to develop guidelines on social media

The United Kingdom's *Communications Act 2003* makes it an offence to send communications over a public electronic network if they are of 'menacing character', as we saw in the September Monthly Update with the case of the tweet in jest about blowing up an airport, and also if they are 'grossly offensive'.

Possibly in the latter category were remarks on Twitter about British Olympic divers Tom Daley and Peter Waterfield made by Daniel Thomas, a semi-professional football player. The tweet was originally sent to the footballer's friends and family but retweeted to a much larger audience. The Crown Prosecution Service concluded that while the comments were certainly offensive, it was probably not in the public interest to bring criminal charges against Thomas. Rights of free expression must be balanced against the need to prosecute serious wrongdoing; 'context and circumstances are highly relevant'. Thomas's tweet was clearly intended to be humorous and for a small group of followers; he did not send it to either Daley or Waterfield directly, and quickly expressed remorse when the whole thing went public. The Director of Public Prosecutions will be developing guidelines to assist prosecutors in determining whether a tweet will warrant criminal prosecution: in his view, 'the time has come for an informed debate about the boundaries of free speech in an age of social media'.

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EMPLOYMENT

Does Workers' Comp have to pay for your medical marijuana?

Quite possibly, said a Saskatchewan Queen's Bench judge in *Heilman v Workers' Compensation Board*, 2012 SKQB 361. Carey Heilman suffers from chronic back pain resulting from a workplace injury. After many other kinds of drugs failed to alleviate that, he was prescribed a daily dose of 4 grammes of marijuana, which he consumes by smoking and with a vaporiser. Heilman's licensed provider currently doesn't make him pay but is likely to change that, so Heilman claimed the cost of his stash under the provincial workers' comp scheme. The claim was denied and two appeals also went against Heilman. The appeal tribunal cast doubt on the efficacy of medical marijuana and cited the provincial board's policy not to compensate a worker for the cost of obtaining, growing or using it. (The board will pay for drugs derived from marijuana in certain circumstances, however.) In reaching its decision, the appeal tribunal also relied on the stated opposition of the board's medical department and medical consultant to the use of medical marijuana in all cases. Heilman sought judicial review of the last round of appeal.

McMurtry J agreed with Heilman that the appeal tribunal had effectively fettered its discretion by delegating its decision-making power to the medical department and medical consultant; the tribunal had failed to make its own determination and therefore made an error of jurisdiction. The case was remitted to another tribunal appointed under the statute for a decision in accordance with the law.

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EVIDENCE

Be careful of e-mail auto-delete function if litigation in prospect

One battle in the patent infringement war between Apple and Samsung concerns spoliation of evidence. Apple contended that Samsung's use of an auto-delete setting in its e-mail system should give rise to an adverse inference that Samsung had destroyed documents that were unfavourable to its case: *Apple Inc v Samsung Electronics Co Ltd*, 2012 US Dist LEXIS 103958 (ND Cal, 25 July 2012).

Grewal J of the northern district of California noted that Samsung's reliance on auto-delete had proven problematic in earlier litigation (*Mosaid v Samsung*, 348 FSupp 2d 332 (DNJ 2004)) and was no less so in these proceedings. Samsung's system automatically deleted an e-mail after the passage of two weeks, in order to minimise the risk of misappropriation or inadvertent disclosure of confidential business information, reduce document-retention costs and comply with Korean privacy law. Samsung received notice of Apple's infringement claims in August 2010 and a few weeks later instructed 'a select handful of employees' that they had a duty to preserve relevant documents. Litigation hold notices went out more broadly to Samsung employees once the Apple claim was filed in April 2011, informing them not to destroy documents which could be relevant to the litigation, and employee meetings were held. At no time, however, did the company verify whether its employees had, in fact, disabled the auto-delete feature on their accounts. Apple argued that Samsung's duty to preserve documents arose in August 2010, while Samsung maintained that the duty arose only as of April 2011. The court agreed with Apple: there was clearly a reasonable likelihood that litigation was on its way as of August 2010, and Samsung's failure to police its employees' document retention practices gave rise to the inference that damaging evidence had been destroyed. Samsung could not avoid sanctions after having taken 'almost no steps to avoid spoliation beyond telling employees not to allow what will otherwise certainly happen.'

INTELLECTUAL PROPERTY

More on single-colour trade-marks

The colour purple, this time. More specifically, Pantone 2685C, the particular shade of purple used on a range of Cadbury's chocolate products (see below), which the company was able to register in 2008 after filing evidence that it was distinctive through use (the trade-mark examiner having initially questioned the registration on that account). Société des Produits Nestlé SA objected to the registration, which was upheld – although for a narrower range of products. Nestlé appealed this to the Chancery Division and achieved some success: the product range was narrowed a bit further to include only milk chocolate, in light of the evidence about which Cadbury products were branded with purple and which were not. The general principle that a single colour may be sufficiently distinctive as to be capable of trade-mark registration was accepted: *Société des Produits Nestlé SA v Cadbury UK Ltd,*[2012] EWHC 2637 (Ch).

[Link available **here**].

LAWYERS

Mandatory *pro bono* requirement for aspiring New York lawyers

If you want to be admitted to the New York bar, as of January 2015 you will need to have completed 50 hours of *pro bono* work, generally 'in the service of low-income or disadvantaged individuals who cannot afford counsel', for tax-exempt organisations or for courts, governments or legislative bodies. Activities in foreign countries will qualify but will require additional documentation. A summer job with a law prof won't, except to the extent it's spent working on the prof's own *pro bono* projects. Volunteering on a political campaign doesn't count, but performing qualifying *pro bono* work while employed at a firm will (unless you get additional compensation for doing it). Community service that doesn't involve providing legal services won't cut it.

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PRIVACY

Ontario privacy commissioner downplays *USA PATRIOT Act* outsourcing risks

Ontario's Ministry of Natural Resources (MNR) stores personal information related to hunting and fishing licences in a database located in the United States, under contract with a commercial vendor called Active Outdoors. Two members of the provincial legislature questioned this practice in light of the ability of US law enforcement agencies to compel the disclosure of personal data under the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (aka the *PATRIOT Act*, winner of the 2001 award for silly statute name).

In response to the MPPs' complaint, the Privacy Commissioner has issued a report, in which she concludes that the *PATRIOT Act* 'has invoked unprecedented levels of apprehension and consternation', but 'far more than ... is warranted.' US law enforcement agencies have long been able to compel disclosure of personal information, so the *PATRIOT Act* doesn't really change anything, and Canada's own anti-terrorism laws replicate many aspects of the US disclosure requirements; this is all part of normal information-sharing between governments. In the commissioner's view, it is fine for government agencies to outsource data-hosting services, provided they do not abdicate accountability for the personal information at stake. MNR's contract with Active Outdoors contains 'robust provisions that protect the personal information under [the ministry's] control and restrict the use of that information' by Active Outdoors, including a requirement to notify MNR promptly of any attempt by US authorities to compel disclosure, giving the ministry the opportunity to seek a protective order or other remedy to limit disclosure. MNR's collection, use and disclosure of personal information comply with provincial privacy legislation and there are sufficient safeguards for information that is in the hands of the ministry's US agent.

[Link available **here**].

Use of initials and publication ban in Facebook bullying case

In *AB v. Bragg Communications Inc*, 2010 NSSC 215, an unknown person created a fake Facebook profile of a teen-aged girl, including photographs and allegedly defamatory sexual commentary about her. The girl's litigation guardian sought to proceed by way of initials, a publication ban and a court order requiring the ISP to disclose the identity of the unknown person. The court concluded that there was no compelling case for protecting the girl's identity, either by the use of initials to describe the parties or by way of a publication ban. The public interest in disclosure prevailed. The Facebook page was no longer accessible and the evidence did not indicate a risk that it would be republished. A *prima facie* case of defamation had been made out, however, and there was no other way to obtain information about the unknown person: the ISP was ordered to disclose information about the unknown person. The judgment was upheld by the Nova Scotia Court of Appeal as a matter of deference to the trial judge on an interlocutory matter where there was no error of law or patent injustice, but with strong endorsement of the principle of open courts: 2011 NSCA 26.

Abella J, writing for the SCC, has affirmed but only in part. While recognising the importance of the principle of open courts and the freedom of the press, she stated that it is also important to protect the privacy of an inherently vulnerable minor from 'the relentlessly intrusive humiliation of sexualized online bullying'. AB may now proceed anonymously to seek disclosure of the relevant IP user or users, although the publication ban will not extend to that portion of the Facebook profile containing no personal information. The costs orders against AB in the Nova Scotia courts were also set aside.

[Link available **here**].

No reasonable expectation of privacy in ISP customer information

The Ontario Court of Appeal has, in *R v Ward*, 2012 ONCA 660, upheld the protocol between police and internet service providers (ISPs) under which the police request information about an ISP's customer who is suspected of committing a child pornography offence, but without obtaining a warrant. While acknowledging that Canadian case law is a bit all over the map on the issue, the court concluded that there is no reasonable expectation of privacy on the part of the ISP's customer; a police request for disclosure of the customer's identity is therefore not an unreasonable search under the *Charter*.

The Sudbury police requested customer information from Bell Sympatico in order to identify the subscriber assigned to three internet protocol (IP) addresses which had accessed child pornography made available on a German website. Bell Sympatico complied. The subscriber, later accused of child pornography offences, challenged this process as an unreasonable search under s 8 of the *Charter*. Both the trial judge and the Court of Appeal stated that s 8 would be engaged only if the accused had a reasonable expectation of privacy in his account information. While anonymity is 'to some degree at least' a feature of internet activity that may enjoy constitutional protection, Ward's expectation of privacy was objectively unreasonable. His contract with Bell Sympatico permitted disclosure to the police where there was alleged criminal misuse of the services, Bell Sympatico had a legitimate interest in making voluntary disclosure to assist in the investigation of alleged criminal activity, and Bell Sympatico was also under a legal duty under privacy legislation to disclose personal information to the police, if certain prerequisites were met.

[Link available **here**].

SECURITIES/DERIVATIVES/ CLASS ACTIONS

Successful class action by municipalities against Lehman Brothers over derivatives

In a long (1,247 paragraphs long) judgment, the Federal Court of Australia has found Lehman Brothers liable to a class of three municipal councils arising from the sale of synthetic collateralised debt obligations (SCDOs), an investment product that Rares J described as essentially 'a sophisticated bet' – and a bet that went disastrously wrong during the financial crisis of 2007.

Grange Securities (later acquired by Lehman) marketed the SCDOs as being like government bonds, readily tradable in a liquid and established market, and suitable for a conservative investment strategy. The risk that the councils would lose their investment was said to be remote. All of this proved to be anything but true. Grange breached its contract with the councils, negligently misrepresented the level of risk involved, engaged in deceptive and misleading conduct under Australian securities law and breached its fiduciary duties as adviser. There was damning evidence in an internal e-mail that Grange not only knew that the SCDOs were 'risky, illiquid, and, if sold, might realise far less than their face value', but also that Grange 'was conscious that the trust its uninformed Council clients had placed in it was being used to Grange's advantage'. Lehman (or rather its trustees in bankruptcy) will have to make good the multi-million-dollar investment losses of each of the councils.

Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in Liq), [2012] FCA 1028

[Link available **here**].

TAX

No GST refund on unused airline fares

Like many airlines, Qantas regularly overbooks flights on the assumption that not all passengers will turn up. Qantas remitted GST on fares received but wanted to get it back in cases where no refund was claimed by the purchaser or none was available. The Commissioner of Taxation took the position that the executory nature of the passenger contracts didn't matter; GST was payable at the end of the tax period in which the 'supply' of services had occurred, not on performance of the contract to provide air services. The Australian federal court reasoned that what the passenger pays for is carriage by air, finding for Qantas.

The High Court of Australia has reversed that judgment in favour of the taxman: *Commissioner of Taxation v Qantas Airways Ltd*, [2012] HCA 41. The majority of the court agreed with the tax commissioner that 'supply' includes rights, obligations and services in addition to the proposed flight. In any event the conditions attached to the passenger contract did not provide an unconditional promise that the passenger and his or her baggage would in fact be carried on a particular flight. Qantas 'supplied something less than that' – merely a promise to use best efforts to get person and baggage from A to B – but even that was a taxable supply for the purposes of GST legislation. Heydon J dissented, for the reasons stated by the court below. He did acknowledge the 'superficially unattractive feature' of the argument put forward by Qantas: it was essentially asking for money that passengers never intended it to have but instead assumed would go to the government. This was not a fatal flaw in the Qantas argument, in his view: to the extent that the tickets were not refundable or passengers failed to exercise rights to a refund, ticket purchasers had no cause for complaint.

[Link available **here**].

TORTS

Can there be *Rylands v Fletcher* liability for fire damage to a neighbouring property?

Yes, but not often and not on the facts of *Stannard (t/a Wyvern Tyres) v Gore*, [2012] EWCA Civ 1248. To refresh your memory, a defendant will be liable for damage to a neighbouring property where (a) the defendant brings a dangerous thing onto his or her land, (b) the danger escapes onto the neighbour's land and (c) the use the defendant has made of his or her land is 'non-natural'. In this case, Stannard carried on business supplying and fitting vehicle tires, storing his supply of about 3,000 of them 'haphazardly and untidily' on part of his premises. Faulty wiring caused a fire to break out in Stannard's workshop; it spread to the tires and ended up totally destroying both Stannard's premises and those of his neighbour Gore. At first instance, Stannard was found not to have been negligent, but liable under the principles in *Rylands v Fletcher* (1868) LR 3 HL 330: a dangerous thing escaped from Stannard's property, Stannard's haphazard storage of the tires was inherently risky (given their 'special fire risk quality') and Stannard's storage of the tires was non-natural in that it was disorderly and exceeded the capacity of a typical storage facility.

The Court of Appeal agreed that there can be *Rylands v Fletcher* liability arising from a fire that starts on a neighbour's property, but after providing a comprehensive review of the authorities, Ward LJ (with whom Etherton and Lewison LLJ agreed) concluded that recovery will be 'very rare'. Under the rule in *Rylands*, it is the 'thing' brought onto the defendant's land 'which must escape, not the fire which was started or increased by the "thing"'. The defendant owner would need to have brought fire onto his or her land, either deliberately or negligently, for there to be *Rylands* liability – and starting a fire on one's own land may in any event be an ordinary use of the land (and thus 'natural' for *Rylands* purposes). Stannard brought a large stock of tires onto his land, but tires are not in themselves exceptionally dangerous. The tires did not escape his land (although fire did), and keeping a large stock of tires for a tire-fitting business was not an unusual or extraordinary use. The claim had to fail. Lewison LJ noted that liability to a neighbour for accidental fire damage will arise only where the defendant is negligent in failing to prevent its spread.

[Link available **here**].

TORTS/EMPLOYMENT

Tort claims arising from deaths of employees

Lots of black-letter law from the High Court of Australia in *Barclay v Penberthy*, [2012] HCA 40.

Five employees of Nautronix were involved in a plane crash. Sadly, two died and the other three were seriously injured. The company, the three survivors and the spouses of the latter brought claims against Fugro Spatial Solutions (from which the plane was chartered), Penberthy (the pilot) and Barclay (the engineer who had advised – negligently it was found – the use of the sub-standard part that caused the plane's engine to fail).

The High Court dismissed the claims made by Nautronix for damages arising from the deaths of its two employees. The court relied on the rule in *Baker v Bolton* (1808) 1 Camp 493, 170 ER 1033, which provides that the death of a person cannot constitute a cause of action for damages (except to the extent the rule is modified by statute – for example in fatal accidents or family law legislation). The company could recover, however, on the old action *per quod servitium amisit* (for loss of the services of an employee). This is not a negligence claim, so it does *not* depend on a finding of a duty of care; it is merely an action to recover the replacement value of lost services. The majority also allowed Nautronix to recover for economic loss arising from the negligence of the pilot (who owed a duty not to cause such loss). A similar claim against the engineer was abandoned at an earlier stage of the proceedings in favour of the *per quod* claim against him.

[Link available **here** and **here**].

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