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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.

Administrative

- decision-maker's academic writings not enough to create reasonable apprehension of bias
- oral hearing not required to terminate membership of Order of Canada

Civil procedure

- are you being served?
- good brief summary of requirements for obtaining *Anton Piller* and *Norwich Pharmacal* orders
- Ontario judge orders Attorney General to produce searchable electronic transcript
- personal injury claim can be assigned, says Australian court

Civil procedure/defamation

- don't let your client intimidate or victimise a witness!

Civil procedure/securities

- special circumstances can extend limitation period for secondary market claim

Conflict of laws

- national bank not Argentina's *alter ego*

Conflict of laws/insolvency

- UK Supreme Court complicates international insolvencies

Contracts

- illegality defence fails because illegal acts incidental to main contract
- no mitigation, no specific performance

Contracts/agency/fiduciaries

- satiric web posting not grounds for treating contract as terminated

Corporate

- veil-piercing ignores corporate existence but does not deny it

Corporate/directors

- director thought he was doing the right thing but still breached duty of loyalty

Corporate governance

- TSX adopts new requirements for director elections

Corporations/securities

- BC Court of Appeal reverses problematic decision on empty voting

Criminal/fashion law

- UGG boot's role in car accident 'entirely foreseeable'

Employment

- OK to fire employee for Facebook posting but not to curtail free speech

Evidence

- Delaware court takes narrow view of common-interest privilege

Health

- is it 'unprofessional' to be a drug addict?
- widow gets late husband's sperm but court controls its use

Health/administrative

- regulatory investigator's summons power upheld as constitutional

Insolvency/evidence

- receiver not required to produce documents to a party without a specific purpose related to the receivership

Intellectual property

- handy guide to passing-off in the context of domain names
- in-house counsel has sense-of-humour failure, fails to send puppy photo

Lawyers

- lawyer can owe duty to non-clients who relied on legal opinion in promotional materials

Lawyers/contracts/torts

- every solicitor's nightmare: the million-dollar 'and'

Personal property/civil procedure

- out of time to recover misappropriated sheep but not their progeny

Privacy/criminal

- reasonable – but diminished – expectation of privacy in contents of employer-owned laptop

Securities

- CSA consultation paper on statutory fiduciary duty for advisers and dealers

Tax/statutory interpretation

- colloquially known as ‘the ballet’, but still not a tax-exempt ‘musical arts performance’

Torts

- duty of tattoo artist ‘a fairly strict one’

Torts/defamation/conflict of laws

- B&B owner fights back over TripAdvisor review

Torts/health law

- can the mentally disabled be contributorily negligent?

Wills and estates

- electronic document doesn’t qualify as holograph will

ADMINISTRATIVE

Decision-maker’s academic writings not enough to create reasonable apprehension of bias

Carleen Francis, a citizen of St Vincent and the Grenadines, applied for refugee status in Canada on the grounds that, as a lesbian, she faced discrimination in her home country. Homosexuality is still a criminal offence in St Vincent, and Francis had been the subject of physical abuse on account of her sexual orientation. The Refugee Protection Division rejected her claim, not finding the discrimination she faced in St Vincent sufficiently serious; the board concluded that St Vincent does not actually enforce its *Criminal Code* provisions, the physical abuse seemed to be an isolated incident and Francis didn’t face persecution if she was sent back. Francis challenged that determination, arguing that the decision-maker, a Mr Gallagher, had published a number of academic articles on Canadian immigration and refugee policy, in which he had criticised some aspects of the system for processing refugee claims and suggested that mass immigration had a negative effect on Canada’s social cohesion. He also singled out St Vincent as an example of a country which produced questionable refugee claims.

In the Federal Court, Justice Noel didn’t buy the argument that having expressed views on immigration in previous academic work automatically meant that Gallagher should be disqualified; indeed, his previous experience probably made him a better decision-maker: *Francis v Canada (Citizenship and Immigration)*, 2012 FC 1141. Gallagher did fail, however, to consider all of the evidence on St Vincent’s treatment of gays and lesbians, which attested to the fact that its anti-homosexuality provisions have been enforced as recently as 2009 (the year before Francis made her refugee claim), and didn’t come to a reasonable conclusion on the level of discrimination Francis would face if she returned to St Vincent. A new panel was ordered to hear Francis’s claim.

[Link available **here**].

Oral hearing not required to terminate membership of Order of Canada

If Lord Black did not exist, he would need to be invented, if only to provide fodder for comment. Freshly sprung from time spent at the pleasure of the US government, his Lordship challenged a decision of the body that advises on appointments to (and ejections from) the Order of Canada: *Black v Advisory Council for the Order of Canada*, 2012 FC 1234.

Justice de Montigny concluded that while the Advisory Council was subject to judicial review, procedural fairness and natural justice did not require it to hold an oral hearing including submissions

from the noble lord, although things appeared to go well for him at the start. The Council's decision was interlocutory only (the final decision rests with the Governor General), and the usual rule is that such decisions should not be subject to judicial review except in unusual circumstances. Because the ultimate decision on his membership would probably not, as an exercise of Crown prerogative, be subject to judicial review, Lord Black's application was not premature. Was the Council's decision also immune from judicial review? No, and Black had a reasonable expectation that the Council would follow its stated policy on terminations. Two points for his Lordship. Where his case fell down was on procedural fairness, which under the circumstances did not require an oral hearing. The judge rejected the argument that there should be a high degree of procedural fairness because of the potential effect on Black's reputation; in the judge's view, there is no right to or legitimate expectation of an honour from the Crown, and no right to maintain an honour once granted. If there was anything that was going to tarnish Black's reputation it was his convictions for fraud in the United States. His credibility was *not* in issue; the Council was not considering the merits of those convictions but merely assessing them as facts to be considered in making a recommendation to the GG. Black had made – and could make further – written submissions and that was really enough. The necessary level of procedural fairness was, in the end, 'minimal'.

[Link available **here**].

CIVIL PROCEDURE

Are you being served?

A little gem from the BC Supreme Court: *Wang v Wang*, 2012 BCSC 1077. The Wangs wanted to set aside the transfer of a piece of real estate that their son Danny had made to his common-law spouse, Ellen Chiang, and to kick the couple out of the premises. The issue before Humphries J was whether default judgments against Danny and Ellen should be set aside because they were improperly served. The evidence disclosed that a process server had approached Ellen's car as she waited for the light to change, shoved the court document under one of the windshield wipers and walked away. Ellen testified that she had no recollection of the incident and did not find any papers on her windshield when she arrived home. Danny was served in a restaurant but claimed to have been served in other ways too – to the point where, he said, he was so drunk that he could not remember having been served with anything other than alcohol.

The judge set aside default judgment against both parties. It was clear that Ellen had not been properly served, because delivery of the document had not been effected in such a way that she would have realised she was being presented with legal documents. No reasonable person would have thought that. As for Danny, the judge didn't buy his story but, in the interests of not having potentially inconsistent results, she set aside the default judgment against him too.

[Link available **here**].

Good brief summary of requirements for *Anton Piller* and *Norwich Pharmacal* orders

Perell J of the Ontario SCJ provides another of his potted summaries of the law in *Bergmanis v Diamond & Diamond*, 2012 ONSC 5762, this time on the requirements for obtaining *Anton Piller* and *Norwich Pharmacal* orders. (Too bad the judgment sometimes refers to the former under the name *Anton Pillar*.)

Procedural points first. You must satisfy the technical requirements of Ontario rule 40.02 (motion for interlocutory injunction or mandatory order without notice), and also disclose all material facts, or risk having the order set aside. Because both remedies are injunctive in nature, you also need to satisfy all the requirements for that (serious issue to be tried or strong *prima facie* case, irreparable harm, balance of convenience favours granting rather than refusing, undertaking as to damages). As to substance, an *Anton Piller* order is 'very intrusive and exceptional', 'at the extremity of the court's powers'.

It prevents property from being destroyed but does not authorise access to privileged communications. In order to obtain an *Anton Piller* order, there must be (a) an extremely strong *prima facie* case, (b) very serious actual or potential damage to the plaintiff, (c) convincing evidence that the defendant possesses incriminating documents or objects and (d) a real possibility that the material may be destroyed or secreted before trial. A *Norwich* order is 'a form of equitable discovery against third parties before the commencement of proceedings', predicated on the principle that the third party has a duty to assist the applicant in pursuing its rights. To obtain a *Norwich* order, (a) the plaintiff must have a *bona fide* claim or potential claim against a wrongdoer, (b) the defendant to the *Norwich* proceeding must have a connection to the wrong beyond being a witness, (c) the defendant to the *Norwich* proceeding must be the only practical source of the necessary information, (d) the interests of the plaintiff must outweigh the defendant's interest in privacy and confidentiality, and any public interest in non-disclosure and (e) the interests of justice must favour disclosure.

Applying each of these requirements to the facts before him, Justice Perell concluded there just wasn't a strong enough case to justify continuing either the *Anton Piller* or *Norwich Pharmacal* orders which had previously been obtained. These are 'not a dime a dozen remedies; they are rare and precious', in the words of the judge.

[Link available **here**].

Ontario judge orders Attorney General to produce searchable electronic transcript

Justice DM Brown of the Ontario Superior Court, in his continuing quest to drag courtroom procedure into the 21st century, has found it 'entirely reasonable' for counsel to request a fully searchable electronic transcript in *Re Summit Glen Waterloo/2000 Developments Inc*, 2012 ONSC 5786. Because no specific format for transcripts is prescribed, they vary from reporter to reporter, making a specific order necessary. Ideally, an electronic transcript should not only be searchable but also indexed and hyperlinked.

[Link available **here**].

Personal injury claim can be assigned, says Australian court

Provided, that is, the assignee has a 'genuine commercial interest' in the benefit of the claim; otherwise, the assignment will be champertous and unenforceable: *WorkCover Queensland v AMACA Pty Ltd*, [2012] QCA 240. Douglas Rourke worked for AMACA, where he contracted mesothelioma from exposure to asbestos. He subsequently died and his estate assigned his negligence and contractual claims against AMACA to WorkCover Queensland, the government body which oversees workers' compensation and safety issues in the state. WorkCover was to hold any damages which exceeded the amount it had already paid to Rourke in trust for his estate.

The Queensland Court of Appeal, faced with the question whether the assignment was enforceable, concluded that it was. The old rule at common law was that a cause of action that turns on personal rights cannot be assigned, in order to discourage trafficking in litigation. The modern tendency has been to create exceptions to that rule, and to allow assignments that are made to a party with a genuine or legitimate commercial interest in the claim. As an insurer which fully indemnified its insured, WorkCover certainly had a genuine commercial interest in the Rourke litigation, akin to an insurer's subrogated claim. There was no suggestion that WorkCover had some improper collateral purpose that amounted to officious (and champertous) intermeddling in another's litigation. Round-up of Australian, English and Canadian authorities on point.

[Link available **here**].

CIVIL PROCEDURE/DEFAMATION

Don't let your client intimidate or victimise a witness!

Don Staniford, an environmental activist, published mock cigarette packs on his blog, which bore warning labels like 'Salmon Farming Kills' as well as references to Norwegian ownership. Mainstream, a Norwegian-owned fish-farming operation, sued him for defamation. Adair J found that the material was

defamatory and that it referred to Mainstream, but also accepted Staniford's defence of fair comment: even though she found him 'severely prejudiced' and 'exaggerated and obstinate' in his views about salmon farming, he honestly believed what he said. Noting that evidence of express malice will defeat a defence of fair comment, she nevertheless found that Staniford (while clearly malicious) did not have the dominant purpose of injuring Mainstream – his main objective was to campaign against industrial aquaculture, however 'clumsy, crude, irrational or foolish' his tactics: *Mainstream Canada v Staniford*, 2012 BCSC 1433. Mainstream's action was dismissed, but an appeal has been filed.
Where Staniford skated close to the line on the malice point was in his treatment of two of Mainstream's witnesses, a point dealt with separately in *Mainstream Canada v Staniford*, 2102 BCSC 1609. Staniford suggested in a blog posting during the trial that appropriate theme music for the witnesses would be Queen's 1978 hit 'Fat-bottomed Girls'. Mainstream's counsel asked Adair J to direct Staniford to refrain from making such references, and while she declined to do so given that the degree of Staniford's malice was a live issue in the ongoing trial, she quoted some stern words of Lord Denning that 'there can be no greater contempt to intimidate a witness before he gives his evidence or to victimize him afterwards for having given it': *Attorney-General v Butterworth*, [1962] 3 All ER 326 (CA).

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

CIVIL PROCEDURE/SECURITIES

Special circumstances can extend limitation period for secondary market claim

Ontario's *Limitations Act 2002* was intended to bring clarity and certainty to this area of the law. Ha! Anything but. The common law provided that a judge had the discretion to extend an expired limitation period, where 'special circumstances' warranted doing this in the interests of justice. It is clear from the case law that the doctrine is no longer available for claims that are subject to the *Limitations Act 2002* (except to the extent that the statute preserves some aspects of it), but Perell J has held that it may still offer relief to a plaintiff making a claim which is not subject to that legislation – including a claim for secondary market liability under Part XXIII.1 of the Ontario *Securities Act*.

The issue arose in *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v Celestica Inc*, 2012 ONSC 6083, where the defendants moved to strike a class claim against them for having misrepresented the progress of Celestica's restructuring. The plaintiffs appear to have believed (incorrectly) that the filing of their class proceedings suspended the limitation period and wanted to see how parallel US proceedings would unfold. After providing his usual review of the case law, Justice Perell concluded that by virtue of excluding the Part XXIII.1 limitation period from the application of the *Limitations Act 2002*, the legislature had intended the common law rule to continue to apply to secondary market claims, in order to allow a court to 'ameliorate the rigours of an absolute limitation period' like that found in s 138.14 of the *Securities Act*. Application of the 'special circumstances' doctrine will (where available) always be 'principled, limited and narrow', but on the facts of the case it was appropriate to use it to give the plaintiffs a break. The defendants had long been aware of the claim against them, the law had changed in the mean time to the plaintiffs' detriment and the defendants had not previously raised a limitations defence. The defendants couldn't say that the plaintiffs' failure to proceed expeditiously with the Ontario claim was prejudicial; if anything, it gave the defendants some breathing room while they defended the parallel action in New York.

[Link available **here**].

CONFLICT OF LAWS

National bank not Argentina's *alter ego*

Creditors of the Republic of Argentina (and there are a lot of them) wanted to go after Banco de la Nación Argentina (BNA), wholly-owned by the republic, in

order to satisfy their claims against the latter: *Seijas v Republic of Argentina*, 2012 US App LEXIS 22167 (2d Cir, 25 October 2012). The plaintiffs argued that the government of Argentina appointed and removed the bank's directors, that BNA had made loans to individuals and corporations that were favourable to Argentina's sovereign interests and loans to Argentina itself (in breach of BNA's charter) and that BNA's financial records were sufficiently murky as to give rise to a need to pierce the corporate veil.

Sorry, said the 2d Circuit in affirming summary judgment for the republic. The Argentine government exercised its rights as sole shareholder to appoint BNA's directors, but this didn't make the bank the *alter ego* or instrumentality of the state. There was not 'extensive' control by the government over the bank's day-to-day operations. The bank's loans were consistent with its charter to act in a manner consistent with government policy. The 'purported obscurity' of BNA's records was too speculative a basis on which to ignore its separate legal personality. Compare *Kensington Int'l Ltd v Republic of Congo* (SDNY, 30 March 2007), where the instrumentality had a corporate structure that was used for complicated schemes to confound the state's creditors, had a state employee for a president, passed up revenue which was simply transferred to the state's coffers, engaged in no significant commercial activity, commingled its own assets with those of the state and refused to disclose records in the course of an IMF and World Bank audit. The alleged facts in *Seijas* fell 'far short' of those in the *Kensington* case, and the district court was correct to find in favour of the defendant.

CONFLICT OF LAWS/INSOLVENCY

UK Supreme Court complicates international insolvencies

The central question in *Rubin v Eurofinance SA*, [2012] UKSC 46, was whether the English courts ought to recognise the order or judgment of a foreign court to set aside transactions determined to be preferential or to have been at an undervalue, in circumstances where the defendant in the foreign proceedings was not present in the foreign jurisdiction or had not voluntarily submitted to its courts. By a majority of 4 to 1, the United Kingdom Supreme Court has concluded that the traditional requirements at common law and under UK legislation on the recognition of foreign judgments – which would allow enforcement of a foreign judgment only where the defendant is present in or has attorned to the foreign jurisdiction – should not be relaxed in order to facilitate international insolvencies.

The majority of the court expressly declined to follow the broader rule which has been adopted in Canada, which permits enforcement where there is a 'real and substantial connection' between the defendant and the foreign jurisdiction, whether or not the defendant was present there when proceedings were instituted or voluntarily submitted to its jurisdiction. Lord Collins was blunt: except in matrimonial proceedings, 'reciprocity has not played a part in the recognition and enforcement of foreign judgments at common law', and to go the Canadian route would be 'a radical departure from substantially settled law'. Where this leaves us is that a Canadian court could enforce the insolvency order of an English court (which is what happened in *Re Cavell Insurance Co (*2006) OR (3d) 500 (CA), cited in the UKSC judgment), but an English court would not be able to enforce a Canadian one. So much for comity?

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

CONTRACTS

Illegality defence fails because illegal acts incidental to main contract

'Illegality and the law of contract is notoriously knotty territory', says Sir Robin Jacob in *ParkingEye Ltd v Somerfield Stores Ltd*, [2012] EWCA Civ 1338. The case arose from a contract to enforce parking charges at British supermarkets, where customers get a certain amount of free parking time but after that have to pay. Somerfield engaged ParkingEye to install – and then enforce – an automatic system to

determine which customers owed money for extra time. The basic charge was £75 for overstaying, reduced by half if payment was made within 14 days of ParkingEye's first notice. The charge went up to £135 after a certain length of time. ParkingEye sent a series of scary (and 'illiterate') letters, made to look as though they came from the police, to the owners of overstaying vehicles. The trial judge found that while the basic charge was not a penalty, the £135 was (and thus unenforceable). He also found that while the first two scary letters did not contain falsehoods, the third and fourth in the series clearly did, in representing that the debt was owed to ParkingEye (not Somerfield), that it was sent on Somerfield's behalf (which it was not) and that ParkingEye had Somerfield's authority to issue proceedings against defaulters (which it did not, and didn't really intend to do anyway). When ParkingEye sued Somerfield for repudiation of the contract, the latter pleaded illegality as a complete defence, on the grounds that ParkingEye should not be able to rely on its own deceitful conduct. The trial judge agreed that ParkingEye had engaged in deceitful practices, but not that it had had 'a firm and settled intention to act in an unlawful manner' at the time it entered into the agreement with Somerfield. There was also evidence that Somerfield executives had agreed with ParkingEye about the content of letter 3, but the judge concluded that that agreement was collateral to the parties' underlying agreement – which itself being free of illegality could not be vitiated as Somerfield contended.

The Court of Appeal upheld the trial judge's decision. The main agreement was not, at inception, predicated on an illegal intention or an intent to perform illegally (although Sir Robin characterised the 'intention from the outset' rule as 'distinctly odd'). The main contract was never intended to be carried out in a wholly illegal manner, so it could not be said that ParkingEye's illegal means of performance had the effect of tainting the contract in its entirety. 'Considered with a sense of proportionality', it wasn't fair to allow Somerfield to leave ParkingEye with no remedy for Somerfield's own wrongful repudiation. Toulson LJ agreed, noting that the illegality was merely tortious and not central to performance of the main contract.

[Link available **here**].

No mitigation, no specific performance

An important point from the Supremes in *Southcott Estates Inc v Toronto Catholic District School Board*, 2012 SCC 51. Southcott Estates, a single-purpose entity created (and funded by its parent company) for the purpose of a specific land purchase, agreed to buy a piece of property from the school board that was suitable for development. The board failed to satisfy a condition and refused to extend the closing date of the transaction. Southcott sued for specific performance. The trial judge found that the board was in breach and had failed to prove that Southcott could have mitigated its damages, awarding the latter just under $2 million for loss of a chance. The Ontario Court of Appeal agreed about breach, but thought that Southcott could have found another suitable piece of land; its damages were reduced to a nominal dollar.

Karakatsanis J, writing for the majority of the SCC, reviewed the general principles underlying the doctrine of mitigation. She rejected the contention that, as a single-purpose corporation with finite resources, Southcott was unable to mitigate loss – and, more significantly, that it was not required to do so given its claim for specific performance of the contract with the school board. While there may be situations where a plaintiff will be justified in not mitigating, a claim for specific performance should not insulate it from having to make a reasonable attempt to do so. If the plaintiff's refusal to buy a substitute property has a 'substantial justification', then fine: not mitigating will have been the reasonable course of action. Here, however,

Southcott's inaction could not be justified. It was engaged in a commercial transaction for investment purposes, so it could not be said that the particular parcel had any peculiar and special value, and the trial judge erred (both in law and on the facts) in concluding that there were no comparable, profitable properties available. McLachlin CJC, dissenting, disagreed that the trial judge got it wrong about comparable properties and found it difficult to conclude that Southcott had acted unreasonably in promptly seeking specific performance. In her view, a plaintiff, 'acting reasonably, cannot pursue specific performance and mitigate its loss at the same time'; to do so might result in the (clearly unintended) acquisition of two properties. Specific performance is often motivated by the unavailability of substitutes in the marketplace, which seemed to be the case here. Even though the old common-law presumption of the uniqueness of real property no longer obtains, specific performance may be the way to go when a property has unique characteristics and there are no substitutes readily available. The Chief Justice would have restored the judgment of the trial judge.

[Link available **here**].

CONTRACTS/AGENCY/FIDUCIARIES

Satiric web posting not grounds for treating contract as terminated

Spectrum Agencies was the commercial agent for the sale of Crocs Europe BV's (unaccountably) popular line of footwear. Employees of Spectrum found that Crocs was slow to respond to orders – to the point where one of them posted a satiric video sequence about the relationship with Crocs, based on the opening credits of *Star Wars*. It began: 'That's a Croc!! Of Shite!! SPECTRUMS WAR OF LIGHT VS DARK'. The posting was forwarded to customers of Crocs but later taken down. Crocs took offence at this and had their solicitors send a stern letter to Spectrum: this was a breach of Spectrum's duty of good faith which harmed Crocs and amounted to a repudiatory breach of Spectrum's core duty as an agent. In return, Spectrum claimed compensation for termination of the agency relationship of between £13 and £18 million. The trial judge characterised the posting as a lighthearted joke about what was common knowledge in the industry, and that it didn't amount a repudiation by Spectrum of its agency contract with Crocs.

Crocs appealed: *Crocs Europe BV v Anderson*, [2012] EWCA Civ 1400. Mummery LJ largely agreed with the trial judge. Under the regulations applicable to commercial agents and the general law of either agency or contract, what the Spectrum employee had done was not sufficient to amount to a repudiatory breach of contract which gave rise to a right to treat the contract as having been terminated. While agents do owe fiduciary duties to their principals, not every aspect of the relationship involves that level of duty, and not even a breach of that duty would necessarily give rise to a right to terminate on the part of the aggrieved principal. Spectrum's breach was 'more in the nature of a one-off incident that did not involve bad faith on the part of the claimant, was not shown to involve a real risk of harm to the defendant ... and did not, when viewed objectively, evince an intention to abandon or to refuse to perform the commercial agency contract.' Bean J thought the breach was 'quite close to the borderline' but that it was open to the trial judge to conclude that it was not repudiatory. Hughes LJ concurred with both of his colleagues.

[Link available **here**].

CORPORATE/DIRECTORS

Director thought he was doing the right thing but still breached duty of loyalty

Just because you disagree with your fellow directors about corporate policy doesn't mean you can pursue your own strategy for the company. A point Simon Michael, a director of Shocking Technologies,

failed to appreciate when he had talks with a potential investor in the company. Michael disclosed confidential information about Shocking to the investor, in an attempt to dissuade it from injecting funds into Shocking. By leaving the company 'desperate for funding', Michael believed the investor would be able to negotiate a better deal which would include undercutting the authority of the rest of the Shocking board.

Not shockingly, Vice-Chancellor Noble of the Delaware Court of Chancery took a dim view of this in the resulting litigation: *Shocking Technologies Inc v Michael*, 2012 Del Ch LEXIS 224 (28 September 2012). While Michael had a right to seek to change the direction or composition of the company's board, this was not without limits. It clearly did not give this director free rein to interfere with crucial financing efforts (thereby risking the demise of the company) or to disclose confidential information in the pursuit of an individual agenda. The fact that Michael's self-interest as an investor in Shocking was aligned with his ostensible altruism about corporate governance also didn't help his case. Even if he had reasonable goals, he chose improper means to pursue them, and putting the company on the brink of financial disaster was clearly a breach of his 'unremitting' duty of loyalty to it. But because Michael had 'failed abjectly' in achieving his objectives, the vice-chancellor concluded that Shocking did not suffer material damages, nor would he exercise his discretion to make a significant costs award in Shocking's favour. It was simply too speculative to say that Michael's actionable conduct would have continued or intensified if Shocking had not sued its rogue director.

CORPORATE GOVERNANCE

TSX adopts new requirements for director elections

The TSX has announced that listed issuers will be required to (a) elect directors individually, (b) hold annual elections for all directors, (c) disclose whether they have adopted a majority voting policy for uncontested meetings (or explain why not), (d) advise the TSX if a director receives a majority of 'withhold' votes (if majority voting has not been adopted) and (e) promptly issue a news release providing details of voting results for directors. These amendments to the TSX Company Manual are intended to remedy what the exchange regards as Canada's 'lagging' performance in comparison with corporate governance practices in other jurisdictions.

[Link available **here**].

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 BLG's Vancouver office acted for CDS.

[Link available **here**].

CRIMINAL/FASHION LAW

UGG boot's role in accident 'entirely foreseeable'

Vera Baxter's UGG boot (a fashion crime in and of itself) got caught under the brake pedal of her car as she was driving in Manchester, causing her to swerve out of the way of a police patrol car and headlong into an on-coming vehicle. Ms Baxter managed to pull herself – and both boots – out of the wreckage, and the driver of the other car escaped with a case of whiplash. Baxter was charged with dangerous driving, banned from the road for 4 months and fined £350. The presiding judge reasoned that the risk posed by her unsuitable footwear was 'entirely foreseeable'. Unsuitable and hideous.

[Link available **here**].

EMPLOYMENT

OK to fire employee for Facebook posting but not to curtail free speech

Robert Becker took issue with the hot dogs served by his employer, a BMW dealership in Lake Bluff, Illinois, at a promotional event. Becker thought something fancier was in order, given the nature of the dealership, and posted photos and critical comments about it on his Facebook page. He also posted pictures of an accident which had occurred during a test drive on the dealership's premises. Management pointed out that Becker's postings violated the company's social media policy, which required employees not to say bad things about their employer in a public forum, to be courteous in all their dealings and to avoid bad language. Becker removed the postings but was later terminated. The National Labor Relations Board (NLRB) challenged the Facebook firing, arguing that the dealership's employee manual unduly restricted employees' rights to discuss the terms and conditions of their employment.

An administrative law judge ruled that Becker had not been fired for his mockery of the hot dogs but instead for the accident photos. While the comments about the hot dogs were, in the judge's view, protected speech that the employer could not restrict, the dealership was within its rights to terminate Becker for injuring its image or reputation through the posting of the accident photos. The NLRB and the dealership appealed. A full panel of the NLRB heard the appeal, affirming the judge's ruling – at least as far as it related to lawful termination for posting the accident pictures: *Karl Knauz Motors Inc dba Knauz*

BMW v Becker, 358 NLRB No 164 (28 September 2012). The panel declined to say whether the hot dog comments were protected speech, but the majority did think that the employee handbook went too far in restricting the rights of employees to comment on their employment. An employer can expect workers to be courteous in their dealings with third parties, but can't restrict the content of their speech if that would deter them from making legitimate comment about the terms and conditions of their jobs. The dissenting panel member didn't think the employee manual was problematic; its courtesy rule was 'nothing more than a common-sense behavioral guideline for employees'.

EVIDENCE

Delaware court takes narrow view of common-interest privilege

CrossFit, a distributor of fitness and training regimens, is owned 'by an artificial entity, the marital community enjoyed by Greg and Lauren Glassman'. That marital community hasn't been so enjoyable lately; the pair are in the course of getting divorced in Arizona, making board deliberations a bit fraught (the couple being the sole directors of the company). Mrs Glassman agreed to sell her inchoate 50% share of the business to a venture capital outfit called Anthos LLP, subject to her actually being awarded 50% of the company. Corporate governance issues ensued: the two disagreed about the purchase of a corporate jet, and Mr Glassman claimed that his spouse had breached her fiduciary duties in providing information to Anthos. Wanting to buy her out, he sought to enjoin the sale to Anthos and disclosure of communications between Mrs Glassman and Anthos. She asserted that the communications were protected by a common-interest privilege, on the grounds that they were created in furtherance of a deal that might be affected by the Arizona divorce proceedings and partly with a view to a joint defence against possible legal action by Mr Glassman.

Glasscock J rejected the claim of privilege in *Glassman v CrossFit Inc*, 2012 Del CH LEXIS 248 (12 October 2012). In Delaware, a common-interest privilege will not protect a business deal that might be subject to or affected by litigation. And in any event, documents in the privilege log assembled by Mrs Glassman were ambiguous in terms of their relation to litigation. In the judge's words, 'communications about a business deal, even where the parties are seeking to structure a deal so as to avoid the threat of litigation, will generally not be privileged under the common-interest doctrine.' He also declined to apply a privilege for 'business strategy' which Delaware courts have invoked under their inherent jurisdiction, generally (and only then reluctantly) in order to prevent discovery of time-sensitive information in the context of a take-over bid. Canadian courts have proved more willing to recognise a common-interest privilege in the context of a business transaction (see, for example, *Barclays Bank plc v Metcalfe & Mansfield Alternative Investments VII Corp*, 2010 ONSC 5519), but there isn't a lot of authority out there; as a general proposition the Delaware approach may be unhelpfully narrow.

[Link available **here**].

HEALTH

Is it 'unprofessional' to be a drug addict?

No, argued two nurses who were disciplined for stealing narcotics from the hospital dispensary and for falsifying records: *Wright v College and Association of Registered Nurses of Alberta*, 2012 ABCA 267. They contended that physical and mental illness made them addicts and that to punish them amounted to discrimination based on disability. The hearing tribunal which heard their cases disagreed, saying that there was an insufficient nexus between their illnesses and the behaviour that was the subject of the discipline proceedings; they were being

prosecuted for theft and dishonesty, not addiction. An appeal affirmed that result: the acts in question were 'not entirely caused by addiction, but also reflected an element of choice'. Disability may have given rise to a distinction but did not amount to discrimination.

The majority of the Alberta Court of Appeal agreed that there had been no discrimination: 'there are a great many addicts who do not commit criminal acts, and it is not discriminatory to hold those who do accountable for their acts', said Slatter JA. Berger JA dissented, on the grounds that the real issue was 'whether neutral performance standards have a disproportionately adverse impact on a nurse suffering from a disability, namely an addiction'. In Justice Berger's view they did, in imposing penalties not imposed on nurses who were not drug addicts.

[Link available **here**].

Widow gets late husband's sperm but court controls its use

In *Re H, AE No 2*, [2012] SASC 177, a widow sought an order for the removal of sperm from the body of her husband, who had been killed in a car crash. She intended to use the sperm for the purposes of *in vitro* fertilisation.

Justice Gray of the South Australia Supreme Court was prepared to recognise that there could be a property right in sperm (in spite of the common law's traditional rejection of that position). The sperm was not the property of the deceased or his estate, and the medical staff who had extracted it under a previous court order couldn't say it was theirs either; the only person with a claim to it was the widow. There was a kicker, though: the deceased had not consented to the extraction of the sperm and there were the interests of any resulting offspring to consider, which justified the court's exercise of its inherent jurisdiction and its control over the uses to which the widow put the sperm. This left the widow in a bind, because South Australia's *Assisted Reproductive Treatment Act* had not licensed any clinic in the state to provide the IVF treatment she wanted, and she was probably precluded from going to another Australian state in light of their legislative provisions – leaving her with no option but to seek from the state attorney general an exemption from the South Australian statutory scheme.

Compare *Re the Estate of the late Mark Edwards*, [2011] NSWSC 478.

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

HEALTH/ADMINISTRATIVE

Regulatory investigator's summons power upheld as constitutional

Sazant, a doctor, challenged the constitutional validity of a College investigator's power of summons under the Health Professions Procedural Code, a schedule to the *Regulated Health Professions Act 1991*. A College investigator has the same powers to issue a summons (without prior judicial authorisation) as a commission under the *Public Inquiries Act*. Dr S's licence to practise had been revoked by the College on account of sexual activity with young boys (one of whom was a patient). Sazant claimed that the investigator's summons power violated ss 7 and 8 of the *Charter* because there was no system of prior authorisation, no requirement to establish reasonable grounds for an offence or that an investigation would afford evidence of that offence, and no limitation on the ability to seize documents that were not relevant. It was argued that in the context of medical practice, something very close to the standard applicable in a criminal case ought to apply.

The Divisional Court upheld the summons power, which in its view is not unbridled; it is restricted to relevant, non-privileged information and a witness must be informed of the right to object to questions. In the end, it is no different from the power of a civil litigant to issue a summons under the rules of civil procedure. The court was also mindful of the importance of self-regulated professions in protecting

the public. An investigator's power should not be restricted to a narrow range of activities (diagnosis, treatment, prevention of illness) but properly encompasses broader aspects of a doctor's practice. The fact that two of the boys were not patients did not take them out of the scope of the inquiry into professional misconduct.

The Ontario Court of Appeal has dismissed Sazant's appeal, holding that the Code's investigative powers do not violate s 8 of the *Charter* and that the protracted nature of the investigation and prosecution of the doctor did not constitute an abuse of process: *Sazant v College of Physicians and Surgeons of Ontario*, 2012 ONCA 727. Simmons JA held that the Code's investigative reach is not confined to matters related to a doctor's medical practice but is clearly intended to permit the investigation of acts of professional misconduct. The summons power under the Code is reasonable and properly constrained by a requirement to use it solely to obtain non-privileged information that is relevant to a duly authorised investigation into specified misconduct. As a result, it is not overbroad. Sazant's reasonable expectation of privacy in the information sought by the College was limited in the context of an authorised investigation, on reasonable and probable grounds, into alleged professional misconduct – and Sazant was under a professional duty to co-operate with that investigation. In light of this, and the context of a self-governing professional regulatory scheme, the summons power does not in and of itself violate the *Charter* (although it could conceivably be exercised in a way that does). On the second point, the fact that the investigation and prosecution were protracted did not necessarily mean that there had been abuse of process, and Sazant had failed to show that he had suffered such prejudice by virtue of the College's proceedings as to bring the administration of justice into disrepute.

[Link available **here**].

INSOLVENCY/EVIDENCE

Receiver not required to produce documents to a party without a specific purpose related to the receivership

The OSC brought proceedings against Peter Sbaraglia, alleging that he was involved in a Ponzi scheme. A court-appointed receiver was also investigating Sbaraglia, his wife and their companies in relation to the same scheme. Sbaraglia reckoned that the receiver had materials that would be helpful in defending the OSC's allegations. Sbaraglia obtained an order from the Superior Court for production of some of the documents. He then appealed, seeking production of more material; the receiver cross-appealed, arguing that it had no obligation to disclose documents to Sbaraglia at all.

The Ontario Court of Appeal set aside the order requiring the receiver to produce: *SA Capital Growth Corp v Mander Estate*, 2012 ONCA 681. A receiver has a duty to make full disclosure to an 'interested person', but (perhaps somewhat counter-intuitively, given the fact that both the receivership and the OSC proceedings concerned Sbaraglia's alleged involvement in the same Ponzi scheme) Sbaraglia was not such a party. An interested person is someone with a direct interest in the subject matter of the receivership, but who also needs to see documents in the hands of the receiver for a specific purpose related to the receivership – not for some collateral purpose. The OSC proceedings were 'separate and distinct' from the receivership, and Sbaraglia therefore wanted the documents in question for a purpose that was collateral to the receivership – that is, his defence before the OSC. The extent of Sbaraglia's rights of procedural fairness in making a full answer and defence in the OSC proceedings was not something to be decided on an interlocutory motion, but instead by the ultimate decision-maker. It was up to the OSC to determine what procedural rights were to be afforded; if the OSC failed to do that correctly, Sbaraglia had

'appropriate remedies' like judicial review. The fact that a single commissioner of the OSC had ruled that he lacked jurisdiction to order production by the receiver did not preclude Sbaraglia from going back and trying again.

[Link available **here**].

INTELLECTUAL PROPERTY

Handy guide to passing-off in the context of domain names

Passing-off – that is, making your product look like someone else's or suggesting it has their endorsement – is as old as the hills, but its application to the digital age is pretty new. It's helpful, then, that Kenneth L Campbell J of the Ontario Superior Court distils the applicable principles from such case law as there is in *Dentec Safety Specialists Inc v Degil Safety Products (1989) Inc*, 2012 ONSC 4721. (A case where the defendant was alleged to have passed off the domain name for his business as somehow connected to that of his brother.) The factors to consider in assessing a passing-off case involving a domain name are as follows: (1) how likely is the average consumer to be misled? (2) how similar are the domain names and the products being sold? (3) how strong is the plaintiff's business name in the marketplace? (4) what is the value of the product? (5) how much care and attention is reasonably expected of consumers who purchase the product? (6) did the defendant intend to confuse people (not dispositive, but indicative of customer confusion)? (7) were members of the public actually confused? (8) do the plaintiff and defendant regularly sell their products through the same channels and in the same market? (9) what is the level of 'initial interest internet confusion' when web shoppers look for the plaintiff's site but are directed to the defendant's. Basically what you'd consider in a more traditional case, but it's good to have some authority directly on point. On the facts, the defendant had clearly misrepresented a connection with the plaintiff's business, had caused confusion over who was selling the products and it was likely that the plaintiff would suffer damages as a result. The plaintiff won his case.

[Link available **here**].

In-house counsel has sense-of-humour failure, fails to send puppy photo

A 'skunkworks' project has come to mean one conducted by 'a small and loosely structured group of people who research and develop a project primarily for the sake of radical innovation' (thank you, Wikipedia), but it originated with a specific development programme at Lockheed Martin (LM), which trade-marked the word.

David Galbraith, an internet developer, registered the domain name designskunkworks.com for his own project, unaware (he says) of LM's trade-mark. Galbraith received an e-mail from in-house counsel at LM, asking him to assign the domain name to the company. Galbraith's reply pointed out that he had registered the name in good faith on the strength of the common usage of the key term, saying that he was only too happy not to be associated with a 'manufacturer of cluster bombs and weapons of mass destruction'. He asked for instructions on how to assign the domain name, attaching a cute picture of a kitten on the assumption the in-house lawyer needed to take his or her 'mind off things'. The LM lawyer sent instructions for the assignment, making no mention of the kitty. Galbraith took (mock) offence at this omission, but said that he'd be willing to eat the $9.99 he had spent on registration and assign the name to LM in exchange for a picture of a puppy. While LM did offer to reimburse Galbraith for the cost of registration (upon providing satisfactory proof), no puppy picture (or, consequently, assignment of the domain name) has been forthcoming. Actual e-mail exchange (kitten picture included) at the link.

[Link available **here**].

LAWYERS

Lawyer can owe duty to non-clients who relied on opinion used as promotional material

As part of the promotional materials for a questionable charitable donations tax shelter, ParkLane Financial included a legal opinion provided by a partner in the tax department of a prominent firm. A class action against ParkLane was certified, and an appeal from that dismissed by the *Ontario Divisional Court in Cannon v Funds for Canada Foundation*, 2012 ONSC 6101.

An interesting aspect of the Divisional Court decision is the discussion of the plaintiffs' claim in negligence and in negligent misrepresentation against the lawyer and the two firms he had been associated with. MA Sanderson J agreed that it was not plain and obvious that those claims would fail, given that the lawyer had 'provided substantial input into the development and marketing' of the scheme, his help in drafting the relevant documents and his awareness that his opinion (and professional profile) would be included in the promotional materials. While he had not communicated directly with investors, he was not necessarily immune from liability to them, given the possibility that he nevertheless owed them a duty of care and their reliance on his representations. The lawyer's failure to direct ParkLane to remove his 'comfort letters' from the promotional materials after a negative tax ruling in 2007 was clearly actionable. The lawyer also put himself in a conflict of interest by agreeing to act for ParkLane in a test case appeal of the CRA decision on the tax shelter, presumably because of potential divergence among his own interests and those of the two firms, ParkLane and the non-clients.

[Link available **here**].

LAWYERS/CONTRACTS/TORTS

Every solicitor's nightmare: the million-dollar 'and'

Wollongong City Council's legal and risk manager, a Mr Williams, instructed the council's longtime solicitor to draw up lease documentation. It was originally proposed that the rent the council was to receive was to be calculated based on the value of both the landlord's and the tenant's fittings and fixtures, but it was later decided that those of the tenant would be excluded. Peedom, the solicitor, inserted a preamble stating that 'for the removal of doubt the value of the following fixtures and fittings are [*sic*] to be ignored', with a list of the tenant's items. That list ended with the word 'and'. On the next page, which the solicitor clearly neglected to look at, began with a listing of the landlord's fixtures and fittings, which were by virtue of that 'and' also excluded from the rent calculation – in spite of the specific instruction that they were to be included. The council sued: *The Stuart Park (D580060) Reserve Trust v Peedoms Lawyers Pty Ltd*, [2012] NSWSC 1133.

Grove AJ of the New South Wales Supreme Court found that Peedom had been negligent. This was not a case of mere inadvertence, as the change in drafting instructions on the rental calculation clearly 'demanded express focus' on the particular clause. Peedom's correspondence with the council routinely included a request for approval of his drafts, but the evidence showed that Williams had not reviewed the draft lease. Because the clarity of the instructions required Peedom's 'precise focus' on the rent provisions, Williams's contributory negligence reduced Peedom's liability only by 25%. The council still obtained judgment for AUS$1.1 million plus costs and interest, although it failed to recoup the costs of a rectification action they had brought against the defendant, which was an unreasonable step on their part in the circumstances.

[Link available **here**].

PERSONAL PROPERTY/CIVIL PROCEDURE

Out of time to recover misappropriated sheep but not their progeny

Not a case of sheep-rustling exactly, but its modern equivalent. YYH Holdings acquired 16 rare Awassi sheep from the liquidators of their owner, Awassi Pty Ltd, in 2003. Grant, a shareholder of Awassi Pty, seems to have wanted to keep the sheep for himself. In 2004, YYH attempted to recover the sheep and pellets of their semen from Grant, without success (and without initiating legal proceedings). In 2010, Grant attempted to sell the herd – which had by this point grown to 209 head, all of them bred from the original stock of 16. YYH commenced an action to recover the original herd, their progeny and any semen or embryos in the possession of Grant. Grant

admitted that he had wrongfully converted the herd but pointed out that the 6-year limitation period for YYH's claim had expired – and that the limitation period applied to the progeny as much as to the progenitors.

The trial judge agreed with Grant about the expiration of the limitation period, but didn't think it extended to the descendants of the original 16 sheep, which were different goods (animals being personal property). Grant appealed but lost: *Grant v YYH Holdings Pty Ltd,* [2012] NWSCA 360. The old (very old: by 1572) rule at common law is that 'the offspring of domestic animals are the property of the owner of the dam' (mother, for city folk) – except, somewhat oddly, in the case of swans. While noting that the trial judge had elided the torts of detinue and conversion, this did not affect the result or displace the common-law rule about the ownership of animal offspring. Grant's argument that the offspring were essentially the same goods as the original 16 was rejected, and relying on the holding in an 'abhorrent' 1856 Tennessee case that the acquirer of a female slave also acquires her child was certainly a tactical error. The descendants of YYH's original herd and the genetic material derived from it were separate items of property from the 16 and thus the subject of a separate claim which had not expired in 2010. There was some merit to Grant's argument that if YYH's title to the 16 had been extinguished by the relevant provision of the limitations statute then there could be no claim to the progeny of sheep YYH no longer owned, but the argument had not been raised at trial and could not be considered on appeal. As appears to be the case with Australian appellate decisions, there is an excellent round-up of domestic, English and Canadian authorities.

[Link available **here**].

SECURITIES

CSA consultation paper on statutory fiduciary duty for advisers and dealers

The Canadian Securities Administrators have released a consultation paper on a proposed statutory duty for advisers and dealers, which would require them to (a) act in the 'best interests' of retail customers and (b) exercise the degree of care, diligence and skill that a reasonably prudent person or company would exercise in the circumstances. The comment period ends on 22 February 2013.

[Link available **here**].

TAX/STATUTORY INTERPRETATION

Colloquially known as 'the ballet' but still not a 'musical arts performance'

The owner of an 'adult "juice bar"' (basically, a strip joint) in Latham, New York, argued that it did not have to pay state tax levied on admissions to places of amusement, on the grounds that the kind of dancing displayed in the establishment was a tax-exempt 'dramatic or musical arts performance'. The New York tax appeals tribunal rejected that argument, and the owner appealed: *677 New Loudon Corp v State of New York Tax Appeals* (NY App, 23 October 2012).

Four of the seven judges hearing the appeal held that the taxpayer had failed to show that the dances in question qualified for the exemption, in part because the expert evidence it tendered (yes, really) 'was not based on any personal knowledge or observation of "private" dances that happened' at the establishment. It was therefore reasonable for the tax appeals tribunal to discredit the expert opinion. There was no reason to treat these dances – 'however artistic or athletic their practiced moves are' –any differently from ice dancing performances, which can be 'intricately choreographed' but which are nevertheless treated as taxable entertainment. Three judges dissented: the majority was making 'a distinction between highbrow and lowbrow dance' which was not supported by the governing legislation. The statutory requirement for choreography of some kind was satisfied because the dances at issue were 'dance routines'. 'It does not matter what kind of dancing is being done', since the statute did not specify that the exemption is available only to 'dance worthy of a five-syllable adjective'. Any deficiencies in the expert testimony simply didn't matter; it was superfluous and may have been a misguided attempt to 'impress the Tribunal with the cultural value of the entertainment' on offer. To make a distinction based on the perception that the dancing was 'unedifying' or 'distasteful' was discriminatory and probably unconstitutional.

[Link available **here**].

TORTS

Duty of a tattoo artist 'a fairly strict one'

And a further little gem, this one from the Nova Scotia small claims court: *Huckle v Pelletier*, 2012 NSSM 13. Marie Huckle wanted to have a tattoo on her side, as a memorial to a recently deceased friend. She found a text on the internet, rendered in a font the small claims adjudicator later described as 'Gothic or Old English' (properly, black letter) and took a print-out of it to a local tattoo parlour. The text read 'See You at the Crossroads'. Helena Pelletier, the tattooist, replicated the text on her computer and played around with it a bit, so it could be resized as a template. The evidence was conflicting, but Huckle maintained that while the first version Pelletier showed her was fine, the second one (which Huckle claimed not to have seen and which Pelletier used as her pattern) read 'See You at the Cossroads' (missing a crucial R). Huckle noticed the error when she got home with her new tattoo. Adam Spencer, the owner of the tattoo parlour, discussed various options, including inserting the missing R or covering the whole text up with some other design, but in the end agreed to refund Huckle's money and pay for the costs of removing the tattoo. Huckle was unhappy with the removal work, which proceeded slowly, and sued for the cost of future removal sessions, her transportation costs to the removal clinic and general damages up to the statutory maximum in small claims court (a princely $100). Spencer questioned whether it was necessary to remove the whole tattoo and didn't think he should have to pay for the skincare products Huckle used between treatments. Pelletier argued that Huckle should have caught the error and was contributorily negligent to some degree.

The Nova Scotia adjudicator acknowledged that 'emotions [had] run fairly high in this matter', but tried to be dispassionate. Pelletier owed a duty of care, and although this did not impose a standard of perfection it was 'a fairly strict one'; in this instance, it was far from clear that Huckle had had an opportunity to do a final proof-read, and Pelletier could not shift part of the blame for her own error. Huckle had not been asked to sign a waiver, but a waiver wouldn't necessarily have absolved the tattooist and the shop of liability anyway. Huckle got everything she wanted (except a properly spelt tattoo).

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TORTS/DEFAMATION/CONFLICT OF LAWS

B&B owner fights back over TripAdvisor review

TripAdvisor reviews of hotels can be useful, but often raise more doubts about the reviewer than the reviewed. Richard Gollin, owner of a small guesthouse in Uig on the island of Lewis in the Outer Hebrides of Scotland, had more than a few doubts: he claimed that comments about his establishment on the site were clearly false, given that the reviewer hadn't even been in the guesthouse on the dates indicated in the review. Gollin sued TripAdvisor in small claims court, seeking £2,000 in damages for lost business. TripAdvisor challenged the claim on jurisdictional grounds, arguing that it was not subject to the law of Scotland. Gollin's counsel pointed out that TripAdvisor has an office in London, which put the defendant within the jurisdiction of the UK; given that the delict (tort) occurred in Scotland, the Scottish court was the logical forum. The advantage may have shifted back to TripAdvisor, which successfully managed to have the claim punted to a higher court, a move Gollin says may expose him to greater costs than he can bear and force him to drop the lawsuit.

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

TORTS/HEALTH LAW

Can the mentally disabled be contributorily negligent?

Very sad facts in *Town of Port Hedland v Hodder*, [2012] WASCA 212. Reece Hodder was born with cerebral palsy and mild to moderate intellectual disability. He is profoundly deaf, almost blind, virtually unable to speak and afflicted with spastic diplegia, amongst other conditions. Family members took the 23-year-old to the public swimming pool in Port Hedland, Western Australia, and left him unattended. Hodder mounted one of eight diving blocks placed at the shallow end of the pool, dived in and struck his head on the bottom of the pool. He was rendered

quadriplegic. Hodder sued. The trial judge found that there had clearly been negligence: the diving blocks were known to pose a danger, placing them at the shallow end was essentially an invitation to dive off them, there was no lifeguard and warning signage was inadequate. The trial judge did, however, reluctantly feel bound by authority to apportion 10% of the liability to Hodder, and to make that assessment on an entirely objective basis, without regard to his disabilities.

In the Western Australia Court of Appeal, the 10% apportionment was overturned, but with all three judges expressing a different view on the matter, based on a comprehensive canvass of the Australian and English case law. Martin CJ thought that finding Hodder to some extent the author of his injuries at the pool displayed 'harshness, injustice and unfairness' in that it assumed 'a miracle of biblical proportions' requiring the court 'to assess the question of contributory negligence in some parallel universe in which the blind can see, the deaf can hear, the lame can walk or even run, and the cognitively impaired are somehow restored to full functionality'. McLure P agreed that the 10% apportionment should be set aside, but not that the standard for assessing contributory negligence should be subjective: 'generally, the standard of care in negligence is both objective and impersonal' and the attenuation of the standard made for children 'has not been widened to include other classes of people with impaired capacity for foresight or prudence.' The trial judge had erred, however, in President McLure's view, by finding that Hodder had been contributorily negligent: the placement of the diving blocks was an implicit invitation to use them, and even on the objective standard of an ordinary person, what Hodder had done in response to that invitation could not be said to have been negligent. Murphy JA thought the trial judge was correct about the 10%. Result: Hodder received 100% of his damages.

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WILLS AND ESTATES

Electronic document doesn't qualify as holograph will

Denis Bellemore and Sylvie Dussault maintained somewhat independent lives but were in some kind of relationship when he died in 2009. Bellemore also had three children from a previous union, but during his lifetime never told them clearly about his relationship with Dussault. At issue in *Bellemore (Succession de)*, 2012 QCCS 4283, was the inheritance of his estate, in particular the benefits under his company pension. In a document Bellemore had composed on his computer and called his '2009 Personal Will', he left most of his estate (including his pension entitlement) to Dussault, except for interests in the will of his parents, which he left to his kids. Bellemore had printed and signed the document, but hadn't done so before a notary – so it was invalid as a will in the traditional sense. Could the electronic version nevertheless qualify as a valid holograph will? Did it amount to a beneficiary designation for the purposes of his company pension? And was Dussault his common-law spouse (*conjointe de fait*), entitled to death benefits under the pension?

Laberge CJS found that the 'will' was adequate as a beneficiary designation because the applicable legislation only required a designation in writing. The judge also concluded that, in spite of their somewhat separate lives, Bellemore and Dussault were at the time of his death *conjoints de fait* for the purposes of the pension scheme, thus entitling her to death benefits. So far, so good for Dussault. The printed and signed version of the will wasn't valid, nor was it OK as a holograph because it hadn't been written entirely in Bellemore's hand (which, as the judge pointed out, is what 'holograph' means). Provisions of the *Civil Code* which can cure a defective will weren't available and the functional equivalency rules for electronic documents did not extend to testamentary dispositions. Dussault got the pension money (and a third of Bellemore's ashes), but not the remainder of the estate.

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