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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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ART LAW/TAXATION/VALUATION

What is the value of something you can't sell?

The Internal Revenue Service has dropped its claim against the estate of Ileana Sonnabend over 'Canyon', a three-dimensional collage by Robert Rauschenberg that was owned by the late art dealer. The work includes a stuffed bald eagle, which (as we saw in the Monthly Update back in May 2012) created problems for Sonnabend during her lifetime, as it is illegal in the US to possess or traffic in live or dead specimens of the national avian emblem.

Sonnabend obtained a permit both to own the work and to lend it to the Metropolitan Museum in New York, but her executors faced a massive federal and state tax bill which included an assessment based on a valuation of 'Canyon' at US$65 million. This resulted in tax of US$29.2 million on the Rauschenberg work alone, plus an 'undervaluation penalty' of 40%. Sonnabend's estate sued the IRS, arguing that the value of the work is $0, there being no legal market for the piece; they pointed out that selling it to pay the tax bill could put the executors in prison. The IRS initially took the position that the valuation should be determined according to what the work would sell for on the black market, suggesting that a hypothetical Chinese billionaire might be willing to buy it secretly, but has since backed down and agreed to let the estate donate the work to the Museum of Modern Art. The estate will not be able to claim a charitable deduction for the gift – which is at least consistent a valuation at nil.

ART LAW/TORTS

You can't charge admission; this museum is supposed to be free!

So say the plaintiffs in *Grunewald v The Metropolitan Museum of Art* (NY Sup Ct, filed 8 November 2012). They argue that under the terms of the museum's governing legislation and its virtually rent-free lease from the city, it is required to admit visitors free of charge. If you've ever been to the Metropolitan, you will have seen (but perhaps not read) the signs at the cashiers saying that the stated admission charges are merely 'recommended'. Grunewald *et al.* allege that the 'recommended' bit isn't prominently displayed, the fact of herding people into queues for the cash desks suggests the fees are mandatory, and the museum's wording on various ticket websites (its own included) also fraudulently conveys the message that payment of an admission fee is required for entry. The plaintiffs seek injunctive relief but not disgorgement of profits.

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

BANKING/TORTS/CONFLICT OF LAWS

New York court on jurisdiction over claims of bank's foreign non-customers

The plaintiffs in the two related judgments in *Licci v Lebanese Canadian Bank SAL and American Express Bank Ltd* (2d Cir, 5 March 2012) were Israeli residents who had been the victims of Hezbollah rocket attacks in 2006. They alleged that Lebanese Canadian Bank (LCB) knowingly maintained bank accounts for a group allegedly affiliated with Hezbollah and that both LCB and Amex Bank had facilitated wire transfers for the affiliate. New York law does not impose a duty on a bank to protect non-customers from intentional torts committed by the bank's customers, but was it New York or Israeli law which governed the claims? New York, said the banks (for obvious reasons). Ultimately the 2d Circuit concluded while any tort would have occurred in Israel, all of the conduct on the part of Amex Bank that might have given rise to liability occurred in New York, which therefore had the closer connection to the claim. This led to the same result the trial judge had reached: the claim against Amex Bank was dismissed because New York law didn't impose a duty to non-customers.

Things were less clear to the 2d Circuit in respect of LCB. The court didn't think New York provided sufficient guidance on whether a New York court had the jurisdiction to hear the claims being asserted. The trial judge thought that the mere fact that LCB maintained a corresponding bank account in New York and used it to wire funds to the Hezbollah affiliate wasn't a sufficient basis for jurisdiction, but the 2d Circuit thought the whole question 'insufficiently developed' and certified two questions to go up to the Court of Appeals: (1) is using a correspondent account in New York for the purposes of wire transfers the transaction of business in the state, such that it would be captured by the 'long-arm' Civil Practice Law and Rules? and (2) if the answer to the previous question is 'yes', did the plaintiffs' claims actually arise from that transaction (or was the nexus between wire transfers and rocket attacks too attenuated)?

The New York Court of Appeals has now answered 'yes' to both questions posed by the 2d Circuit: *Licci v Lebanese Canadian Bank SAL* (20 November 2012). On question 1, the court concluded that while 'mere' maintenance of a correspondent bank account would be an insufficient basis for jurisdiction, repeated use of the account was, in effect, a 'course of dealing' that constituted 'purposeful availment' of the banking system of the state of New York over which its courts had jurisdiction. As to question 2, there was a 'substantial relationship' between the business transactions at issue and the claim being asserted; it was not necessary to establish a causal link between the two, as long as the claim was not 'completely unmoored' from the transactions. The viability of the claim itself – that the bank violated its duties to the plaintiffs in allegedly allowing terrorists to fund their activities through a New York account – was another question altogether, and not one to be determined on a jurisdictional challenge.

CIVIL PROCEDURE

Ontario lawyers to be able to use electronic devices in court

The Superior Court of Justice has issued a protocol which will allow the use of electronic devices by lawyers in the courtroom, starting 1 February. Use must be silent, discreet and unobtrusive; it must not interfere with courtroom decorum, court recording equipment or the administration of justice. Communications in breach of a publication ban are strictly *verboten*. Snapping pics or shooting video is also a no-no, unless the presiding judge is cool with it. Journalists will have the same privileges, but (unless the judge says OK) not other members of the great, unwashed, non-lawyer public.

[Link available **here**].

Why you should give a hoot about sloppiness in litigation practice

Your client could be subject to a costs order, that's why – as was the case in *Monaco v 1195053 Ontario Ltd*, 2012 ONSC 6477. Counsel for one of the respondents in the case fell ill the day before the application was to be heard, advised opposing counsel of his condition and then sent an e-mail to the court saying that 'someone' would attend the following day to request an adjournment, apparently on consent. Opposing counsel were not cc'd on that second e-mail. Justice Brown was none too pleased when three lawyers turned up and indicated they would contest the terms of the adjournment.

In his reasons Justice Brown mused, 'why should I give a hoot about what happened today?', concluding that this wasn't just some minor procedural hiccup but instead the symptom of a larger malaise: 'sloppy litigation habits by those who use our court system'. In this case, that sloppiness involved misleading the court and wasting precious judicial time. Result: adjournment granted but $500 in costs payable by the sick lawyer's client.

[Link available **here**].

CONFLICT OF LAWS

Enforceability of forum-selection clause by non-parties to contract

The plaintiffs in *Adams v Raintree Vacation Exchange LLC,* 2012 US App LEXIS 26000 (7th Cir, 20 December 2012) were purchasers of timeshare units in Mexico. They bought their interests from Desarollos Turísticos Regina (DTR), a Mexican company which had, by the time of the litigation, become an affiliate of Raintree Vacation Exchange (RVE) through a series of mergers. The timeshare contracts contained a forum-selection clause conferring exclusive jurisdiction on the courts of the federal district of Mexico City. The plaintiffs alleged that RVE had conspired with Starwood Vacation Ownership (SVO) to defraud them through a pretended Mexican subsidiary, taking their money for a timeshare resort that would never be built. RVE and SVO moved to have the action in the US federal courts dismissed, on the basis of the forum-selection clause. The plaintiffs countered with the argument that RVE and SVO could not invoke that clause because neither was a party to the timeshare agreements they had signed with DTR.

Posner J pointed to the line of cases which allows a non-party to enforce a contractual clause where it is 'closely related' to the lawsuit arising from it, but noted that they establish only a 'vague standard'. He nevertheless thought that two 'reasonably precise principles' could be distilled from the authorities: 'affiliation' and 'mutuality', concluding that the first applied to RVE and the second to SVO. Justice Posner observed that too literal an approach to forum-selection clauses could result in evasive tactics and undermine commercial certainty. RVE and DTR were sufficiently closely related to make the substitution of the one for the other unproblematic from the perspective of contract enforcement. As for SVO, it made sense to allow it to rely on the forum-selection clause, given the allegations against it: the plaintiffs were arguing that it had conspired with RVE and would have used the forum-selection clause to sue it in Mexico, so it was only fair to allow SVO to take advantage of the clause and have the action heard in Mexico; to say otherwise would give the plaintiffs a choice of forum but deny SVO (or RVE, for that matter) a mutual right regarding jurisdiction. The lower court's decision to dismiss the US action was affirmed.

CONTRACTS

Disagreement about an agreement to agree

PE Systems made a pitch to CPI Corp., offering to reduce the latter's credit card processing costs. The parties signed a document 'that appeared to be a contract', but CPI later repudiated it and argued that it was but an agreement to agree, and thus not enforceable. The deal appeared to have been that PES would calculate CPI's historic processing costs as a starting point, but that the parties would agree on a specific number on which to base comparisons for calculating future cost savings. An addendum defining 'historic cost' was left blank.

The trial judge found in favour of PES, but was reversed on appeal. The case then went to Washington's highest state court, which applied a test of 'objective manifestation' to determine whether there was a binding agreement between the parties. Under that test, it was clear that the parties had entered into a contract, albeit one with 'an open term easily and definitively ascertainable and therefore enforceable'. No further meeting of the minds was necessary because the document signed by the parties included a mechanism for calculating 'historic cost'; they just needed to work that out and fill in the blank. The court was not prepared to go as far as the court below, however, in concluding that CPI had actually breached the contract, an issue which was remanded to the trial court: *PE Systems LLC v CPI Corp* (Wash Sup Ct, 6 December 2012).

Risk-allocation to be interpreted in light of what the parties reasonably intended

Even, as in *Mir Steel UK Ltd v Morris*, [2012] EWCA Civ 1397, where the clause allocating that risk didn't clearly spell out how far it was intended to go. Mir Steel bought the assets of the insolvent Alphasteel, including a hot strip mill, knowing that the assets were subject to claims by Lictor Anstalt, which had assembled them. The asset purchase agreement provided in clause 9.5 that Mir Steel would be responsible for settling 'any claim' to the hot strip mill made by Lictor. Lictor later sued Mir Steel for conversion, inducing breach of contract and conspiracy by unlawful means. Mir Steel sought contribution from Alphasteel but was met with the argument that it was off the hook given the broad language of clause 9.5. The trial judge agreed.

Mir Steel argued on appeal that clause 9.5 should be interpreted more narrowly, along the principles set out in *R v Canada Steamship Lines Ltd*, [1952] AC 192 (PC (Can)), where it was held that express words were required in order to exclude claims for negligence. If express words were required with respect to negligence, Mir Steel contended, they should clearly be required to exclude the claims for intentional wrongdoing being made by Lictor. The English Court of Appeal pointed out that *Canada Steamship* should not be applied 'mechanistically' and provides only 'guidelines'. What a court really needs to do is determine whether it is 'inherently improbable' that the parties intended to allocate risk in a particular way. On the facts of *Mir Steel*, it was clear that the parties to the asset purchase were aware that title to them was either 'flawed or possibly flawed' and a claim by Lictor in the offing. The purchase price presumably reflected that risk. It was therefore reasonable to conclude that 'any claims' in clause 9.5 meant exactly that, including claims based on Mir Steel's alleged intentional wrongdoing. The court's job is to interpret 'the particular contract in the context in which it was made', including its 'commercial purpose'.

[Link available **here**].

CONTRACTS/REAL PROPERTY

Can a right of first refusal bind non-parties and be registered on title?

Yes and yes, said Gillese JA on behalf of the Ontario Court of Appeal in *Benzie v Hania*, 2012 ONCA 766. The Kunins had three children: Michael (a daughter), Barbara and Mitchell. Michael married Norman Benzie, an American, and was planning to move with him to New Mexico, but to entice them to stay in Ontario Mr Kunin proposed to sell the family's farm property to Michael, who had spent a considerable amount of money on it. Barbara opposed the sale, wanting the property to remain 'a family property' (although title was actually in her name for financial and tax reasons). As a compromise, Mr Kunin proposed an arrangement whereby the property would be transferred to Michael but her siblings would have a right of first refusal (RFR) if she ever decided to sell, and the net proceeds of any sale of the property would be divided among them equally. The agreement they signed in 1987 to effect this also provided in an enurement clause that it was binding on the heirs, administrators and successors of the siblings. Barbara agreed to let Michael convey title to herself and Norman as joint tenants, provided the latter undertook to be bound by the terms of the 1987 agreement, including the RFR. The agreement and the undertaking were registered on title under the *Registry Act*, and later migrated to Land Titles. The Kunin siblings subsequently fell out. Michael and Norman sought to have the 1987 agreement deleted from the Land Titles registry and obtain a declaration stating that it was not binding on non-parties (including Norman, Michael's children by him and her children from a previous marriage) and the undertaking unenforceable.

The judge declined to grant the application, reasoning that the agreement was intended to survive the deaths of the parties and create an interest that bound anyone who might inherit it. Those who inherited the property also inherited the terms of the agreement. Norman was bound by the agreement because he signed the undertaking, and received consideration for that in the form of Barbara's forbearance from enforcing her rights under the agreement. The agreement was properly registered initially and also properly translated to the Land Titles system. The Court of Appeal agreed. The fact that the heirs were not parties to the original contract was essentially a red herring. Because the agreement was not a contract based on personal considerations (*e.g.* individual skill or confidence), it did not terminate with the death of one of the parties. Michael's estate would be bound by it after her death and so, Justice Gillese thought, should her heirs (based on a couple of Canadian cases where a RFR has survived the death of one of the original parties). The RFR would be binding on both Michael's kids and her widower after her death, consistent with the enurement clause. Norman's undertaking was enforceable for the reasons given by the judge at first instance. On the registration point, Michael and Norman were incorrect in arguing that the RFR couldn't be registered because it wasn't a covenant that runs with the land. A RFR isn't a covenant at all, but a personal right – and it met the criteria for a registrable instrument. Michael and Norman's application failed, with the result that the RFR will continue to operate after Michael's death.

[Link available **here**].

EMPLOYMENT

Compensation for injuries sustained during sex on business trip

Back in July 2012, we covered *PVYW v Comcare (No 2)*, [2012] FCA 395, which concerned an employee in the HR department of an Australian government agency who was injured on a work-related trip to a country town in New South Wales. The injuries were sustained, not while she was conducting budget reviews and staff training, but instead during the course of a sexual encounter in her motel room with an old friend she had hooked up with: 'the respondent was injured whilst engaging in sexual intercourse when a glass light fitting above the bed was pulled from its mount and fell on her…', in the words of the court in the most recent round of appeal. The issue was whether physical and psychological injuries sustained while swinging from the chandelier (or something like it) in off-hours while on a business trip were compensable under the *Safety Rehabilitation and Compensation Act 1988*.

The employment tribunal rejected the claim, concluding that at the time of the injury the employee was not engaged in acts 'associated with her employment' or 'at the direction or request of her employer', nor was the injury 'sufficiently connected' with her job. The Australian Federal Court reversed: PVYW was in the motel room only because her job required it, and an interlude in an overall period or episode of work was still part of being on the job, whether she was playing cards in her room or doing something more fun, unless it involved gross misconduct or self-inflicted (rather than accidental) injuries: *PVYW v Comcare* (No 2), [2012] FCA 395. That judgment has been upheld on further appeal to the Full Court of the Federal Court: [2012] FCAFC 181. The Full Court agreed with the interval/interlude analysis in circumstances where the employer has induced or encouraged the employee to spend the interval or interlude in a particular place or way, absent gross misconduct.

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

Repudiation does not automatically terminate employment contract, says UKSC

Geys, a managing director in the London office of Société Générale (SG) was summarily dismissed in November 2007, in breach of the terms of his employment contract. SG did pay an amount into Geys's bank account in lieu of notice in December 2007, but was also obligated to make a 'compensation payment' on termination. If Geys was terminated on or after 31 December 2007, the compensation amount would reflect entitlements arising from 2006 and 2007; if before, it would be assessed at a much lower figure reflecting 2005 and 2006. Geys's solicitors wrote to SC in January 2008 saying that he had decided to affirm the repudiated contract; the bank exercised its contractual termination rights in reply.

The trial judge held that the bank had terminated the contract only once it communicated with Geys in January 2008. The Court of Appeal disagreed, saying that the termination had occurred when the payment in lieu of notice had been made in December 2007. SG argued that termination had occurred in November 2007 when it repudiated the contract. The UK Supreme Court was faced with the question whether repudiation of an employment contract automatically terminates it or whether the traditional contract rule would apply, which provides that a wrongful repudiation is effective only once accepted by the non-repudiating party: *Geys v Société Générale London Branch*, [2012] UKSC 63. The majority of the court (Lord Sumption dissenting, except on two specific points of contractual interpretation) held that the elective rather than the automatic view should apply, as with other kinds of contract; to say that repudiation has the immediate effect of terminating the contract would provide an incentive to wrongful repudiators. The majority concluded that Geys had not been terminated until SG exercised its rights in accordance with the contract in January 2008. The mere fact that it had made a payment into Geys's account in December 2007 was not sufficient notice of termination; it is not up to an employee to keep checking his or her bank account to see if he or she is still employed.

[Link available **here**].

EMPLOYMENT/HOSPITALS

Can an employer prohibit visible tattoos and piercings in the workplace?

The answer is no, according to a recent labour arbitration, *Ottawa Hospital v CUPE Local 4000* (14 January 2013). The hospital introduced a dress code for unionised employees that went into considerable detail: no mini-skirts, sweat suits, bare feet, flip-flops, perfume, artificial nails in clinical settings and – contentiously – no 'visible, excessive body piercings' or 'large tattoos' uncovered during working hours. Nine employees objected to the policy, many of them testifying that their tattoos and/or (more likely just 'and'?) piercings were a 'significant part of their identity and mode of expression'. Others said the rules were difficult to enforce, and in fact enforced inconsistently. The hospital justified the code ostensibly on the grounds that 'excessive' tattoos and piercings were, in essence, freaking out patients – especially older ones. The union brought a grievance on behalf of the employees.

The arbitrator assessed the dress code against the long-established standard of reasonableness set out in *Re KVP Co Ltd and Lumber and Sawmill Workers Union, Local 24537* (1965) 16 LAC 73. He rejected the hospital's argument that the *KVP* standard should be revisited to reflect the priority of the needs of patients over those of employees. The arbitrator disagreed that *KVP* prevented the hospital from devising a policy that was reasonable, clear and consistently enforced. It could certainly balance patient needs against employees' individual rights. He also pointed to a case from the early 1970s involving sideburns on police officers (controversial then, no big deal now), observing that the negative stereotypes once associated with both tattoos and piercings outside the earlobe have probably diminished too. There was in any event no evidence to connect any remaining negative impressions of modern body modification with actual healthcare outcomes. Although the grievance was not predicated on a human rights violation, the arbitrator thought there were echoes: the hospital wouldn't accede to a patient's negative stereotypes about an employee's racial or ethnic identity, so why should it cave in to (perceived) views about workers whose bodily adornment merely reflects 'the diversity that anyone would expect in a big-city hospital'? In the end, the hospital appeared to have 'attempted to fix a problem that does not exist'. The policy was declared void and unenforceable.

[Link available **here**].

EMPLOYMENT/HUMAN RIGHTS

No discrimination in failing to enforce perfume policy

Susan Koivos has a 'scent and fragrance sensitivity', although precisely what that involves was not clearly established in her human rights complaint against her erstwhile employer: *Koivos v Inteleservices Canada Inc*, 2012 HRTO 1570. Koivos worked for Inteleservices, which operates a call centre, for a total of three days. During her job interview, she indicated that she was sensitive to scents and was assured that that wouldn't be a problem, as the company had a 'fragrance-free' policy in the workplace. The policy seems to have been lost on Buffy, one of the complainant's co-workers, whose perfume or cologne allegedly made Koivos feel unwell during a training session. Koivos complained to the trainer and the message appeared to have been communicated to Buffy. But Buffy seems, however, not to have been the only offender: Koivos claimed that another colleague's cologne brought on feelings of nausea. Upset, she approached a supervisor and said she couldn't continue with the company – but did not seek any specific accommodation, apart from enforcement of the fragrance policy. She did ask if there were jobs that didn't involve proximity to other call-centre workers but was told there was nothing available. This resulted in a complaint to head office in the US and a decision to quit on the grounds that the fragrance policy was not being enforced. A complaint to Ontario's human rights commission ensued.

The adjudicator of that complaint reviewed the Inteleservices policy, noting that it was really a request for employees to be aware of others' sensitivities and go easy on the Eternity, rather than an enforceable prohibition. There was evidence that the employer had accommodated workers who were bothered by exposure to scents, but not a lot of evidence about the exact nature of the sensitivity to scent that Koivos characterised in her complaint as a disability. Given Koivos's hypersensitivity (she claimed to be affected by smells that are undetectable by others) it was unlikely that she could ever be accommodated without imposing undue hardship on her employer – but in any event, Koivos hadn't sought any accommodation or clearly articulated the effects she suffered. Asking for enforcement of a voluntary policy was an insufficient foundation for a claim of discrimination through failure to accommodate.

[Link available and **here**].

EVIDENCE

No privilege in notes of interview with witness who is now opposing party in related litigation

Steve Hart, along with other members of the federal public service, sued the government for alleged misrepresentations about the transferability of pension entitlements. He agreed to be interviewed by Crown counsel during the course of some of his colleagues' actions, bringing a non-lawyer friend with him. Crown counsel took notes of the interviews but no formal transcript was made. When it came time for his own action against the feds, Hart sought production of the interview notes.

Master MacLeod concluded that while the notes were prepared for litigation that was strongly connected to Hart's action (which would preserve any litigation privilege originally arising from them), neither litigation nor solicitor-client privilege applied. The master reasoned that 'simple recording' of the interview was not cloaked in privilege; counsel's observations about answers or potential responses would be. It could hardly be said that Hart's own statements could be kept from him on the grounds that they were confidential. There was no solicitor-client privilege because the notes did not contain legal advice or communications with Crown counsel's client; the odd marginal note and some underlining weren't sufficient indicators of the Crown's litigation strategy. The Crown appealed but was unsuccessful. Linhares de Sousa J thought the master had got things right: *Hart v Canada (AG)*, 2012 ONSC 6067. Litigation privilege cannot restrict disclosure of the opposing party's statements, where the record of them contains no additional 'commentary, remarks, observations etc. that would amount to a solicitor's work product'. The notes in question were 'the mere recording of information or statements' from an opposing party, which had to be disclosed to that party even though they were created 'with a view to anticipated future actions'.

[Link available **here**].

Use of work e-mail negates spousal privilege

Hamilton, a one-time Virginia legislator, was convicted of bribery and extortion, having secured state funding for a local university in exchange for a job. In advance of the meeting with university officials to discuss funding, Hamilton exchanged e-mails with his wife in which they talked about their financial difficulties and their hope that the university would be able to offer employment that Hamilton could use to supplement his income as a member of the state's House of Delegates. The e-mails were sent on Hamilton's account at the public school where Hamilton also worked. During his trial on the criminal charges that resulted, Hamilton challenged the admissibility of the incriminating e-mails, maintaining that they were protected by the marital communications privilege.

The 11th Circuit went old school and applied a case from 1934 in which the defendant's communications with his wife were not protected by the spousal privilege because he had made voluntary disclosure of their contents to a third party, his stenographer, thereby waiving the privilege: *Wolfle v United States*, 291 US 7. The circuit judge analogises this to the facts before her: 'In Hamilton's case, email has become the modern stenographer'. Hamilton's employer had an e-mail usage policy stating that employees could have no expectation of privacy in their communications over the system and Hamilton had taken no steps to protect the information he had sent: he had waived any privilege the e-mails would otherwise have enjoyed: *United States v Hamilton*, 2012 US App LEXIS 25482 (11th Cir, 13 December 2012).

EVIDENCE/EMPLOYMENT/INSURANCE

Facebook evidence: not always damning?

It has become a cliché: person claims employee benefits or insurance proceeds arising from some kind of accident, then posts holiday snaps on Facebook showing him or her lounging by the pool or engaging in some vigorous activity, with the result that compensation is denied or clawed back. The case for denying compensation on that basis has failed, however, in two recent cases: *Dakin v Roth*, 2013 BCSC 8, and *Stewart v Kempster*, 2012 ONSC 7236.

In *Dakin*, the plaintiff appeared to have exaggerated some of her injuries, but the judge was not prepared to buy the argument that the vacation photographs she had posted on her Facebook page were necessarily inconsistent with her physical limitations. The judge in *Stewart* put it more colourfully: 'I am not persuaded that the photographs in question have any real relevance to the issues in this case. I quite agree that if there were photographs that showed the plaintiff water[-]skiing or rock climbing, they would be relevant to demonstrate the extent of her physical limitations following the accident. The photographs in question, though, say nothing about the physical limitations she is suffering from. An injured person and a perfectly healthy person are equally capable of sitting by a pool in Mexico with a piña colada in hand. A photograph of such activity has no probative value.'

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

EVIDENCE/PRIVACY/INSURANCE

No privilege in information derived from ATI request

Karen Bennett's house was destroyed by fire. State Farm, her insurer, denied coverage on the grounds that the house had been left vacant for more than 30 days and wanted to obtain copies of police reports it believed would confirm that position. Bennett's affidavit of documents in her litigation against the insurer revealed that she had obtained police reports through an access-to-information request. She asserted that she did not have to disclose the reports because they were protected by litigation and statutory privilege, as well as public interest immunity. The motion judge ordered disclosure.

The New Brunswick Court of Appeal agreed that there was no reason to withhold the documents: *Bennett v State Farm Fire & Casualty Co*, 2013 NBCA 4. The principles governing the production of a Crown brief did not apply because the records were not obtained under the disclosure obligations set out in *R v Stinchcombe*, [1991] 3 SCR 326, but instead through an ATI process with its own screening rules. Any public interest immunity applied to the police or the attorney general, not Ms Bennett, and disclosure of the reports would not damage the functions of government. The reports had been screened and redacted before being unconditionally released to her. This put her in the position of having documents which were relevant to the litigation against State Farm, and it would be unfair not to let the latter see them as well. Any potential negative effect on the confidentiality of police investigations was adequately protected by the screening mechanisms under the New Brunswick privacy and ATI statutes. Bennett's claim of litigation privilege also failed: the reports (not privileged to start with) were not somehow cloaked with privilege merely because counsel had asked for them and put them in the brief for trial. To make the reports available to State Farm would not be to use police reports for a 'parasitic or collateral' purpose in civil litigation; the documents were relevant to that litigation and properly producible.

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

INSURANCE

Law firm event gone wrong

There was what Newbury JA of the BC Court of Appeal called 'a very unfortunate turn of events' at a social function for associates and students of a Vancouver law firm: *Poole v Lombard General Insurance Co of Canada*, 2102 BCCA 434. After a firm-sponsored dinner at a restaurant, some young members of the firm went on to a nightclub. That portion of the evening was voluntary although typical of similar evenings in the past. Poole (an associate) fell on Danicek (a student) on the dancefloor, causing brain injuries. Poole admitted liability and ultimately settled with Danicek, but claimed coverage under the firm's insurance policy and challenged the insurer's denial of that coverage. The trial judge held that the insurer had a duty to defend Poole from the claim brought by Danicek, but that the latter's claim was not covered by the firm's policy given that the claims did not arise 'out of or in the course of' her employment with the firm. Poole appealed on the coverage point.

Madam Justice Newbury (her colleagues concurring) agreed with Poole that the reference in the policy to 'any employee .. with respect to their [*sic*] employment' should be interpreted broadly to include a student like Danicek who was attending a function that had some connection with her work, even if the nightclub portion of the evening had not been part of the official programme. Justice Newbury agreed with the trial judge, however, that Poole was, when he fell on Danicek, not acting 'with respect to his employment' (even though that phrase is broader than the 'in the course of his or her employment' language elsewhere in the policy). Poole was thus outside the scope of coverage provided by the policy; it could not be said that 'any connection, however tenuous' to Poole and Danicek's work was sufficient to bring a nightclub dancing accident within the four corners of the policy. The policy's language required 'that a line be drawn on a commercially reasonable basis between what are essentially firm functions and what are essentially social functions – notwithstanding some weak connection between the latter and an insured's employment.'

[Link available **here**].

Was the property an apartment or a condominium?

It mattered in *Ment Bros Iron Works Co LLC v Interstate Fire & Casualty Co* (2d Circuit, 11 December 2012). Ment Bros, a welding contractor, was working on the construction of a development at 40 Mercer Street in New York and caused a fire. The property-owner's insurer denied coverage on the grounds that the policy excluded liability for property damage 'arising out of the construction of residential properties' – including a 'condominium' but excluding an 'apartment'. The latter term was defined as 'a unit of residential real property in a multi-unit residential building or project where all units are owned by and titled to a single person or entity', the former in similar terms except that '... each unit is separately owned and titled'. The New York district court took the insurer's position: 40 Mercer was a 'residential property' but not an 'apartment', so there was no duty to defend or indemnify the insured.

The 2d Circuit reversed. Under New York law, an insurer has the onus to prove that a policy exclusion applies, but the insured bears the burden of establishing the applicability of an exception to the exclusion that would preserve coverage. Forty Mercer was clearly a 'residential property'. But was it an 'apartment' or a 'condominium'? At the time the fire occurred, the property developer had not actually sold any units (although it clearly intended to do so at a later date). The insured was, at the relevant time, still the sole owner of the entire property, making it an 'apartment' for the purposes of the policy. There was language in the policy which confirmed this interpretation, in making reference to the conversion of an 'apartment' to a 'condominium' on the filing of the required declaration under the state's condominium legislation. This appeared to reflect a rational choice to provide insurance where a piece of real property has a single owner but not where there are multiple owners of units on the site. Even if it could be said that the policy was ambiguous, that ambiguity would be resolved in favour of coverage. The exception to the exclusion applied.

INTELLECTUAL PROPERTY

Are you infringing copyright with that sequence of yoga poses?

Breathe easy: the US district court in Los Angeles has decided that the answer is no. Bikram Choudhury and his yoga college contended otherwise, arguing that copyright in a sequence of 26 poses, performed in a particular order and in a room heated to 105 degrees Fahrenheit, was being violated by Evolation Yoga, an operation run by two former Choudhury employees: *Bikram's Yoga College of India LP v Evolation Yoga LLC* (Cent D Calif, 14 December 2012). Choudhury had registered copyright in written and audiovisual materials describing the sequence and contended that this extended to the moves themselves. A notion which Wright J rejected, citing the classic decision in *Feist Publications Inc v Rural Telephone Service Co*, 499 US 340 (1991): Choudhury's copyright protected the expression of the sequence but not the underlying facts of the sequence itself. And anyway, a system of exercises or yoga poses is not copyrightable subject matter under US legislation, not even as a 'pantomime or choreographic work'. The Choudhury sequence was merely a 'procedure, process, system, method of operation, concept, principle, or discovery' which lay outside the realm of copyright protection. So do your sun salutations with confidence, at least on the IP front.

Just because something is funny doesn't mean it isn't also 'scandalous'

The US Federal Circuit has upheld a trade-mark board's decision to refuse to register a mark on the grounds that it was 'immoral ... or scandalous': *In re Marsha Fox*, 2012-1212 (Fed Cir, 19 December 2012). Since 1979 Fox has sold 'rooster-shaped chocolate lollipops' under the name COCK SUCKER, with a device of a crowing farmyard bird. Her primary market consists of fans of the University of South Carolina and Jacksonville State University football teams, 'both of which employ gamecocks as their athletic mascots'. This was too much for the trade-mark officials, who thought that the proposed mark also supported a 'scandalous' meaning. They rejected Fox's argument that any lewd or vulgar connotations were negated by spelling her product names as two words rather than one. Her appeals failed, in part because Fox conceded that the humour of the mark was based on the *double entendre*. One word *versus* two was 'a distinction without a difference', the association of the product with poultry not diminishing its connection with the associated vulgar term. 'The fact that something is funny does not mean it cannot be "scandalous"', said the learned (and somewhat unfortunately named) Dyk J.

New form of intellectual property in registered images

The Bailiwick of Guernsey (a UK Crown dependency and one of the vestiges of William the Conqueror's duchy of Normandy) has created a new kind of intellectual property right, the registered image.

The personality and images of a 'personnage' – that is, one or more natural or legal persons or fictional characters – may be registered, giving the registrant the right to control the commercial use of both the personality and images of the personnage. Images for these purposes include the personnage's name, voice, signature, likeness, verbal or facial expressions, gestures and other distinctive characteristics, as well as conventional images. Rights in respect of a natural person may be registered if the person is living at the time of the registration or died no more than 100 years earlier. Registration gives the right to control the use of any image of the personnage, although it will be easier to enforce the use of specific registered images. The term of the right is 10 years, subject to renewal. 'Derogatory' use of a registered personnage is prohibited, but there are exceptions in the legislation for media reporting, parody and satire, artistic use and private or non-commercial use. Personality rights are capable of assignment, licensing and transmission on death. Registration is open to non-residents of the Bailiwick.

[Link available and **here**].

To what extent is there copyright in a snapshot?

The snapshot that generated the litigation was taken by Donald Harney, a freelance photographer. The subjects: Christian Gerhartsreiter and, on his shoulders, his young daughter with a Palm Sunday palm in her hand, with a church in the background. Gerhartsreiter had, in fact, abducted his daughter during a custodial visit and publication of the photo in the media and as a FBI wanted poster blew his cover as a fraudster who had masqueraded as a British aristocrat and, more recently, a member of the Rockefeller family. So why the copyright suit? Sony Pictures made a TV movie about Gerhartsreiter, publicising it with an image of father carrying daughter that was clearly based on Harney's original. The issue, then, was whether Harney could assert copyright in the photo he had taken.

In the end, the answer was no. The two images were very close in many respects: same pose, same pink coat on the girl, tree and church in the background. The district court in Boston concluded that while the factual content of the two images was almost identical, the Sony photo lacked the 'expressive content' that was unique to Harney's image. The 1st Circuit, which heard Harney's appeal, agreed. It is permissible to mimic the non-original, factual elements of a work that is subject to copyright. The district court judge was correct to 'dissect' Sony's image into its component parts, expressive and factual, in order to separate the protected elements from the unprotected. The photo used by Sony reproduced the factual aspects of Harney's work (father, daughter on shoulders etc.) but not Harney's 'aesthetic flair' in composition, contrast of light and shade, and vibrant use of colour. The court rejected Harney's argument that his photo encapsulated the essence of the Gerhartsreiter story and should not be subject to the dissection analysis, because this would enlarge the scope of copyright protection by giving him control over the idea captured in the still. This will not leave freelance photographers who take pictures on the fly without copyright protection: they can still prevent unauthorised use of the actual images they have taken, if not reproduction of the purely factual elements of those pictures. The Sony picture reproduced almost none of the protectable aspects of the original, so Harney's claim had to fail: *Harney v Sony Pictures Television Inc* (1st Cir, 7 January 2013).

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

LAWYERS

Little reminder from the Delaware court: don't fake that notarised document

If you do, bad things can happen – as in *Bessenyei v Vermillion Inc* (Del Ch, 16 November 2012). Bessenyei and Goggin were shareholders of the defendant, which they sued over a reduction in the number of seats on the company's board of directors. The whole action was derailed when it transpired that a Pennsylvania notary had, in Bessenyei's absence abroad, signed copies of documents that had purportedly been sworn before her when in fact they hadn't. Vermillion argued that because the notary's verifications were invalid under Pennsylvania law, they were improperly filed in the Delaware proceedings.

Quite so, thought Vice-Chancellor Noble of the Chancery court. Under Pennsylvania law, the ‘notarised’ documents were not just invalid but unlawful; not having them sworn in the presence of the notary was no mere technicality. Delaware law allows unsworn declarations by parties located outside the USA, but does not recognise improperly sworn documents. Bessenyei, a Hungarian non-lawyer residing in Switzerland, probably didn’t understand the legal niceties, but the Pennsylvania notary should have known better. She was, however, acting on the instruction of Goggin, Bessenyei’s co-plaintiff and a lawyer, and her fate was best left to her regulatory body. As for Goggin, he really ought to have known better – but again, his ethical violations were a matter for the Pennsylvania authorities as he was not acting (at least formally) on the file. Where the buck stopped was with the Delaware counsel who acted for Bessenyei and Goggin: they were aware that Bessenyei was out of the country and there were issues with the ‘notarised’ documents as a result. In the Vice-Chancellor’s words, ‘Conduct of this nature warrants dismissal’, with the result that Bessenyei and Goggin’s action was dismissed in its entirety (although, this happening in the US, the defendants could not recoup their costs).

MUNICIPAL

By-law struck down for lacking proper purpose

Toronto city council passed a by-law in 2011 banning the possession, sale or consumption of shark fins and products derived from them, on account of the inhumane method by which the fins are typically harvested. The applicants in *Eng v Toronto (City)*, 2012 ONSC 6818, challenged the validity of the by-law and won, on the grounds that it lacked a proper municipal purpose.

The city was unable to establish that protecting sharks from extinction through human predation provided an identifiable benefit to the environmental well-being of the city and its residents, promoted the welfare of animals in the city or protected the health of Toronto residents. The by-law was also overly intrusive in that it affected the private consumption of food products which have not been made illegal by the federal or provincial government, and adversely affected the traditional cultural practices of members of the Chinese community.

[Link available and **here**].

SECURITIES

Everyone’s a VP, right?

Or a managing director, but often enough the title on the business card doesn’t reflect a truly senior or executive function. As a result of a recent survey of member firms and investors, the Investment Industry Regulatory Organization of Canada has proposed to issue guidance which would require firms to implement best practices and supervisory systems, with a view to minimising public confusion about the seniority or expertise of a given individual. IIROC is proposing centralised review and approval of business titles and financial designations, especially those used in relation to older investors and retirement planning. The comment period ends on 9 March.

[Link available **here**].

TORTS/CONTRACTS/BANKING

Bank not liable for alleged misrepresentation about credit rating

The Gatts owned Melksham Court, a multi-million pound house in a posh part of Gloucestershire. They applied to the Bank of Scotland (BoS) for a second mortgage on the property, but were – to their considerable chagrin – turned down. Their own bank, Barclays, had provided information to credit rating agencies, which had in turn passed it on to BoS, that Mr Gatt’s account was ‘delinquent’ (if not ‘in default’) as a result of a credit limit of only £1,500 but an overdraft of £260,000. This was erroneous, said the couple: the account was not Mr G’s alone, but a joint account with his wife; and, more seriously, the Gatts contended that Barclays had misrepresented the fact that the overdraft had been authorised on the informal assurances of their bank manager. As a result of the bank's misstatements, the Gatts alleged that the inability to refinance Melksham in order to fund their property-development business led to the collapse of that business, the loss of Melksham and the personal bankruptcy of Mr Gatt. (In the course of Mr G's bankruptcy proceedings, Barclays bought his claim from the trustee and then dropped it, 'so that to the Gatts' considerable indignation' Mrs G was left as sole claimant against the bank.) The bank disputed Mrs Gatt's claims for breach of contract, negligent misrepresentation and defamation, arguing that the information that had been passed on was 'essentially true' in that the joint account had a very large unauthorised overdraft.

All claims failed: *Gatt v Barclays Bank*, [2013] EWHC 2 (QB). The contract claim was not well founded because the Gatts had consented to disclosure of their credit information. There would have been breach of contract if the bank had made false statements to the credit agencies, but it had not: the £260,000 overdraft was, in fact, unauthorised (if not in default). The manager, while trying to help the Gatts through a bad patch, had not actually authorised the large overdraft, which the bank was actively trying to get the Gatts to repay. The figures disclosed to the credit agency therefore reflected reality, and this largely disposed of the claim of negligent misrepresentation too. The defamation claim failed as well. While the bank had clearly published information about the Gatts' bad credit that (if true) was defamatory, the Gatts had authorised disclosure of the information, and it was substantially true. It was unlikely, in any event, that the Gatts would have been able to survive a falling property market even if the credit reports had not been published; having 'borrowed beyond their means', they would probably have lost everything anyway. The judge also found that as joint holder of the account, Mrs Gatt was personally liable to repay the full amount of the couple's indebtedness to the bank.

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

TORTS/POLICE

Woman who sent suicidal text fails in claims against police for wrongful arrest

Linda Leenstra has a history of mental illness, which has resulted in stays in hospital for related emergencies. One day, she sent a text to her therapist in which she said she thought it was 'a good day to die'. The therapist replied, saying that if she didn't hear back she would have to call the police. Leenstra did not reply, so the therapist contacted the police and asked them to conduct a 'welfare check'. The cops arrived at Leenstra's house, where her husband assured them she was fine, but Leenstra reiterated the statement she had made to the therapist and, when told by the police officers that they would need to call an ambulance to take her in for an assessment, a scuffle ensued. Leenstra allegedly spat on the officers and kicked them; she was placed under arrest for assault. Later, she sued the officers and the local police force and the township for various wrongs, including detention without probable cause, wrongful search and arrest, use of excessive force, endangering life and limb, malicious prosecution, constitutional violations and (with respect to the force and the township) failure to train and supervise, conspiracy to arrest falsely and maintaining a practice of constitutional violations: *Leenstra v Then* (D NJ, 3 December 2012).

All claims were summarily dismissed by the district court in New Jersey. The police acted under a reasonable belief that Leenstra posed a danger to herself in resisting voluntary treatment, and the evidence showed that she had assaulted the officers sent to her house. Their efforts to restrain her were reasonable in the circumstances, and Leenstra failed to make out a claim of malicious prosecution. Her constitutional claims also failed, as well as those against the police force and the township.

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