Annual Review of Law and Practice 2014:

Torts

David A. Crerar and Hunter Parsons[1]
Borden Ladner Gervais LLP, Vancouver

David A. Crerar

David Crerar is a partner in the corporate and commercial litigation group at Borden Ladner Gervais LLP, and serves as an adjunct professor at the University of British Columbia Faculty of Law. He practices and has published in the areas of banking and pension litigation, injunctions, defamation, media and internet law, and protection of trade secrets. He has chaired and presented in CLE BC conferences on torts, internet law, civil procedure, and electronic discovery. Mr. Crerar is a graduate of the University of Toronto Faculty of Law.

Hunter Parsons

Hunter Parsons is an articling student at Borden Ladner Gervais LLP. He has published in the areas of trial and case management, commercial arbitration, corporate fiduciary duties, and securities regulation. Mr. Parsons is a graduate of the Schulich School of Law at Dalhousie University, where he was a Schulich Scholar from 2011-13.

[1] The authors acknowledge and thank Evelyn Chui of Borden Ladner Gervais LLP for her invaluable assistance in the preparation of this chapter.

I. INTRODUCTION

It was another relatively sleepy year for the development of tort law in Canada. In a pair of decisions – *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 and *Sun Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 – the Supreme Court of Canada held that claims based in predominant purpose conspiracy, unlawful means conspiracy

and intentional interference with economic interests brought by indirect purchasers down the distribution chain who claimed injury as a result of price-fixing and overcharges were sustainable and it was not plain and obvious that such claims would fail.

The most important 2013 Supreme Court of Canada hearing in torts will likely result in the most important torts decision in 2014: on January 31, 2014, *A.I. Enterprises v. Bram Enterprises Ltd*., 2014 SCC 12 was released (just missing the cut-off for this year's *Annual Review*), dismissing the appeal from 2012 NBCA 33 (discussed in last year's *Annual Review*). Watch this space next year for a full review of this decision and a discussion on the torts of unlawful means conspiracy and intentional interference with economic interests as articulated by the Supreme Court of Canada.

Defamation continues to be the most fertile area of tort law. The English Court of Appeal decision in *Tamiz v. Google Inc.* [2013] EWCA Civ 68 exposes Google and other search engines and internet service providers to liability as publisher of defamatory statements that are not taken down or blocked in a timely manner after complaint. And *Mainstream Canada v. Staniford*, 2013 BCCA 341 (application for leave to appeal dismissed with costs (without reasons) February 13, 2014 (File No. 35545)) arguably raises the bar for the defence of fair comment, clarifying the required provision of facts that back up controversial statements made in the course of an active scientific debate.

II. NEGLIGENCE: DUTY OF CARE

To determine whether the defendant owes a duty of care to the plaintiff, the court first asks whether the relationship between the parties gives rise to a duty of care already recognized in the case authorities: if so, a *prima facie* duty of care is presumed. If the relationship does not fall within traditional categories, the analysis proceeds to the second step: given the relationship between the parties, is it reasonably foreseeable that the defendant's carelessness could harm the plaintiff, and is there sufficient proximity between the parties to make it just and fair to impose a *prima facie* duty of care? Finally, if a *prima facie* duty of care arises under either of the first two steps, are there residual policy considerations outside of the relationship between the parties that ought to negate or limit the *prima facie* duty? (*Cooper v. Hobart*, 2001 SCC 79).

1. Dangerous Construction Claims Brought by Subsequent Owners

A subsequent owner of a building that poses a real and substantial danger to the occupants is entitled to claim in tort against the original builder of the building for the reasonable cost of repairing the defects and putting the building back into a non-dangerous state. It is not necessary that the real and substantial danger be imminent (*Fargo v. Canmore (Town)* 2013 ABCA 96, applying and interpreting *Winnipeg Condominium Corp. No. 36 v. Bert Construction Co.* [1995] 1 SCR 85). If the law were to impose a pre-condition of imminent threat of real and substantial danger before a subsequent owner could recover, it would encourage owners to put off repairs to fix the defect until it poses an imminent risk of injury to persons or damage to property: an undesirable disincentive.

2. No Duty of Care to a Purchaser of a Non-dangerous Product

Arora v. Whirlpool Canada LP, 2013 ONCA 657 held that it is plain and obvious that a manufacturer does not owe a duty of care to a purchaser of a defective product that is not a direct or indirect source of danger (see the 2013 *Annual Review* for discussion of the trial decision). Purchasers of Whirlpool front-loading washing machines sought to bring a class action based on a design defect that allegedly caused a build-up of smelly mold, mildew, and bacteria. The court assumed for the sake of analysis that the plaintiffs' pleadings disclosed a *prima facie* duty of care but held that policy considerations negate the recognition of a cause of action for diminution in value for a defective, non-dangerous consumer product.

3. Government Food Inspector Owes No Duty of Care to an Inspected Food Distributor

A government food inspector does not owe a duty of care to a food distributor economically harmed by the inspector's negligent health warning concerning the plaintiff's food (*Los Angeles Salad Co. v. Canadian Food Inspection Agency,* 2013 BCCA 34) (see the 2012 *Annual Review* for discussion of the trial decision). In the facts leading to the decision, the plaintiff food company sued the Canadian Food Inspection Agency for damages allegedly caused by the agency's public health warning that the plaintiff's carrots were the likely source of a Shigellosis outbreak. Applying the *Cooper* analysis set out above, the court first noted that the relationship between a government food inspector and a food company is materially different from the relationships in other cases that recognize a duty of care owed by other government authorities to the claimants. Further, there was insufficient proximity between the parties to establish a new duty of care. The court noted that the proximity analysis requires examination of the relationship at issue, and the consideration of factors such as expectations, representations, reliance, and the property or other interests involved, as well as policy considerations. Where the statutory scheme imposes duties on the regulator to the public at large, a private law of duty of care in the exercise of those duties does not typical arise. Finally, even if a duty of care were recognized, the duty would be negated on the policy grounds that it would create liability in an indeterminate amount for an indeterminate time to an indeterminate class: if the agency owes a duty of care to protect the economic interests of a food supplier, then it will be difficult not to extend that duty to a multitude of other persons whom would be foreseeably harmed by negligent inspection, including retailers, wholesalers, suppliers, food processors, distributors, and farmers, along with all of their employees. Accordingly, the Court of Appeal confirmed the decision of the trial judge, striking the claim on a summary basis.

4. Government Owes Duty of Care to Members of Military

While governments are immune from claims in negligence for acts or omissions occurring during combat, the Ministry of Defence owes a duty of care to members of the armed forces, as employees, to provide safe work systems and safe equipment (*Smith v. Ministry of Defence* [2013] 1 All ER 778 (CA)). The reasons addressed several actions brought by family members of soldiers killed in Iraq. In one claim, the soldiers were killed by improvised explosive devices (IEDs) while driving Snatch Land Rovers that were alleged to be insufficiently armoured. The second claim was that the Ministry had failed to provide technology sufficiently protective against the "friendly fire". The Court of Appeal agreed with the trial judge's refusal to strike the

claims on a summary basis. The Court of Appeal noted that multiple authorities had recognized a duty of care owed by the Ministry of Defence as employer to members of the military. The mere fact that courts may face policy questions concerning the allocation of scarce resources does not preclude the existence of a duty to take care. Such questions about the allocation of scarce public resources, and the appropriate work conditions for soldiers, are to be examined with respect to whether the Ministry of Defence met the standard of care, not in the determination of whether a duty of care exists (*quaere* whether such an analysis would apply in Canada, given the distinction between operational and policy decisions set out in cases such as *Just v. British Columbia*, [1989] 2 SCR 1228). With respect to the scope of "combat immunity" protecting the Ministry of Defence from negligence claims for accidents arising from acts or omissions in active operations, the court noted that the alleged breaches (that is, the failure to supply proper equipment) occurred well before the active operations in which the deaths occurred.

5. Duty of Care: Athletic Events

The many lawyer participants in Grand Fondos and myriad other organized cycling events will find the reasons in *Kempf v. Nguyen*, 2013 ONSC 1977 of interest. Both the plaintiff and defendant were experienced cyclists who crashed while competing in a 75-kilometre charity bicycle ride. The court found that the plaintiff was accelerating when the defendant, for no apparent reason, moved suddenly to the left; their tires came in contact and the plaintiff fell off his bicycle, sustaining injury. The court found that the defendant owed a duty to the plaintiff to take care while riding in a close-knit group of cyclists, as any sudden or unexpected movement could have a disastrous effect on the safety of the other riders. The inherent risks present in the activity do not negate the duty of care. Rather, the fact that a particular activity carries with it certain inherent risks can operate to modify what constitutes the standard of reasonable care in the circumstances: a person engaged in a risky activity must be taken to reasonably expect to encounter specific risks.

III. NEGLIGENCE: STANDARD OF CARE

1. Standard of Care: Athletic Events

Kempf, supra, also provides useful guidance of the standard of care: that standard is measured against what a reasonable competitor would do in the circumstances. In joining the ride, the plaintiff assumed the usual risks of the sport, but did not agree to accept the risks associated with conduct that did not accord with the usual rules, standards, and etiquette of the sport. By its nature, cycling is not a contact sport or one that involves physical encounters with opponents, as in football or rugby, and the conventions of the sport required the defendant not to make sudden movements while riding in a peloton.

2. Recess Rough-Housing: Standard of Care for 11-Year-old Child

The standard of care applicable to children, which is that of a child of similar age, intelligence and experience, was applied to a case involving friendly horseplay during recess (*Gu (Litigation Guardian of) v. Friesen*, 2013 BCSC 607). The Court held that an 11-year-old fell below the standard of care when he pushed the child plaintiff from behind, who was carrying another child

piggyback-style, causing the plaintiff to lose her balance and break her arm as a consequence. The plaintiff was carrying her friend on her back during recess when the defendant, who was also friends with the plaintiff, pushed the plaintiff from behind. The defendant was aware of the school's policy against pushing on the playground, but he testified that he did not put his mind to the risks of his conduct before pushing the plaintiff. The Court found that the defendant possessed normal intelligence for his age. Additionally, his maturity and impulsivity fell within the normal range for an 11-year-old. The Court found that a child with similar attributes ought to have foreseen that pushing a child who was carrying another child on her back would create the risk of an injury for one or both of the children. The Court noted that this is the type of knowledge that is acquired by all children on the playground "at a very young age".

IV. NEGLIGENCE: CAUSATION

1. Causation: Troubled Delivery of Child

In the facts leading to *Ediger v. Johnston*, 2013 SCC 18 (see the 2012 *Annual Review* for discussion of the Court of Appeal decision and the 2010 *Annual Review* for the trial decision), the plaintiff suffered from persistent bradycardia during her birth, causing severe and permanent brain damage. The doctor defendant attempted to deliver the plaintiff using a mid-level forceps procedure, which he abandoned midway to seek out a surgeon for an emergency caesarian section. The trial court found that the doctor's application of the forceps likely caused the obstruction of the plaintiff's umbilical cord, leading to the bradycardia. The trial judge also found that the doctor's failure to have surgical back-up available was a "but for" cause of the injury.

The Supreme Court of Canada commenced its analysis by reaffirming the legal test for causation set out in *Clements v. Clements*, 2012 SCC 32 (discussed in last year's *Annual Review*): the plaintiff must show, on a balance of probabilities, that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was the necessary cause of the injury; in other words, the injury would not have occurred without the defendant's negligence.

The defendant doctor argued that the plaintiff failed to show that her injury would have been avoided had the doctor satisfied the standard of care by having surgical back-up ready during the mid-forceps procedure. The doctor appellant argued that the evidence did not establish that the plaintiff would have been delivered faster had the surgeon arrived earlier than he did. The Supreme Court of Canada, however, agreed with the trial judge's ultimate conclusion that "*minutes mattered and because of Dr. Johnston's failure to ensure that surgical back-up was reasonably available, the damage was done before Cassidy could be delivered by caesarian section and resuscitated*." As the plaintiff could have been delivered by caesarian section without injury, and as the defendant doctor failed to take precautions to ensure surgical back-up, despite any urgency precluding him from doing so, the doctor fell below a standard care, in a manner that caused the injury.

2. Causation: Retirement Misrepresentations

Even through the defendant insurance agents made errors with respect to the monitoring and implementation of a retirement plan for the plaintiffs, no liability could be found where the plaintiffs did not rely upon the contents of the plan in making their decision to retire at a certain time, which decision, and not the defendant's errors, was the triggering event for their reduced income and losses that they suffered (*Giesbrecht v. Canada Life Assurance Co*., 2013 MBCA 53). The Court of Appeal concluded that the trial judge had failed to address the issue of whether the representations and omissions of the defendants had in fact caused the alleged financial losses. For this, the trial judge was required to apply the "but for" test set down in the Supreme Court of Canada decisions of *Hanke v. Resurfice Corp*., 2007 SCC 7 (see the 2008 *Annual Review*), *Clements (Litigation Guardian of) v. Clements*, 2012 SCC 32 (see last year's Annual Review), and *Ediger (Guardian ad litem of) v. Johnston*, 2013 SCC 18, above.

3. Causation: Insurance Misrepresentations

Similarly, a plaintiff claiming against an insurance broker for an allegedly negligent failure to offer certain optional benefits bears the same onus of proving causation as in an ordinary negligence case (*Zefferino v. Melochie Monnex Insurance Company*, 2013 ONCA 127). The trial judge dismissed the plaintiff's claim, finding as a fact that the plaintiff would not have purchased the additional insurance even if it had been offered. The Court of Appeal dismissed the plaintiff's argument that the insured need only show that the insurer had a duty to inform the insured, that it breached its duty of care, and that there was a gap in coverage. The Court of Appeal noted that requiring proof of the elements of the tort did not place an impossible burden on the insured. Each case will turn on its own facts with respect to whether the plaintiff's history, motivations and other factors that can be canvassed in evidence would have indicated that he would or would not have purchased the optional insurance, and whether the agent's failure to offer that insurance in fact caused a loss.

V. NEGLIGENCE: DAMAGES

1. Failure to Mitigate: Plaintiff Insists on Playing Lacrosse After Lower Back Injury

Following a motor vehicle collision in which the plaintiff suffered a lower back injury, the trial judge properly reduced the loss of earning capacity award by 30% for the plaintiff's failure to mitigate through his insistence upon continuing to pursue a professional lacrosse career (*Morgan v. Galbraith*, 2013 BCCA 305). In *Morgan*, the plaintiff was a highly-regarded amateur and professional lacrosse player who was employed full-time at a bank at the time of the motor vehicle collision. Three months after the collision, the plaintiff left his employment with the bank, complaining of debilitating pain whenever he sat for a prolonged amount of time. Instead of searching for another conventional employment avenue, the plaintiff decided to pursue his professional lacrosse career instead, playing for almost five years after the date of the motor vehicle collision.

In order to play lacrosse, the plaintiff required pain-killing injections for his lower back before each game. The trial judge found the plaintiff's claim that his back pain prevented him from working at the bank was not credible, finding that the plaintiff wanted to pursue his professional

lacrosse career instead of working at the bank. The plaintiff failed to mitigate his loss as he made no reasonable effort to avail himself of a career in banking or the accommodations his employer was willing to make for his injury.

The Court of Appeal did not disturb the trial judge's finding that playing professional lacrosse was not "conducive to recovery" despite the trial judge not making a finding with regard to the extent to which lacrosse actually aggravated the plaintiff's injuries. The Court of Appeal held that 30% was a reasonable reduction of loss of earning capacity for the plaintiff's continued pursuit of lacrosse following the motor vehicle collision.

2. Non-Pecuniary Damages: Indexed to Canada-wide Inflation

Non-pecuniary damages are indexed to Canada-wide inflation rather than the rate of inflation applicable to the province where the plaintiff resides (*T.(A.B.) v. Mah*, 2013 ABQB 241). In *Mah*, the plaintiff, who resides in Alberta, argued that her non-pecuniary award should be indexed to the rate of inflation in that province, which is higher than the Canada-wide rate of inflation. The Court noted that pecuniary damages take into account provincial differences in costs: wage losses, the cost of care and other heads of pecuniary damage are calculated upon the location where the injured plaintiff resides. The Court recognized that, although a non-pecuniary award in the hands of a plaintiff located in a high-inflation province will have less purchasing power than a plaintiff in a low-inflation province, the non-pecuniary award cap set by the Supreme Court of Canada was meant to have a Canada-wide effect. Therefore, it follows that the inflationary adjustment made to such awards is to have a national effect as well, which requires the use of the Canada-wide, rather than provincial, rate of inflation.

VI. CONSPIRACY

In twin decisions, the Supreme Court of Canada confirmed a potential cause of action against a company which has effectuated an overcharge at the top of the distribution chain that has allegedly injured the plaintiff indirect purchasers – the ultimate consumers of the product – as a result of the overcharge being "passed on" to them through the chain of distribution (*Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 and *Sun Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58). In *Sun-Rype*, the plaintiffs were direct and indirect purchasers of high-fructose corn syrup sweetener sold and distributed by the defendants. In *Pro-Sys*, the plaintiffs claimed that Microsoft had engaged in unlawful conduct by overcharging for its Intel-compatible PC operating systems and Intel-compatible PC applications software.

In *Pro-Sys*, Microsoft argued that, as a necessary corollary to the rejection in *King Street Investments Ltd. v. New Brunswick (Department of Finance)*, 2007 SCC 1 of the defence of passing on (that is, the defence that the claimants ultimately suffered no loss as they had passed the burden of *ultra vires* taxes on to their customers), a plaintiff could not use the doctrine offensively, to claim that Microsoft had passed on the cost to the plaintiffs, down the distribution chain. The court rejected this argument, as well as arguments based on policy concerns about such claims. The court found that courts are able to manage the risk of duplicate or multiple recovery, and that a defendant is free to adduce evidence of multiple recovery by the plaintiff and ask the court to reduce the claim accordingly. Further, courts will be able to manage the massive evidence, complex economic theories, and multiple parties in the chain of distribution

required to analyze a claim based upon overcharges. Finally, actions brought by indirect purchasers may serve useful competition and consumer protection goals, as the direct purchasers, usually engaged in active and profitable business relationships with the companies accused of introducing overcharges in the chain of commerce, will not likely bring such actions.

With respect to the substantive tort on which the claim was based, in *Pro-Sys*, the plaintiffs alleged that Microsoft had combined with various parties to commit the economic torts of conspiracy (both predominant purpose conspiracy and unlawful means conspiracy), as well as unlawful interference with economic interests. The court took the opportunity to set out the difference between the two forms of conspiracy.

Unlawful means conspiracy requires no predominant purpose, but requires that:

(1) the unlawful conduct in question is directed toward the plaintiff;
(2) the defendant knows or ought to know that injury to the plaintiff is likely to result; and
(3) injury to the plaintiff does in fact occur.

In contrast, predominant purpose conspiracy is made out where:

(1) the predominant purpose of the defendant's conduct is to cause injury to the plaintiff, using either lawful or unlawful means; and
(2) the plaintiff does in fact suffer loss caused by the defendant's conduct.

Where lawful means are used, if their object is to injure the plaintiff, those lawful acts are considered to be unlawful.

The court noted that while predominant purpose conspiracy has been called by court a "commercial anachronism", it should not strike out Pro-Sys's pleading that Microsoft's primary intent was to injure the plaintiffs, or that the unlawful increase of its profits was a result of that intention. Accordingly, the court declined to dismiss the claim on a pleadings application, as it could not be said that it was plain and obvious that Pro-Sys's claim in predominant purpose conspiracy would fail. The court further rejected the argument that there could never be, as a matter of law, a conspiracy between a parent and subsidiary corporation.

VII. INTENTIONAL INTERFERENCE WITH ECONOMIC INTERESTS

In *Pro-Sys*, *supra*, the Supreme Court of Canada confirmed the three essential elements of the tort of intentional interference with economic interests:

(1) the defendant intended to injure the plaintiff's economic interest;
(2) the interference was by a legal or lawful means; and
(3) the plaintiff suffered economic loss or harm as a result.

The court confirmed that the objective of the tort is to provide a remedy to victims of commercial wrongdoing.

VIII. JOINT TORTFEASORS

Mere facilitation of another's tort will not be enough to make one a joint tortfeasor (*Fish & Fish Ltd. v. Sea Shepherd UK*, [2013] EWCA Civ. 544). For joint liability to arise, there must be (1) a common design that one or more parties will perpetrate a tortious act; and (2) the alleged joint tortfeasor must itself do acts in furtherance of that common design.

In *Fish & Fish*, the plaintiff, who operates a tuna farm in the Atlantic Ocean, was towing cages of live tuna to its fish farm when its vessel was rammed by a ship for the purpose of freeing the tuna. The ramming ship was owned by an environmental activist organization but operated by another organization with the permission of the owner. The plaintiff's cage was damaged and over half of its tuna catch was released. The plaintiff brought a suit against the ramming ship's owner as well as the operator, claiming trespass and conversion against each of them. The Court held that the owner of the ramming ship was a joint tortfeasor since it acted in furtherance of the common design by making the vessel available to the campaign and, as a finding of fact, paying the crew and assisting in the handling and processing of donations received by the operator. The court clarified that a joint tortfeasor does not need to be physically present in order for a common design to be established, nor is it necessary for the joint tortfeasor to play an "effective" or "essential" part in the common design. All that is required is the joint tortfeasor to undertake "some act" in furtherance of the common design to attract joint liability.

IX. DEFAMATION

1. Negligent Communication

Traditionally, Canadian courts have resisted claims in negligent communication where the claim is essentially one for defamation; the negligence formulation is often brought as an end-run around generous defamation defences, based upon the importance of free communication in our society. That said, in *Young v. Bella*, 2006 SCC 3, the Court confirmed that a negligent communication claim could be brought in tandem with a defamation claim where (a) proximity and enforceability have been established; and (b) the damages cover more than just harm to the plaintiff's reputation. Courts will nonetheless be loath to find a duty of care based on a sufficiently close relationship of proximity between the parties such that, in the reasonable contemplation of the defendant, carelessness on its part in communicating might cause damage to the plaintiff. Where a journalist or a fact-checker at a journal contacts the subject-plaintiff before publication in order to obtain comment or to check facts (as required under the responsible communication defence set out in *Grant v. Torstar Corp.*, 2009 SCC 61), that alone is insufficient to establish the proximity required to ground a duty of care (*Schtaif v. Toronto Life Publishing Co. Ltd.*, 2013 ONCA 405, at paras. 80-85). Otherwise, a duty of care, leading to a potential negligent communication claim, would arise in virtually every defamation claim arising from a published article.

2. Liability for Publication

Traditionally, anyone involved in the creation and distribution of a defamatory publication is liable for its publication. But to be responsible, a person must knowingly be involved in the process of publishing the relevant words. It is not enough that a person merely plays a passive

role in the process. To constitute publication, it is not sufficient for a member of a group of defendants to merely approve of what the group is communicating. Rather, the defendant must actively participate in the publication to face liability. Thus, the director of communications of the defendant medical association, while serving as the author of the publication in question, was doing so in her capacity as communications director, and operating under the directions of her employers, was not liable as a publisher (*Wang v. British Columbia Medical Association*, 2013 BCSC 394, at paras. 268-276). Similarly, although a director of the medical association could in theory have insisted upon changes, and generally supported the concept of the publication, as the directors did not see the actual publication before it was distributed, they could not be held liable.

3. Rejection of the US "Single Publication Rule"

The Ontario Court of Appeal endorsed a decision of the British Columbia Court of Appeal (*Carter v. BC Federation of Foster Parents Assn.*, 2005 BCCA 398) in rejecting the "single publication rule" from the United States wherein a plaintiff alleging defamation has a single cause of action, which arises at the first publication of an alleged liable, regardless of the number of copies of the publication distributed or sold (*Shtaif v. Toronto Life Publishing Co. Ltd.*, 2013 ONCA 405). Anglo-Canadian jurisprudence continues to hold that each new distribution or publication of a defamatory statement in a new context (for example, the posting and re-posting of a newspaper article on a website), constitutes a fresh defamatory statement on which the plaintiff can separately sue. The imposition of a single publication rule has important implications with respect to traditionally tight limitation periods for defamation claims: while the initial publication may be limited, and thus not prompt the plaintiff to sue, a later, wider distribution may cause the plaintiff concern, but it might nonetheless be statute-barred because of the earlier publication. The Ontario Court of Appeal held that this potentially serious prejudice to plaintiffs should prompt the ongoing rejection of the American rule in Canada.

4. Pleadings

Casses v. Canadian Broadcasting Corp., 2013 BCCA 200 addressed two points in the technically demanding area of defamation pleadings, in both cases confirming the traditional law. First, the court confirmed the rule in *Polytech (Holdings) plc v. Trelford* [1986] 2 All ER 84 (CA): the defendant may plead that an alleged defamatory statement does not contain the "sting" alleged by the plaintiff, but that the impugned words, when read in the context of the overall article or publication, convey a different meaning. This is based on several policy considerations: (1) the plaintiff should not have the exclusive right to define the issues for trial; (2) the trier of fact should not be limited to the sting as pleaded by the plaintiff; and (3) unless the defendant has an opportunity to provide a full explanation for its position, freedom of expression and freedom of the press will be severely harmed.

Second, the court confirmed the rule in *Plato Films Ltd. v. Speidel*, [1961] 1 All ER 876 (HL): as an action in defamation seeks to compensate for the loss of a good reputation, the defendant is permitted to plead particulars of the plaintiff's general bad reputation. Although the defendant may not plead specific bad acts committed by the plaintiff, where those negative incidents are of sufficient notoriety and relevance so as to contribute to a general bad reputation, they are permitted. There is not a bright line between impermissible facts that in themselves did not contribute to the reputation of the plaintiff (whether because they were not well-known or

otherwise) and relevant and direct facts of past specific incidents that would provide necessary background information for considering the plaintiff's existing reputation.

5. Potential Liability of Website or Search Engine as Publisher of Defamatory Statements

A website that provides webpages for blogs (and, by extension, any website) could face liability in defamation as a publisher, but only after the existence of a potentially defamatory publication is brought to the attention of that party, or otherwise ought to have been known by that party (*Tamiz v. Google Inc*. [2013] EWCA Civ 68). In *Tamiz*, the plaintiff had complained to the defendant Google, the provider of the Blogger.com web service providing webpages and design tools for users to develop and post their blogs. One such blog included potentially defamatory statements about the plaintiff, a politician. After complaint, Google swiftly removed the postings. The Court concluded that it may be possible, if the defendant allows defamatory material to remain on a blog that it hosts after notification of the presence of that material, for the court to conclude that the web host had associated itself with, or made itself responsible for, the continued presence of the defamatory material, and thereby became a publisher of that material. While the plaintiff was successful with respect to the potential liability of Google, in the end the plaintiff's claim was dismissed: because Google removed the posting so swiftly after having received notice, any damage to the plaintiff's reputation arising out of continued publication of the comments during that brief period would have been trivial. Note that the decision arose from a backfired application by Google to strike the claim summarily.

6. Order that Websites Contribute to Crafting Effective Injunction

In a novel ruling, the High Court of Ireland ordered expert representatives from Google and Facebook to meet with the plaintiff's expert to formulate an effective remedy for various defamatory statements posted online (*McKeogh v. John Doe 1 et al.* (16 May 2013 Record No. 2012/254P). After a customer left his taxi without paying his fare, the taxi driver posted a video on YouTube and asked if anyone could identify the young male customer. A viewer named the plaintiff as the culprit, and identified him as a student at Dublin City University. The plaintiff was thereafter subjected to terrible opprobrium in comments on both YouTube and Facebook. The video and the comments went viral. A fake Facebook profile defamatory of the plaintiff was created. The court noted that payment of damages would not be an adequate remedy so long as the defamatory materials persisted on the internet. The court ordered expert representatives from Facebook and Google/YouTube to meet with the plaintiff's expert to produce a report setting forth what steps would be taken to achieve the total takedown of the defamatory materials as far is was reasonably possible.

7. Defence of Qualified Privilege: Website Communications

The Saskatchewan Court of Appeal in *Rubin v. Ross*, 2013 SKCA 21, leave to appeal refused, [2013] SCCA No. 181 (QL) endorsed a list, provided in R.D. McConchie and D.A. Potts, *Canadian Libel and Slander Actions*, of criteria to consider when determining whether a communication is protected by qualified privilege on the grounds that the communicator has a duty to make the communication, and the recipient has an interest in the communication:

(1) the content of the alleged defamatory expression;
(2) who published it;
(3) why it was published;
(4) to whom it was published;
(5) under what circumstances it was published;
(6) the nature of the duty which the defendant claims to discharge or the interest which the defendant claims to safeguard;
(7) whether there are any statutory duties imposed on the speaker;
(8) the urgency of the occasion;
(9) the manner in which the defendant conducted himself or herself;
(10) whether or not the expression was published in breach of confidence;
(11) whether or not the defendant officiously volunteered the information or whether it was in answer to an inquiry; and
(12) whether or not what was published was germane and reasonably appropriate to the occasion.

The communication in question, implying that the plaintiff was actively involved in harassing an employee, was published by the defendant union on its website and on hospital bulletin boards, both publicly-accessible. As such, many of the recipients of the communication lacked the requisite corresponding interest in receiving the communication. The court noted that while a union or other organization may be protected by qualified privilege for postings on a website, such privilege will only apply where reasonable steps are taken to restrict access to the website by the public generally and by those with no interest in the information. Even where a certain occasion attracts qualified privilege, it does not necessarily follow that all of the statements made on the occasion attract qualified privilege if the contents of the communication go beyond what is necessary to achieve the purpose of the qualified occasion, the defence of qualified privilege will not apply.

8. Defence of Qualified Privilege: Communications Within a Professional Organization

A letter by the Executive Board of the British Columbia Medical Association to all of its members is protected by qualified privilege, as it was a communication from a BCMA member to other members on a subject of communal interest: the functioning of that board (*Wang v. British Columbia Medical Association*, 2013 BCSC 394, at para. 289).

9. Defence of Qualified Privilege: Allegations of Sexual Abuse

In an unhappy case, the court found that the defendants' emails to various family members alleging that the plaintiff, their uncle, had sexually abused them as children were defamatory, and not protected by the defence of qualified privilege (*Vanderkooy v. Vanderkooy*, 2013 ONSC 4796). The court rejected the defendants' argument (which relied on a British Columbia case, *P.B. v. R.V.E.*, 2007 BCSC 1568) that all family members have an interest in receiving allegations of sexual abuse of a child member of the family, and that all statements within the family are protected by qualified privilege. The court found that communicating the allegations of sexual abuse beyond the circle of immediate family members, to extended family members

and to other members of the church and community, exceeded the relationship of duty-interest required in qualified privilege, and was thus not protected. Nor were the communications necessitated by urgency or by a need to counter the plaintiff's version of events, which was a simple denial of such allegation. The defendants' communications merely repeated their past allegations of sexual abuse and were not responsive to the plaintiff's denials. The court awarded the plaintiff general damages of $125,000.00.

10. Defence of Fair Comment and Scientific Controversies

In order for the defence of fair comment to succeed, it must be clear to those who read it what the underlying facts are and what comments are made upon them (*Mainstream Canada v. Staniford*, 2013 BCCA 341 (application for leave to appeal dismissed with costs (without reasons) February 13, 2014 (File No. 35545)). This can be achieved in three ways:

(1) by expressly setting out the underlying facts in the same publication in which the comment appears;

(2) by making clear reference to external facts or studies on which the comment is based; or

(3) without express or direct reference, if the underlying facts are "notorious" .

The defendant Staniford, a zealous activist against farmed salmon, issued mock advertisements based upon cigarette packaging with warning statements to the effect that "Salmon Farming Kills" and "Salmon Farming is Poison". The plaintiff Mainstream, a producer of farmed salmon, claimed that these statements defamed its products, and that they could not be defended as fair comment because they were blatant statements of fact. The trial court concluded that the defendant's statements, "as prejudiced, exaggerated and obstinate as they are" were based upon scientific literature generated by the debate over farmed salmon, and were thus statements of opinion protected by the defence of fair comment.

The Court of Appeal reversed the decision below. Certain facts underlying the comment (specifically that certain contaminants found in the flesh of farmed salmon were capable of causing cancer, in the opinion of certain scientists) were not expressly mentioned within the defamatory publication. Nor were they notorious. Nor were those underlying studies sufficiently referred to in the defamatory publication. As such, readers of Staniford's defamatory comments were unable to make up their own minds about the merits of the comments. The fact that a "determined reader" might be able to further research the issue and locate in scientific studies the facts on which the statements were based is insufficient: the defence of fair comment is un available where only a portion of the audience is aware of the facts upon which a comment is based, or could have become aware of those facts with relative ease without being required to use their own substantial initiatives to search out those facts.

The court thus concluded that the defence of fair comment did not apply. The court awarded general damages of $25,000. Given the malice and persistence of the defendant, significant punitive damages of $50,000 were awarded. Further, the defendant's contemptuous and aggravated behavior in the course of the litigation prompted an award of special costs.

This case has significant implications for the boundaries of free speech and scientific debate in our society. One can think of many controversial statements that nonetheless right-thinking people would consider to be protected matters of comment that may well fall short of the requirements set out by the court in *Mainstream*: in daily conversations concerning matters of active scientific debate, how often are specific studies cited?

Oddly, neither the trial nor the appellate decision cited the recent UK Supreme Court decision in *Spiller v Joseph*, [2010] UKSC 53, where that court expressly rejected the need that a comment "…identify the subject matter on which it was based with sufficient particularity to enable the reader to form his own view as to its validity" in order to be protected by the defence of fair comment: "where adverse comment is made generally or generically on matters that are in the public domain I do not consider that it is a prerequisite of the defence of fair comment that the readers should be in a position to evaluate the comment for themselves." Instead, the comment need only "…explicitly or implicitly indicate, at least in general terms, the facts on which it is based". The UK Supreme Court further stated:

> The comment must, however, identify at least in general terms what it is that has led the commentator to make the comment, so that the reader can understand what the comment is about and the commentator can, if challenged, explain by giving particulars of the subject matter of his comment why he expressed the views that he did. A fair balance must be struck between allowing a critic the freedom to express himself as he will and requiring him to identify to his readers why it is that he is making the criticism. [at para.104]

X. BREACH OF CONFIDENCE

The tort of breach of confidence has three elements: (1) the information conveyed must be confidential in nature; (2) the information must have been communicated in confidence; and (3) the information must have been misused by the party to whom it was communicated and to the detriment of the party who confided it (*Lac Minerals Ltd. v. International Corona Resources Ltd*., [1989] 2 SCR 574).

In order for the information to be "confidential in nature" at the first stage of the test, the plaintiff must have a proprietary right over the information in the sense that he or she created the information through his or her time, skill and effort (*Scott & Associates Engineering Ltd. v. Finavera Renewables Inc*., 2013 ABQB 273, aff'd 2013 ABCA 181). Information that is obtained through a third party and subsequently passed along to the defendant by the plaintiff is not "confidential in nature".

In *Scott*, the plaintiff sought to purchase a wind generating project offered for sale by a third-party vendor. The plaintiff submitted a qualifying bid, which was eventually selected by the vendor as the preferred bid. However, the plaintiff did not have the financing necessary to fund the project, and as a consequence, the plaintiff was brought together with the defendant to assist with financing. The parties signed a Mutual Confidentiality Agreement (the "MCA") and the plaintiff brought the defendant into the acquisition of the project. Accordingly, the plaintiff shared information about the project with the defendant that was originally obtained by the plaintiff from the vendor. The transaction eventually closed, but the plaintiff and the defendant

had a falling out, with the defendant claiming that it acquired the project by itself. The plaintiff brought an action for, *inter alia*, the tort of breach of confidence.

The Court held that the defendant did not breach the MCA, but it was still open for the plaintiff to establish the elements of the tort of breach of confidence independent of the mutual obligations contained in the MCA. The plaintiff was unable to do so. With reference to the first element of the tort, the Court observed that there is no duty of confidence where the party asserting the right had no part in creating the information. Merely summarizing information obtained by a third party does not give the summarizing party a right of confidentiality over such information. The Court found that the "great majority" of the information the plaintiff provided to the defendant was created by the vendor, and as a consequence, the plaintiff could not assert confidentiality over it against the defendant.

XI. COMMON LAW TORT OF INVASION OF PRIVACY REJECTED IN BRITISH COLUMBIA

Last year's *Annual Review* discussed Ontario's recognition of a common law tort of invasion of privacy, in *Jones v. Tsige*, 2012 ONCA 32. The Court defined the tort as "one who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to the other person."

The key features of this new cause of action in Ontario are: (1) the defendant's conduct must be intentional or reckless; (2) the defendant must have invaded, without lawful justification, the defendant's private affairs or concerns; and (3) a reasonable person would regard the invasion as highly offensive causing distress, humiliation, or anguish. Proof of harm to a recognized economic interest is expressly not an element of the cause of action.

1. British Columbia Rejects Tort of Invasion of Privacy

Demcak v. Vo, 2013 BCSC 899 held that there is no common law tort of invasion of privacy in British Columbia and a Notice of Civil Claim that pleads this cause of action is not sustainable. Unfortunately, the Court did not engage in any analysis in relation to the tort and did not comment on the applicability of *Jones* in British Columbia. However, the Court did note that the tort of invasion of privacy is only actionable in British Columbia pursuant to the *Privacy Act*, RSBC 1996, c.373. If the statute does not apply, then the plaintiff does not have a cause of action under the common law in British Columbia.

In *Ari v. ICBC*, 2013 BCSC 1308, the Court noted that "given the clear status of the law in British Columbia that the tort for invasion of privacy does not exist", such claims will be struck for failure to disclose a reasonable claim.

2. Ontario Courts Continue to Develop Tort of Invasion of Privacy

Despite the position taken in British Columbia on this emerging tort, in 2013, Ontario courts forged ahead and considered the its applicability in a number of circumstances. We anticipate that Ontario litigants will continue to plead and rely upon this new tort, with further judicial

commentary and application expected in 2014. This in turn will not doubt influence British Columbia claims for breach of privacy, which tort suffers from a dearth of case law.

In *Ludmer v. Ludmer*, 2013 ONSC 784, the respondent husband in a divorce application alleged that a third party in the application caused his email account to be "hacked" in addition to intercepting and forwarding fax transmissions that he sent to his ex-wife. The Court applied the test for the tort of invasion of privacy from *Jones*, and found that neither the applicant nor the third party "hacked" the respondent's email account. The Court indicated that gaining access to another person's email account without consent may constitute an invasion into one's "private affairs" under the second stage of the test. However, there was no evidence in this case to support the respondent's claim that the applicant had access to his email account. The Court also commented that the act of faxing or photocopying intercepted communications does not meet the requirements of the tort of invasion of privacy.

In *Action Auto Leasing & Gallery Inc. v. Gray*, [2013] OJ No. 898 (Small Claims), the Court held that an automobile lessor who left a voicemail message with the lessee's mother, disclosing that the lessee was in default, invaded the lessee's privacy. The Court noted that the disclosure of such information to a third party constituted disclosure of embarrassing private facts, or alternatively, was an intrusion upon seclusion as set forth by *Jones*. As a result, the automobile dealer was ordered to pay the lessee $100 in damages for the phone call.

In *Leung v. Shanks*, 2013 ONSC 4943, the Court held that is not plain and obvious that a claim for invasion of privacy will fail because the information was provided to the defendant in the course of a "legitimate professional situation". A nurse, who was entitled to access the plaintiff's information for legitimate purposes may nonetheless invade the plaintiff's privacy by using such information for an unauthorized purpose.

XII. CYBERBULLYING

As a possible portent of future developments in British Columbia tort law, on August 7, 2013 the Nova Scotia *Cyber-safety Act*, SNS 2013, c.2 came into force. The Act creates a new tort of cyberbullying, defined in the Act as:

> *any electronic communication through the use of technology including, without limiting the generality of the foregoing, computers, other electronic devices, social networks, text messaging, instant messaging, websites and electronic mail, typically repeated or with continuing effect, that is intended or ought reasonably [to] be expected to cause fear, intimidation, humiliation, distress or other damage or harm to another person's health, emotional well-being, self-esteem or reputation, and includes assisting or encouraging such communication in any way.*

The person committing the tort may be liable for general, special, aggravated, and punitive damages. A court may issue an injunction against the cyberbullying. With respect to defendants under the age of nineteen, his or her parents or guardians may be jointly and severally liable unless they can establish that they were exercising reasonable supervision over the child at the time of the cyberbullying, and that they made reasonable efforts to prevent or discourage the child from engaging in that kind of activity.

XIII. PASSING OFF

The common law tort of passing off has three necessary elements: (1) the existence of goodwill; (2) deception of the public due to a misrepresentation; and (3) actual or potential damage to the plaintiff.

It is plain and obvious that a business without a presence in the marketplace does not have the goodwill necessary to establish a claim of passing off (*Wildman v. Kulyk*, 2013 SKCA 55). Since goodwill is a concept that refers to the reputation of a business or product, merely taking steps to establish a business in a marketplace (such as opening bank accounts, arranging for insurance or obtaining a business number from the Canada Revenue Agency) is insufficient to establish a presence in the marketplace.

XIV. MISFEASANCE IN PUBLIC OFFICE

In order to establish the tort of misfeasance in public office, the plaintiff must establish that: (1) the public official engaged in unlawful conduct in the exercise of his or her public functions; and (2) the public official was aware that the conduct in question was unlawful and was likely to injure the plaintiff (*Odhavji Estate v. Woodhouse*, 2003 SCC 69).

An allegation that the Province of Ontario's decision to cancel its wind power program was specifically directed at a single wind power provider for the purpose of financially crippling that provider gives rise to a sustainable cause of action for misfeasance in public office (*Trillium Power Wind Corporation v. Ontario (Natural Resources)*, 2013 ONCA 683). The Court commented that "core policy decisions" are generally immune from review by the courts unless such decisions are irrational or made in bad faith. The Court went on to say that, if a public official's decision is based upon "political/electoral expediency", this does not mean that it was made in bad faith or that it was irrational. Politically-influenced decisions are part of the valid policymaking process, and accordingly, such decisions are immune from liability in tort. However, to the extent that the Province's decision was not for political purposes, but made for the specific intention of injuring the plaintiff, this would be a bad faith decision, and liability for the tort of misfeasance in public office would attach.

XV. NUISANCE

To establish a claim in nuisance, the plaintiff must suffer annoyance or discomfort that is both substantial and unreasonable. The threshold inquiry involves determining whether the interference is substantial. Only where the harm is sufficiently material to justify recognition by the court will the analysis proceed to an assessment of whether the interference is unreasonable in the circumstances. To assess unreasonableness, the court will consider: (1) its severity; (2) the character of the neighborhood; (3) the utility of the defendant's conduct; and (4) the plaintiff's sensitivity. Embedded throughout this test is the need to strike a balance among competing property interests, as well as the principles of tolerance and accommodation.

Although the focus of the tort is upon the unreasonable interference suffered by the plaintiff rather than the nature of the defendant's conduct, the defendant's conduct is not an entirely irrelevant consideration, particularly where the defendant is a public authority (*Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13). In *Antrim Truck*, the

plaintiff's truck stop business, located on a major highway in Ontario, was effectively put out of business when the Ministry of Transportation opened a new section of highway that diverted traffic away from the business. Notwithstanding the public utility of the project, the Court held that the plaintiff was entitled to damages for private nuisance since it was unreasonable to expect the plaintiff to bear the loss associated with the permanent interference of its property.

The Court clarified that the utility of a public authority's conduct does not provide a complete answer to the reasonableness inquiry of the tort. The severity of the harm suffered by the plaintiff and the public utility of the impugned activity are not weighed equally since the acts of a public authority are often of significant utility. Rather, the inquiry focuses on whether it is reasonable for the plaintiff to bear the interference without compensation, not on whether it was reasonable for the public authority to undertake the work in the first place. The Court cautioned that not every "substantial interference" suffered by a property owner in the face of a public works project will be unreasonable. The reasonableness analysis should favour the public authority where the harm to the property interest, considered in light of the factors identified above, is such that the harm cannot reasonably be viewed as more than the plaintiff's fair share of the costs associated with providing a public benefit. This is especially true where the public authority has made all reasonable efforts to reduce the impact of its works on the neighboring properties. However, where the loss is disproportionately borne by one property owner, and not spread out amongst a number of property owners, as was the case in *Antrim*, then the interference is more likely to be seen as unreasonable.

XVI. TORT DEFENCES: WAIVERS

In *Kempf v. Nguyen*, 2013 ONSC 1977 (for more details, see above under "Duty of Care" and "Standard of Care"), the defendant sought to rely upon a waiver signed by the plaintiff when he registered for the charity bicycle ride. The court noted that the waiver was poorly drafted and confusing, and that it only released the sponsored charity, the City, the police, and other associations from claims of damage. The waiver did not release other participants, such as the defendant. The court further confirmed that a party relying on a waiver has the onus proving the validity of the document, and that any ambiguity is resolved against that party (for further discussion of waivers in sporting events, in British Columbia, see the 2013 Annual Review).

XVII. KNOWING RECEIPT

The Supreme Court of Canada test for a claim in knowing receipt is very broad: the defendant is liable if it receives funds in circumstances where a reasonable person would be put on notice or inquiry that a breach of trust may have occurred. This test has not been significantly clarified or limited by case law, which is relatively rare and tends to be very fact-specific.

CFI Trust v. Royal Bank of Canada, 2013 BCSC 1715 provides useful guidance on a number of issues arising from claims based in knowing receipt (and with respect to equitable claims generally). In the facts leading to the case, the plaintiff CFI and the defendant RBC were both creditors to a large and now-defunct Vancouver car dealership, each providing funding with respect to certain vehicles. Each creditor held a security agreement with the dealership, and each registered its security interests in the British Columbia Personal Property Registry. RBC had a further connection to the dealership: the dealership held its general operating account at the bank.

Each month, approximately a million dollars flowed into and out of the account: practically all of the dealership's payments went in and out *via* the RBC operating account. The CFI-related business constituted a small percentage of the overall activity of the dealership. Each day the bank automatically deducted from or topped up the operating account to ensure that it was never in a negative balance, and to allow the dealership to continue to meet its day-to-day obligations. The dealership authorized the bank to use any positive balance to pay down its various loans and credit facilities.

The plaintiff CFI claimed that the car dealership sold some 242 CFI-securitized vehicles and failed to report their sale, or remit the sale proceeds to CFI, as was required. Instead, the dealership deposited the proceeds from those vehicles into its RBC operating account in breach of the dealership's obligations under the agreements. As the dealership was largely defunct and judgment-proof, CFI turned to the bank for compensation, seeking just over $5 million, representing the deposits made into the operating account with respect to the missing vehicles. There was no allegation of any wrongdoing against the bank. Instead, CFI claimed that RBC had benefitted from the illicit deposits, as the dealership may have used those funds to repay the various loans and credit facilities owed by the dealership to the bank. In addition to its arguments based on PPSA principles and a security agreement, CFI also claimed in equity that RBC had knowingly received funds obtained by the dealership in breach of trust, and that RBC was unjustly enriched by the deposits.

In dismissing the claim, the Court surveyed the limited jurisprudence and provided, in clear terms, useful principles for such claims:

- Where an inquiry would not have unearthed any wrongdoing, a defendant cannot be faulted retrospectively for not carrying out an inquiry;

- The court must look at the relative knowledge of the plaintiff and defendant: if the plaintiff knew or ought to have known more than the defendant financial institution about the alleged breach of trust or conversion, the plaintiff cannot then seek restitution from the defendant;

- Similarly, where the claimant fails to take appropriate and timely steps to investigate suspicious circumstances and to take steps to protect itself, relief may be denied in knowing receipt; and

- A claimant against a bank for knowing receipt is not entitled to 100 cents on the dollar for its loss, but is only entitled to claim a *pro rata* amount, discounting the amount claimed down to a percentage of the overall deposits into the account in question.

The decision is under appeal.

XVIII. BREACH OF FIDUCIARY DUTY

The requirements for the creation of a fiduciary relationship are: (1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and (3) the beneficiary is

particularly vulnerable to or at the mercy of the fiduciary holding the discretion or power (*Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574).

1. Pension Plan Administrator Cannot Abandon Fiduciary Duty to Beneficiary in Context of CCAA Proceedings

An employer acting as a pension plan administrator is not permitted to disregard its fiduciary duties to the members of the plan and favour the competing interests of the corporation instead in a *Companies' Creditors Arrangement Act* proceeding (*Re Indalex Ltd.*, 2013 SCC 6). Despite involvement in CCAA proceedings and the directors' fiduciary duty to act in the best interests of the corporation, the employer remains a fiduciary in relation to the plan beneficiaries. Where the employer's own interests do not converge with those of the pension plan members, then just like any other fiduciary, the employer must take steps to resolve the conflict in favour of the beneficiary and find a solution to ensure that the plan members' best interests are taken care of. The court commented that this could mean that the employer puts the plan members on notice of the CCAA proceedings, finds a replacement administrator, appoints representative counsel, or finds another acceptable means to resolve the conflict.

2. Fiduciary Duty of Government to Its Pension Plan Members Does Not Include Preventing Plan From Being Eroded by Inflation

The 2012 *Annual Review* discussed *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, where the Court held that governments only owe fiduciary duties in limited and special circumstances. This year, the Court of Appeal for Saskatchewan held that the provincial government does not owe a fiduciary duty to the beneficiaries of a defined benefits pension to prevent pension entitlements from erosion by inflation (*May v. The Government of Saskatchewan*, 2013 SKCA 11).

A class proceeding was brought against the Government of Saskatchewan by certain members of a provincial pension plan. The pension in issue is the Public Service Superannuation Plan (the "PSSP"), which was originally established by provincial legislation in 1927. The PSSP is a defined benefits plan. The legislative scheme that created the PSSP did not index pension benefits against inflation in any way. In 1977, the PSSP was closed to new entrants and the Province created a new, defined contribution plan. When this conversion took place, members in the PSSP were given the option of migrating to the new plan.

The class plaintiffs were comprised of PSSP members who chose not to migrate over to the new pension plan in 1977. The plaintiffs alleged, *inter alia*, that the Province owed the PSSP members a fiduciary duty to provide "enhanced benefits" in the plan and adjust the post-retirement benefits so as to take cost of living increases into account in the provision of pension benefits to retirees under the plan.

The Court held that the Province's fiduciary duty to its pension plan members did not extend to protection of the beneficiaries' pension entitlements from erosion by inflation. The plaintiffs failed to establish an undertaking by the Province to act in their best interests with regard to the inflationary effect upon pension benefits. The Court concluded that, in light of the Province's well-documented history of resisting the implementation of inflation-based increases in pension

rates, the plaintiffs were unable to discharge their burden on this point, and their claim to fiduciary protection from inflation failed as a result.

3. Sales Agent Without Authority to Bind Principal Can Still Owe a Fiduciary Duty

Despite a sales agent's absence of authority to bind its principal, an agent's unlimited access to the principal's customers and confidential information (including pricing, timing, and strategy) may nonetheless give rise to a fiduciary relationship (*Indutech Canada Limited v. Gibbs Pipe Distributors Ltd*., 2013 ABCA 111). In *Indutech*, the defendant, pursuant to a written agency agreement, was the plaintiff's sole sales agent for certain specialized oilsands products. The defendant marketed these products on behalf of the plaintiff for a number of years. Eventually, the defendant used the information it obtained from its relationship with the plaintiff to establish a competing manufacturing business without the plaintiff's knowledge or consent. Subsequently, the plaintiff brought a claim for, *inter alia*, breach of fiduciary duty.

Pursuant to the agency agreement between the parties, the defendant did not have the power to bind the principal. The court rejected the defendant's argument that this precluded a fiduciary relationship, instead holding that the defendant's "unlimited access" to the plaintiff's information gave the defendant the unilateral and discretionary power to affect the plaintiff's legal interests. The court found that the plaintiff was particularly vulnerable to misuse of confidential information as a result of its relationship with the defendant. Although vulnerability alone is often insufficient to support a fiduciary claim, where the vulnerability arises from the nature of the contractual relationship between the parties, this is indicative of a fiduciary relationship. The fact that the relationship was commercial in nature did not preclude the finding that the plaintiff could not be vulnerable to the defendant, especially since the defendant's breach of the agency agreement was "calculated and deceptive".

4. Disgorgement

Where the loss suffered by the plaintiff arises from a combination of breaches of contract and fiduciary duties, it is a proper exercise of the trial judge's discretion to order disgorgement of profits for breaches that are fiduciary in nature, while ordering compensation for lost profits suffered as a result of contractual breaches (*Indutech Canada Limited v. Gibbs Pipe Distributors Ltd*., 2013 ABCA 111). Remedies for breach of fiduciary duty are discretionary and highly fact-dependent. The purpose is to address the fairness between the parties and uphold the public interest in the "maintenance of the integrity of the fiduciary relationship". Disgorgement is an appropriate remedy where the fiduciary makes a profit in an impermissible manner and where the fiduciary's profit is greater than the beneficiary's loss. Damages are not limited to the actual loss suffered by the beneficiary in such circumstances.

In *Indutech*, the defendant sales agent diverted business opportunities away from the plaintiff by establishing a competing business without the knowledge or consent of the plaintiff. Some of the defendant's breaches caused the plaintiff to suffer a direct loss of income, however, other breaches did not. The Court held that it was a proper exercise of the trial judge's discretion to award disgorgement of all monies the defendants earned through the breach of its fiduciary duty, regardless of whether the plaintiff suffered a direct loss from such breach. The Court reasoned that, if the trial judge limited the plaintiff's recovery to indemnification damages, then the

defendant would have been allowed to breach its fiduciary duties "with impunity". Deterrence and fairness required disgorgement as the appropriate remedy for such breaches.