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Quickscribe Reporter

Vol: XVI – Issue: V – May 2017

QUICKSCRIBE NEWS:

Quickscribe Welcomes Two New Contributors
We are pleased introduce you to Melanie Harmer and Jeff Young as our latest expert annotators to Quickscribe.

Melanie Harmer, a partner at McMillan LLP, will contribute annotations in the area of administrative law. Melanie practices in the areas of administrative law, civil litigation, and employment law. Melanie frequently appears before administrative tribunals and before courts on judicial review of administrative decisions. She is also regularly called upon to research and prepare complex legal opinions and draft submissions to the court in all areas of law. Prior to joining McMillan LLP, Melanie clerked for the Supreme Court of British Columbia.

Jeff Young, associate counsel at Altman & Company, will act as Quickscribe's expert annotator in the area of new media/entertainment law. Jeff's primary focus over his legal career has been in the area of intellectual property, new media, sports and entertainment, particularly in film/TV and music. Jeff has also negotiated with major entertainment and media corporations. He currently acts for a number of Vancouver music publishers, film companies, sports franchises and live entertainment venues in negotiating business deals involving media, film, music, sports and entertainment.

Latest Annotations
New annotations have recently been added to the Quickscribe site. These annotations include contributions from:

- Devyn Cousineau, British Columbia Human Rights Tribunal – *Human Rights Code*
- Stan Rule, Sabey Rule – *Wills, Estates and Succession Act*
- Katherine Hardie, British Columbia Human Rights Tribunal – *Human Rights Code*
- Kimberly Jakeman, Harper Grey LLP – *Medicare Protection Act*, *Health Care Costs Recovery Act*

Watch this 20-minute YouTube video to learn more about annotations and how to receive alerts when new annotations are published to the laws that matter most to you.

Tip: Log in to Quickscribe Online prior to clicking Reporter links...

View PDF of this Reporter.

FEDERAL LEGISLATION – For notification of federal amendments, we recommend you use our Section Tracking tool.

[Previous Reporters]

CATEGORIES

COMPANY & FINANCE

Company and Finance News:

Dealing with Conflicts of Interest for Registrants – Disclosure is Not Enough

On April 27, 2017, the Investment Industry Regulatory Organization of Canada ("IIROC") issued a rules notice and guidance note (the "Notice") regarding dealer firm ("Dealers") management of compensation-related conflicts. The review identified three areas of concern including: (i) reliance on disclosure without first addressing the conflict and inadequate disclosure; (ii) a lack of dealer review and oversight of compensation programs and the conflicts they create; and (iii) inadequate supervision and monitoring of fee-based accounts.

These concerns may be equally applicable to non-IIROC registered Dealers and portfolio managers. IIROC is working with the CSA to formulate new conflicts rules and guidelines as a part of the initiative referred to in "Canadian Securities Administrators Consultation Paper 33-404 - Proposals to Enhance the Obligations of Advisers, Dealers, and Representatives Toward Their Clients".

IIROC and the CSA are of the view that further regulatory action is required to better align the interests of registrants to the interests of their clients. In connection with this initiative IIROC has recently sent a request for information to Dealers in an effort to gain a clearer understanding of how Dealers are administering their fee-based accounts. Read the full article by Jarrod Isfeld, Michael Der, Russel Drew and Mitchell Smith of DLA Piper LLP.

If It Looks like a Duck: British Columbia Court of Appeal Rules on Title Use

Professional regulators are often faced with non-members who use titles similar to those used by regulated members of the profession but not explicitly prohibited by the governing statute. In *Organization of Chartered Professional Accountants of British Columbia v. Nordine*, 2017 BCCA 103, the British Columbia Court of Appeal rejected a technical approach to this problem. It held that the proper approach in assessing whether the use of a title is contrary to the statute is to perform a pragmatic analysis into what the public would understand by the use of the title. The insertion of a word in a title such that it is no longer the exact wording prohibited by the statute does not change the fact that the title may imply that the individual is a member of a regulated organization.

The Organization of Chartered Professional Accountants of British Columbia ("CPABC") is the regulatory body responsible for governing professional accountants in British Columbia. Its governing statute, the *Chartered Professional Accountants Act* (the "Act"), provides that only CPABC members may use particular designations and non-CPABC members cannot imply, suggest, or hold themselves out as a professional accountant. Read the full article by Jason Kully and Gregory Sim of Field Law LLP.

BC Securities – Policies & Instruments

The following policies and instruments were published on the BCSC website in the month of March:

- 72-505 – Amendment to BC Instrument 72-505 *Exemption from prospectus requirement for crowdfunding distributions to purchasers outside British Columbia*
  Effective May 5, 2017, the Commission has amended BC Instrument 72-505 *Exemption from prospectus requirement for crowdfunding distributions to purchasers outside British Columbia* to eliminate the expiry date. This instrument provides a prospectus exemption to facilitate out of province crowdfunding using Multilateral Instrument 45-108 *Crowdfunding*, subject to certain conditions
- 33-319 – CSA Staff Notice 33-319 - *Status Report on CSA Consultation Paper 33-404 Proposals to Enhance the Obligation of Advisers, Dealers, and Representatives Toward Their Clients*
  The purpose of this Notice is to provide a high-level summary of the consultation process to date, identify certain of the high-level key themes that emerged through the consultation process, and indicate the direction that the CSA will take in respect of the various proposals outlined in Consultation Paper 33-404.
- 31-350 – CSA Staff Notice 31-350 - *Guidance on Small Firms Compliance and Regulatory Obligations*

For more information visit the BC Securities website.

Act or Regulation Affected	Effective Date	Amendment Information

Designated Accommodation Area Tax Regulation (93/2013)	June 1/17	by Regs 275/2016 and 41/2017

ENERGY & MINES

Energy and Mines News:

Legislation Introduces Ban on Oil-tankers on Canadian West-Coast

On May 12, 2017, the Government of Canada introduced Bill C-48, the proposed *Oil Tanker Moratorium Act* (the "Act"), in Parliament. The Act's central purpose is to formalize the oil tanker moratorium on British Columbia's north coast. If brought into force, the Act will complement the existing voluntary Tanker Exclusion Zone which was created in 1985 to help avoid potential spills from oil tankers travelling between Alaska and the continental United States as well as the prohibitions on oil tanker travelling within Inside Passage.

The Act applies to oil tankers that are capable of carrying more than 12,500 metric tons of crude or persistent oil. Crude oil is defined within the Act as any liquid hydrocarbon mixture that occurs naturally in the Earth. Other oil products, such as lubricating oils, partially upgraded bitumen, synthetic crude oil, pitch, slack wax, and bunker C fuel oil, are included within the Act's definition of persistent oil. Certain oil products are not included within the definitions of crude or persistent oil, including liquefied natural gas, gasoline, naphtha, jet fuel, and propane. Accordingly, oil tankers carrying these products as cargo are not subject to the Act's prohibitions. It is important to note that liquefied natural gas is not included within the definition of crude or persistent oil and as such British Columbia's liquefied natural gas industry would not be affected by the Act's prohibitions. Currently, the British Columbia government has proposals for 19 liquefied natural gas ports along the coast, many located in the moratorium area. The Act will also not have any effect on crude or persistent oil not being transported by oil tanker. Accordingly, this Act will have no impact on the KM Trans Mountain expansion project, the terminus for which is in Vancouver. Read the full article by Nils Goeteyn, Sarah Sweet and Dionysios Rossi of Borden Ladner Gervais LLP.

Ian Mulgrew: Mining Firm's SLAPP at Environmental Protest to Get Public Airing

A landmark provincial defamation case that scrutinizes big business's use of SLAPP suits to suppress environmental protest and dissent will be webcast by the B.C. Court of Appeal.

Taseko Mines Ltd. is appealing a B.C. Supreme Court decision that tossed its libel action against the Western Canada Wilderness Committee over harsh criticism of the plan for storing toxic tailings at the proposed New Prosperity gold-copper mine near Williams Lake.

The company launched the litigation to douse a public campaign by the environmental group against the $1.5-billion mine (approved by BC but twice rejected by Ottawa) while denying it was a so-called "Strategic Lawsuit Against Public Participation."

The case and another – later abandoned by Trans Mountain Pipeline against five individuals linked to Burnaby Mountain protests – set off a debate over whether BC should revisit then-Liberal premier Gordon Campbell's 2001 decision to scrap months-old anti-SLAPP legislation.

At the time, the Liberals argued that the *Protection of Public Participation Act*, the first law of its kind in Canada, was unnecessary and would lead to a provincial "protest culture." Read *The Vancouver Sun* article.

Court Dismisses Injunction Seeking to Halt Industrial Development

The British Columbia Supreme Court has dismissed an application for an injunction that would have restrained the Province of British Columbia from authorizing various industrial developments within a 10,000 sq. km area in Northeast British Columbia (*Yahey v. British Columbia*, 2017 BCSC 899).

The application was brought by Blueberry River First Nations (Blueberry River), who are signatories to Treaty 8. Blueberry River brought an action against the Province in 2015, alleging that the cumulative effects of various industrial developments within their claimed territory (particularly forestry and oil and gas activities) have taken

away the meaningful ability to exercise their Treaty rights. (BLG represented the Province of British Columbia).

This is the first action in British Columbia to allege a breach of Treaty rights on the basis of cumulative effects.

> ***Background***
> In August 2015, the Court dismissed an earlier injunction application by Blueberry River. That application sought to enjoin the Province from selling certain Timber Sales Licenses, which were within what Blueberry River alleged to be "Critical Areas" in its territory. The Court dismissed the injunction on the basis that it was not satisfied the timber sales would materially increase the cumulative impacts on Treaty rights. The Court observed that the relief sought would not accomplish what Blueberry River alleged was needed to address its concerns over cumulative effects – effectively an embargo on industrial development within its territory.

Read the full article published on *The Resource*, BLG Energy Blog – Borden Ladner Gervais LLP.

Act or Regulation Affected	Effective Date	Amendment Information
Drilling and Production Regulation (282/2010)	June 1/17	by Reg 146/2017
Fee, Levy and Security Regulation (8/2014)	June 1/17	by Reg 147/2017

FAMILY & CHILDREN

Family and Children News:

Canadian Bar Association Releases Child Rights Toolkit

On May 11, 2017, at the start of the two-day CLEBC "Access to Justice for Children Conference: Child Rights in Action," the Canadian Bar Association (CBA) introduced its new online Child Rights Toolkit. Developed by over 30 legal professionals across the country, the Toolkit is an educational and practice resource for judges, lawyers and advocates who work to adjudicate, support and defend children's rights. It also offers information and guidance to members of the public in their efforts to support children.

> ***History on the Development of the Toolkit***
> The CBA's initiative to develop an online child rights resource was prompted by UNICEF's 2013 report that ranked Canada as 17th among 29 industrialized nations for overall child well-being. As a first step, the CBA created its Children's Law Committee in 2014. The committee's focus was to examine issues surrounding children's rights in Canada, and work with members of the legal profession to provide knowledge, support and guidance on the development of children's law across the country.

Read the full article by Valerie Le Blanc and published on the BCLI website.

Is Income from a New Spouse Relevant in an Application to Cancel or Reduce Spousal Support ?

I am involved in an interesting case this week where the husband is applying to reduce his spousal support. The case has raised a number of interesting issues which I will post more about this week. The first question is whether the income of the husband's common law wife is relevant to the application for cancellation or reduction of spousal support.

The answer to the question of whether a new spouse's income is relevant, in short, is yes, for both the recipient and the payor, in different ways, and of course it depends on the particular facts of the case and whether the application is for a change in child or spousal support.

It is fair to say, however, that income from a payor's new spouse is relevant to a determination of support owing to a former spouse. Read the full article by Karen F. Redmond and published on *JP Boyd on Family Law: the Blog*, by Collaborative Divorce Vancouver.

BC Court Drops "Unfettered" as Appropriate Description of Discretion

In a decision regarding a family law dispute, the British Columbia Court of Appeal determined that it's time to discard the word "unfettered" when describing the discretion for a judge to reopen a trial. *Hansra v. Hansra* 2017 BCCA 199 was the appeal of a case that involved a dispute over the estimation of matrimonial assets in a divorce proceeding. One of the central issues the trial judge (Justice Robert Crawford) had to determine was how to value Jagtar Hansra's assets, which were in India. Read the full article by Amanda Jerome published in *The Lawyer's Daily*. ***Note: Subscription Service – access free trial to read article.***

Act or Regulation Affected	Effective Date	Amendment Information
Small Claims Rules (261/93)	June 1/17	by Reg 120/2017

FOREST & ENVIRONMENT

Forest and Environment News:

BC Market Pricing System (Abridged Version)

If you've ever sponsored someone working towards becoming a forest professional, you probably found describing the stumpage system challenging. The appraisal manuals are highly technical and assume one already understands the stumpage system. Providing this understanding is the goal of this article.

Generally, in the United States, sawmills purchase timber at the gate or on the stump in exchange for cash. In BC, when sawmills with tenure purchase timber from the Crown, they provide cash and services. The cash portion of these transactions is stumpage, and the services provided are items like road development and reforestation. At the risk of a gross oversimplification, this difference in how timber is sold, along with who owns the majority of the land, lies at the heart of the current softwood trade dispute with the US. Read the full article by Allan Bennett, RPF published in the May-June Edition of *BC Forest Professional Magazine*.

BC Timber Sales Undergoes Audit

The Forest Practices Board will examine the activities of the BC Timber Sales (BCTS) program and timber sale licence holders in the Skeena-Stikine Natural Resource District portion of the Babine Business Area from June 5 to 9.

Auditors will examine harvesting, road and bridge construction and maintenance, silviculture, fire protection, and associated planning for compliance with the *Forest and Range Practices Act* and the *Wildlife Act*.

The audit includes all forestry activity from June 2015 to June 2017. The audit area is located within the Bulkley Timber Supply Area, which is located in northwestern BC and covers about 760 000 hectares. The area includes the communities of Smithers, Telkwa, Moricetown and Fort Babine.

This BCTS business area was chosen randomly for audit from among all the BCTS business areas in the province. The board audits two BCTS business areas each year. Read the full Forest Practices Board news release.

Canada, U.S. Unlikely to Get Lumber Deal by Mid-Aug: Canada Source

Canada and the United States are unlikely to strike a deal on a dispute over lumber exports by the time talks on renewing NAFTA start in mid-August, a source close to the matter said on [May 18th].

U.S. Trade Representative Robert Lighthizer said earlier in the day he hoped the issue would be solved before the formal start of negotiations on the trilateral North American Free Trade Agreement.

"It's hard to imagine a deal being done that soon," said the source, who declined to be identified due to the sensitivity of the matter.

Washington last month imposed tariffs on Canadian softwood lumber exports, triggering the fifth formal bilateral dispute over timber in less than 40 years. The legal battles can take years to resolve. Read the full article reported by Reuters.

Occupational Health and Safety Regulation Amended
Effective May 1, numerous changes were made to the Occupational Health and Safety Regulation by B.C. Reg. 9/2017. For starters, this regulation amended definitions for "combustible liquid" and "flammable liquid", and added the definition "B.C. Electrical code". Next, an exception to having guardrails was added if you're working with a moveable work platform and scaffold. Pursuant to concerns around e-cigarettes, they are now treated similarly to tobacco. Part 4, Environmental Tobacco Smoke, now includes e-cigarettes on controlled exposure, with exceptions. Asbestos, lead, and crystalline silica figured strongly in these new amendments. As for asbestos, inventory must now be more detailed, with additional requirements placed on the owner. Both employer and owner are now responsible for identifying asbestos-containing materials present in the workplace. The employer must now maintain for at least 10 years records for instruction and training of workers, and incident investigation reports, with regard to asbestos-containing materials. Amendments to specific requirements for lead were updated and several sections concerning requirements for respirable crystalline silica were added. A section was added on the scope to which the new rules apply. Monitoring, housekeeping, and training sections are all given greater regulatory detail. A new section on testing motor vehicles on chassis dynamometers was introduced. Requirements for mobile equipment that may be struck by saw chain shot during use in forestry operations are outlined in a new section, *Saw chain shot*.

Environmental Appeal Board Decisions
The following Environmental Appeal Board decisions were released in the month of March:

Environmental Management Act

- *Harvest Fraser Richmond Organics Ltd. v. District Director, Environmental Management Act, (City of Richmond, Third Party), (Participants)* [Preliminary Decision – Constitutional Question – Not Impede Exclusive Federal Jurisdiction]

Visit the Environmental Appeal Board website for more information.

Act or Regulation Affected	Effective Date	Amendment Information
There were no amendments this month.		

HEALTH

Health News:

New Law Aims to Reduce Drug Deaths by Encouraging People to Report Overdoses
Good Samaritan Drug Overdose Act "will save lives all across the country"
A new federal law aims to reduce the number of people who die from opioid and other drug overdoses in Canada.

The *Good Samaritan Drug Overdose Act* was introduced as a private member's bill last year by BC Liberal backbencher Ron McKinnon and received royal assent on [May 4th].

The law provides immunity from simple possession charges for anyone calling 911 to report an overdose.

McKinnon said he was spurred to action by an epidemic of opioid overdoses in his home province of British Columbia and the rising number of deaths in Alberta and other provinces. Read the CBC article.

Sinus Surgery Wait Times: A Tale of Two Patients
The judge presiding over the BC public vs. private health care trial had sinus surgery at a private Vancouver clinic, but didn't pay for it himself because the operation was funded through a contract Vancouver Coastal Health had with the False Creek Surgical Centre.

Trial plaintiffs, led by Dr. Brian Day of the Cambie Surgery Centre, are arguing in court that BC laws prohibiting

doctors from charging patients for expedited services in private clinics violate individuals' constitutional rights. B.C. Supreme Court Justice John Steeves had surgery at the False Creek private clinic about three years before the trial began. In a pre-trial conference, he disclosed this to lawyers for both sides – the B.C. Government and the plaintiffs – to avoid any perception of bias or conflict.

Then, during the trial, Steeves declared that Dr. Amin Javer, who is on the plaintiffs' witness list, had been his surgeon when he had his operation at False Creek Surgical Centre.

Javer, head of the St. Paul's Hospital Sinus Centre, is due to appear in court, as a witness for the plaintiffs, when the trial resumes in the fall. So is Dr. Mark Godley, the medical director of the False Creek private clinic. Read the full *Vancouver Sun* article.

Canada's House of Commons Rejects Mandatory Labeling of Genetically Modified Foods

As previously discussed here, last summer represented a turning point in the consumer's "right to know" movement, with former President Obama approving a bill that, once the Department of Agriculture has finalized the regulations, will create a federal labeling requirement for genetically modified ("GM") food in the US. This bill arose and was quickly passed in response to the *Vermont Genetically Engineered Food Labeling Act*, which would have created a patchwork of labeling requirements across the US that would have been difficult for companies to comply with. Canada seemed to be on a similar path when a private member's bill, Bill C-291, *An Act to Amend the Food and Drugs Act (genetically modified food)*, that would require labeling of GM foods was introduced in June 2016 and accepted for debate in the House of Commons.

> ***The Sticking Point***
> While Canada appeared to be following in the US's footsteps, Bill C-291 was defeated by a significant majority at the Second Reading on May 17, 2017. During the Second Reading, the NDP sponsor of Bill C-291 outlined that the purpose was to increase labeling transparency because Canadians have the right to know what they are consuming.

Read the full article by Rebecca Rock of McMillan LLP.

Act or Regulation Affected	Effective Date	Amendment Information
There were no amendments this month.		

LABOUR & EMPLOYMENT

Labour and Employment News:

Probationary Clauses: the Devil is in the Detail

The legal effect of a probationary clause in an employment contract can be unclear depending on the facts of the case. The Supreme Court of British Columbia recently addressed probationary clauses in employment contracts in *Ly v British Columbia (Interior Health Authority)* (2017 BCSC 42).

> ***Facts***
> The plaintiff, PY, was hired by the Interior Health Authority (IHA) as the manager of quality and patient safety and client experience, and moved from Vancouver to Kamloops for the position. The offer of employment contained the following clause: "Employees are required to serve an initial probationary period of six (6) months for new positions." PY's employment was terminated before he had completed this probationary period. Relying on the probationary clause, the IHA took the position that reasonable notice was not required under common law.
>
> ***Decision***
> There were several issues before the court, including whether employers can enforce a probationary period longer than the minimum articulated by the *Employment Standards Act* and whether such clauses breach the act. In British Columbia, Section 63 of the act does not require employers to give notice of termination of employment to an employee who has been employed for less than three months. However, if an employee has been employed for more than three months, statutory and common law notice requirements apply.

Read the full article by J Alexandra MacCarthy of Fasken Martineau DuMoulin LLP.

The Canadian Human Rights Commission Publishes Impaired at Work: Guide to Accommodating Substance Dependence
The national epidemic of opioid abuse and overdoses is almost a daily feature in news media. Meanwhile, recent figures indicate that prescriptions for painkillers continue to increase in Canada. It is in this context that the Canadian Human Rights Commission recently released a new guide: *Impaired at Work: Guide to Accommodating Substance Dependence*. As stated at the outset of the guide, its purpose is "to help federally-regulated employers address substance dependence in the workplace in a way that is in harmony with human rights legislation."

The definition of disability under the *Canadian Human Rights Act* includes "previous or existing dependence on alcohol or drugs." It follows that federally-regulated employers have a duty to accommodate an employee with substance dependence. The *Impaired at Work* guide sets out a five step process to fulfilling this duty:

> 1. ***Recognize the signs*:** Employers may observe negative changes in an employee's behaviour, performance, and attendance at work. While these changes are not necessarily indicative of substance dependence, in some cases, the observed behaviour could be the consequence of substance dependence.

Read the full article by Christopher McHardy of McCarthy Tétrault LLP.

Here's a Bonus: You're Fired!
– from CLEBC website – Practice Points
This paper from *Employment Law Conference 2017* discusses the legal test and recent Canadian case law surrounding the question of: What comes of bonus, incentive payment, and profit sharing entitlements that are part of an employee's remuneration package upon termination of the employment relationship? Authors: Gradin D. Tyler and Natasha Jategaonkar, both of Mathews, Dinsdale & Clark LLP. Click here to view a pdf version of the paper.

Occupational Health and Safety Regulation Amended
Effective May 1, numerous changes were made to the Occupational Health and Safety Regulation by B.C. Reg. 9/2017. For starters, this regulation amended definitions for "combustible liquid" and "flammable liquid", and added the definition "B.C. Electrical code". Next, an exception to having guardrails was added if you're working with a moveable work platform and scaffold. Pursuant to concerns around e-cigarettes, they are now treated similarly to tobacco. Part 4, Environmental Tobacco Smoke, now includes e-cigarettes on controlled exposure, with exceptions. Asbestos, lead, and crystalline silica figured strongly in these new amendments. As for asbestos, inventory must now be more detailed, with additional requirements placed on the owner. Both employer and owner are now responsible for identifying asbestos-containing materials present in the workplace. The employer must now maintain for at least 10 years records for instruction and training of workers, and incident investigation reports, with regard to asbestos-containing materials. Amendments to specific requirements for lead were updated and several sections concerning requirements for respirable crystalline silica were added. A section was added on the scope to which the new rules apply. Monitoring, housekeeping, and training sections are all given greater regulatory detail. A new section on testing motor vehicles on chassis dynamometers was introduced. Requirements for mobile equipment that may be struck by saw chain shot during use in forestry operations are outlined in a new section, *Saw chain shot*.

Act or Regulation Affected	Effective Date	Amendment Information
Occupational Health and Safety Regulation	May 1/17	by Reg 9/2017

LOCAL GOVERNMENT

Local Government News:

To Regulate or Not to Regulate: BC Environmental Appeal Board Confirms that Provincial and Municipal Laws Designed to

Regulate Air Emissions Do Not Impede on Federal Jurisdiction
A decision released by the British Columbia Environmental Appeal Board (EAB) on May 12, 2017 has clarified the relationship between federal lands and provincial environmental legislation and confirmed Metro Vancouver's jurisdiction to regulate air contaminants from a facility located on federal lands. Decision Nos. 2016-EMA-175(b) & 2016-EMA-G08 addressed the constitutional question raised by Harvest Fraser Richmond Organics (Harvest), which had challenged the jurisdiction of the District Director of the Greater Vancouver Regional District (also known as Metro Vancouver) to regulate the discharge of air contaminants from Harvest's composting anaerobic digester and combined heat and power facility (the Facility), which is located on federal land leased from the Vancouver Fraser Port Authority (VPA).

The appeal by Harvest stemmed from the District Director's decision to renew the air emissions permit for the Facility (the New Permit), which contained more onerous conditions compared to Harvest's previous permit that had expired in June 2015 (the Previous Permit). Six months after the issuance of the New Permit, the District Director ordered Harvest to immediately cease part of its operations due to the violation of certain conditions under the New Permit. Harvest served notice of a constitutional question pursuant to section 8(2) of the *Constitutional Question Act*, arguing that the authority under which the New Permit was issued, namely the British Columbia *Environmental Management Act* (the Act) and the *Greater Vancouver Regional District Air Quality Management Bylaw No 1082, 2008* (the Bylaw) cannot apply to the Facility because it is located on federal lands. Read the full article by Paul R. Cassidy and Selina Lee-Andersen of McCarthy Tétrault LLP.

BC Court of Appeal Discusses the Unique Limitation Periods in *Local Government Act*
Reasons for judgement were published [May 31, 2017] by the BC Court of Appeal discussing the unique nature of the notice limitation period for suing local governments.

In this case (*Anonson v. North Vancouver*) the Plaintiff was injured when her bicycle was struck by a truck. After starting a lawsuit she obtained an order allowing her to add the City of North Vancouver as a Defendant. The City was never given notice under the 2 month provisions required by the *Local Government Act*. The question was whether the City could rely on this defense after being added to the lawsuit because *"It is settled law that the addition of a party to an action pursuant to R. 6-2(7) of the SCCR on the basis that it is "just and convenient" to do so generally will engage s. 4(1) of the Limitation Act and eliminate a party's accrued limitation defence"*

The Court of Appeal held that the notice limitation period is unique from the *Limitation Act* and a local government can indeed still take advantage of this defense even after being added as a party to an existing lawsuit. Read the full article by Erik Magraken published on his blog *BC Injury Law*.

A Hazy Road Ahead: The Proposed *Cannabis Act* and Local Governments
A new legal landscape for the recreational use of cannabis in Canada has been proposed in the House of Commons. For local governments, the highly-anticipated *Cannabis Act* has significant implications for local zoning and density bylaws, building standards, as well as matters related to personal cultivation, smoking restrictions, public nuisance complaints, as well as the minimum age of purchase and personal possession limits. The bills will be subject to heavy scrutiny as the different levels of government sort out jurisdictional issues in the coming months. This bulletin highlights five key issues that local governments should be aware of as the federal government moves toward the legalization of recreational cannabis.

> 1. Individual Possession and Cultivation is Allowed
> Adults (18 or older) may possess up to 30 g of dried cannabis (or equivalent) in a public place. Adults may grow up to four one-metre tall cannabis plants per residence, anywhere on their property. Regulations regarding access to medical marihuana and cannabis remain in place. Local governments may be able to implement further regulations on personal cultivation to address municipal concerns.

Read the full article by Stefanie Ratjen of Young Anderson Barristers & Solicitors.

Act or Regulation Affected	Effective Date	Amendment Information
Electrical Safety Regulation	May 29/17	by Reg 50/2017

(100/2004)		

MISCELLANEOUS

Miscellaneous News:

Important Changes to Small Claims Court
Effective June 1, 2017, amendments to the Small Claims Rules and the Small Claims Monetary Limit Regulation require that, with just a few exceptions, all civil actions for claims up to $5,000 must now be dealt with by the Civil Resolution Tribunal, rather than the Small Claims Court. At the same time, the upper limit for cases heard by the Provincial Court of British Columbia has been increased to $35,000. Section 3.1 of the *Civil Resolution Tribunal Act* grants the CRT authority to hear claims for:

- debt or damages
- recovery of personal property
- opposing claims to personal property
- demanding performance of an agreement about personal property or services

However, the CRT may not resolve issues relating to:

- a claim for libel, slander or malicious prosecution
- a claim for or against the government
- a claim excluded from the authority of the CRT by regulations (there are no such exclusions now)

BC Provincial Court Finds Member of U.S. Tribe Has Aboriginal Right to Hunt in Canada
On March 27, 2017, Madam Judge Mrozinski of the provincial court of British Columbia (the "Court") rendered a decision that recognizes the ability of an individual who is a member of an Indigenous people called the Sinixt to exercise an Aboriginal right to hunt in BC. A unique facet of this case is that Sinixt are an Indigenous people whose members now largely reside in the United States.

The defendant, Richard DeSautel, was charged with hunting without a license and hunting big game while not being a resident, contrary to ss. 11(1) and 47(a), respectively, of the B.C. *Wildlife Act*. These charges came after Mr. DeSautel shot an elk for ceremonial purposes near Castlegar, B.C.

Mr. DeSautel argued that he was exercising an Aboriginal right to hunt in the traditional territory of his Sinixt ancestors. Mr. DeSautel described the traditional territory of the Sinixt as spanning the U.S. – Canada border, extending from Revelstoke, BC in the north, to Kettle Falls, Washington State in the south. Mr. DeSautel is a member of a modern Sinixt group called the Lakes Tribe of the Colville Confederated Tribes ("Lakes Tribe"), and lives on the Colville Indian Reserve in Washington State. No evidence was provided relating to the existence of a modern Sinixt community on the Canadian side of the border. Read the full article by Paul Seaman and Jeremy Sapers of Gowling WLG.

Plaintiffs Lack Standing to Bring Representative Action to Claim Aboriginal Rights
The British Columbia Supreme Court recently refused to allow the Chief and Council of the Hwlitsum First Nation ("HFN") to advance a representative action to claim Aboriginal title and rights on behalf of a historic rights-bearing community. In *Hwlitsum First Nation v Canada (Attorney General)*, 2017 BCSC 475, Justice Abrioux held that the representative action could not proceed because the class or collective for whom the representative plaintiffs purported to act was not capable of clear and objective definition.

As we previously noted in the Canadian Class Actions Monitor's commentary on *Araya v Nevsun Resources Ltd*, 2016 BCSC 1856, British Columbia does not have a common law class action. Rather, the *Class Proceedings Act*, RSBC 1996, c 50 ("CPA"), sets up a comprehensive code for class actions in British Columbia. Representative proceedings under Rule 20-3 of the British Columbia Supreme Court Civil Rules are limited to actions in which the plaintiffs allege a common right or seek a common remedy. One example, noted in *Nevsun*, is where plaintiffs allege collective rights, such as Aboriginal rights or title.

Background
HFN, as represented by its Chief and Council, commenced an action on behalf of itself and its members seeking declarations of Aboriginal title and rights and compensation. HFN claimed to be the continuation of or successor to the Lamalcha Tribe, and specifically to be comprised of

descendants of a prominent historical member of the Lamalcha, Si'nuscutun. The defendants included the Attorney General of Canada ("Canada"), the City of Vancouver and several First Nations.

Read the full article by Timothy Froese of McCarthy Tétrault LLP.

Sexual Violence and Misconduct Policy Act
Brought into Force
Effective May 19, the *Sexual Violence and Misconduct Policy Act* was brought into force, a year after receiving royal assent to allow for a transitional period for public post-secondary institutions to create their sexual misconduct policies. The act defines "sexual misconduct" to include nine different types of sexual assault. Post-secondary institutions are required to develop a formal policy to deal with sexual violence and misconduct and make this policy publicly available on their website. Every 3 years, this policy must be reviewed. The minister is given authority to mandate additional reviews, as well as direct a post-secondary institution to conduct a survey to assess the effectiveness of its sexual misconduct policy.

Act or Regulation Affected	Effective Date	Amendment Information
Civil Resolution Tribunal Act	June 1/17	by 2015 Bill 19, c. 16, sections 1 (g) (part), 3 (part), 7 (part), 8 (part), 10 (b) (part) and (c) (part), 12 (part), 30 (part) and 38 (part) only (in force by Reg 111/2017), Civil Resolution Tribunal Amendment Act, 2015
Civil Resolution Tribunal Small Claims Regulation (111/2017)	**NEW** June 1/17	see Reg 111/2017
College and Institute Act	May 19/17	by 2016 Bill 23, c. 23, section 9 only, in force one year after Royal Assent, Sexual Violence and Misconduct Act
Court Rules Act	June 1/17	by 2015 Bill 19, c. 16, section 43 only (in force by Reg 111/2017), Civil Resolution Tribunal Amendment Act, 2015
Private Training Regulation (153/2016)	May 17/17	by Reg 153/2016
Sexual Violence and Misconduct Act	May 19/17	c. 23 [SBC 2016], Bill 23, whole Act in force one year after Royal Assent
Small Claims Act	June 1/17	by 2015 Bill 19, c. 16, section 44 only (in force by Reg 111/2017), Civil Resolution Tribunal Amendment Act, 2015
Small Claims Rules (261/93)	June 1/17	by Reg 120/2017
University Act	May 19/17	by 2016 Bill 23, c. 23, section 10 only, in force one year after Royal Assent, Sexual Violence and Misconduct Act

MOTOR VEHICLE & TRAFFIC

Motor Vehicle and Traffic News:

Driver 25% at Fault for Being Rear

Ended Due to "Sudden Stop"

Reasons for judgement were released [May 23rd] by the BC Supreme Court, New Westminster Registry, assessing a motorist 25% at fault for a crash despite being rear-ended.

In this case (*Gibson v. Matthies*) the Plaintiff was operating a motorcycle travelling behind the Defendant. The Defendant brought his vehicle to a "sudden stop" prior to attempting a left hand turn. The Plaintiff was unable to react in time and rear-ended the Defendant vehicle. The Court found that the Plaintiff was negligent but also gave the Defendant 25% of the blame for his sudden stop. In reaching this conclusion Mr. Justice Crawford provided the following reasons: Read the full article by Erik Magraken on his *BC Injury Law and ICBC Claims Blog*.

Phone Secured while Driving?
Cup Holder Won't Cut It

Using a cell phone or global positioning system while driving can cost drivers in BC if done wrong, and police say many people remain confused about the muddy rules around phone mounting.

It can't be too low or block the driver's view. To avoid a $368 mistake, people buy phone holders but even that can be problematic when trying to follow the letter of BC's tough distracted driving laws that have netted $48-million in fines since their inception – fines that have proven to be hard to beat.

Police urge people to forgo using a device while driving, if possible, but if it is near the driver, it must be securely attached to the car or the person – for example in a pocket – and remain in hands-free or voice-activated mode.

If mounted to the car, it not only matters where but what is displaying on the screen. Video or television is not allowed to distract the driver's eye, with the exception of GPS and that can only be used secured and hands-free. Read the *CBC* article.

Ride-hailing Still Coming to BC, but
NDP, Greens Offer Few Details

The expected fall of the BC Liberal government won't close the door on ride-hailing companies, although how such businesses will operate under an NDP administration remains unclear.

Early in the election campaign, NDP Leader John Horgan sharply criticized the Liberals' proposal to allow ride-booking companies like Uber and Lyft into the province by the end of the year, saying he would hold more discussions with the taxi industry.

In addition to tabling legislation by December, the Liberals said they would introduce a new tax credit for people who use car-booking services such as Modo, Evo or Car2Go, fund crash-avoidance technology for taxis, remove the requirement for special driver's licences for taxi drivers, provide money for an app to modernize taxi services for customers and continue to consult with the traditional taxi industry.

On [May 30th], after releasing the details of a power-sharing agreement between the BC NDP and Green parties that is meant to topple the Liberal minority government, Horgan said ride hailing is coming to BC, but he will make sure there is a level playing field for taxi companies and ride-hailing businesses. He also said he would look at what commitments the Liberals had already made. Ride hailing was not specifically mentioned in the agreement. Read *The Vancouver Sun* article.

Act or Regulation Affected	Effective Date	Amendment Information
There were no amendments this month.		

PROPERTY & REAL ESTATE

Property and Real Estate News:

Recent Civil Resolution Tribunal's
Strata-property Decisions
Bylaw and rule enforcement: compliance
with statutory procedure

In *SM v The Owners, Strata Plan ABC*, 2017 CRTBC 23 (PDF), a strata lot owner asked for a $150 fine to be waived. The fine was "imposed following a May 2016 vandalism incident involving a member of the applicant's family."

The owner didn't dispute "the nature and scope of the vandalism the strata alleges occurred in either April 2015 or May 2016." "The only issue," before the tribunal, "is that in its June 19, 2016 council minutes and June 21, 2016 letter, the strata stated that it had imposed fines while at the same time inviting the owner to respond." This issue raised whether the strata corporation had complied with the procedure for enforcing a bylaw or a rule set out in section 135 of the *Strata Property Act*. The tribunal found that, similar to a strata corporation in an earlier court case, the tribunal had initially fallen afoul of section 135 but had ultimately managed to correct its error. Read the BCLI article by Kevin Zakreski.

Notary Liable for Failing to Advise on the Sellers' Residency Status

The recent case of *Mao v. Liu*, 2017 BCSC 226, has attracted much media attention in BC. Several newspapers have published articles with titles such as "House Buyer Beware: Landmark court ruling will shake real estate industry". Despite the media attention, the Mao decision does not impose a higher standard of care on BC notaries, nor does it affirm any new rights for the buyers of BC real estate.

In this case, the plaintiffs Jing Li and Jun Mao hired a notary, Tony Liu, to assist them with the purchase of a Vancouver home for $5.56 million. Liu was contractually required to ascertain whether the sellers were Canadian residents as defined by the *Income Tax Act*. In brief, section 116 of the *Income Tax Act* requires a seller who is not a Canadian resident to pay capital gains tax on the sale of Canadian property. If the seller does not pay the capital gains tax, Canada Revenue Agency ("CRA") can recover it from the buyer. The buyer can escape this liability if he or she obtains a declaration from the seller or if the buyer can show that, after making a reasonable inquiry, he or she had no reason to believe that the seller was a non-resident. Read the full article by Anna Sekunova and Catherine Repel of Clark Wilson LLP.

NDP/Green Platform Relating to Real Estate

With the announcement that the Green Party and New Democratic Party intend to work together to govern British Columbia, we have reviewed the two parties' platforms for the 2017 election as summarized by the BC Business Council. The relevant planks in those platforms are set out below.

Taxes – Real Estate/Housing

NDP

- Institute an annual $400 renter's rebate
- Introduce an annual 2% absentee speculators' tax
- Establish a multi-agency task force to fight tax fraud and money laundering in the BC real estate market
- Pass legislation requiring fair tenant treatment during renovations and demolitions of rental property
- Build more affordable rental, non-profit, co-op and other housing units over 10 years

GREEN

- Expand the foreign buyers tax across the province and increase it to 30%
- Tax capital gains in excess of $750,000 on principal residences for homes owned for less than 5 years
- Make the home owner grant income based (no details provided)
- Introduce a "progressive property tax system"

Read the full article by Darren Donnelly of Clark Wilson LLP.

Negotiating a Tenant's Restoration Obligations: A Reminder on Reasonable Wear and Tear Exceptions in BC

One of the many issues commonly negotiated between landlords and tenants is the condition of the state of repair that the premises must be in at the expiry of the lease. Typically, a standard form lease will require that the tenant return the premises to the landlord in the same condition as that which it is required to maintain during the term of the lease, and to remove certain tenant improvements. While these restoration clauses can be more or less complex or onerous depending on the nature of the property (i.e. industrial, retail or office), one common thread is that tenants will try to negotiate that their restoration obligations be subject to a "reasonable

wear and tear" exception.

This language is regularly agreed to by the parties based on a mutual understanding that the tenant should not be required to deliver the premises in perfect condition at the end of the term or to eliminate all signs of aging to the premises. But this begs the question: how broadly will a court interpret a reasonable wear and tear exception in the event of a dispute?

The decision of the British Columbia Supreme Court (BCSC) in *Griffin Holding Corporation v. Raydon Rentals Ltd.*, 2016 BCSC 2013 serves as a reminder of the legal interpretation given to the words "reasonable wear and tear" when considering a tenant's restoration obligations in a commercial lease. Read the full article by Chad Travis and Jada Tellier of Lawson Lundell LLP.

BC Court of Appeal: Classification of Strata Lots as Residential Must Be Determined "at or around the Inception of the Development"
In *East Barriere Resort Ltd v The Owners, Strata Plan KAS1819*, 2017 BCCA 183, the Court of Appeal for British Columbia allowed an appeal from a decision of a chambers judge in a case concerning the interpretation of the expression "residential strata lots" in section 128 of the *Strata Property Act*. As the court of appeal put it, "the essential position of the parties can be contrasted in this way: the petitioners would look to the 'design and intention' in play at the time of the filing of the various strata plans in the Land Title Office (or thereabouts) creating the four phases of the Resort; the strata corporation, on the contrary, would look at that evidence but as well, the actual use of the strata lots over time." The chambers judge held that determination of whether a strata lot may be classified as "residential" should be informed the actual use of the strata lot over time. The court of appeal rejected this approach. In its view, "the appropriate approach must be to assess the design and intention at and around the time of the inception of the development." Read the full article by Kevin Zakreski and published on the BCLI website.

Mortgage Lending: Update and Practice Points
– from CLEBC website – Practice Points
In this paper from *Residential Real Estate Conference – 2016*, Timothy J. Lack of Lunny Atmore LLP presents interesting recent cases that involve various aspects of mortgage lending and provides practical take aways for each case. Click here to view a pdf version of the paper.

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There were no amendments this month.		

WILLS & ESTATES

Wills and Estates News:

Bach Estate
In British Columbia, if you make a gift to one of the two witnesses to your will, or to the spouse of one of the two witnesses to your will, the usual rule is that the gift is invalid. This rule can lead to very harsh results, invalidating significant gifts to close family or friends, thwarting the will maker's intentions.

Fortunately, the *Wills, Estates and Succession Act* contains a new provision allowing the court to declare that a gift to a witness, or to the spousal witness, is valid and may take effect, if the court is satisfied that the will maker intended to make the gift. The relevant provision is section 43 of the *Wills, Estates and Succession Act*. Read the full article by Stan Rule of Sabey Rule LLP and published on his blog *Rule of Law.*

Drafting a Will In Light of the Rule in *Howe v. Earl of Dartmouth*
When deciding how to distribute property under a will, a will-maker will sometimes wish to delay when those assets are transferred to a particular beneficiary, or group of beneficiaries, after death. The will-maker may also wish to have some other party benefit immediately from the income produced by the estate's assets, while preserving the assets themselves (the capital) for the eventual beneficiary, or beneficiaries.

A distribution scheme like this can charge a trustee with balancing different interests in administering the estate, depending on the assets held by the estate. Since trustees have a duty to maximize the value of the estate for

all beneficiaries (both those receiving the income, and those eventually receiving the assets themselves), a trustee's decision to retain, acquire or dispose of certain assets may disproportionately favour one of these groups of beneficiaries over the other, and result in a breach of the trustee's duty. Read the full article by Gordon Behan and Michael Larsen of Clark Wilson LLP.

Wills Variation – 84 Year Old Second Spouse With Dementia
Philp v. Philp Estate 2017 BCSC 625 in a wills variation claim awarded an 84 year old second spouse with dementia $300,000 from an estate of $660,000 after a 35 year marriage.
The widower was a retired doctor who had contributed substantial sums of his money to his spouses horses breeding hobby farm throughout their marriage. He had approximately $600,000 of his own assets at the time of his wife's death.

The plaintiff was severely demented and was living in a care facility at a cost of $7000 per month.

His wife had left him a life estate in her hobby farm that she had been given after her divorce from her first husband.

The court held that the wife had satisfied her legal obligation to her husband as per the leading case of *Tataryn v Tataryn* 1994 SCR 807, but she had failed to satisfy her moral obligation to provide for his maintenance and awarded him $300,000. Read the full article by Trevor Todd with *Disinherited – Estate Disputes and Contested Wills*.

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There were no amendments this month.		