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Litigation Update

March, 2007 - No. 9

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1. Negligence Primer: S.C.C.

Resurfice Corp. v. Hanke, 2007 SCC 7 is a recent torts decision that addresses the basics of a tort action in negligence: duty of care, foreseeability and causation. This relatively brief (just 30 paragraphs) decision from the unanimous Supreme Court provides a textbook-like review and should be required reading for every litigator.

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2. Reminders from Court of Appeal

A recent Notice from the Court of Appeal reminds counsel of a rule change that came into effect on October 1, 2006, published in Manitoba Regulation 177/2006. The notice goes on to state that effective April 1, 2007 material that does not comply with the Rules will be rejected except in special circumstances at the discretion of the Registrar. See the Notice dated February 1, 2007 for complete details.

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3. The Buck Stops Here: F.C.A.

In its December 20, 2006 decision in *Remo Imports Ltd. v. Jaguar Cars Limited*, 2006 FCA 416 (CanLII), the Federal Court of Appeal chastens counsel for failing to follow Rules 65 and 70 of the Federal Court Rules, in that their trial memoranda:

- Exceeded the maximum of 30 pages
- Contained more than 30 lines per page
- Did not respect the rules for top and bottom margins

The court states that "…both parties have been abusing the process of the Court with impunity. The buck stops here." For a discussion of the decision, see *Judge raps lawyers for flouting rules* in the January 22, 2007 issue of Law Times.

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4. Discouraging Motions to Expunge: Q.B.

In *The Winnipeg School Division No. 1 v. The Winnipeg Teachers' Association of the Manitoba Teachers' Society*, 2007 MBQB 23 (CanLII), the court considers whether a motion to expunge on a matter before the court on application should be heard as a preliminary motion and finds that their use should be discouraged.

> …preliminary motions to expunge should be reserved to situations where a party can

demonstrate that it will suffer material prejudice if the objections are deferred to the application hearing. That will ordinarily entail proof that a failure to expunge the impugned evidence before the hearing will require extensive affidavits to be filed in response or complex cross-examinations. That will rarely be the consequence of an objection that is based on an argument that the evidence is frivolous, vexatious, abusive, inadmissible or even irrelevant. Improper evidence will simply be ignored by the judge hearing the application.

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5. Arbitration Process Provides Effective Remedy: Q.B.

The court in *Giesbrecht v. McNeilly et al.*, 2007 MBQB 25 (CanLII) considers whether a collective agreement that contains a compulsory arbitration clause deprives the court of jurisdiction to hear the plaintiff's claims. In other words, did the plaintiff properly bring his claim to the court for resolution, or should it rather have been brought to arbitration pursuant to the collective agreement? In granting the defendant's motion to strike, the court considers the essential character of the claim, and whether, *inter alia*, an effective remedy is available to the plaintiff through the arbitration process set out in collective agreement.

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