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Contract Law Remains a Cornerstone of the Common Law

"The sanctity of contract law has eroded over the last century, particularly in the field of employment law. Fairness in contracting has caused courts to seek out possible ambiguities in the employment contract so as to impose equity. However, contract law does remain a cornerstone of the common law."

- Justice Little, *Van Mensel v. Walpole Island First Nation*

In today's business world, many employers hire employees on fixed-term contracts with set start dates and end dates. Such relationships afford the employer greater flexibility to respond and adapt appropriately to ever-changing market dynamics. Upon completion of the fixed term, the employee's employment ends without the requirements of notice of termination or payment in lieu. However, as cautioned by Justice Little in the recent case *Van Mensel v. Walpole Island First Nation*, Ontario courts have gone to great lengths to minimize the effect of repeated fixed-term contracts.

In *Van Mensel*, the plaintiff provided computer training for approximately 11 years to students of the Walpole Island First Nation on their reserve. Throughout this period, she worked as an independent contractor pursuant to a series of fixed-term contracts that ran from September of one year to June of the next year – being the school term. Each year, the plaintiff prepared a contract proposal, specifically including a fixed term. Following negotiations regarding the remaining terms, the proposal would be approved by the defendant.

In 2008, the defendant decided to make the position held by the plaintiff a permanent post. It put the position up for tender and did not offer the plaintiff a contract. The plaintiff sued, claiming that she was effectively an employee of the defendant and therefore entitled to notice of termination or payment in lieu thereof.

In the decision, Justice Little noted that the consequences for an employee of finding that an employment contract is for a fixed-term are serious. Specifically, the protections afforded to the employee by the *Employment Standards Act 2000* and by the common law principle of reasonable notice do not apply when the fixed term expires. Therefore, courts will require unequivocal and explicit language to establish such a contract and will interpret any ambiguities strictly against the employer's interests.

Furthermore, the employer may not evade these legal protections simply by using the label "fixed-term contract" when in fact the reality of the employment relationship is continuous service by the employee for many years coupled with verbal

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Contract Law Remains a Cornerstone of the Common Law continued . . .


representations and conduct on the part of the employer that signal an indefinite-term relationship. Consequently, courts will be particularly vigilant in circumstances where the employee works for several years under a series of fixed-term contracts.

On the facts before the court in *Van Mensel*, the contract was simple, clear and unambiguous; it lasted for the term of the school year only. The plaintiff was not paid over a 12-month period as were the permanent teachers of the defendant, nor

did she expect that her contract would be automatically renewed annually. Subjectively, the plaintiff knew that her relationship was not one of an indefinite-term thereby entitling her to employee benefits. Accordingly, Justice Little determined that the plaintiff was not a permanent employee of the defendant and dismissed her claim with costs.

Van Mensel is a rare win for employers on the issue of fixed-term contracts. This decision signifies that courts will uphold fixed-term

contracts where the language is simple, clear and unambiguous and the intentions and expectations of the parties are to contract for a fixed term.

Please do not hesitate to contact a member of SorbaraLaw's Employment Law Group if you require assistance in drafting or reviewing your employment contracts. 

Seth Jutzi, B.B.A., LL.B., is a member of SorbaraLaw's litigation group, focusing primarily on employment, construction and commercial disputes.

SorbaraLaw Successful on Appeal

In September, 2010, SorbaraLaw partner Justin Heimpel appeared before the Divisional Court on behalf of our client, BJC Architects Inc. (BJC), in response to an appeal of a Small Claims Court decision by Deputy Judge Filkin in *Walker Office Complex Inc. v. BJC Architects Inc.*

The case involved a commercial tenancy dispute between Walker Office Complex Inc. (Walker) as landlord and BJC as tenant. BJC leased the main floor of a commercial property in Guelph from November, 2000, until it vacated the unit in November, 2006. The unit in question had been renovated in the early 1990s, but the carpets were not replaced nor were any of the walls repainted by the landlord when BJC took possession in 2000.

In September 2006, BJC provided written notice of its intention to terminate the lease effective November 30, 2006, as required by the terms of the lease. Prior to vacating the premises, BJC removed all of its belongings, including all trade fixtures, and spent many hours restoring and cleaning the premises – including vacuuming and cleaning the floors and repairing nail holes caused by items it had affixed to the walls. BJC had also offered to have the carpets steam-cleaned but the new

tenant advised that this was not necessary as it intended to replace the carpets in any event.

The lease contained a standard provision that the premises were to be left in a state of good repair, subject to reasonable wear and tear. It also contained a provision that the tenant was required to remove all trade fixtures and repair any damage caused by the trade fixtures.

Notwithstanding BJC's efforts to clean the unit, the fact that the unit was at least 12 years old at the date that BJC vacated, the fact that the new tenant intended to renovate the unit substantially, and the express provisions of the lease, Walker sued BJC to recover the cost of a number of items, including the replacement of the carpets, repainting of the entire unit, and loss of two months' rent. The total of these amounts was almost \$20,000.

At trial, Deputy Judge Filkin accepted BJC's evidence with respect to the efforts it had taken to clean and restore the unit. He also found that BJC had met its obligation to leave the unit in a state of good repair. He found that it was unreasonable for a commercial landlord to expect its tenant to pay to replace 12-year-old carpets and repaint 12-year-old walls upon vacating the premises, absent an

express obligation in the lease. Deputy Judge Filkin did, however, find that, notwithstanding its efforts, BJC had not repaired the damages caused by its removal of trade fixtures to an acceptable level, and awarded Judgment to Walker for an amount that was less than 10% of the total amount it had claimed. Deputy Judge Filkin dismissed the claim for unpaid rent on the basis that there was no evidence to support the claim that rent had been lost, and on the basis that the landlord would have required time to carry out its repairs in any event.

Walker appealed to the Divisional Court, seeking damages for all amounts claimed, including the carpets and painting, and two months' lost rent. During argument, Walker abandoned all claims but the claim for lost rent. Divisional Court Justice Fragomeni dismissed the appeal in its entirety and awarded costs of the appeal in favour of BJC. This cost award was greater than the amount of the original Judgment.

We are pleased that we were able to assist our valued client in achieving this positive result.



Justin J. Heimpel, B.A., LL.B., is a partner with SorbaraLaw. He has been with the firm since 1999, practicing in the area of civil litigation with a particular focus on employment and construction matters.

Hatred Has No Legal Remedy in Family Law

The role of a family law judge is to be impartial, fair and unbiased in rendering decisions related to marital breakdown. However, all too often, judges are thrown into the role of referee between warring spouses more intent on hurting one another than reaching a mutually acceptable solution.

In a recent case, Justice Joseph Quinn of the Ontario Superior Court of Justice, faced with a particularly hate-filled couple, responded with the only tool he could in the situation – ridicule. In a decision that has garnered much attention in the legal profession and beyond, Justice Quinn dealt with the couple’s legal issues while simultaneously deriding their behaviour. “Paging Dr. Freud. Paging Dr. Freud... Here, a husband and wife have been marinating in a mutual hatred so intense as to surely amount to a personality disorder requiring treatment.” Thus begins Justice Quinn’s memorable decision.

With the tone of the 31-page decision set, the frustrations of a family law judge are apparent throughout. Justice Quinn even takes a shot at family law itself, referring to spousal support as “historically the roulette of family law (blindfolds, darts and Ouija boards being optional).” But the bulk of his irritation is directed at the couple and their behaviour. As he states, “Larry and Catherine hate each other... This hatred has raged unabated since the date of separation. Consequently, the likelihood of an amicable resolution is laughable (hatred devours reason); and, a satisfactory legal solution is impossible (hatred has no legal remedy).”

The spouses are portrayed as shockingly hateful and foul-mouthed individuals who exhausted an enormous amount of police and court resources waging their delusive battle. Justice Quinn was disgusted by the parental alienation the mother engineered against the

father with regard to their 13-year-old daughter. When he found himself bound to grant the mother sole custody, in frustration he went on to order spousal support of just one dollar per month to the mother.



Earlier in the proceeding, Justice Quinn had called a four-month adjournment of the trial so that the parties could benefit from mediation, a strategy he now acknowledged as pointless in this case. His exasperation was palpable: “It is touching how a trial judge can retain his naivety even after 15 years on the bench.”

Midway through the decision, Justice Quinn appears to sum up his vexation: “the function of Family Court is not to change people, but to dispose of their disputes at a given point in time. I preside over a court, not a church.” In concluding the decision, he notes that, despite the involvement of numerous social agencies, “the parties repeatedly have shown that they are immune to reason. Consequently, in my decision, I have tried ridicule as a last resort.”

Reaction to the decision has ranged across the spectrum, from cheers of encouragement for a judge “telling it like it is,” to calls for his resignation. But in the

legal community, particularly among family law practitioners who commonly witness spouses putting their own passions and animosities ahead of their children’s best interests, Justice Quinn’s dispirited decision has been met with a surprising level of understanding. Indeed, in another recent family law matter, a judge ordered a Toronto-area couple to read several books on parenting and divorce and provide “book reports” at their next appearance in court. That judge, like Justice Quinn, was fed up with the couple’s aggressive legal tactics and mean-spirited treatment of each other, both within and outside the courtroom.

To be fair, not all family law disputes resemble these cases, and alternative dispute resolution techniques like mediation and collaborative family law have had a significant positive impact on the process. As with any legal dispute, if the parties are prepared to approach a family law dispute in a mature and pragmatic way, there is no reason why they cannot reach a reasonable resolution in a cost-effective manner through the court system.

In any event, it can only be hoped that some extreme litigants may learn from this new judicial strategy. As a last resort, might sarcasm and ridicule have a positive effect?



Jessica Freedman, B.A. (Hons.), J.D., is currently completing her articling term with SorbaraLaw. She is a graduate of the University of Windsor Law School.

Here's another look around the firm...

With the holiday season now over, we look back fondly on some memorable recent events. We held a special children's Christmas party in December for the children and grandchildren of SorbaraLaw employees. The party was held at Bingeman's *FunworX Indoor Playland*, where the children (and some of the adults, too) enjoyed games, activities and tasty treats. The highlight of the party was a surprise appearance by Santa and one of his elves. SorbaraLaw partner **Justin Heimpel** and staffer **Brenda Hooton** disappeared mysteriously at this point in the party. Coincidence? Must be. The children had a wonderful time at this event that is sure to become an annual SorbaraLaw tradition.



But the children weren't the only ones who experienced some Christmas cheer. Our annual firm Christmas party was held on



December 18 at the beautiful Elmhurst Inn. Our staff and their guests enjoyed cocktails and a delicious dinner, and then danced the night away. As a special treat, Oakville-based artist Bruce Outridge was on hand to capture the festivities in his impressive caricature drawings, and the SorbaraLaw partners were presented with a remarkably insightful "portrait." The annual Christmas party is a favourite event among SorbaraLaw employees, and this one was no exception. We can't wait for December 2011.



The Christmas Party was also our opportunity to recognize the special accomplishments and milestones of our staff.

In particular, **Brenda Hooton** and **Linda McKnight** each achieved their five-year anniversaries with the firm in 2010. Brenda joined our litigation department in Fall 2005 and has been an invaluable member of the team ever since. Linda joined SorbaraLaw after "retiring" as the Registrar at the Land Registry Office in Kitchener and has been of immeasurable assistance to us in our

real estate and land development practice areas. Brenda and Linda joined three other staff members who celebrated five-year anniversaries in 2010 – **Lynn Majek**, **Cathy Annoni-Galvez**, and **Denise Kocher** were recognized in our Fall issue of *LegalEase*. Each of these employees was honoured with a special announcement and gift at the Christmas party. Congratulations and

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the Firm

thank you for five great years. We look forward to many more.

We are also pleased to report that our staff once again showed their generosity and Christmas spirit in participating in the House of Friendship's annual Christmas Hamper Program and Turkey Drive. Many of our staff members contributed to the Turkey Drive, with SorbaraLaw matching all employee donations. In addition, **Kris Schumacher**, wife of partner **Mark Schumacher**, volunteered her time and energy in helping to deliver food hampers to local families in need. We thank Kris and all our staff for their generosity and spirit this year.



Listeners of local radio stations K-Fun Radio and Oldies 1090 might have heard a familiar voice in December. Counsel **Fred Kirvan** participated in a "question and answer" spot with the Investors Group. Fred's practice in business law, Wills, trusts, estate planning, and real estate made him ideally suited for this interesting discussion. Watch and listen for more from Fred in the future.

SorbaraLaw also participated in an Information Forum hosted by the Canadian Paraplegic Association Ontario. Partner **Greg**

Murdoch, counsel **Steve Kenney**, and associates **Lisa Toner** and **Cynthia Davis** provided information and answered questions on a broad range of advocacy issues including health law issues, estate planning, and housing relationships at sessions in Guelph on November 23, 2010 and in Kitchener on



December 2, 2010. Our litigation clerk, **Brenda Hooton**, also assisted in organizing



and preparing for the event. Both sessions were well-attended and successful.

SorbaraLaw was voted Best Law Firm in the Waterloo Region Record's Readers' Select Awards for 2010. Thank you to our clients who nominated and voted for us for this special award. We look forward to working with you in 2011!

Last, but not least, we are very pleased to say that our new Waterloo office is now open for business at 31 Union Street East. At this point, our litigation department is operating out of the new office, with **Denise Kocher** also providing an early corporate/commercial presence. The historic Seagram House is a

gorgeous building. While the building has been updated to suit our business needs, the historic charm remains, with stunning original floors and woodwork throughout, many fireplaces, and even a billiards room. It is definitely worth a visit. We hope to begin construction on a sizeable addition at the rear of the current building in summer 2011. Upon its completion, our entire Kitchener office will move to this beautiful new location.



FCC Hits Roadblock in Enforcing TV Decency Rules

South of the border, censorship and public decency issues continue to arise in television broadcasting.

On January 4, 2011, a federal appeals court in Manhattan vacated a \$27,500 penalty imposed by the U.S. Federal Communications Commission (FCC) on each of the forty-four ABC affiliate stations for broadcasting nudity during an episode of the police drama show NYPD Blue.

In 2008, the FCC had fined the ABC Television affiliates for a 2003 episode of NYPD Blue that showed actress Charlotte Ross' naked buttocks and the side of one of her breasts as she prepared to take a shower. The offending scenes were broadcast for seven seconds. The FCC called the depiction of buttocks "offensive." The scene involved a female character being accidentally observed by her boyfriend's son as she prepared to shower, having recently moved into her boyfriend's (and his son's) apartment. ABC argued that the scene was not indecent or sexual and was meant to show the characters'

awkwardness with their new domestic arrangement

The Parents Television Council had lodged a complaint to the FCC about the episode. Although stations are permitted to air nudity and offensive language between 10:00 pm and 6:00 am, this NYPD Blue episode aired at 9:00 pm.

The FCC found the images "titillating" and "shocking" and imposed the maximum fine, totaling \$1.2 million, on the ABC stations (\$27,500 x 44 stations). However, the appeals court held that the scene was not so offensive or indecent as to violate the FCC's rules. There is no word yet on whether the FCC intends to appeal the matter further.

Interestingly, this recent decision vacating the NYPD Blue fines follows on the heels of a ruling last summer by the U.S. Circuit Court of Appeals for the 2nd Circuit that the FCC's indecency rules were "unconstitutionally vague." The FCC had recently launched a crackdown on offensive broadcasts after a number of incidents

generated complaints, including Janet Jackson's now infamous "wardrobe malfunction" during the 2004 Super Bowl half-time show and the use of the "F-word" by Bono, lead singer of Irish rock band U2, during the 2003 Golden Globe Awards. Fox Television was one of the major networks on the receiving end of this crackdown.

In making this ruling, the Court held that the FCC's indecency rules did not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." Broadcasters simply had no way of determining what the FCC would find offensive; the FCC's rules were simply too vague to be enforced. The Court ruled that there was "no significant distinction" between the Fox Television case and ABC's airing of the controversial scene from NYPD Blue. The FCC will decide this spring whether to appeal the Fox Television case to the Supreme Court. [LegalEase](#)

Jill Renaud, B.J., LL.B., joined SorbaraLaw in October 2010. Jill works in the corporate/commercial and business law departments, and also provides services in municipal law, residential and commercial real estate transactions, and wills and powers of attorney.

Powers of Attorney for Personal Care

In the last issue of *LegalEase*, we discussed the importance of a Power of Attorney for Property and the duties of the attorney named in that document. In this article, we will discuss Powers of Attorney for Personal Care, and the duties of the named attorney.

A Power of Attorney for Personal Care is a document by which a person (the grantor) authorizes a named individual or individuals (the attorney(s)) to make decisions concerning the grantor's personal care, if and when the grantor

becomes incapable of making such decisions through illness or injury. Personal care decisions relate to hygiene, nutrition, housing, health care, safety, clothing, and other similar matters.

The *Ontario Health Care Consent Act* contains provisions listing the people who can make personal care decisions for an incapable person, but a Power of Attorney for Personal Care allows a grantor to designate for him/herself the person he/she wishes to perform this function (which may or may not be a person listed in the

Health Care Consent Act's list).

If a person becomes incapable of making his or her own personal care decisions, and does not have a Power of Attorney, an interested family member will have to make a court application to be appointed the incapable person's guardian for personal care. This normally will require an assessment by a qualified capacity assessor to determine whether or not the "incapable" person truly is incapable of making his or her own personal care decisions.

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Powers of Attorney for Personal Care continued . . .

A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the consequences of a decision or lack of decision.

Duties and responsibilities of the attorney under a Power of Attorney for Personal Care

As with attorneys for property, the attorney for personal care is required to explain to the incapable person what his or her powers and duties are. He or she is required to act in the best interests of the incapable person, and to keep records of all decisions made on behalf of the incapable person.

In deciding what the incapable person's best interests are, the attorney must consider the values and beliefs that the attorney knows the person held when capable. These include:


- the person's current wishes if they can be ascertained;

- whether a decision to be made by the attorney is likely to improve the quality of the person's life, or to prevent the quality of the person's life from deteriorating, or reduce the extent to which, or the rate at which, the quality of the person's life is likely to deteriorate; and
- whether the expected benefit from the decision outweighs the risk of harm from an alternative decision.

The attorney is required to encourage the incapable person to participate, to the best of his or her abilities, in the decisions being made by the attorney on his or her behalf. The attorney is also required to foster the incapable person's independence, to the extent possible, and in making decisions, to seek the least restrictive and least intrusive course of action available.

Finally, the attorney must seek to foster regular personal contact with the incapable person's family and friends, and also to consult with supportive family members and friends who are in regular personal contact with the incapable person.

While the *Substitute Decisions Act* does not state explicitly that compensation is available to attorneys under a Power of Attorney for Personal Care, courts have held that compensation can be claimed under section 61(1) of the *Trustee Act*. That section provides that trustees, guardians and personal representatives are entitled to fair and reasonable allowance for the care, pains and trouble, and the time expended in carrying out their duties. Reimbursement for expenses incurred by an attorney in caring for an incapable person may also be claimed.

If you think you may need, or you have a close friend or family member who may need, a Power of Attorney for Property and/or a Power of Attorney for Personal Care, contact us at SorbaraLaw. We can help to make sure the proper attorneys are chosen, the necessary arrangements are made, and all the appropriate needs and duties are addressed. 

Lisa S. Toner, B.Soc. Sci., LL.B., has been with SorbaraLaw since September 2007, practicing in the areas of wills, estate planning and estate administration.

Mistrial in a Murder Case has Implications for Wireless Providers

A murder trial in Windsor, Ontario was into its fifth day in November, 2010 when a lawyer for Telus, Scott Hutchison, told the Superior Court that the company had learned there was additional information on seven witnesses' cell phone records that Telus did not originally release after being ordered by the court to release the contents of these cell phone records last August.

Telus discovered a small amount of individual information that was not turned up in the first search, located in physical background tapes beyond the 30 to 59 days that customer records are typically kept before purging them. The company also keeps backup tapes containing data measured in terabytes (which are huge) for a couple of years for the purpose of systems recovery in the event of emergency or disaster.

Now, in addition to the Windsor case, Telus must go back and comb through these backup tapes for information it may have missed in numerous other court requests. Cell phone companies receive thousands of such orders yearly, ranging from wiretap requests to requests for phone records and text messages. The results of these new searches could have serious implications, as cases could be reopened if the parties can demonstrate that deeper searches would have made a difference to the outcome of their trials.

Despite this discovery of a veritable Pandora's Box of information, there has been a cautioning as to how wide a net the courts can cast on gathering data. In a recent Supreme Court of Canada decision, *R. v. Morelli*, Canada's top court

cautioned that such searches can be extremely intrusive and thus need to be very directed.

The telecommunications industry has a long history of co-operating with law enforcement within the legal framework for access to communications and subscriber information, claims Marc Choma, spokesman for the Canadian Wireless Telecommunications Association. However, wireless providers must also respect and protect their clients' privacy when complying with lawful requests.

Currently, there are three bills before Parliament that would increase the providers' legal obligations, forcing companies to provide basic subscriber information, overhaul their systems to allow narrower surveillance of individuals, and

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Mistrial in a Murder Case has Implications for Wireless Providers continued . . .

give police more power to monitor a customer's creation and transmission of data in real time.

Striving to achieve a balance between privacy legislation and lawful requests for information is not new to Canadian courts. However, with the discovery of massive amounts of historical data records held by Telus and other wireless companies,

refining the law to protect the evidentiary process and the *Charter* rights of individuals being investigated could become an interesting balancing act for Canadian courts in the years to come.

LegalEase

Jessica Freedman, B.A. (Hons.), J.D., is currently completing her articling term with SorbaraLaw. She is a graduate of the University of Windsor Law School.

Bell Canada Fined \$1.3M for Violating National Do Not Call List

On December 20, 2010, communications giant Bell Canada was hit with a massive \$1.3 million penalty for engaging in unauthorized telemarketing practices. The fine, handed out by the Canadian Radio-television and Telecommunications Commission (CRTC), is the largest of its kind and is certain to send a decisive message to all telemarketers.

The CRTC is an independent public authority that regulates and supervises broadcasting and telecommunications throughout Canada. It investigates complaints and applies the Unsolicited Telecommunications Rules, which include the National Do Not Call List. Established under the *Telecommunications Act*, the National Do Not Call List allows consumers to register their residential, wireless, fax, and VoIP numbers. Once a number is registered, telemarketers are prohibited from making unsolicited phone calls to that number.

The CRTC became aware of Bell Canada's telemarketing practices after consumers registered on the National Do Not Call List complained to the CRTC of receiving promotional calls from Bell Canada for its various services. Following an investigation, the CRTC found that Bell Canada had hired independent telemarketers to promote and sell its services by making unsolicited telephone calls to consumers who had, in fact, signed up on the National Do Not Call List.

A week prior to the Bell Canada fine, following a separate investigation, the CRTC fined Xentel DM, a Calgary-based telemarketing firm, with a penalty of \$500,000 for its misuse of the charity exemptions of the National Do Not Call List Rules. The CRTC determined that Xentel DM made calls on behalf of organizations that were not registered as charities with the Canada Revenue

Agency, to consumers who had registered on the National Do Not Call List.

When we first reported on the creation of the National Do Not Call List two years ago in the Summer 2008 issue of *LegalEase*, we were uncertain as to how effective this legislation would be in curbing unsolicited marketing telephone calls. These significant penalties that were imposed on or around the two-year anniversary of the implementation of the National Do Not Call List appear to demonstrate that the CRTC is taking the list seriously and will move aggressively to crack down on telemarketers found to be violating the rules.

It is important to note that the National Do Not Call List does not prohibit all unsolicited phone calls. In addition to the exemption afforded to registered charities, the National Do Not Call List Rules provide exemptions to the following:

- persons or organizations with whom the call recipient has recently done business;
- political parties and candidates;
- persons or organizations collecting information for a survey of members of the public; and
- persons or organizations soliciting a subscription for a newspaper of general circulation.

It is also important to note that registrations of phone numbers on the list are limited for a period of five years, and expire automatically at the end of the registration period unless otherwise renewed. For more information or to register for the National Do Not Call List visit www.lnnte-dncl.gc.ca. LegalEase

Seth Jutzi, B.B.A., LL.B., is a member of SorbaraLaw's litigation group, focusing primarily on employment, construction and commercial disputes.

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