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TOP 10 DECISIONS OF OUR SUPREME COURT OF CANADA IN 2013

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Our Supreme Court of Canada was busy in 2013, delivering well over 100 decisions on appeals (and leaves to appeal) from across Canada. Looking back, it has been quite an eventful year with landmark decisions on important issues ranging from the right of employers to engage in random drug and alcohol testing to the legality of Canada's prostitution laws. Picking a list of the most important or significant decisions is therefore difficult and highly subjective. From our perspective however here is a summary of the "top 10" decisions which will have a significant impact on the lives of Canadians and their businesses.

1. **Employment Law - Random Drug & Alcohol Testing:** *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Limited* Supreme Court considered the impact of random drug and alcohol testing on an employee's right to dignity and privacy and balanced this right against the employer's concerns for workplace safety and discipline. Ultimately siding with the employees on this issue, the Court decided that *random* drug and alcohol testing of employees would *not* be permitted even in a dangerous work environment, *unless* an employer could prove that there was a general problem with alcohol or drug abuse in its workplace. Based on this decision, the vast majority of Canadian employers will not be permitted to maintain policies for random drug and alcohol testing.
2. **Employment Law - Restrictive Covenants:** *Payette v. Guay Inc.* - The rules applicable to restrictive covenants relating to employment differ depending on whether the covenants are linked to a contract for the sale of a business or to a contract of employment. The application of different rules in the context of a contract of employment is a response to the imbalance of power that generally characterizes the employer-employee relationship when an individual contract of employment is negotiated, and its purpose is to protect the employee. These rules have no equivalent in the commercial context, since an imbalance of power is not presumed to exist in a vendor-purchaser relationship.
3. **Employment Law - Deductibility of Pension from Severance:** *IBM Canada Limited v. Waterman* - Dismissed employee drawing pension benefits upon dismissal. Pension benefits are not deducted



from the employee's entitlement to severance. Deducting the pension benefits would leave the employee in a worse position than he would have been had his employment not been terminated.

4. **Intellectual Property - Copyright Infringement:** *Cinar Corporation v. Robinson* - Copying of a number of features from the plaintiff's original work was infringement. Important to not conduct the infringement analysis by dealing with the copied features piecemeal. The cumulative effect of the features copied must be considered, to determine whether those features amount to a substantial part of the plaintiff's skill and judgement expressed in his work as a whole. A qualitative and holistic assessment of the similarities between the works is therefore required which takes into account the relevant similarities and differences between the works. The question of whether there has been substantial copying focuses on whether the copied features constitute a substantial part of *the plaintiff's work* — not whether they amount to a substantial part of *the defendant's work*. The alteration of copied features or their integration into a work that is notably different from the plaintiff's work does not necessarily preclude a claim that a substantial part of a work has been copied. With respect to damages the Court upheld an award of compensatory and punitive damages (\$500,000 in punitive damages), plus disgorgement of profits.
5. **Legal Profession - Conflicts of Interest:** *Canadian National Railway Co. v. McKercher LLP* - A lawyer's duty of loyalty has three salient dimensions: a duty to avoid conflicting interests; a duty of commitment to the client's cause; and a duty of candour. The duty to avoid conflicts is mainly concerned with protecting a former or current client's confidential information and with ensuring the effective representation of a current client. The duty of commitment entails that, subject to law society rules, a lawyer or law firm as a general rule should not summarily drop a client simply to avoid conflicts of interest. The duty of candour requires disclosure of any factors relevant to the ability to provide effective representation. A lawyer should advise an existing client before accepting a retainer that will require him to act against the client. The Court upheld a general *bright line rule* that a lawyer may not concurrently represent clients adverse in interest without first obtaining their consent.
6. **Criminal Law - Prostitution:** *Canada v. Bedford* - The Court struck down as unconstitutional the Criminal Code provisions prohibiting various activities related to prostitution including the operation of brothels, living on the avails of prostitution (pimping) and communicating in public for the purposes of prostitution (solicitation).
7. **Criminal Law - Search and Seizure of Computers:** *R. v. Vu* - Significant privacy interests are at stake when computers are searched. Therefore computers are treated as a "separate place" and prior authorization is required before police can search a computer. A specific, prior authorization to search a computer found in the place of search ensures that the justice granting the search warrant has considered the full range privacy concerns raised by computer searches. This means that if



police intend to search any computers found within a place they want to search, they must first satisfy the authorizing justice that they have reasonable grounds to believe that any computers they discover will contain the things they are looking for. If police come across a computer in the course of a search and their warrant does not provide specific authorization to search computers, they may seize the computer, and do what is necessary to ensure the integrity of the data. If they wish to search the data, however, they must obtain a separate warrant.

8. **Criminal Law - Text Messages:** *R. v. TELUS* - Search warrant required for police to access text messages stored on TELUS database.
9. **Pharmaceuticals - Generic Drug Pricing:** *Katz Group Canada Inc. v. Ontario* - Ontario legislation to regulate and promote transparent pricing and elimination of price inflation along the drug supply chain challenged by Ontario pharmacies including Shoppers Drug Mart and Rexall. The Supreme Court upheld the Ontario regulations and found that their purpose of banning private label products was to prevent another possible mechanism for circumventing the ban on the rebates that had kept drug prices inflated. If pharmacies were permitted to create their own affiliated manufacturers whom they controlled, they would be directly involved in setting the formulary prices and have strong incentives to keep those prices high.
10. **Property Law - Resulting Trust:** *Nishi v. Rasca Trucking Ltd.* - When making a gratuitous transfer of property, the person who makes the transfer must have intended either to pass the beneficial interest (a gift) or retain it (a trust). A purchase money resulting trust arises when a person advances funds to contribute to the purchase price of property, but does not take legal title to that property. Where the person advancing the funds is unrelated to the person taking title, the law presumes that the parties intended for the person who advanced the funds to hold a beneficial interest in the property in proportion to that person's contribution.