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BLG MONTHLY UPDATE

Borden Ladner Gervais

The BLG Monthly Update is a digest of recent developments in the law which Neil Guthrie, our National Director of Research, thinks you will find interesting or relevant – or both.

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ADMINISTRATIVE

Bong hits for judicial review

On the night before graduation from Appleby College, a private high school near Toronto, Gautam Setia went back to a chum's dorm room to smoke the rest of the pot they had started somewhere off-campus. The director of residence burst in, discovered boys and bong, and promptly filed a 'serious incident report'. Setia was expelled for violating Appleby's code of conduct, which reserved the right of the school to apply 'a full range of sanctions, including expulsion' for infractions. He was also denied his diploma.

Setia challenged the school's decision, on the grounds that natural justice had been violated: *Setia v Appleby College*, 2012 ONSC 5369. First, though, a jurisdictional question: was this a decision which was subject to judicial review or a private contractual matter? The Ontario Divisional Court concluded that it had jurisdiction to hear the case because the college was established by a special Act of the legislature; the disciplinary powers of its principal are statutory not contractual in nature, and thus subject to judicial review. The majority of the court agreed with Setia that natural justice had been flouted: the young man had not been given notice of the specific infraction (the allegations against him appeared to conflate a violation of the fire safety code with a violation of the substance abuse policy), had not been given a right to be heard and was subjected to an unreasonably harsh penalty. On the last point, the evidence showed that Setia had not been the lighter of the bong, or the owner of either the bong or the stash. The other boy had said at the time the director of residence turned up that Setia had not been involved, and there was no evidence that he had actually lit anything (although he had inhaled). Appleby treated the incident as a 'zero tolerance' fire issue, when it should have assessed it as a drugs infraction that did not need to attract such a harsh penalty. In any event, Setia was not given the opportunity to make submissions on the appropriate sanction. The court declined to order Appleby to award the diploma, but the new head of school was invited to reconsider that decision in light of the court's reasons. Chapnik J, dissenting, agreed on the jurisdiction issue but did not think there had been a failure of procedural fairness or natural justice.

Marty Sclisizzi and Margot Finlay of the Toronto office of BLG acted for Appleby College, which will be seeking leave to appeal the jurisdictional point.

[Link available **here**].

ART LAW

Shaking down the sheikh

The venerable London numismatic auction house of AH Baldwin & Sons, with two other dealers, recently obtained a worldwide freeze on the assets of Sheikh Saud bin Muhammad Al Thani, a cousin of the Emir of Qatar and one of the world's biggest collectors -- as well as one of its most controversial. A £1-billion shopping spree on behalf of Qatar's national museum resulted in the sheikh's detention back home in 2005 for alleged falsification of sales receipts. Last month, he stiffed Baldwin's and the other two dealers to the tune of US$20 million after a sale of ancient Greek coins in New York: hence the freezing order. The ruling from Haddon-Cave J indicates that the Qatari collector also owes the Bonhams auction firm the princely sum of £4.3 million and a further US$42 million to

Sotheby's. The latter's securities filings disclose that as of September 2012 a single unnamed customer (presumably the sheikh) owed the auction house US $56.1 million; he has pledged a number of 'purchases' to Sotheby's Financial Services, including a US$5.5-million Fabergé egg.

[Link available **here, here, here** and **here**].

CIVIL PROCEDURE/PRIVACY

UK Supreme Court restates *Norwich Pharmacal* test

The United Kingdom Supreme Court has restated the test required to obtain information from a person who 'gets mixed up in the tortious acts of others' and who thereby comes under a duty to assist the person who has been wronged, in *The Rugby Football Union v Consolidated Information Services Ltd*, [2012] UKSC 55. The Rugby Football Union (RFU) has a mandate to promote rugby which includes not selling tickets for profit. RFU was therefore concerned when it found out about the activities of Viagogo Ltd (now Consolidated Information Services), which was facilitating the resale of tickets for matches at Twickenham stadium at a profit (which under the RFU's terms and conditions would render the tickets null and void). RFU sought a *Norwich Pharmacal* order requiring Viagogo to disclose the names of those who had been involved in ticket reselling, so it could take action against them. Viagogo resisted, ultimately relying on article 8 of the European Charter of Fundamental Rights, which protects personal data. Both the trial judge and the English Court of Appeal found that any interference with personal privacy was proportionate to the RFU's legitimate objective in going after wrongdoers. The UKSC agreed.

In doing so, the Supreme Court reiterated the law as set out in *Norwich Pharmacal Co v Customs & Excise Commissioners*, [1974] AC 133, and as developed since. (Notably, subsequent cases have held that *any* form of redress, not just legal action, will suffice as the basis of a *Norwich* order.) Whether a *Norwich Pharmacal* order would be 'a necessary and proportionate' response to wrongdoing depends on a range of relevant (and interdependent) factors: (i) the strength of the applicant's possible cause of action, (ii) the strength of the public interest in allowing the applicant to vindicate that right, (iii) whether an order would help to deter similar wrongdoing, (iv) whether the information sought could be obtained from another source, (v) whether the respondent knew or ought to have known that it was facilitating conduct that was arguably wrong, (vi) whether the order would reveal the names of innocent parties as well as wrongdoers, and the extent of harm to the innocent that would result; (vii) the degree of confidentiality of the information being sought, (viii) the EU privacy and data protection rights of individuals whose identity would be disclosed and (ix) the public interest in maintaining the confidentiality of a journalistic source. The courts below had assessed the factors correctly and RFU got its order.

[Link available **here** and **here**].

CONTRACTS

The plaintiff knew the contract was illegal: can he still recover?

Neither party to this contract appears to be an angel. In order to fund his illegal mah-jong parlour, Lai borrowed $50,000 from Tsoi; Tsoi, for his part, charged a rate of interest that was alleged to exceed the 60% limit set by s 347 of the *Criminal Code*. Lai made repayments totalling $4,000, but then defaulted. Tsoi sued for the balance that was owing: *Tsoi v Lai,* 2012 BCSC 1082.

Bowden J of the BC Supreme Court found that the interest was (just) legal – because it was at a simple and not compounded rate of 5% per month – but that Tsoi was aware that the proceeds of the loan would be used to fund Lai's illegal gambling den. The issue was therefore whether that underlying illegality and Tsoi's knowledge of it ought to deprive him of his remedy. A party to an illegal contract at common law may still recover, but only where he or she is 'less at fault' than the other party, has 'repented' of the bargain before it has been performed or has an independent claim (in tort, for example) which is not premised on the illegal agreement. Tsoi could not fit himself within any of the exceptions to unenforceability, even if he did not intend to participate in the operation Lai's illegal business. On the other hand, it wasn't right to give Lai an unjustified windfall, so Lai was ordered to repay the principal amount less the $4,000 he had already paid, with no interest on top.

[Link available **here**].

CORPORATIONS

Directors' resignations: when are they effective and can they be revoked?

Small but useful points in *Adams v Association of Professional Engineers (Ontario)*, 2012 ONSC 3850, and *Kandolo v Kabelu*, 2012 ONSC 4420.

The OBCA, the CBCA and the new Ontario *Not-for-profit Corporations Act 2010* provide that a director's resignation is effective on the later of receipt of the resignation by the corporation or a date specified in the resignation, does not need to be accepted by the corporation and cannot be revoked once given, unless the corporation agrees. The position is less clear for corporations with share capital that are governed by the Ontario *Corporations Act* (and the common law), but the 'prevailing view' (according to the *Adams* case) is that a resignation is effective once given (not received) but also does not have to be accepted by the corporation; revocation is likewise possible only with the consent of the corporation. The court in *Adams* didn't think that different principles should apply to *Corporations Act* not-for-profits without share capital, unless the by-laws specify anything different. The whole point of the rules is to allow a resigning director to know when his or her liability will cease and to give the corporation certainty as to the composition of its board.

[Link available **here** and **here**].

EMPLOYMENT

A pterodactyl hit the front end of my delivery van

Right. And the reason your employer fired you is not the utter improbability of your accident report but because you're a woman.

So claimed Nancy Barnette, a driver for Federal Express: *Barnette v Federal Express Corp*, 2012 US App LEXIS 209097 (11th Cir, 9 October 2012). She claimed that an 'oversized avian', either a pterodactyl or 'some kind of big bird' collided with her vehicle, causing the window to cave in. Barnette failed to report the 'unexpected ornithological occurrence' immediately, as dictated by Fedex policy, and was terminated. She challenged that, alleging that the employer was really discriminating against her on the basis of sex. The fact that Fedex could produce an eyewitness who had seen her van crash into the gate of a subdivision and show that paint marks on the van matched the gate exactly was certainly not helpful to her case. There was no evidence that female Fedex drivers were treated any differently from male employees. Barnette's boss seemed to be an 'offensive' chap and an 'unpleasant supervisor', but the company was justified in terminating a worker for delaying and then falsifying an accident report. And for not coming up with a more plausible excuse?

INTELLECTUAL PROPERTY

Just who owns that e-mail?

Adkins was the CEO of Fairstar Heavy Transport, but not its employee: he worked for a personal holding company which was under contract to Fairstar to provide management services. Fairstar was in financial trouble, and a dispute with Adkins ensued over the wisdom of certain dealings on the company's behalf. The company was subsequently sold and Adkins terminated by its new owners. In a dispute over Adkins's dealings towards the end of his time with Fairstar, the latter made a proprietary claim for Adkins's e-mails. (For jurisdictional reasons, no claim was advanced on the basis of ownership of the medium of transmission or any paper copy of the e-mails, or on the basis of copyright or confidentiality.) E-mail addressed to Adkins at his Fairstar address while he was still CEO were automatically forwarded to a personal account; Fairstar claimed that they were also automatically deleted from Fairstar's server at the same time. Adkins sent e-mail only from his personal account, so unless a Fairstar address had been cc'd, the company had no record of Adkins's outgoing correspondence.

But who owned the e-mails? After reviewing the case law and commentary, Edwards-Stuart J of the English Technology and Construction Court concluded that the weight of authority pointed strongly against there being any proprietary right in the content of information, including an e-mail: *Fairstar Heavy Transport NV v Adkins*, [2012] EWHC 2952 (TCC). If there is ownership in the content of an e-mail message (a point the judge did not concede but was prepared to entertain for the sake of argument), five possibilities arise: (1) title to the content remains with its creator, (2) title to the content is transferred to the recipient, once the e-mail is sent; (3) the recipient is granted a licence for legitimate use of the content, but title remains with the creator, (4) title to the content passes to the recipient, but the creator has a licence to retain and use it for any legitimate purpose, and (5) creator and recipient share title (and with any subsequent recipient). Option (1) seemed to the judge to be unworkable, in that it would allow the creator to require any recipient of a much-forwarded e-mail to deliver it up; option (2) presents similar difficulties in giving the recipient

the right to require the sender (or any sender) to delete the e-mail, making its last recipient the only person entitled to it but making the situation 'hopelessly confused' to the extent there are multiple recipients. Options (3) and (4), while 'perfectly workable', would have the effect of depriving the proprietary interest in an e-mail's content of any value whatsoever and would involve difficult questions about what amounted to 'legitimate' use. Option (5) is equally unrealistic: it would permit a sender to require every recipient to help it restore a lost database, and parties which had since fallen out to have access to each other's servers. In the end, there was for the judge 'no practical basis for holding that there should be a property interest in the content of an e-mail', although this was not a result he viewed 'with any enthusiasm in the circumstances of this particular case'. Fairstar's proper remedies lay in equity (for breach of confidence) or copyright law.

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PARTNERSHIPS

It's a grey area

Limited partnerships are weird. They have been around for ages (in Ontario since 1849) and are a common vehicle for enterprise, but there are still what Justice Cooke of the English Commercial Court called significant 'grey areas' in the law, especially on the perennial topic of loss of limited liability through participation in the management of the partnership business. That is one of the central issues in *Certain Limited Partners in Henderson PFI Secondary Fund II LLP v Henderson PFI Secondary Fund II LLP,* [2012] EWHC 3259 (Comm).

The certain limited partners (LPs) in that case alleged that the general partner (GP) and the sister company the GP had appointed as manager had failed to follow the investment criteria set out in the limited partnership agreement. The LPs faced an obstacle, however: LPs cannot sue a third party in the name of the partnership; only the GP can bring an action on their behalf, and trying to do this themselves would amount to taking part in the management of the partnership's business. What they needed to do was bring some kind of derivative claim against the GP and the manager in the name of the partnership that would not expose them to liability for the partnership's obligations (or the costs of the derivative action). The LPs argued that the GP was in a conflict of interest because it was unlikely to want to pursue the partnership's claim against the GP's own sister company. Justice Cooke didn't think a derivative action against the GP was impossible, but the LPs would need to show that there were 'special circumstances' which justified it. On the facts, there was 'simply no need and no room' for a derivative action against the GP; the LPs could simply sue the GP individually for whatever losses they had suffered, without reference to LPs who didn't want to be involved. The viability of a derivative claim against the manager was a different story: the GP was unlikely to sue the manager without being forced to, and removing and replacing the GP would involve 'difficulties and uncertainties'. But in bringing a derivative claim, the LPs would effectively be taking over a GP function and managing the partnership business. The range of activities that a LP can engage in without losing limited liability is, in the end, limited. The UK statute does go a bit further than Ontario's in allowing LPs to 'advise' the GP on management issues, and while the extent of that is one of those grey areas, advancing a claim against a third party would clearly be something that 'supplants the general partner', thereby exposing the LP to liability as a GP. The rest of the judgment focuses on the construction of the particular limited partnership agreement, which needn't concern us.

[Link available **here**].

PERSONAL PROPERTY

What ownership interest do you have in virtual property?

Apparently people really do inhabit the virtual world of sites like Second Life - and spend real-world money to do so. Just what they get for their money is the central issue in *Evans v Linden Research Inc* (ND Calif, 20 November 2012), a class action against the company behind Second Life. On the website, participants buy virtual currency and with it buy items of virtual real and personal property. Participants also pay 'tier fees' to 'maintain' the property they have acquired. But what have they really acquired? The plaintiffs argued that they obtained 'an actual ownership interest' in the virtual property, and that Linden Research attempted to limit or remove those rights by changing the terms and conditions of the website; Linden Research countered that all that participants had acquired was copyright in whatever they had created (through purchases) and a licence to use the virtual property, but that actual ownership remained with Linden Research.

The Northern District of California was not persuaded that the plaintiffs had shown that all members of the proposed class (anyone who had ever purchased or sold virtual property through Second Life) had suffered damages arising from alleged misrepresentations about their

ownership interests. The court was prepared, however, to accept that a smaller subset of participants whose property rights had been 'confiscated' through suspension or termination of their accounts (and forfeiture of any credit balances) could proceed with a class claim based on conversion, interference with contractual relations and prospective economic advantage, and unjust enrichment.

See also *Abreu v Slide Inc*, (ND Calif, 2012), reported in the BLG Monthly Update for November 2012.

PRIVILEGE

The perils of cc'd e-mail

We've all had the moment of panic: 'to whom did I just send that sensitive e-mail, and do I now want the earth to open up and swallow me whole?' Management at Marketforce Communications must have had something like that reaction when an e-mail was sent to the company's lawyers about Maria Fernandes and the company's desire to terminate her employment, but also cc'd to Fernandes. There was 'an immediate attempt to retrieve the information', but the horse had left the proverbial by that point. The employee took the position that all of this was constructive – and wrongful – dismissal.

Marketforce, for its part, tried to argue that the e-mail was privileged (it was a request for legal advice) and that inadvertent disclosure of it was not a waiver of the company's privilege in the contents. Sproat J determined that, yes, the e-mail was privileged and its disclosure inadvertent, but that the interests of justice and fairness required the inclusion of the e-mail in the evidentiary record. The e-mail was essential to understanding Fernandes's state of mind and her actions; it was not unfair to Marketforce to require its production. Marketforce appealed but without success: Beilby J of the Ontario Divisional Court thought that Justice Sproat's decision was consistent with the cases on inadvertent disclosure and that preserving privilege would put Fernandes at a 'significant disadvantage' in establishing her case. Sensible result: *Fernandes v Marketforce Communications*, 2012 ONSC 6392.

[Link available **here**].

SECURITIES

Trading on false insider information is still insider trading, says High Court of Australia

Day, the managing director of AdultShop, 'Australia's leading online erotic e-tailer' (can an 'e-tailer' not be online?), gave optimistic assessments about the company's financial performance to Mansfield, who passed the information on to Kizon. Day was also alleged to have told Kizon that a well-known Australian businessman had bought a large stake in the company on the strength of the numbers. All of this information proved to be false. Without knowing that, Mansfield and Day bought shares in AdultShop, and were subsequently prosecuted for insider trading. The central issue for three levels of court was whether Mansfield and Day had traded on the basis of information that was not generally available. The two argued, naturally, that because the information was all lies it was not really 'information'.

The Western Australia trial judge acquitted both men, holding that the insider 'information' that was acted upon had to be based on a 'factual reality'. The state appeal court reversed (2:1), and the High Court of Australia has unanimously affirmed that determination. In the final analysis, the High Court noted that 'information' in the relevant provisions includes both 'matters of supposition' and 'matters relating to the intentions or likely intentions' of a person which are not generally known to the public, as well as 'matters which are insufficiently definite to warrant being made known to the public'; there is also no requirement that the information must actually come from within the company that is the subject of it. All of this suggests that insider information need not necessarily have a factual basis: information may be false or incorrect but is information nevertheless. As a matter of policy, the insider trading prohibitions are intended to prevent trading on the basis of information that is not generally known in the marketplace – again, whether that information turns out to be true or not, it being possible (as in this case) to distort free and fair trading on the basis of an untruth. Mansfield's and Kizon's appeals were dismissed: *Mansfield v The Queen*, [2012] HCA 49.

[Link available **here**].

TORTS

Vicarious liability of unincorporated association for one of its members

Yet another case arising from the alleged physical and sexual abuse of children at a religious school, but one in which the UK Supreme Court had to grapple with whether the unincorporated association which ran the school (in this case, the Institute of the Brothers of the Christian Schools)

could be vicariously liable for the acts of the individual lay brothers who were its members: *Catholic Child Welfare Society v Various Claimants*, [2012] UKSC 56. A test case in Scotland a few years ago (*McE v De La Salle Brothers* [2007] CSIH 27) concluded on similar facts that it could not.

Lord Phillips, for the Court, noted that 'the law of vicarious liability is on the move', but that the following principles have emerged: (1) an unincorporated association can be vicariously liable for the acts of one or more of its members; (2) D2 may be vicariously liable for the tortious act of D1 even though the act is a breach of the duty owed to D2 by D1 or a criminal act; (3) vicarious liability can extend to a criminal act of sexual assault; and (4) two different defendants, D2 and D3, can each be vicariously liable for the single tortious act of D1. The question in *Catholic Child Welfare Society* was whether the relationship between individual lay brothers and the Institute was sufficiently close as to make the latter vicariously liable for torts committed by lay brothers. His Lordship focused on the essential elements of the relationship and the significance of control, finding that the relationship was sufficiently akin to that of employer and employee so as to give rise to the possibility of vicarious liability. He then focused on the connection between the brothers' acts and their relationship to the Institute, finding that it was 'close' and gave rise to the creation of the risk that the brothers would commit torts against pupils in their charge. Lord Phillips disagreed with the Canadian abuse cases that the creation of risk will in itself give rise to vicarious liability but thought it 'an important element' in the analysis. On the facts before the court ('not a borderline case'), it was 'fair, just and reasonable' to impose liability on the Institute for the acts of its members.

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TORTS/DEFAMATION

Google's defence of innocent dissemination fails

Milorad Trkulja was more than a bit upset when a Google search of his name disclosed news articles and images associating him with organised crime in Melbourne. He brought a defamation suit against Google, successfully establishing in a jury trial that some of the material was defamatory and also rebutting Google's defence of innocent dissemination. Google moved for judgment to set aside the jury's findings. This proved to be a tactical error: *Trkulja v Google Inc LLC (No 5),* [2012] VSC 533.

Google argued that it did not intend to publish the defamatory content because there was 'no human intervention between the request made to the search engine and the publication of search results'. Beach J of the Victoria Supreme Court disagreed: Google 'intended to publish everything [its] automated systems ... produced' as a 'consequence of computer programs, written by human beings, which ... were doing exactly what Google Inc and its employees intended and required'. Google was, then, the publisher of the defamatory material. The defence of innocent dissemination, which usually avails newsagents, libraries and the like, could not save Google's bacon because (in the learned judge's view) it was more than just a 'passive intermediary'. In his view, the facts were distinguishable from the line of English authorities which have absolved internet search engines, message boards and blog platforms of liability for defamatory content they have (passively) facilitated. In Justice Beach's view, the 'passive intermediary' description could not be applied 'to an internet search provider in respect of material produced as a result of the operation of that search engine'. It was therefore open to the jury to conclude that Google was liable to Trkulja, and an award in the amount of AUS$200,000 was entered in his favour. This one is sure to be appealed...

[Link available **here**].

WILLS AND ESTATE

The suicide note was a valid will

A judge in New South Wales has held that Bradley MacDonald's suicide note was a valid will that altered an earlier testamentary disposition he had made in 2008. The 2008 will wasn't valid, because MacDonald had married later that year, thereby revoking the document. The suicide note included what sound like fairly detailed 'instructions for distribution of my goods' and a request to his wife, from whom he was by this point estranged, not to make a claim on his estate. She abided by that, but the estate needed to determine whether MacDonald had died intestate (in which case his wife would have inherited everything as next of kin) or if the suicide note took care of things. It did, so probate was granted.

[Link available **here**].

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