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BLG MONTHLY UPDATE

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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 LAW

Don't take everything you see on a government website at face value

Especially where it's clear that the information on the website deals only in generalities and can't address particular circumstances, as Rob Mauchel learned in *Mauchel v Canada (Attorney General)*, 2012 FCA 202. Mauchel quit his job to relocate to Toronto, where his wife had accepted a new position. He checked the Service Canada website and concluded that employment insurance (EI) was available only to those who lose a job 'through no fault of their own'. If he had dug a little more deeply, he would have seen that quitting to relocate with a spouse would also have made him eligible for EI. A government employee subsequently pointed this out to Mauchel, who applied for EI retroactively.

His application was initially turned down, but successful on appeal. A further appeal found in favour of the EI Commission, on the grounds

that Mauchel had found the website unduly complicated but failed to make further enquiries, as a reasonable person would have done. Mauchel took things to the Federal Court of Appeal, which disagreed that Mauchel had found the site too complex (he testified that he thought the information 'clear and unambiguous') but agreed that he had not taken reasonable steps to assess whether the general statements on the main page really applied to him. (The fact that he was a previous EI claimant and an IT worker accustomed to web-based research clearly factored into the reasonableness analysis.) A reasonable person would have gone deeper into the website or called the Commission.

[Link available **here**].

ADMINISTRATIVE/TORTS

Misrepresentation claim against the Crown fails for lack of due diligence on the plaintiffs' part

Officials of the Department of Indian Affairs and Northern Development (DIAND) represented to South Yukon Forest Corp. (SYFC) and Liard Plywood and Lumber Manufacturing Inc. (LPLM) that if they built a lumber mill in the Yukon the Crown would ensure an adequate, long-term supply of timber. The mill was built, the timber was not forthcoming, the mill shut down at a loss. The Federal Court found the Crown liable for breach of contract, negligence and negligent misrepresentation.

The Federal Court of Appeal, while accepting the factual findings of the trial court, held that SYFC and LPLM relied unreasonably on the assurances they received about the supply of timber, as they should have known that such a supply could be guaranteed only under a long-term timber-harvesting agreement (THA) with the Crown: *Canada v South Yukon Forest Corp*, 2012 FCA 165. A THA is contingent on the filing of a timber management plan and is granted at the discretion of the federal Cabinet. DIAND officials had no authority to bind the Crown to grant the THA necessary to guarantee a profitable level of timber. This was something the two companies ought to have figured out for themselves. In any event, the totality of the DIAND representations left it far from certain that SYFC and LPLM would ever get a THA. The officials did not have the authority to bind the Crown, so there was no breach of contract. By operating the mill under a short-term permit, the companies took the risk that a THA might not be forthcoming. They had no legitimate expectation as to the substantive matter of timber supply and could not say the Crown was negligent in taking its time in considering the granting of a THA.

[Link available **here**].

CIVIL PROCEDURE

Pleadings need factual basis, can't just be 'bitter polemic' or publicity stunt

As Lance Armstrong found out when his complaint against the US Anti-Doping Agency (which he asserted was a 'kangaroo court' with no jurisdiction over him) was tossed out by Sparks J of the district court in Austin, Texas.

The judge had harsh words for Armstrong's 80-page pleadings, which were just an

'unadorned, the-defendant-unlawfully-harmed-me accusation', 'a mechanical recitation of boilerplate allegations' and a 'bitter polemic' intended to 'indulge Armstrong's desire for publicity, self-aggrandizement or vilification' of the Agency. 'Vast swaths of the complaint could be removed entirely ... without the loss of any legally relevant information'. Contrary to what Armstrong (and his lawyers) appeared to believe, 'pleadings filed in the United States District Court are not press releases, internet blogs, or pieces of investigative journalism'. Ouch – but Armstrong was given leave to amend (which he did).

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

CONTRACTS

LOI provision to use reasonable endeavours and negotiate final agreement in good faith found unenforceable

On the traditional grounds that it was a mere 'agreement to agree' in *Shaker v Vistajet Group Holding SA*, [2012] EWHC 1329 (Comm). The letter of intent in question related to a potential purchase of aircraft, under which a deposit would be repaid if the parties failed 'despite the exercise of good faith and reasonable endeavours' to conclude a final deal.

The LOI stated that it was non-binding, for one thing, but Teare J of the Commercial Court went further: agreements to negotiate in good faith or to make best efforts to reach an agreement cannot be enforceable because there are generally no objective criteria by which reasonableness can be assessed (the parties themselves may have differing views on it) and because acting in good faith is 'inherently inconsistent with the position of a negotiating party'. Objective criteria to assess reasonableness could exist (as in *Petromec Inc v Petroleo Brasileiro SA*, [2005] EWCA Civ 891), but did not in this case.

[Links available **here** and **here**].

Oral contract not worth the paper it's written on

But still a binding obligation, as Dresdner Bank found out in *Attrill v Dresdner Kleinwort Ltd,* [2012] EWHC 1189 (QB). In 2008, Dresdner was in the process of being sold by Allianz SE to Commerzbank AG. Many Dresdner employees felt uncertain about their future and left the bank, so to stem the tide of resignations Dr Jentzsch, the bank's CEO, announced at a town-hall meeting in August 2008 that a 'guaranteed' minimum bonus pool of €400 million had been set aside for 2008, to be allocated on a discretionary basis according to individual performance ('in the usual way' and 'no matter what'). In December, employees received written notice of their provisional bonus entitlements, which were said to be subject to a 'material adverse change' (MAC) clause. The sale to Commerzbank was completed in January 2009 and apparently new brooms sweep clean: Dr Jentzch was replaced, the MAC clause was invoked and the bonus pool reduced by 90% in response to public concerns about bankers' bonuses.

The bankers fought back and won. Owen J found that the announcement of a specified bonus pool gave rise to a binding promise that was sufficiently certain as to its terms. The Dresdner

employee handbook provided that unilateral changes to compensation terms affecting a group of employees had to be communicated over the bank's intranet, but the town-hall meeting had been posted there, and in doing so the bank had effectively waived any requirement for employees to indicate their acceptance of the offer. Consideration was given in the form of the employees' continued service to the bank in exchange for a bonus entitlement. The insertion of the MAC clause was a breach of the oral agreement to pay the full amounts conveyed in the December 2008 bonus letters (and possibly also a breach of a duty of implied trust and confidence under the bank's contracts with its employees). Even if the MAC clause had been proper, the bank didn't apply it correctly according to its terms. The bankers were entitled to the full amounts specified in the December 2008 bonus letters.

[Link available **here**].

Related contracts can form a single transaction; ambiguity not a precondition for applying test of commercial reasonableness

Ecore International, a manufacturer in Pennsylvania, wanted the services of Downey, an engineer. It was more advantageous for him from a tax perspective not to be an employee, so the parties structured their arrangement using a consulting agreement between a company owned by Downey called CSR Industries (of which Downey was defined as a 'key person') and a confidentiality agreement between Ecore and Downey personally. The confidentiality agreement stated that the courts of Pennsylvania had jurisdiction over any disputes. Downey later sued Ecore in Ontario over the assignment of IP rights that had arisen while he worked for Ecore. Ecore moved to stay the Ontario action on the strength of the forum-selection clause (FSC).

The trial judge denied the stay, saying that the confidentiality agreement failed for lack of consideration: it was CSR, not Downey (who was not a party), which received consideration for signing it, so Downey could not be bound by the FSC. The Ontario Court of Appeal thought this was too simplistic: 'the contours of the exact bargain between the parties may sometimes require consideration of more than one contract'. In reality, the bargain between the parties was contained in both the consulting and confidentiality agreements, which formed a 'composite whole', even if not all parties signed both. This interpretation was in accordance with commercial reasonableness (which, incidentally, the court confirmed may be considered even where a contract is not ambiguous). Consideration had therefore moved from Ecore to Downey, and the FSC clause was enforceable against him.

[Link available **here**].

CONTRACTS/CORPORATE

No such thing as a remedial constructive contract

Well, that's a relief. In the words of the English Court of Appeal, to impose one would be to make 'a fundamental inroad into the basic principle of law that contracts are the result of a consensual arrangement between, and only between, those intending to be parties to them': *VTB Capital plc v Nutritek International Corp*, [2012] EWCA Civ 808.

The argument in favour of making such an inroad was made by VTB Capital, the UK subsidiary of a Russian bank, which alleged that it had been the victim of a conspiracy by two British Virgin Islands companies, a Russian company and a Russian individual in connection with the financing of a corporate take-over by one of the BVI companies. VTB claimed that two of the entities involved were under common control but had been represented as operating at arm's length, and that the assets of the target company had been overstated.

Even were this a case for piercing the corporate veil (which the court ultimately decided it was not), there are limits to what the veil-piercing exercise will do. To mix metaphors, it will permit the identification of the puppeteer behind the puppet, and permit an equitable remedy against the puppeteer where the puppet's corporate status has been used for fraudulent purposes. Veil-piercing does not, however, make the puppeteer a party to the puppet's contracts. Much less does it make third parties liable in contract for a bargain that none of them ever thought it was – or ever intended to be – bound by. VTB did have arguable tort claims in deceit and conspiracy, but failed to establish that England and not Russia was clearly the more appropriate forum to hear the dispute.

[Link available **here**].

CORPORATE

Liability of *de facto* and 'shadow' directors, shareholder fiduciary duties

Interesting things on the liability of various corporate actors in a recent decision on amendments to pleadings: *McKillen v Misland (Cyprus) Investments Ltd,* [2012] EWHC 521 (Ch). The case concerned the proposed take-over by Sir David Barclay and his brother Sir Frederick Barclay of Coroin Ltd, which indirectly controls a stable of posh London hotels. In a challenge to the actions of the Barclay brothers, it fell to be decided whether they were *de facto* or 'shadow' directors of the company (and thus potentially in breach of their fiduciary duties) and whether they owed fiduciary duties to the other shareholders of Coroin (specifically the claimant, McKillen).

Richards J provides a helpful overview of how one becomes a director *de facto* (which can happen in Canada as well, when a person assumes the responsibilities of a director without holding the actual office) and of shadow directors (non-directors – other than professional advisers – who instruct or influence actual directors, whether from the shadows or more openly). An individual may fall in one category or both, and with respect to selected functions, depending on the facts. *De facto* directors are liable as fiduciaries to the extent they assume the powers and functions of directors; shadow directors are liable only to the limited extent provided in the *Companies Act*. Shareholders do not typically owe each other a fiduciary duty, although one may be imposed where there is the requisite degree of trust and confidence – subject to any limitations imposed by a shareholders agreement. On the facts, Sir David could not be a *de facto* director but might be a shadow director; a claim for shareholder fiduciary duty was unsustainable. As ever, good review of the jurisprudence by an English judge.

[Link available **here**].

CORPORATIONS/CIVIL PROCEDURE

Oppression claim can be assigned, says Ontario CA

As long as the assignment of a claim doesn't 'savour of maintenance' (officious intermeddling in someone else's lawsuit) it will be OK.

This includes the assignment of an oppression claim, as in *Ma v Ma*, 2012 ONCA 408. In that case the Ontario Court of Appeal looked at the transaction as a whole, concluding that the assignment of a shareholder's oppression claim was valid because it was ancillary to a property right in the shares of the company, which had also been assigned, and was not a separate cause of action. The fact that the assignee paid $1 for the right of action reflected the risk of oppression litigation and the value of the shares if that proved unsuccessful. The assignment would also have been upheld if the assignee had had a genuine pre-existing commercial interest in taking the assignment and enforcing it, which wasn't the case on the facts.

[Link available **here**].

EMPLOYMENT

Brief e-mail exchange on termination can be settlement agreement

Bland was terminated without cause by his employer, Canadian Farm Insurance. In an e-mail with the subject line 'notice of termination', the employer confirmed earlier discussions indicating that Bland would receive 4 weeks' pay in lieu of notice, continued benefits coverage for a certain period after termination, commissions and vacation pay. Bland replied, saying 'all is agreed'. He actually received 6 weeks' pay, as a courtesy, plus use of an office until he found another job. He sued for wrongful dismissal nine months later: *Bland v Canadian Farm Insurance Services Inc,* 2012 ONSC 3021.

Pollak J found that Bland had negotiated and accepted a termination package; an objective observer would say that that the parties had concluded a settlement agreement. The fact that Bland had not signed a formal release didn't matter: it was clear from the nice post-termination things the employer did for Bland that it considered that he had agreed to settle all claims against it. His wrongful dismissal suit therefore failed.

[Link available **here**].

Employer has duty to protect reputation of wrongfully terminated employee

The employer, Public Works and Government Services Canada (PWGSC), was found to have breached its duty of good faith in terminating Douglas Tipple because it failed to take reasonable steps to protect his reputation from the effects of press statements which PWGSC knew to be false: *Tipple v Canada (Attorney General)*, 2012 FCA 158. Tipple had been hired from the private sector to serve as a special adviser on cost-reduction. He met his targets, saved his employer $150 million and received the best possible performance reviews. PWGSC seems, however, to have regarded his proposal to turn the department into a Crown corporation as a bad one, and the view was expressed (in spite of

his achievements) that he was 'not working out'. Then came a fateful business trip to London with a colleague, where Tipple was to attend meetings with UK officials that had been scheduled by the Canadian High Commission. There was some kind of mix-up, because Tipple was signed up for meetings that were outside his remit and more properly within those of the colleague. He attended the meetings that were within his bailiwick. On Tipple's return, he found out that PWGSC had sent letters to the UK government apologising for his non-attendance at meetings and that his trip report had been leaked to the press. Media reports of 'a trail of cancelled meetings' followed; an internal investigation exonerated Tipple, but was not made public. He was terminated shortly afterwards but was unable to find a new job because of the black cloud hanging over him.

An adjudicator awarded Tipple $1.4 million in damages for wrongful termination, which included amounts for psychological injury and loss of reputation. PWGSC challenged the award for loss of reputation, which was set aside by the Federal Court but restored by the Federal Court of Appeal. Applying *Wallace v United Grain Growers Ltd,* [1997] 3 SCR 701, the appeal court concluded that while there is no freestanding duty to protect an employee's reputation, in circumstances where there has been wrongful termination, the *Wallace* duty of good faith requires the employer to protect the employee from reputational loss suffered as a result of allegations that the employer knows to be false and that impair the employee's ability to find a new job. Here, the employer clearly failed to do that, in not correcting the false statements or allowing Tipple to defend himself. There was no evidence to show that PWGSC's media plan was anything but a self-serving exercise at Tipple's expense.

[Links available **here** and **here**].

EMPLOYMENT/CONTRACTS

Employee terminated without cause not required to mitigate if entitled to fixed term of notice or pay in lieu

So says the Ontario Court of Appeal in *Bowes v Goss Power Products Ltd,* 2012 ONCA 425, where the contract of the employee in question said he was entitled to 6 months' notice or payment in lieu but was silent on his need to mitigate damages. He was terminated without cause and found a new job 2 weeks later. The old employer paid him no more than the 3 weeks' pay required by statute, arguing he'd lost only 2 weeks and had a duty to mitigate any damages suffered; the employee claimed he was entitled to the full payment set out in the agreement and had no duty to mitigate.

The trial judge agreed with the employer, but the Court of Appeal reversed. Where the parties have agreed to a fixed sum on termination, they have contracted out of the requirement for reasonable notice or damages in lieu. The specified amount represents liquidated damages and mitigation (which relates to damages which are at large, *i.e.* in lieu of reasonable notice) is not required. The intention of the parties was certainty on termination, and it would be unfair to allow the employer to undermine that certainty by seeking to pay a smaller amount than agreed

and to require mitigation on the part of the employee that was not contemplated in the original bargain.

[Link available **here**].

ENVIRONMENTAL

Clean-up order can be made against owner which had no part in contamination

Several hundred litres of fuel oil leaked from the Gendrons' basement in Kawartha Lakes, Ontario, threatening to affect adversely a nearby lake. The environment ministry ordered the Gendrons to clean up the spill, but they had limited resources and their insurance coverage ran out before remediation could be completed on city property. The ministry ordered the city to remediate and prevent further discharge, even though it had played no part in the original leakage. The ministry's order was upheld by the Environmental Review Tribunal and, on further appeal, the Divisional Court: *Corporation of the City of Kawartha Lakes v Director, Ministry of the Environment,* 2012 ONSC 2708.

While an earlier case (*Re 724597 Ontario Ltd* (1993) 13 CELR (NS) 257 (OEAB), affd (1995) 26 OR (3d) 423 (Div Ct)) suggested that an 'innocent' owner could be relieved of clean-up liability on the grounds of fairness, there was no other party which could remediate this particular problem and, more to the point, prevent further contamination. The tribunal correctly avoided apportioning blame, which was more properly dealt with in other arenas (*e.g.* civil litigation).

The operating principle under applicable legislation is not that the polluter pays but that the owner pays.

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EVIDENCE

Are electronic records real evidence or documents?

The answer is that it appears they can be either or both, but until *Saturley v CIBC World Markets Inc,* 2012 NSSC 226, there has been precious little judicial discussion of the point. CIBC tendered electronic trading records as a defence to Saturley's wrongful dismissal claim and in support of its contention that he had traded without proper authority. Saturley argued that the records should be treated as documents.

Why does it matter? Real evidence – like a photograph or a physical object – simply needs to be authenticated. The trier of fact then draws whatever inferences are appropriate. If electronic records are treated as documents, authentication is also required – but in addition, the best evidence rule may require the production of the original of the document and, where third-party information is present, the hearsay rule will apply. Relying on academic commentary and some older case law, Wood J of the Nova Scotia trial court found that the records in question could be treated as real evidence because they consisted of data that had been captured automatically by CIBC computer system, without human intervention. Admission of the

evidence would be subject to questions about its reliability and to confirmation that it came from its purported source. If the records fail the tests for admission as real evidence, they may still be admissible as documentary evidence. A record could be both real and documentary evidence. The records in question met the test to be considered real evidence and for admissibility.

[Link available **here**].

HEALTH/CONSTITUTIONAL

Judge strikes down *Criminal Code* provisions on physician-assisted dying

Madam Justice Smith has confronted this difficult issue in *Carter v Canada,* 2012 BCSC 866, concluding that the *Criminal Code* prohibitions are invalid because they violate the *Charter* rights of the plaintiffs (a woman with a fatal neurodegenerative disease and the daughter and son-in-law of another woman who terminated her life in Switzerland with their assistance, where to do so is legal).

Smith J noted that while some of the issues were canvassed in *Rodriguez v BC (Attorney General),* [1993] 3 SCR 519, the *Charter* jurisprudence has moved on since then. It is clear from *Rodriguez* that the prohibition on doctor-assisted death engages s 7 rights to security of the person and liberty, but leaves open whether the legislation infringes the right to life. The earlier case was, however, decided before the emergence of two principles of fundamental justice for *Charter* purposes, that laws must not be overbroad or grossly disproportionate, and also did not determine whether s 15 equality rights had been infringed. In Justice Smith's view, the assisted-death provisions do infringe equality rights because they make a legal act more difficult for people with physical disabilities – a distinction that is both discriminatory and unjustifiable under the s 1 analysis. An absolute prohibition goes too far: while there is disagreement as to the effectiveness of safeguards designed to prevent abuse in jurisdictions where assisted dying is permitted, a limited and carefully monitored system could be devised. Section 7 rights are also infringed, either by their 'very severe' effect on liberty and security of the person or right to life (including the right to shorten life) or in criminalising the acts of persons who have assisted others to die. These infringements were also found to be unjustified, as overbroad and disproportionate in relation to the objectives of the prohibition. The prohibition was declared invalid, but this was suspended for a year to allow parliament to devise better legislation. One of the plaintiffs was granted a constitutional exemption during the period of suspension to permit her to proceed with a plan to end her life (if she decides to do so) with the assistance of her physician under specified conditions. An appeal is expected.

Angus Gunn and Sarah Hudson of the Vancouver office of BLG represent The Ad Hoc Coalition of People with Disabilities Who are Supportive of Physician-Assisted Dying, one of the intervenors in the case.

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INSURANCE

Coverage denied for a gruesome occurrence

On the way to cremation at Liberty Grove Cemetery, dead bodies were illegally dissected so that tissue, organs and bones could be removed from them for commercial sale. The gruesome scheme was discovered and the perpetrators brought to justice. The owners of Liberty Grove contended that they received the remains in closed containers and were unaware of any tampering; in any event, they were not prosecuted. Families of the deceased brought claims against the cemetery for damage to human remains and mental anguish, some of which were dismissed. The cemetery owners incurred defence costs, which they sought to recover from their insurers.

Denial of the cemetery's claim for defence and indemnification was upheld. Discovery of some of the claims for mental anguish fell outside the policy period. Other claims, while falling within the period of coverage, were excluded by an 'improper handling' clause: *Memorial Properties LLC v Zurich Insurance Co* (NJ SCAD, 28 June 2012). The exclusion clause clearly applied to the cemetery's allegedly negligent handling or disposal of human remains in its care and custody, and the insurers had no duty to defend or indemnify.

INTELLECTUAL PROPERTY

Five big copyright cases from the SCC

Of the five, the two most significant are probably *Society of Composers, Authors and Music Publishers of Canada v Bell Canada,* 2012 SCC 36, and *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37.

In *SOCAN v Bell Canada,* the court held that listening to previews of music that is available for commercial download is 'fair dealing' for the purposes of private study or research. 'Research' is to be construed liberally, and includes the inquiry necessary to determine whether that Megadeth track is really worth the 99 cents that iTunes is charging. Because this is fair dealing, no royalty is payable for the preview.

The *Access Copyright* case also considers fair dealing, with the majority concluding that it's OK for teachers to make photocopies of works subject to copyright for use in the classroom. This too is 'fair dealing' for the purposes of the *Copyright Act* because it facilitates the research and private study of pupils; it's not as though teachers have some sinister 'ulterior motive' in distributing the copies.

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

Posting and linking on public websites: guidance on what will (and will not) infringe

Free Dominion is an online political discussion forum of a conservative cast, operated by Mark and Constance Fournier. Richard Warman claimed that the site infringed his rights in three works in which he held the copyright: a speech he had made, an article written by Jonathan Kay for the *National Post* and a photograph by another third party. Warman had an exclusive licence to use the

Kay article and the photograph. The speech was posted in its entirety; the Kay article was taken down and replaced with an excerpt; the photograph had not been uploaded to Free Dominion but was accessible through a hyperlink to Warman's personal website.

Could Warman (and the *Post*) recover against the Fourniers? No, said Rennie J of the Federal Court: *Warman v Fournier*, 2012 FC 803. While Warman's rights in the speech had clearly been infringed, he had brought his claim after the expiration of the applicable limitation period. As for the Kay article, the excerpts that were reproduced (less than half of the whole) did not amount to a 'substantial part' of the original and thus did not infringe; even if they did, the reproduction was fair dealing for the purpose of news reporting, which should be interpreted liberally. The link to the photograph did not infringe; by posting the image on his own website, Warman had authorised other parties (including the Fourniers) to hyperlink to it. If Warman didn't want people to do that, he could remove the photograph from his site (which he ultimately did).

[Link available **here**].

MERGERS AND ACQUISITIONS

Can a confidentiality agreement serve as a standstill (part 2)?

We reported last month that the Delaware Chancery court had found that the terms of a confidentiality agreement precluded one party to merger discussions from subsequently using confidential information from those discussions in order to mount a hostile bid against the other party (thereby effectively turning a NDA into a standstill): *Martin Marietta Materials Inc v Vulcan Materials Co,* 2012 Del Ch LEXIS 93.

The Chancery court relied in part on the Ontario decision in *Certicom Corp v Research in Motion Ltd* (2009) 94 OR (3d) 511 in its analysis of the contractual language. An appeal from the Chancery decision has been dismissed by Delaware's supreme court: *Martin Marietta Materials Inc v Vulcan Materials Co* (SC Del, 10 July 2012). The Supreme Court concluded that the court below was correct in finding that the NDAs prohibited the use of confidential information for a hostile bid, that doing so was breach of the agreements and that injunctive relief was the appropriate remedy. There is no discussion of *Certicom*, however. The argument that the Chancery court had 'stealthily' converted the confidentiality agreements into a standstill was rejected. While the two types of agreement are different, the Chancery court did not unduly conflate them; it merely interpreted the confidentiality agreements according to their terms.

SECURITIES/TORTS

Not a winning defence to say 'we didn't really mean it when we said we were honest'

But Goldman Sachs tried it anyway in *Richman v Goldman Sachs,* 2012 US Dist LEXIS 86556 (SDNY, 21 June 2012), a class action over alleged failures of disclosure in the marketing of collateralised debt obligations (CDOs). Buyers of the CDOs claimed that Goldman marketed

products it knew would perform poorly or fail, while itself betting that they would do exactly that; failed to disclose SEC enforcement investigations into various CDO transactions; and made material misstatements in disclosure documents. Goldman contended that the representations it had made about its honesty, integrity and extensive policies on conflicts of interest were not actionable because they were mere puffery, which no one would rely on.

Crotty J thought this 'Orwellian' and, if true, a sign that 'the world of finance may be in more trouble than we recognize.' He refused to dismiss the plaintiffs' claims that the firm had made material misstatements about its business practices and that it did so knowing the statements were untrue.

TORTS

Be careful in sending your complaint about a retailer to a list of e-mail recipients

The reason? It could be defamation, as Annie Bisaillon found out in *2964376 Canada Inc v Bisaillon,* 2012 ONSC 3113. Ms Bisaillon's parents bought a dining room set from Prestige Furniture, which turned out to be badly damaged. The Bisaillons accepted the table as a loaner until a replacement could be found, but this didn't happen and the manufacturer subsequently went out of business. Prestige attempted to repair the table (which was particularly affected) to no avail, and their offer to supply a non-matching table was refused. The buyers complained to the Better Business Bureau and the Small Claims Court, both of which concluded that Prestige had acted in good faith, but with the latter awarding modest damages and costs. The daughter then entered the picture. From her work e-mail account she sent 38 recipients a message with a likeness of Prestige's logo, in which she stated that the retailer was 'untrustworthy' and 'deceitful', relying on the fact that her parents got neither a replacement table nor a refund, and on the Prestige workman's statement that the original table could not be repaired. The judge found that Ms Bisaillon had admitted that her intention was revenge on her parents' behalf. Her e-mail found its way to the brother-in-law of the owner of Prestige, who complained to Ms Bisaillon's employer (representing that he worked for Prestige, which was not the case). She was disciplined by the employer for misuse of e-mail and sued by Prestige for defamation.

The judge reviewed the elements of defamation and concluded that the e-mail was defamatory. It had been published to third parties, and its content would clearly affect the reputation and business of Prestige. Did the defence of fair comment apply? No, for a variety of reasons (although the analysis is thin): it applies to matters of public interest, not to private commercial disputes; fair comment must be based on fact, not second-hand perceptions; it must be presented as opinion, not as facts; and it is unavailable where the statement is motivated by malice. Ms Bisaillon's counterclaim that she had been defamed when her e-mail usage had been reported to her employer was dismissed: that communication relayed facts which the employer verified for itself before taking action.

[Link available **here**].

'But for' is default test for causation and need not be satisfied with scientific precision; 'material contribution' test confined to multiple tortfeasors

Mrs Clements was injured when the motorcycle driven by her husband (the defendant) span out of control after a nail punctured its rear tire. The evidence showed that Mr Clements was driving too fast and that the motorcycle was overloaded. The plaintiff claimed that she would not have been injured but for her husband's negligence and, in the alternative, that 'special circumstances' warranted the application in her favour of the material contribution (MC) test from *Resurfice Corp v Hanke,* 2007 SCC 7. The defendant argued that the 'but for' onus had not been satisfied and presumably that MC did not enter into it.

At trial Grauer J was not satisfied that, but for the excessive speed and load, the defendant would have retained control of the motorcycle; it was impossible to determine the weight and speed at which the defendant would have been able to do so. The trial judge turned to the MC test and concluded on that basis that the defendant was 100% liable.

The BC Court of Appeal allowed the defendant's appeal, noting that the MC test is one for legal – not factual – causation. *Resurfice* did not intend MC to displace the 'but for' test, which remains the default rule. The MC test is available only in the 'special circumstances' where it is impossible to prove 'but for' causation and where there is a clear breach of a duty. This will arise only in two situations: (1) circular causation (where it is impossible to say which of two parties caused the injury) or (2) dependency causation (where causation depends on establishing what one party would have done had another party not acted negligently, which may be impossible to prove). These will be rare cases; 'but for' remains the default rule, except where denial of liability under it would offend basic notions of fairness and justice.

The SCC has (7-2) has allowed the appeal, ordering a new trial. McLachlin CJC, for the majority, held that once the breach of a duty of care has been established, the basic rule for determining whether that breach was the cause of injury is the 'but for' test, which is to be applied 'in a robust common sense fashion', without the need for scientific evidence of the precise contribution made by the negligent defendant. The MC test, which permits a plaintiff to recover where 'but for' causation cannot be established, is available only in rare circumstances where fairness would require it, and generally only in situations involving multiple tortfeasors. On that basis, the trial judge made two errors: (1) he insisted on scientific evidence reconstructing the circumstances of the accident in order to find 'but for' causation, which was excessive; and (2) he applied the MC test to a case where it was clearly unwarranted. LeBel and Rothstein JJ, dissenting, agreed with the Chief Justice on the law, but didn't think 'but for' causation could be established on the facts, even if the trial judge had used the common-sense approach to it. The trial judge was wrong to apply the MC test, but it was also wrong, on policy and

process grounds, to order a new trial when the decision of the BC Court of Appeal could simply be upheld.

[Link available **here**].

TORTS/CONTRACTS

Not your average slip and fall; exotic dancer also fails to show existence of collateral contract

Randyll Newsham, an exotic dancer, performed at the Naughty but Nice Sex Show in Vancouver. He claimed to have slipped and fallen on an 'oily substance' during his performance, which he alleged was body paint left on the stage after an earlier demonstration. He sued the organiser of the show, alleging that inadequate care had been taken to ensure safe performance conditions and seeking damages for pain and suffering, loss of income and cost of care: *Newsham v Canwest Trade Shows Inc*, 2012 BCSC 289. Canwest denied liability on the basis of a waiver of liability in the standard-form exhibitor contract which Newsham had signed in order to rent a booth at the show. It was, however, a bit more complicated than that: Newsham argued that in addition to his exhibitor's contract for two booths (where he displayed unidentified 'products'), he had a separate contract under which the booth rental fee was waived in exchange for his agreement to perform on stage; this collateral contract, he said, superseded the exhibitor contract and its waiver. He also claimed either not to have read or understood the waiver clauses.

Brown J of the BC Supreme Court found that even if the terms of a collateral contract could be established, there was no reason to conclude that the terms of the exhibitor contract had somehow been excluded. But did the exhibitor contract contain an implied term that Canwest would provide a safe and secure environment at the show? Not really, because Canwest had that obligation in any event, under the *Occupiers Liability Act* (OLA). The judge found, however, that Canwest had failed to make the waiver clauses sufficiently clear to Newsham, as required under the OLA. While Canwest owed Newsham a duty of care, there was sufficient evidence to suggest that he had not complained of a slip after his performance but not enough to establish that there was, in fact, something slippery underfoot. Even if Newsham's version of the facts was accepted, it was possible that he had slipped on the baby oil he had applied to his body before his performance or was susceptible to injury because of a fall on stage at a previous gig. Newsham failed to show that Canwest had breached the standard of care, but wouldn't have been able to establish causation even if he had.

[Link available **here**].

TORTS/EMPLOYMENT

Employer's vicarious liability for workplace prank sharply divides Oz court

The prank was a kick by a trucker to the back of the knees of a co-worker while they waited all day for a ship to arrive at the docks. The blow caused the co-worker to collapse, resulting in serious back injuries from which he never recovered.

The trial judge and the majority of the Victoria Court of Appeal concluded that there was an insufficient connection between the wrongful act and the course of the trucker's employment or conduct authorised by the employer: *Blake v JR Perry Nominees Pty Ltd,* [2012] VSCA 122. The theory that the kick was the result of work-induced boredom and frustration was rejected. Neave JA, in a strong dissent, thought otherwise. There was evidence that the employer had not instructed the truckers to refrain from playing football or cricket while waiting for the ship to arrive, or from engaging in the horseplay that was typical among them. It was therefore predictable that they would get bored during a long wait on the dockside and that horseplay would ensue – to the point where any resulting injury was incidental to acts authorised by the employer. Good review by the majority and dissenter of leading Australian, English and Canadian authority.

[Link available **here**].

TORTS/INSURANCE/DAMAGES

Car accident damages and reasonable costs of repair

Two cars collide, causing damage. The insured can opt to find someone to do the repair or have the insurer arrange for repairs by one of its affiliates. The latter is at a lower cost than the insured could obtain – but the insurer charges the going rate for repairs on the open market.

These facts raised three preliminary questions in *Coles v Hetherton,* [2012] EWHC 1599 (Comm): (1) is the insured's measure of loss the reasonable cost of repair (*i.e.* on the open market) or the actual cost? (2) if the insurer arranges the repair, is the reasonableness of its cost judged in relation to what could have been obtained on the open market by the insured or by the insurer? and (3) where the vehicle is not a write-off, and the insurer has the damage repaired and pays for it, is the insured entitled to claim an amount up to the reasonable repair cost? Answers: (1) reasonable cost of repair, even if actual costs were lower; (2) what the insured could have obtained on the open market; (3) left for trial, but the judge drew the parties' attention to the distinction between a claim for diminution in value reflected by the reasonable repair costs (recoverable regardless, presumably) and a claim for loss of use as reflected by those costs (recoverable only if the insured can establish consequential loss?).

[Link available **here**].

TRUSTS

Constructive trust overrides agreement to share 50-50

Pietro Gallarotti and Fabio Sebastianelli bought a flat (apartment) together in 1997. Theirs was not a romantic relationship: they were just friends, as well as business partners in a variety of ventures. Sebastianelli put up 45% of the purchase price, Gallarotti 13%, but the two friends agreed orally that each would have a 50% interest in the property. They later agreed that Gallarotti would pay a larger share of the mortgage payments, but the evidence showed that this didn't happen; Sebastianelli ended up paying the lion's share (75%). Their friendship ended in 2008, and Gallarotti claimed his 50% interest in an asset which had appreciated considerably in value.

The trial court found that the parties' agreement was that they would share the flat 50-50, in spite of their unequal contributions to it. The English Court of Appeal took a different view, interpreting the agreement to have been predicated on an assumption that there would only be a 'slight imbalance' in contributions by each of the two: *Gallarotti v Sebastianelli,* [2012] EWCA Civ 865. The inference from their course of conduct was that they had intended their respective financial contributions to be taken into account, leaving Sebastianelli with 75% under a constructive trust.

[Link available **here**].

UNJUST ENRICHMENT

Claim fails where relationship between claimant and defendant 'too attenuated'

The majority of the New York Court of Appeals found that this was the case in *Georgia Malone & Co, Inc v Rieder,* 2012 NY LEXIS 1890 (CA, 28 June 2012). Georgia Malone & Co (GM), a real estate brokerage and consulting firm, prepared confidential due diligence reports for a developer with respect to potential purchases of commercial properties. GM alleged that the developer sold the reports to Rosewood, a rival brokerage firm, which received the commission GM would have been paid when the deal closed. GM sued the developer for breach of contract, and both the developer and Rosewood in unjust enrichment.

The unjust enrichment claim against Rosewood was dismissed by two levels of court. In the view of the majority in the appeal court, an unjust enrichment claim has its origin in what used to be called (not very helpfully) quasi-contract, which requires 'a sufficiently close relationship' between claimant and defendant for the latter's gain to be recoverable. Here, there were no dealings at all between the rival brokerage firms; GM was not even aware of the Rosewood's existence, making their relationship 'too attenuated' to allow the unjust enrichment claim to go forward. Two of the five judges on the panel dissented: the majority seemed to be requiring privity as a precondition for an unjust enrichment claim, when the real question is

whether one party holds property which in equity and good conscience it ought not to because the property was obtained at another's expense. Rosewood would have seen GM's name on the reports and 'should have known the materials were suspect'. The majority were wrong to say that allowing GM's claim would place an undue burden on commercial parties 'to probe the underlying relationships between the business with whom they contract and other entities tangentially involved but with whom they have no direct connection'.

UNJUST ENRICHMENT/TORTS

What's the deal with waiver of tort?

Who knows... The traditional view is that it is merely an election of remedies, a decision to forego tort damages in favour of disgorgement of gain, but recent Canadian case law has entertained the possibility (to the delight of class-action plaintiffs' lawyers) that it may be an independent cause of action. If that were the case, and no underlying tort claim needed to be established, a plaintiff wouldn't have to show that he or she suffered damages but merely that the defendant profited from wrongdoing. Obviously attractive in the context of class proceedings, where causation isn't always easy to prove.

In *Andersen v St Jude Medical Inc,* 2012 ONSC 366 – that rare thing, a class action taken to trial on the merits – Lax J said she 'could not agree more that it is time to decide the question' about the status of waiver of tort, but because she found that the defendants had done nothing wrong she effectively dodged the issue. Justice Lax reviews the policy considerations on both sides and provides a recap of the inconclusive earlier case law. Those cases have said that the viability of waiver of tort as an independent claim is something best left to trial on the merits – which almost never happens in class proceedings, so it will be a while before we get any closer to an answer.

[Link available **here**].

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