MARCH 2012

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.

IN THIS MONTH'S EDITION

Privacy/police
- installing a GPS tracker on the suspect's car was an intrusion on his privacy
- suspect in drug deal has reasonable expectation of privacy once inside adult video booth

Securities/evidence
- evidence of insider trading must be more than circumstantial, SEC told

Telecommunications
- ISPs aren't broadcasters, says SCC

Torts/police
- police duty of reasonable investigation only goes so far, according to Australian court

Trusts/unjust enrichment
- if B steals A's intangible property and sells it to C, can A recover from C?

ACCESS TO INFORMATION/PRIVACY

SCC sets out principles for government disclosure of third-party information

The Supreme Court of Canada has set out a framework for the disclosure of third-party information in *Merck Frosst Canada Ltd v Minister of Health,* 2012 SCC 3 [Link available **here**]. Health Canada disclosed records of Merck's new drug submission either without notifying Merck or having said that it was not possible for Health Canada to determine whether non-disclosure was justified under the third-party exemption in access-to-information legislation. (That exemption allows a government institution (GI) to refuse to disclose a third party's trade secrets; its confidential financial, commercial, scientific or technical information; or competitive information that would result in financial prejudice to the third party if disclosed.)

Cromwell J (for the majority) set out some guiding principles for the application of the exemption. The duty to protect third-party information is generally as important as the principle of access to government records, and disclosure without notice is justified only in the clearest of cases. A GI should give notice even where there is doubt about the application of the exemption, and must make a serious attempt to apply the exemption (*i.e.*, not just shift the burden to the affected third party). On judicial review of a decision to disclose, a third party must establish the application of the exemption only on a balance of probabilities. 'Trade secret' in this context has its general meaning at law, not something more restrictive. Confidential commercial information need not have inherent value, as long it is not otherwise available to a member of the public. Information that is collected by a GI through its own observation is not 'supplied' by the third party for the purposes of the exemption.
The prospect of harm through the disclosure of competitive information has to be more than possible but need not be likely, much less clear or immediate. It will generally be difficult to show that harm will flow from the disclosure of information that is publicly available or from the misapprehension of disclosed material. It's OK to refuse to sever and produce non-exempt material where the severed material would, on its own, have little meaning or where a cost-benefit analysis weighs against disclosure.

In the end, the majority didn't think that Merck made out its case for exemption. The dissenters (Deschamps, Abella and Rothstein JJ) disagreed in the result but not with the articulation of the general framework for applying the exemption.

BANKING

Attachment or garnishment order against NY branch doesn't restrain debtor's Canadian account

The old 'separate entity' rule, which treats bank branches as distinct for purposes such as garnishment and attachment, is alive and well in New York. The traditional rationale for the rule was that it was too difficult for staff at individual branches to keep other branches posted about the status of accounts, especially where the branches are in different countries (which might not permit enforcement of foreign orders with respect to assets held in their jurisdiction).

In *Global Technology Inc v Royal Bank of Canada,* 2012 NY Slip Op 50023U, judgment creditor Global Technology claimed that the bank was in contempt of an order which restrained the bank accounts of judgment debtor Moto Diesel Mexicana. Global contended that the bank was in contempt of that order because it had allowed Moto Diesel to withdraw funds from its account in Canada.

Stallman J of the NY state supreme court applied the old rule (which is at least as old as the mid 1800s), in spite of the argument that technological advances have made it obsolete and the fact that some US federal cases have declined to follow it. Not to apply the old rule would also offend modern conceptions of due process in terms of service on an affected party.

CIVIL PROCEDURE/LAWYERS' CONFLICTS OF INTEREST

Inmate gets reprieve in 'mailroom of death' case

We reported back in December on the case of Cory Maples, whose ability to appeal his death sentence was denied because the necessary paperwork never reached his *pro bono* lawyers at Sullivan & Cromwell (S&C).

The US Supreme Court has, in a 7-2 decision, granted Maples's petition to have his procedural default excused. Ginsburg J, for the majority, found that Maples had essentially been abandoned by his counsel, noting that S&C's more diligent representation of him after the default was a clear conflict of interest given the firm's obvious desire to minimise damage to its own reputation. She held that 'no just system would lay the default at Maples' death-cell door'. Scalia and Thomas JJ took a different view: Maples had representation throughout, even if it was inept, and the state prosecutors were entitled to stick to the rules.

As for Maples, his appeal is punted back to the 11th Circuit and the district court in Alabama.

[Link available **here**].

CIVIL PROCEDURE

Request for 95 million pages of documents unreasonable, says NJ court

No fooling! I-Med Pharma and Biomatrix were in litigation about the distribution of a drug in Canada. Biomatrix, not liking the disclosure it had received in the course of discoveries, obtained an order requiring I-Med to submit to a forensic audit of its computer system. The audit involved a search of I-Med's servers for about 50 keywords. As it turned out, very broad keywords (e.g., 'profit', 'loss', 'revenue'): the search yielded over 64 million hits and, if printed, would have produced about 95 million pages of documents. I-Med went back to the magistrate who made the order and was granted relief from the obligation to sift through the documents and produce what was not privileged; Biomatrix had not established the relevancy of the material or shown that the likelihood of finding anything relevant was more than minimal.

Biomatrix (surprisingly?) appealed but (not surprisingly) lost. The district court thought the magistrate had exercised his discretion properly;

requiring I-Med to undertake an 'enormously expensive' review of the mass of stuff was hardly in the interests of 'justice and basic fairness': *I-Med Pharma Inc v Biomatrix Inc,* 2011 US Dist LEXIS 141614.

CLASS ACTIONS/SECURITIES

Regulatory proceedings not the preferable procedure for claims of aggrieved investors

The Ontario CA has disagreed with two lower courts on the proper way to decide if a class proceeding is the preferable procedure for addressing the plaintiffs' claims: *Fischer v IG Investment Management Ltd,* 2012 ONCA 47. [Link available **here**].

The OSC investigated five mutual fund managers that had engaged in 'market timing' – that is, trading that takes advantage of short-term discrepancies between the value of securities held in the fund's portfolio and their market value. The five fund managers entered into settlements with the OSC after *in camera* hearings. Unitholders of the funds allege that market timing caused them losses and initiated a class action.

Perell J held that a class action was not the preferable procedure; the OSC proceedings were a better way of modifying behaviour, achieving judicial economy and promoting access to justice. The Divisional Court took issue with this, holding that because damages in a civil action could exceed the amount of the moneys to be paid voluntarily to investors under the settlements, the OSC proceedings were not the preferable route.

Right result, wrong reason, said the Court of Appeal: the adequacy of the relief available is the wrong thing to focus on at the certification stage; the proper question is to ask about the nature of the alternative to a class proceeding. This includes the possible other forum's impartiality and independence, its jurisdiction and remedial powers, applicable procedural safeguards and relative accessibility. OSC proceedings are primarily protective and preventive, rather remedial or punitive (so the Divisional Court wasn't entirely incorrect about the inadequacy of relief, although it was wrong in trying to quantify what damages the class could expect from a class action). Furthermore, OSC proceedings do not provide participatory rights for aggrieved investors in the way that a class action would. A class proceeding was therefore the preferable procedure.

CONFLICT OF LAWS/FAMILY LAW:

Same-sex marriage and divorce, Canadian-style

Some weeks ago a Canadian government lawyer suggested that foreign same-sex couples who come to Canada to get hitched might not actually be validly married at all. The lawyer was, of course, perfectly correct.

Conflict of laws 101. Under private international law, the *formal* validity of a marriage is governed by the law of the jurisdiction in which the ceremony was performed – that is, did the parties have the proper licence? was the officiant authorised to conduct the ceremony? was the ceremony itself valid? *Essential* validity is, however, governed by the parties' pre-wedding domicile (a concept like residence but harder to shake off) – and essential validity depends on having the capacity to marry (*e.g.,* whether the parties were of age or, in some jurisdictions, of opposite sexes).

When a same-sex couple married in Tofino but domiciled in Tallahassee later decide to divorce, it will be Florida law that determines whether they had the capacity to marry in the first place; BC law determines only whether they went through the formalities necessary for a marriage,

but doesn't consider their actual capacity to enter into *this* marriage. If Florida precludes same-sex marriage, they were never married – and are thus incapable of being divorced for the purposes of Florida law, even if Canada decides to recognise retroactively their ability to do so as a matter of domestic law. Judges have often tried to avoid these rules when it looks as though they will lead to an unfair result, but don't count on it.

Did no one really think this one through? Well, one lawyer at the Department of Justice did.

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

CONSUMER PROTECTION/CONSTITUTIONAL LAW

Provincial consumer protection legislation applies to federally-regulated airline, says BC court

Airline passengers pay an 'international fuel surcharge' when they buy their tickets. This has been challenged as a deceptive act or unfair practice under BC's *Business Practices and Consumer Protection Act* (BPCPA), on the grounds that the surcharge has been represented as a tax collected on behalf of a third-party government body rather than for the benefit of the airlines themselves: *Unlu v Air Canada,* 2012 BCSC 60.

Air Canada and Lufthansa denied any misrepresentation and sought summary judgment on the basis that the BPCPA could not apply to them because they are federally-regulated undertakings. Adair J refused to grant that, rejecting their arguments based on paramountcy, interjurisdictional immunity, and operational conflict between federal law and the BPCPA. In the judge's view, the BPCPA does not give rise to operational conflict with federal legislation that regulates air travel, nor does it impair or frustrate the federal scheme. The case will proceed to the certification stage.

[Link available **here**].

CONTRACTS/BANKRUPTCY AND INSOLVENCY

If you aren't successful, can you still get the success fee?

Yes, on the facts in the Chapter 11 proceedings involving Borders, the insolvent bookseller.

Jefferies & Company, an investment bank, was retained by Borders to pursue reorganisation strategies, including a possible sale of the company's assets as a going concern. The bank made considerable efforts in flogging the assets, which resulted in an offer from an interested party, but an actual sale of assets did not happen. Jefferies nevertheless claimed the liquidation fee under its agreement with Borders. The company's creditors opposed this: no sale, no success fee.

Glenn J of the Bankruptcy Court in Manhattan reviewed the terms under which Jefferies had been retained, concluding that the bank was required to market the assets, conduct a sale and/or provide 'material services' in connection with a sale or liquidation, but was not actually required to conclude a sale. The terms of the contract were unambiguous, so the creditors failed in their attempt to introduce parol evidence of a different intent. If the bank was to get the money only if a sale took place, the agreement should have said so.

In re Borders, Inc (Bankr SDNY, 5 December 2011)

CONTRACTS/CONSTRUCTION LAW

Implied terms: only where necessary, not simply because they're reasonable

England's Technology and Construction Court provides guidance in *Leander Construction Ltd v Mulalley & Co*, [2011] EWHC 3449, on the circumstances under which implied terms will be read into contracts for reasons of business efficacy.

Leander was engaged as a sub-contractor on a building project being overseen by Mulalley. The latter became concerned that work was not progressing as it should have and issued two notices to Leander that it intended to withhold contractual payments. Leander challenged the notices and won. The contract required Leander to complete the work by specified dates and allowed Mulalley to terminate if Leander was not performing 'regularly and diligently', but did not contain an express term requiring the work to be carried out in that way. Mulalley argued that this obligation was an implied term, necessary for purposes of business efficacy.

Coulson J reviewed contracts cases and conflicting secondary sources on 'regularly and diligently' in the construction context. He concluded that an implied term will generally be found only where it is necessary to make the contract work, not simply where its existence would be reasonable. Not here: the contract did not, in the absence of the implied term, 'fail to deliver the bargain which the parties had agreed'; the contract worked perfectly well without the implied term. Without an express term to the contrary, a party is free to perform the work as it pleases, as long as it is finished when the contract stipulates.

[Link available **here**].

EMPLOYMENT LAW/FIDUCIARY DUTIES

Corporate officer breached fiduciary duty but still entitled to bonus: Ontario CA

Len Rossetto, an executive at Mady Development, diverted labour and materials belonging to the company towards the renovation of his house. Mady found out, fired Rossetto and sued for conversion, breach of contract, unjust enrichment and breach of fiduciary duty. Rossetto counterclaimed, saying the company owed him his bonuses for the previous two years. The matter was referred to arbitration.

The arbitrator awarded damages to Mady but found that Rossetto's bonus entitlements were part of his contract of employment and were unaffected by his breach of fiduciary duty as an officer of the company. Mady appealed and found success initially: Allen J held that a fiduciary is not entitled to compensation for the period of his or her wrongdoing; Rossetto's bonuses were property or business advantages belonging to the company.

The Ontario Court of Appeal restored the arbitrator's award: *Mady Development Corp v Rossetto*, 2012 ONCA 31. Allen J failed to consider all of the facts in considering the appropriate equitable remedy (which is always discretionary). There is no absolute rule barring compensation during a period in which a fiduciary duty has been breached. An errant fiduciary's bonus-entitlement is therefore a 'fluid' and fact-specific question. Rossetto misappropriated company property for the renovation, but Mady had been compensated for its value through the award of damages. The bonuses were, under the employment contract, an integral (rather than discretionary) part of Rossetto's compensation – to which he was not disentitled by virtue of his breach of duty.

[Link available **here**].

EMPLOYMENT/TORTS

Employer can be vicariously liable for assault by junior employee on more senior one

So says the English Court of Appeal in the combined decision in *Weddall v Barchester Healthcare Ltd* and *Wallbank v Wallbank Fox Designs Ltd,* [2012] EWCA Civ 25. Vicarious liability may be found where the intentional act is 'closely connected' to employment, for example where it is a spontaneous reaction to an instruction.

That was the case in *Wallbank,* where the defendant's managing director (and sole shareholder) pointed out to a factory worker that he had made an error and instructed him to try again with his assistance. The employee grabbed his boss's face and threw him 12 feet, causing injuries. Pill LJ was of the view that while it was going too far to say that a violent reaction to instruction was inevitably an act in the course of employment, it would be unfair to deprive the victim of a remedy where his injuries resulted from a reaction to a lawful instruction. In *Wallbank*, the injuries were sufficiently closely connected to employment that the employer ought to be vicariously liable for them.

Different story in *Weddall*, where the deputy manager of a care home was assaulted by a junior employee who had been asked to come in to help during another employee's absence, turned up drunk and clocked the deputy manager. Here, the violence was 'no more than a pretext for an act of violence unconnected with work as a health assistant'.

[Link available **here**].

EVIDENCE

Presence of childhood friend at interview with lawyer does not amount to waiver of privilege

The mother, brother and ex-girlfriend of the boxer Arturo Gatti contested the will he made shortly before his death. Gatti had asked his friend Mr Rizzo to find him a lawyer, and in May 2009 Gatti spoke to Me Schirm about the possibility of divorcing his wife, Amalia Rodrigues. In June 2009, Gatti and Rizzo saw Schirm together, and Gatti signed a will leaving everything to Rodrigues. Gatti died a month later in mysterious circumstances. Rodrigues was initially charged with his murder and then released, but something of a cloud remains over her.

Gatti's mother and siblings wanted Schirm and Rizzo to disclose the substance of the discussion with Gatti, on the grounds that the latter had effectively renounced privilege over the conversation by allowing Rizzo to be in the room. Because Rizzo was acting as agent of the client (he had found Schirm for Gatti; Schirm was to communicate with either Gatti or Rizzo) and because it was not clear that Schirm had advised Gatti about waiver of privilege, there was no implicit renunciation of privilege over the communications. Waiver needs to be voluntary, clear and informed, and it wasn't here: *Gatti c Barbosa Rodrigues,* 2011 QCCS 4771.

[Link available **here**].

INSURANCE/TORTS

Was the accident caused by the box on the road or the car from which it fell?

Larry Squires swerved to avoid a box on the highway and was injured. It was unclear how the box found its way onto the road; given that Squires was driving on a limited-access artery with no pedestrian access, the box had presumably fallen from an unidentified vehicle. The insurer denied uninsured motorist benefits under Squires's policy, on the grounds that the accident did not arise 'out of the ownership, maintenance or use of an uninsured auto'. The West Pennsylvania District Court agreed; the box, not the car from which it had presumably fallen, was 'the instrumentality causing the accident'.

The Third Circuit reversed, finding that there was a sufficient nexus between the presence of the box in the roadway and the use of the unidentified vehicle, without any new, intervening act*: Allstate Property & Casualty Insurance Co v Squires* (3rd Cir, 26 January 2012). 'The accident was a direct consequence of the use of the vehicle for its intended purpose, for as is sometimes said in another context, things

"fall off a truck."' In any event, as an interpretive matter the policy was to be construed liberally and in favour of coverage.

INTELLECTUAL PROPERTY

Do you find this 'scandalous'?

The Australian trade-marks registrar wanted to reject the trade-mark NUCKIN FUTS for a nut-based snack food to be sold in pubs and nightclubs, on the grounds that the phrase it implied (by way of a spoonerism) was what the *Trade Marks Act 1995* calls 'scandalous matter'. [Link available **here**].

The applicant, Universal Trading Australia, argued that the implied words were in common parlance in Oz and therefore did not pose what an earlier case identified as a 'real, tangible danger' of 'a significant degree of disgrace, shock or outrage': *Cosmetic, Toiletry and Fragrance Association Foundation v Fanni Barns Pty Ltd* (2003) 57 IPR 594. The clothing retailer French Connection Ltd has, after all, succeeded in registering its FCUK mark in the UK and elsewhere, and no one seems to be hugely offended. The NUCKIN FUTS mark will be registered if no one objects by 12 April 2012.

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

LAWYERS

Conflict arising from lawyer's non-traditional engagement as workplace mediator

The non-traditional work was performed by Wong, an associate of Shulgan Martini Marusic LLP (SMM), for Hotel-Dieu Grace Hospital, who was called in to assist with the 'poisonous' work environment at the hospital. The problem for Wong and SMM arose from the latter's representation of Spirou, a member of the hospital's senior management team, in a wrongful dismissal suit which turned in part on the work environment and whether the hospital had followed procedures which Wong had assisted in drafting.

The firm was disqualified from acting for Spirou; it was not necessary for Wong to be acting in the 'narrow role' of counsel for there to be a conflict when her firm acted for an adverse party. SMM claimed it had instructed Wong to obtain a conflict waiver from the hospital; Wong claims the firm did not and also told her they didn't think there was a conflict. She disagreed and eventually left the firm over the issue. In any event, the hospital was not advised of the conflict and could not be said to have given implied consent to it: *Spirou v Chant,* 2012 ONSC 52.

[Link available **here**].

Firm has no duty to keep revising previous advice, unless specifically retained to do so

This finding comes as a result of a dispute between Shepherd Construction and its solicitors, Pinsent Masons LLP. Shepherd had retained the firm (and before that, one of its pre-merger predecessors) to advise on disputes with sub-contractors and to draft standard-form sub-contracts during the period from 1989 to 2008. The contracts took advantage of a loophole in applicable legislation, which was closed off in 2002 but which the firm did not subsequently point out. Shepherd sued, arguing that there was a single contract with the firm which imposed an ongoing duty to advise on changes to the law: *Shepherd Construction Ltd v Pinsent Masons LLP* [2012] EWHC 43 (TCC).

Akenhead J of the English Technology & Construction Court agreed with the firm that

it was not possible to construct a single, overarching retainer out of multiple engagements made with individual lawyers and successive incarnations of the firm. A duty to revise previous advice would arise where it was the subject of a specific retainer to that effect, but it would be 'commercially and professionally worrying' to require professionals to have to revisit all previous advice and services. The answer might be different where the lawyer is solicitor for a family and knows, for example, that an impending re-marriage would invalidate an earlier will, but to apply the same logic in the context of a big firm was 'hopelessly wide' unless one could point to a retainer which specifically required the firm to update previous work. The fact that the firm had provided unsolicited briefings and seminars on developments in the law was not fatal to the defence.

[Link available **here**].

Today only! Deep discount on legal services!

In New York state, it is now OK for lawyers to make such an offer on a 'deal of the day' or 'group coupon' website. Groupon is the one that springs to mind.

In ethics opinion 897 (13 December 2011), the New York State Bar Association says this kind of marketing is fine, as long as it is not misleading and makes it clear that no lawyer-client relationship is formed until the lawyer can conduct a conflicts check. Oh yeah, and the lawyer has to be competent to provide the services. If the lawyer cannot provide the services offered, the coupon-buyer gets a refund. If the coupon-buyer backs out, he or she also gets a refund, subject to the lawyer's *quantum meruit* claim for services performed up to that point.

PRIVACY/POLICE

Installing a GPS tracker on the suspect's car was an intrusion on his privacy

The FBI and the Washington DC police suspected Antoine Jones of drug-dealing and, without a valid warrant, installed a GPS tracking device on the car he drove (which actually belonged to his wife). The device was in place for 28 days and did lead the authorities to over 5 kilos of cocaine and a large amount of cash in a warehouse. Jones challenged evidence of his movements that was obtained using the device and his case went all the way to the US Supreme Court.

Scalia J (Roberts CJ plus Kennedy, Thomas and Sotomayor JJ concurring) held that Jones had a reasonable expectation of privacy in the car he drove, making the installation of the GPS device a search – and an unreasonable one for the purposes of the Fourth Amendment.

For Alito J (with whom Ginsburg, Breyer and Kagan JJ agreed), it was the fact that the monitoring took place over an extended period of time that made the search unreasonable. As Justice Scalia noted, his colleague didn't provide much guidance on when 'relatively short-term monitoring of a person's movements' ceases to be 'okay' or why he thought longer-term monitoring might be all right in relation to 'extraordinary offences' or through other methods.

[Link available **here**].

Suspect in drug deal has reasonable expectation of privacy once inside adult video booth

Otis Hemmings was being tailed by a NYPD detective, who suspected he had just concluded a drug sale in Times Square. Hemmings went into a store specialising in adult books and videos,

heading straight to the video booths. The detective followed him, opened the door to the booth and seized the suspect's jacket and knapsack, as well as $46 in cash.

Hemmings challenged the admission of the evidence that had been obtained, on the grounds that he had a reasonable expectation of privacy once he was in the booth. Pickholz J of the New York County supreme court agreed, analogising the booth to a washroom stall or the fitting room in a clothing store, in which a person does have a reasonable expectation of being free from the scrutiny of others. The fact that Hemmings had not locked the door was not determinative; it was enough that he had closed the door: 'at the very least, societal mores would require [another person] to announce his presence or knock ...' A reasonable expectation of privacy made the detective's intrusion a search subject to 'constitutional strictures'.

People v Hemmings, 2012 NY Slip Op 22011

[Link available **here**].

SECURITIES/EVIDENCE

Evidence of insider trading must be more than circumstantial, SEC told

The mere fact that trading looks fishy isn't enough to found an insider trading case, as the SEC recently learned from the US district court in Chicago: *SEC v Garcia,* 2011 US Dist LEXIS 148623. Luis Martin Caro Sanchez, a resident of Spain, bought call options in Potash Corp. on 11 August 2011 for $47,499. Six days later, BHP Billiton announced its intention to buy Potash, and the stock price soared. Sanchez cashed out that day with a profit of $496,953.33 and a tidy return on investment of 1,046%.

The SEC thought this added up to insider trading, but the regulator was unable to come up with specific evidence of contact between Sanchez and someone with inside information, or any connection between him and co-defendant Juan Jose Fernandez Garcia, an adviser at Banco Santander who was working on the Potash sale, apart from the fact they both lived in Madrid. Sanchez had discarded an old laptop which may have contained relevant information and his explanation that he bought the options based on public rumours and his own intuition stretched credibility, but that wasn't a sufficient basis for prosecution. Aspen J acknowledged that while circumstantial evidence can be all there is to go on in insider trading cases, the SEC needed to establish that there was some connection between Sanchez and Potash, which was totally lacking.

TELECOMMUNICATIONS

ISPs aren't broadcasters, says SCC

In a judgment almost shorter than the headnote, the Supreme Court of Canada has concluded that internet service providers (ISPs) which provide end-users with access to audio and audiovisual programming through the internet (why do people insist on using an upper-case I? it isn't the Television) are not broadcasters, and thus are not subject to regulation under the *Broadcasting Act.* In short, an ISP is merely a conduit for the information and not the sender: *Reference re Broadcasting Act*, 2012 SCC 4.

[Link available **here**].

TORTS/POLICE

Police duty of reasonable investigation only goes so far, says Australian court

It's a bummer when the demolition crew pulls down the wrong building, but your ability to pin that on the cop who dropped by the site is limited,

according to the Victoria trial court in *Taha v Shaq Industries Pty Ltd,* [2012] VSC 30.

[Link available **here**].

Ms Taha owned a number of properties in Melbourne and wanted one of them demolished. The demo crew started work, but it turned out they were at one of Taha's other properties. The neighbours thought the crew were vandals and called the police. Constable Matt Walsh arrived on the scene, asked the crew for ID and accepted their explanation that they were there to pull the house down at the owner's direction. Taha sued the police and the state government, on the grounds Const. Walsh ought to have asked for permits, and done more to check the crew's story.

Beach J followed the line of Australian and English authority which stands for the proposition that police officers do not generally owe a duty of care to an individual to investigate a complaint, where this would conflict with the officer's general discretion to assess investigative priorities in the wider public interest. Different story in Canada, where the tort of negligent police investigation remains alive and well: see *Hill v Hamilton-Wentworth Regional Police Services Board,* 2007 SCC 41.

[Link available **here**].

TRUSTS/UNJUST ENRICHMENT

If B steals A's intangible property and sells it to C, can A recover from C?

Carbon emission allowances were the property at issue in *Armstrong DLW GmbH v Winnington Networks Ltd,* [2012] EWHC 10 (Ch). Winnington bought 21,000 of them from a fraudster who had obtained them from Armstrong's account. Winnington paid the fraudster and sold the allowances to someone else. Armstrong brought three alternative claims against Winnington: (1) a proprietary restitutionary claim; (2) a restitution claim based on unjust enrichment and (3) a personal claim in equity based on Winnington's knowing (or unconscionable) receipt of the allowances or their proceeds.

The first job for Stephen Morris QC (sitting as a High Court judge) was to determine whether the allowances were property and, if so, what kind: intangible, he concluded. Then on to the trickier question: is there a difference between claims (1) and (2), and does it matter? Yes and yes. Based on his review of the (difficult) case law and conflicting academic commentary, Morris was of the view that the two claims differ, and lead to different remedies and defences. The fact that the property in question was intangible did not preclude a proprietary claim – which meant that claim (2) fell off the table. Winnington had not, in fact, been unjustly enriched because it had paid full value for the allowances, and such claims are generally available only when enrichment is conferred directly rather than indirectly by a third party. Winnington's defences, then: to claim (1), certainly the defence of *bona fide* purchase (BFP) for value without notice; but probably not change of position (although this would be a defence to claim (2)). The BFP defence is not available, however, where the recipient of the property is aware of the possibility of impropriety underlying the transaction. (Knowledge that the transaction was 'probably' or 'obviously' improper is not required, but mere negligence on the part of the recipient is insufficient.) Morris then reviewed the elements of knowing or unconscionable receipt of trust proceeds.

After detailed review of the facts, Morris concluded that the fraudster became a constructive trustee of the allowances and that Winnington had recklessly or wilfully shut its eyes to facts which a reasonable and honest person would have investigated. No BFP defence. If this was not the correct conclusion, Armstrong's proprietary claim succeeded because Winnington was (logically,

given the facts underlying the analysis of knowing receipt) unable to say it was without notice of the underlying fraud. If the defence of change of position did apply to a proprietary claim, Winnington was out of luck there too, as it had not acted in good faith after receipt of the property. Armstrong was entitled to a money judgment, interest and costs.

[Link available **here**].

AUTHOR

Neil Guthrie
Partner, National Director of Research
Toronto
416.367.6052
nguthrie@blg.com

BORDEN LADNER GERVAIS LLP

National Managing Partner

Sean Weir	Toronto	416.367.6040	sweir@blg.com

Regional Managing Partners

David Whelan	Calgary	403.232.9555	dwhelan@blg.com
John Murphy	Montréal	514.954.3155	jmurphy@blg.com
Marc Jolicoeur	Ottawa	613.787.3515	mjolicoeur@blg.com
Frank Callaghan	Toronto	416.367.6014	fcallaghan@blg.com
Don Bird	Vancouver	604.640.4175	dbird@blg.com

Borden Ladner Gervais

BORDEN LADNER GERVAIS
LAWYERS | PATENT & TRADE-MARK AGENTS

Calgary
Centennial Place, East Tower
1900, 520 – 3rd Ave S W
Calgary, AB, Canada T2P 0R3
T 403.232.9500
F 403.266.1395
blg.com

Toronto
Scotia Plaza, 40 King St W
Toronto, ON, Canada M5H 3Y4
T 416.367.6000
F 416.367.6749
blg.com

Montréal
1000, De La Gauchetière St W
Suite 900
Montréal, QC, Canada H3B 5H4
T 514.879.1212
T 514.954.1905
blg.com

Vancouver
1200 Waterfront Centre
200 Burrard St, P.O. Box 48600
Vancouver, BC, Canada V7X 1T2
T 604.687.5744
F 604.687.1415
blg.com

Ottawa
World Exchange Plaza
100 Queen St, Suite 1100
Ottawa, ON, Canada K1P 1J9
T 613.237.5160
F 613.230.8842 (Legal)
F 613.787.3558 (IP)
ipinfo@blg.com (IP)
blg.com

Waterloo Region
Waterloo City Centre
100 Regina St S, Suite 220
Waterloo, ON, Canada N2J 4P9
T 519.579.5600
F 519.579.2725
F 519.741.9149 (IP)
blg.com