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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 LAW

Steady diet of appalling prison food could be cruel and unusual punishment

Terrence Prude alleged that staff of the Milwaukee County Jail had subjected him to cruel and unusual punishment because they fed him nothing but nutriloaf, which Judge Posner of the 7th Circuit described as 'a bad-tasting food given to prisoners as a form of punishment', for periods of seven to ten days at a time. Prude alleged that this steady diet caused vomiting, stomach pains, constipation, 'alarming' weight loss and possibly an anal fissure ('which is no fun at all', in the words of the learned judge).

Summary judgment was initially granted in favour of the defendants, but Judge Posner thought this was wrong: their response to the suit was 'contumacious' in that they ignored the self-represented Prude's discovery demands and the court's order to comply with them. The defendants' evidence on summary judgment was a 'preposterous' hearsay assertion that nutriloaf 'has been determined to be a nutritious substance for regular meals'. The fact that Prude had sued prison staff who had not actually been indifferent to his health was not fatal to his appeal; at least some of them were aware of the dire effects of nutriloaf and did nothing to help. The court below was correct, however, to strike Prude's claim that it was cruel to offer him a sandwich ('and not of nutriloaf, either') as a bribe to spy on other prisoners; Prude had rejected the offer, but not getting the sandwich made him no worse off than he would have been otherwise. The defendants were ordered to show cause why they should not be sanctioned for their flouting of the lower court's orders; if they ignored this order, 'they will find themselves in deep trouble'.

Prude v Clarke (7th Cir, 27 March 2012)

ADMINISTRATIVE LAW/SECURITIES

Penalties imposed by securities commission found constitutional; stiff in this instance, but still not penal in nature

Rowan, president and CEO of Watt Carmichael Inc. (WCI) was found by the Ontario Securities Commission to have breached Ontario securities law in trading in, and failing to report trades in,

shares of Biovail Corp. Eugene Melnyk, the chair of Biovail, had set up a number of offshore trusts which held shares of Biovail and which maintained accounts at WCI. Rowan had trading authority over the accounts and was also a director of Biovail. Rowan traded millions of Biovail shares but did not file insider reports. The OSC concluded he had not engaged in insider trading but had breached the insider reporting requirements and had engaged in conduct that was abusive of the integrity of the capital markets. Rowan was ordered to pay an administrative monetary penalty (AMP) of $520,000; his firm, $420,000 for failing to supervise him. Rowan and WCI were also ordered to pay costs of $140,000.

Their appeal was dismissed by the Divisional Court; the Commission's reasons were careful, thorough and correct in law. Rowan and WCI appealed again, arguing the Commission's ability to impose AMPs of up to $1 million per infraction violated s 11(d) of the *Charter* because the magnitude of potential AMPs made them penal rather than administrative in nature, triggering *Charter* protection. The Ontario Court of Appeal rejected this contention: the level of possible AMPs was 'entirely in keeping' with the Commission's regulatory mandate, and necessary to serve as an adequate deterrent to misconduct. Rowan also argued that the Commission may impose an AMP only where there has been an actual breach of the *Securities Act,* not for conduct that has merely been found to be contrary to the public interest. This, too, was rejected: acting contrary to the public interest was 'inextricably linked' to his actual breach of the insider reporting obligations. AMPs for WCI's failure to supervise were also upheld.

Rowan v OSC, 2012 ONCA 208

[Link available **here**].

CIVIL PROCEDURE

Useful summary of principles on letters rogatory

The summary is found in *McFadden Lyon Rouse LLC v Lookkin*, 2012 ONSC 2243, where JS O'Neill J was asked to enforce letters of request (letters rogatory) issued by a court in Alabama for the examination of two parties in Ontario for the purposes of an action in Alabama.

The facts of the case don't much matter, but the judge does provide a nice outline of the general principles for the enforcement of letters rogatory, with citations: (a) obtaining the evidence must have been duly authorised by the foreign court, (b) the witness whose evidence is sought must be within the jurisdiction of the enforcing court, (c) the evidence sought must be in relation to a proceeding in the foreign court and (d) the foreign court must be one of competent jurisdiction. The Ontario court will consider whether (i) the evidence is relevant, (ii) the evidence is necessary for discovery or trial in the foreign jurisdiction, (iii) the evidence is otherwise unobtainable, (iv) the documents sought are identified with reasonable specificity, (v) enforcement would be contrary to public policy in Canada and (vi) enforcement would be unduly burdensome. There is a predisposition to accommodate the requests of foreign courts.

[Link available **here**].

CIVIL PROCEDURE /EMPLOYMENT LAW

Useful review of factors for deciding whether a party can plead an offer to settle

Money Express POS Solutions Inc. made an offer to settle in its termination letter to Raheel Jiwan, which Jiwan then referred to in his pleadings in a wrongful dismissal suit. The employer moved to have references to the letter expunged, on the grounds they were protected by settlement privilege: *Jiwan v Money Express POS Solutions Inc,* 2012 ONSC 909.

Master Short of the Ontario Superior Court gives a useful review of the case law and the factors that will be considered in cases of this kind: (1) was the communication from the defendant? (yes, in this case); (2) was the plaintiff contemplating litigation? (yes, even though the offer to settle was in the same letter as the termination; neither came 'out of the blue' from the employee's perspective); (3) was the defendant offering a real compromise? (yes); (4) was the communication 'without prejudice'? (yes, it said so specifically); and (5) was the genuine purpose of the communication a settlement? (again, yes). The paragraph in the pleadings was therefore struck.

[Link available **here**].

CONFLICT OF LAWS

Further proof that the house always wins?

Or, that what happens in Vegas doesn't necessarily stay in Vegas: *Wynn Las Vegas LLC v Teng*, 2012 ONSC 1927. Tenny Teng went to Las Vegas to gamble, having obtained a $300,000 line of credit from the Wynn casino (and, it appears, from Caesar's Palace and the Bellagio as well). Teng drew on the Wynn line of credit and left Vegas owing a debt of $290,000 (he had paid $10,000 on arrival as front money). The two cheques he had provided as security were dishonoured. The casino was, not surprisingly, in contact with Teng about his indebtedness and was not satisfied by his tales of financial difficulty and promises to repay. The casino sued in Ontario, seeking summary judgment for the outstanding principal and interest. Teng argued first of all that Nevada was the more appropriate forum, given the location of witnesses and the fact the debt arose there. He also denied having applied for the line of credit and claimed even if he had signed the application, he was was under the influence of all the free drinks that the casino had plied him with and couldn't remember a thing. Teng contended these were genuine issues for trial.

Yeah, right! The fact that the casino could have sued in Nevada was not dispositive; the credit application provided it could pursue remedies there or elsewhere; and Ontario was, furthermore, where Teng resided, where his assets were and where the cheques bounced. Teng also attorned to the jurisdiction of the Ontario court by filing a defence. As to the 'genuine' issues requiring trial, they were belied by a clear trail of e-mails which established that Teng had sent the credit application by fax from home, and that any claim not to be able to remember signing the documentation arose after Wynn sued him. Wynn obtained judgment for the full amount of the debt plus pre-judgment interest at the rate of 18% as stipulated in the credit agreement, post-judgment interest of 18% and costs on a partial indemnity scale.

[Link available **here**].

Jurisdiction: the SCC has spoken

In case you missed it in April, the Supreme Court of Canada handed down its judgments in four cases about the assumption of jurisdiction by a court in proceedings with a multijurisdictional character. Hard to summarise briefly, but here goes.

In the combined appeals in *Club Resorts Ltd v Van Breda* and *Club Resorts Ltd v Charron,* 2012 SCC 17, which involved catastrophic injuries (in one instance fatal) sustained by Canadians on holiday in Cuba, the SCC affirmed the decisions below. LeBel J, for the court, largely endorsed the approach that had been taken by Sharpe JA in the Ontario Court of Appeal in refining and reformulating the common-law test for assumption of jurisdiction. A 'real and substantial connection' between the dispute and the jurisdiction is required, and the SCC agreed with Justice Sharpe that jurisdiction may be presumed on the basis of certain factors, each of which may be rebutted by showing that the presumed connection is in fact a weak one. The SCC did, however, narrow the range of presumptive categories to these: (a) the defendant is resident or domiciled in the jurisdiction, (b) the defendant carries on business in the jurisdiction (although suggesting that actual not merely virtual presence should be required), (c) the tort was committed in the jurisdiction and (d) a contract connected with the dispute was made in the jurisdiction. This list is not closed, however, and may be augmented as the case law develops by analogous relationships to the forum. The SCC agreed with Justice Sharpe that the analysis for jurisdiction is distinct from that for *forum non conveniens* (FNC), which decides whether there is another forum which would be a better one to hear the dispute for reasons of practicality and fairness. Only once jurisdiction is established does FNC come into play, but if it isn't raised by the defendant the litigation proceeds. If FNC is raised, the onus is on the defendant to show why another forum is a more convenient one, and there is no exhaustive list of factors to be considered; each case will raise its own issues.

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In *Breeden v Black,* 2012 SCC 19, which arose from allegedly defamatory remarks made over the internet by US representatives of a US company about Lord Black, the court ruled that the tort of defamation occurs upon publication to a third party; in the case of the online statements at issue, this was when they were read, downloaded and republished in Ontario by three newspapers. Every repetition or republication is a new publication, and the original author may be liable where republication was either authorised by him or her or where republication is the natural and probable result of the original publication. There were FNC factors in favour of both Illinois and Ontario, but the balance tipped in favour of the latter. Lord Black's action in Ontario against the three newspapers would otherwise proceed had the parties not already settled (having agreed to let the jurisdiction issue go up to the SCC).

[Link available **here**].

Editions Ecosociété Inc v Banro Corp, 2012 SCC 18, is the civil-law book-end to *Breeden v Black*. Banro, an Ontario-based mining company, sued Quebec-based publisher Editions Ecosociété in Ontario, on the basis that a book it had published, which alleged human rights violations by the company in the Democratic Republic of Congo, was available to Ontario readers on the company's website and in 93 hard copies (in French) in Ontario bookstores. The place where the tort occurred was (as in *Breeden*) where the

allegedly defamatory words were published to a third party, although the SCC mused that the traditional *lex loci delicti* rule might give way in defamation cases to the law of the place where the most substantial harm to reputation occurred. Under either analysis, the Ontario court had jurisdiction to hear the claim and the FNC factors.

Net result? Too early to tell, but Barry Glaspell of the Toronto office of BLG suggests that Canadian courts are much more amenable to assuming jurisdiction over multijurisdictional disputes than their counterparts in England or the US to begin with; these recent decisions may narrow (slightly) the opportunity for a court to assume jurisdiction but may make a FNC transfer to another jurisdiction (slightly) more difficult. Also lots of unanswered questions.

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CONFLICT OF LAWS/CONTRACTS

Don't forget the choice-of-law clause!

This is exactly what the parties forgot to do in *Presstek Europe Ltd v Multi-Digital De Impresion SL* (QBD, 13 March 2012) – although one of them claimed it thought the agreement incorporated a choice-of-law provision from a related contract.

Presstek and Multi-Digital had entered into a non-exclusive distribution agreement which stated that English law governed all disputes except any that involved injunctive relief, and that the London International Court of Arbitration was to have jurisdiction. The parties then entered into a contract for the sale of three machines by Multi-Digital to Presstek; there was no choice-of-law or jurisdiction clause. Presstek (a UK company) claimed that Multi-Digital (a Spanish company) had failed to perform the sales contract and that English law governed. Multi-Digital successfully challenged the jurisdiction of the English courts: even if (and that appears to have been a big if) the sales contract did implicitly incorporate the distribution agreement's choice-of-law and jurisdiction provisions, it was clear that the parties had not intended those provisions to apply to all disputes. Most disputes were to be arbitrated in London under English law, but not all disputes, and nothing involving injunctive relief. The actual dispute between the parties involved an injunction, so it fell into the gap area to which English law did not apply and the English courts did not have jurisdiction. Better to have dealt with choice of law and jurisdiction squarely in the sales contract.

CONTRACTS

Lawful acts can amount to economic duress, rendering a contract voidable

The lawful conduct was hard bargaining (generally OK in a commercial setting) but it amounted to economic duress in *Progress Bulk Carriers Ltd v Tube City IMS LLC,* [2012] EWHC 273 (Comm). Tube City chartered a ship owned by Progress, making it clear that the identity of the vessel was important to both it and the receiver of the goods that were to be shipped on it. Progress then concluded a charter for the ship with another party, in breach of its agreement with Tube City. Progress conceded this and said it would find another ship, initially agreeing to compensate Tube City for any damages. Tube City relied on these assurances and did not look for another vessel itself. Presumably sensing that Tube City was in a jam, Progress then changed

its tune and made a 'take it or leave it' offer which would have required Tube City to release all claims against the ship-owner.

The dispute went to arbitration, where it was found that Tube City's agreement (under protest) to waive its claims had been procured by economic duress. But was that correct, given that Progress's had merely repudiated its contract and not done anything illegal? Cooke J considered the leading cases on economic duress, concluding that 'lawful act duress' can – in exceptional circumstances, and not typically in a commercial setting – amount to the 'illegitimate means' sufficient to render the contract voidable. Progress had not only repudiated its contract with Tube City but had relied on that breach to take advantage of the situation it had created. The arbitrators got it right.

[Link available **here**].

Unknown repudiation: grounds for termination but not damages

A novel point, apparently, in *Leofelis SA v Lonsdale Sports Ltd,* [2012] EWHC 485 (Ch), where the plaintiff made a second kick at the can in claiming damages for repudiation of contract. Leofelis was the exclusive licensee in certain European countries of Lonsdale, a manufacturer of sports and leisure gear. In 2007, Leofelis alleged that Lonsdale had repudiated the Leofelis licence, but was unsuccessful. In the course of that lawsuit, the evidence put forward by Lonsdale indicated that the company had, in fact, granted a licence to a Latvian company with respect to some of the territories under the Leofelis licence. Had Leofelis known this in 2007, there would have been grounds to say that Lonsdale had repudiated the contract and ought to make up for Leofelis's lost profits.

But could Leofelis say it was justified in terminating the contract in 2007 in reliance on a repudiatory breach of which it was unaware at the time? Yes and no, said Roth J of the English Chancery Division. The Latvian side deal would have been enough to justify notice of termination by Leofelis, but because Leofelis had not acknowledged that particular breach it did not have a right to compensation for losses suffered as a result of its decision to terminate the contract.

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CONTRACTS/DERIVATIVES

Literal not contextual approach prevails in interpretation of ISDA Master Agreement

Not, perhaps, what one might have expected in the wake of the recent decision of the UK Supreme Court in *Rainy Sky SA v Kookmin Bank,* [2011] UKSC 50, which opted for the contextual approach, as informed by business common sense. But, on the facts of *Lomas v JFB Firth Rixson Inc,* [2012] EWCA Civ 419, the literal approach seems to make sense.

But first, a little Derivatives 101. Under an interest rate swap, one party pays a floating rate of interest on a notional sum over a specified period; the other party pays a fixed rate on the same sum over the same period. At the end of each period one party will be 'in the money' and the other 'out of the money': the latter pays the difference in value to the other.

When Lehman Brothers became insolvent in 2008, it was in the money in relation to a number of swaps. Its administrators naturally wanted to collect but faced an obstacle in the International Swaps and Derivatives Association (ISDA) Master Agreement, the standard-form contract which governed the transactions. The ISDA Master Agreement provides that payment is conditional on there being 'no Event of Default or Potential Event of Default' (defined to include insolvency) that 'has occurred and is continuing'. On its face, not good for the administrators' case. They argued that the condition precedent ought to be read in the light of four alternative implied terms, under which the condition would no longer be operative (a) after the expiry of such time as would be required to allow the non-defaulting party to elect an early termination date, (b) after a reasonable time, (c) on the expiry or maturity of all relevant transactions or (d) on the expiry of all transactions between the parties governed by the ISDA Master. These alternatives made some commercial sense: why should the out-of-the-money party get off scot-free?

Well, said the English Court of Appeal, because that's what the ISDA Master Agreement provided in clear terms (that bit about 'and is continuing' strongly suggesting that an implied expiration date of the condition ought not to be read in). The court said it would read in terms only 'if it is necessary to do so or if it would be obvious to any disinterested third party that the contract must have the meaning which the implied terms would give it'. Not here.

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CONTRACTS/PARTNERSHIPS/ UNJUST ENRICHMENT

Partnership can arise without written agreement, but not here because all was 'subject to contract'

A useful little reminder about the nature of partnerships and contractual negotiations in *Valencia v Llupar,* [2012] EWCA Civ 396. Valencia owned two restaurants. Llupar, a friend of Valencia's daughter, wanted to become involved in Valencia's business. He alleged that Valencia had represented that the restaurants were flourishing and that he could become her business partner and rent out the apartment above one of the locations. Llupar made payments to Valencia totalling £80,000 although on exactly what basis was unclear. Profits from the restaurants turned out to be considerably less than Llupar claimed he had been led to believe, and the flat wasn't ready for occupation. He sued, claiming that a letter sent to him by Valencia constituted a partnership agreement. It was headed 'partnership agreement – subject to contract'.

The trial judge accepted that Valencia had made misrepresentations but held that because the partnership agreement was never signed, the parties should simply be restored to their original position, either on the basis of the misrepresentations or a total failure of contractual consideration. Correct result, but wrong on the law, said the English Court of Appeal. Partnership can, of course, arise at will without the need for a written agreement, but it was clear from the actual letter that any relation of partnership was to come into existence only when an agreement was concluded – the 'subject to contract' bit. Moneys transferred in anticipation of a formal contract that never materialise are to be

refunded. There was no need to consider whether Valencia had misrepresented the state of the business to Llupar; this was a simple case of unjust enrichment.

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CORPORATIONS

BC government introduces legislation allowing community contribution companies

Following the lead of a number of US states which permit the formation of benefit corporations, British Columbia's Bill 23 (*Finance Statutes Amendment Act 2012*) would, if enacted, see a new corporate hybrid in the province, with features of both a business corporation and a not-for-profit.

The new community contribution company (or C3) would be required to devote a portion of its profit to a community purpose specified in the C3's articles, have limits on its ability to distribute profits to shareholders (including on dissolution) and be required to make public disclosure of its contribution to the community.

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EMPLOYMENT LAW

It doesn't matter what you were doing when injured on the job in order to be compensated for it

PVYW (anonymised by the court for reasons which will become apparent) was employed in the HR department of an Australian government agency, which required her to travel to a country town in New South Wales to conduct budget reviews and provide training. While there, she hooked up with a male friend and took him back to her motel room, where they had sex. During their encounter, a glass light fitting above the bed was (somehow) pulled from its mount. The light fitting fell on PVYW and caused her injuries. She claimed compensation under the *Safety Rehabilitation and Compensation Act 1988* for an injury sustained in the course of her employment.

The employment tribunal rejected the claim: at the time of the injury she was not engaged in acts 'associated with her employment' or 'at the direction or request of her employer', nor was the injury 'sufficiently connected' with her job. Nicholas J of the Australian Federal Court reversed: PVYW was in the motel only because her job required it, and an interlude in an overall period or episode of work was still part of being on the job. Injuries sustained in that kind of interlude are still in the course of employment, unless they involve gross misconduct (which her tryst was not) or self-inflicted injury (which this didn't seem to be, intentionally anyway). She would have been eligible for compensation if she had been bathing or dressing in her motel room; indeed, 'if the applicant had been injured while playing a game of cards in her motel room she would be entitled to compensation even though it could not be said that her employer induced or encouraged her to engage in such an activity'. PVYW's particular recreational activity while on a work trip was also covered by the compensation scheme: *PVYW v Comcare (No 2),* [2012] FCA 395.

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EVIDENCE

Lawyer's trust account ledgers not necessarily subject to solicitor-client privilege

Solicitor-client privilege shields legal advice given to the client from disclosure, but it doesn't extend to all facts contained in the lawyer's file. Are the the contents of a lawyer's trust accounts more like legal advice or are they just facts?

Just facts in this case, said two out of three members of the BC Court of Appeal hearing *Donell v GJB Enterprises Inc.,* 2012 BCCA 135. The client, GJB Enterprises, was a pyramid scheme in California with no legitimate business. Berke, its principal, found his way to British Columbia, where he retained the Farris Vaughn firm (FV). GJB's California receiver applied to the BC court to obtain records in FV's possession which related to GJB's illegal conduct, which the receiver contended would identify the source of payments to Berke's personal bank account in BC. The chambers judge concluded that the firm's records were protected, the crime-fraud exception not coming into play because there was no evidence that FV's communications with Berke involved participation in or counselling of any criminal activity. On appeal, the receiver narrowed the request to the firm's trust account ledgers.

Chiasson JA (Neilson JA concurring) noted that while solicitor-client privilege is now a substantive right in Canada, with constitutional protection, the old distinction between facts and communications for the purposes of obtaining legal advice is still relevant. A lawyer's bill will be privileged because it arises out of the lawyer-client relationship and 'what transpires within it', but trust account ledgers are not presumptively privileged. Where the ledgers reflect the solicitor-client relationship, privilege will attach; where they do not, it won't.

Some of the ledger entries fell into the former category, but the ones the receiver wanted to see merely traced payments in and out and should be produced. Smith JA dissented: the fact of the payments did not arise independently of the solicitor-client relationship, with the result that privilege should attach.

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INTELLECTUAL PROPERTY

ISP notified of illegal downloading but still not liable, says High Court of Australia

iiNet is Australia's third-largest internet service provider (ISP) and the evidence in this infringement case suggested that more than half of its subscribers' usage consisted of illegal downloading of content using BitTorrent peer-to-peer technology. AFACT, a coalition of copyright-holders, used a computer programme to gather evidence of infringement and sent the results to iiNet on numerous occasions. The issue was whether iiNet, having been notified of specific infringements, was itself liable for having authorised infringement: *Roadshow Films Pty Ltd v iiNet Ltd,* [2012] HCA 16.

In the end, no. While iiNet could have simply terminated individual subscriptions to its service, it would have needed to conduct an investigation of its own to determine who was downloading, which applicable legislation did not require it to do. It could not have terminated contracts solely on the basis of the AFACT notices, which did not provide enough information to go on. Inactivity could not give rise to an inference of authorisation – or indeed to one of indifference on the ISP's part, given that it would have been

imprudent to act on the basis of the AFACT notices alone, which might have deprived access to non-infringing services.

[Link available **here**].

Sounds now eligible for trade-mark protection in Canada

Metro-Goldwyn-Mayer Lion Corp. applied for a trade-mark to protect the distinctive lion's roar used by it in the opening credits at the movies. The trade-marks registrar said no; sounds aren't eligible for trade-mark protection. This was reversed by a brief order of a prothonotary of the Federal Court: *Metro-Goldwyn-Mayer Lion Corp v AG Canada,* docket T-1650-10 (1 March 2012).

In response, the Canadian Intellectual Property Office has announced that it will now accept applications for sound marks.

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PRIVACY

Vicarious liability for spam texts

Spam is irritating, whether it comes by e-mail or text message, even though it's actually pretty easy just to delete it. A group of customers of Heartland Automotive Services, a franchisee which operated Jiffy Lube (JL) service stations, found the spam texts they received sufficiently annoying that they initiated class proceedings: *In re Jiffy Lube International Inc Text Spam Litigation* (SD Cal, 9 March 2012). The messages at issue, which offered discounts on JL services, were actually sent by TextMarks, a company which had allegedly been hired by Heartland to store phone numbers and send out mass texts.

The plaintiffs claimed this violated federal law against the use of automated dialling technology. In declining to dismiss their claims, the California district court thought there was no reason in principle why Heartland couldn't be vicariously liable for robocalling, even though this was not expressly provided for in the legislation. Heartland also argued that its customers had consented to receiving text messages by providing their phone numbers when making payment, and while the court didn't rule one way or another on the point it suggested that consent probably required an express statement by the customer that promotional texts would be OK.

PRIVACY/WILLS & ESTATES

Heirs can assert right of publicity in dead person's image, says California court

The dead person in question is Albert Einstein, whose image was licensed from Getty Images by General Motors for an ad in a single edition of *People* magazine. The Hebrew University of Jerusalem claimed this infringed Einstein's statutory and common-law rights of publicity, which the university had inherited under the terms of Einstein's will. The will left Einstein's 'literary property and rights, of any and every kind or nature whatsoever' to the university. GM contended that this could not extend to a right of publicity in Einstein's image; the university countered that it was implied, and that Einstein had, during his lifetime, licensed the use of his image for commercial purposes (*e.g.* a refrigerator ad), although it

was unclear whether he had ever received compensation.

Matz J of the California district court didn't think it was necessary for the plaintiff to show that Einstein had exploited his image for money during his lifetime (some authority to the contrary); what mattered was Einstein's 'probable intent' in desiring to control his image, had he known he could do this even after death. The judge observed that there are 'sound, even compelling reasons' to allow heirs of the famous dead to prevent use of the person's image for purposes inconsistent with the name, image, reputation and identity he or she had established while living. GM's motion for summary judgment was therefore denied, although it did manage to have the university's unfair competition and false endorsement claims dismissed, because it was obvious that GM was not suggesting Einstein's actual endorsement of its product: *The Hebrew University of Jerusalem v General Motors LLC* (CD Cal, 17 March 2012).

TORTS

The sultan, his ex-wife, her badminton coach and the missing diamonds

The ratio of *Aziz v Lim,* [2012] EWHC 915, is – as much as anything else – that it's hard to find good help these days. Mariam Aziz is the ex-wife of the Sultan of Brunei, one of the richest men in the world. As a result of her divorce settlement, Ms Aziz became 'an extremely wealthy woman in her own right' and among the trinkets she received on parting ways with His Majesty were a diamond bracelet worth US$5.545 million, a 12.71-carat pear-shaped blue diamond (US$12.7 million) and a 27.1-carat square yellow diamond (a mere $1 million). Aziz claimed that Fatimah Lim, her badminton coach, bodyguard and personal assistant, had purloined the jewels, selling the bracelet and contriving with a jeweller to replace the two large diamonds with replicas.

Lindblom J found Ms Lim's explanations (there were several, and they conflicted) completely unbelievable. The story that the diamonds were sold to pay off gambling debts in Lim's name but actually those of Aziz (who was allegedly hard up) was simply not credible; ditto Lim's retraction of an earlier confession to the Royal Brunei Police that she had stolen the jewels, which she claimed had been forced from her under duress.

The case doesn't tell us anything about the tort of conversion we didn't already know, but it does shine some light on the lives of the 1% of the 1%.

[Link available **here**].

TRUSTS

Breach of oral trust

It's never a happy day when a father has to sue his daughter, but there will be times when it appears to be necessary: *Berkowitz v Berkowitz,* 2012 US Dist LEXIS 31487 (DMass, 9 March 2012).

Samuel Berkowitz granted a general power of attorney to his daughter Bonnie, telling her to 'take care' of her mother (Samuel's ex-wife) and brother Brian in the event of his death. Samuel later conveyed a series of pieces of real estate to Bonnie, alleging he again instructed her orally to use the income from them to 'take care' of her mother and to share any remaining value with

Brian. Bonnie sold the properties for $1.7 million. By 2002, Samuel suspected that Bonnie had forged his signature on share and funds transfers, but assumed she was nevertheless acting in furtherance of his general instructions. In 2008 Samuel asked for an accounting of the oral trust. 'What trust?' was essentially the reply: Bonnie took the position that her father's words were insufficient to create a trust and that, anyway, because the property at stake was land, the statute of frauds was engaged and any declaration of trust would need to be in writing. Bonnie moved to have her father's claim dismissed as not disclosing a plausible cause of action.

The Massachusetts district court concluded Samuel's complaint certainly disclosed a cause of action. As long as you have the three certainties of intention, subject-matter and objects, there will be a valid trust; there is no requirement in equity for the settlement to take any particular form. Samuel therefore had a plausible case that he had created a trust in favour of Bonnie's mother for life, with a remainder to Bonnie and Brian. Bonnie's limitation defence failed: the clock began to tick from her repudiation of the trust in 2008 and her father's actual knowledge of that repudiation, not from the date Samuel became aware of her apparently dodgy dealings in 2002. Bonnie's statute of frauds argument was best left for trial.

Trust is resident where central management and control carried out, says SCC

In *Fundy Settlement v Canada,* 2012 SCC 14, that meant where the main beneficiaries – not the trustee – resided. Two trusts were settled in St Vincent and administered by St Michael Trust Corp., which was resident in Barbados. The trustee argued that its residence should govern, with the result that the trusts were entitled to a refund of $152 million in withholding tax on capital gains by virtue of the Canada-Barbados tax treaty, which has an exemption for Canadian capital gains realised by Barbadian residents.

The Supreme Court of Canada, noting 'a dearth of judicial authority on the residency of a trust', applied the test used to determine the residence of a corporation: where the central management and control of the corporation's business is carried out. The court rejected the argument that this test was inapplicable given that a trust is not a legal person. True as a matter of the law of trusts, but not under the *Income Tax Act,* which deems a trust to be a person. While St Michael carried out 'limited' administrative functions on the beneficiaries' behalf, it was really they who had the central management and control of the trusts – and they resided in Canada. On different facts, the trustee's residency might govern, but not here. So no refund of the $152 million. (And unclear what the answer would be outside the tax context.)

[Link available **here**].

UNJUST ENRICHMENT

Unclean hands preclude claim for contributions to grow-op

Lonnie Craiggs and Joann Lynn Owens shacked up together, living in 'a marriage-like relationship' in a house owned by Owens. In the basement was a marijuana grow-op, but after the couple split up each party claimed the other was the directing

mind of the venture. Craiggs claimed that he had invested labour and money in the property, and helped pay off the mortgage, unjustly enriching Owens. He admitted that he shared in the profits from the basement, but maintained that his financial contributions to the property were from legitimate sources. Owens counterclaimed, alleging that Craiggs forced her into helping with the pot business and that he should pay damages to the property flowing from a police drug bust (which resulted in a 15-month prison sentence for Craiggs).

Bruce J of the BCSC found that both parties' testimony was difficult to accept in full, but was prepared to say that Craiggs had made out a claim in unjust enrichment: *Craiggs v Owens,* 2012 BCSC 29. Recovery was precluded, however, by his unclean hands – his contributions to the property (like diverting hydro from the municipal wires and hauling bags of fertiliser from the local garden centre) were directly linked to the illegal activity below stairs. Even if some of the financial contributions came from legitimate sources, they were used to fund an illegal operation. Although she was the successful party in the litigation, Owens was not awarded costs on account of her own willing participation in the grow-op.

Perfectly correct, but could people (including judges) please stop saying 'unjust enrichment is an equitable remedy' (at para 34)? It isn't.

[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
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

Borden Ladner Gervais