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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.

Arbitration

- 'a model of how not to conduct' one

Banking/torts

- credit rating agency acted reasonably, even though its information was inaccurate

Civil procedure

- bringing Ontario's longest-running legal drama to an end
- warning: don't put the other side through unnecessary hoops

Civil procedure/lawyers/torts

- successful lawsuits don't always pay

Class actions/privacy

- individual issues overwhelm in data breach class action

Conflict of laws

- Ontario is OK forum for claims arising from airline passenger's detention in Qatar for air rage

Conflict of laws/consumer protection

- Quebec court refuses to enforce choice of forum in eBay user agreement

Contracts

- no implied duty of good faith in termination of automatically renewing contract, says Alberta CA
- that limitation of liability clause may not stand up when seen in context

Corporations/directors' duties/torts

- director can't sue company for injury resulting from breach of director's fiduciary duty

Criminal

- highly entertaining judgment takes 'a detour that might have confused Lewis Carroll'

Evidence

- spoliation of evidence can include failing to preserve text messages and Facebook pages

Evidence/civil procedure

- journalist's privilege in confidential source's information trumps law prof's request for *Norwich* order

Fiduciaries/banking

- every banker's nightmare: a claim for knowing assistance in breach of trust

Insurance/contracts/unjust enrichment

- insurer pays out to wrong beneficiary, facilitating fraud, but not liable

Intellectual property

- no monopoly in historical events, says NY district court

Privacy

- 'reasonable suspicion' of criminal activity required for forensic customs search, says 9th Circuit

Privacy/class actions

- data breach claims against LinkedIn dismissed

Privacy/criminal

- general warrant not enough for access to stored text messages; specific wiretap authorisation required

Privacy/education

- no 'essentially unlimited right' to search student mobile phone

Privacy/personal property/torts

- just who owns that LinkedIn account?

Securities

- SEC now likes social media (within limits)
- US Supreme Court expresses doubts about fraud on the market

Torts/sports law

- now that golf season is upon us

Trusts/solicitors

- flexible approach in applying *Quistclose* trust to funds paid into solicitor's account

ARBITRATION

'A model of how not to conduct' one

Those were the words of Kethledge J of the 6th Circuit in describing the process at issue in *Thomas Kinkade Co v White* (6th Cir, 2 April 2013). Thomas Kinkade Co (TKC) is the entity which distributes the (hideous) works of the eponymous late artist. TKC entered into a dealership agreement with Nancy and David White, which resulted in a reference to arbitration over payment disputes back in 2002. Nearly five years on, the 'purportedly neutral arbitrator' – one Mark Kowalsky – announced that his firm had been retained by the Whites 'for engagements that were likely to be substantial'. TKC's objections were ignored by Kowalsky who, after 'a series of irregularities' favouring the Whites, made an award in favour of the latter to the tune of $1.4 million. TKC took the matter to the district court in Michigan, which vacated the award because of Kowalsky's 'evident partiality'.

Kethledge J, who heard the Whites' appeal, thought that the least of the arbitration's 'blemishes was that it dragged on for years'. The Whites were in many ways not exactly on the side of the angels: their lawyer had surreptitiously sent a live feed of the proceedings to a disgruntled ex-TKC employee, who reviewed the transcripts in order to suggest penetrating questions. The lawyer was confronted after a year of this in a messy scene which reduced the court reporter to tears, but his replacement as counsel fared little better: he was convicted of federal tax fraud. The Whites were seriously deficient in their production of documents (except at the eleventh hour, when 8,800 pages of records they had previously said did not exist suddenly landed on TKC) and in their 'threadbare proof of causation and damages'. And then came the period when the Whites 'and persons associated with them began showering Kowalsky's firm with new business'. In spite of all this (and more), the American Arbitration Association denied TKC's motions to have Kowalsky disqualified. It was obvious to the appeal court from all of this that the arbitration was flawed and the arbitrator 'ethically encumbered' (to put it politely), his disclosures five years into the process being 'little better than no disclosure at all'.

BANKING/TORTS

Credit rating agency acted reasonably, even though its information was inaccurate

Keith Smeaton was none too pleased to have his application for a business loan turned down, partly on account of a bankruptcy order which was disclosed in the credit rating which had been compiled by Equifax. The bankruptcy order had in fact been rescinded, but this was not reflected in the Equifax rating. He sued Equifax for what he claimed would have been the profits from his proposed business venture, plus amounts related to 'his descent into a chaotic lifestyle' that forced him to live in his car for 8 months. After a rather 'tortuous' trial, Smeaton obtained judgment in his favour: the judge found that the credit rating agency had not taken reasonable steps to ensure the accuracy of its data, had breached a duty of care to Smeaton and had caused him loss.

Equifax appealed successfully: *Smeaton v Equifax*, [2013] EWCA Civ 108. Tomlinson JA disagreed with the trial judge that Equifax should have done more to check the bankruptcy records to see whether an order had been annulled, rescinded or stayed. It had obtained Smeaton's information from a reliable and official source, and 'had no reason to believe that a problem existed' with respect to it, until notified by the affected party. Equifax moved quickly to correct the record once it learned of the rescission from Smeaton. The trial judge was also incorrect about the extent of Equifax's duty to Smeaton: it was not reasonably foreseeable that loss would result from an erroneous credit report, and to impose a duty on credit rating agencies would in any event expose them unduly to indeterminate liability to an indeterminate class. UK law related to data protection and credit rating agencies provided adequate remedies for situations like Smeaton's, unfortunate as it was.

[Link available **here**].

CIVIL PROCEDURE

Bringing Ontario's longest-running legal drama to an end

Central to the plot of Charles Dickens's *Bleak House* is an inheritance case, *Jarndyce v Jarndyce*, which 'drones on' on for generations and becomes 'so complicated that no man alive knows what it means'. When *Jarndyce* is finally decided, years of legal costs have consumed the entirety of the estate. Ontario has something like a *Jarndyce* in the Assaf estate litigation, the province's 'longest running legal drama' and a bitter fight since the death of Edward Assaf in 1971. Morgan J of the Ontario Superior Court recently had occasion to bring to an end the 'long and painful history of the Assaf family litigation' – which has involved a forged will, 'vitriolic, vulgar and abusive' harassment of opposing parties, and conduct worthy of 'figures in a classical tragedy, bent upon destroying that which surrounds them and especially their monetary inheritance': *Burton v Assaf*, 2013 ONSC 1392.

Morgan J has held that the latest in a long series of attempts by William Assaf to be awarded the family pile in Toronto's Forest Hill should be dismissed as 'a paradigm case for the application of issue estoppel', an abuse of process and an attempt to litigate beyond the expiration of applicable limitation periods (court-ordered and statutory). William Assaf himself, 'a Pirandellian character in search of an author, re-enacting past struggles in a dramatic loop he cannot seem to escape', has also been declared a vexatious litigant. As the judge observed, 'it is time for the courts to put the re-litigation of these issues to an end' – although it sounds unlikely that disposition of the case will calm the underlying 'Assaf family maelstrom', and William Assaf seems likely to appeal Justice Morgan's decision in any event.

[Link available **here**].

Warning: don't put the other side through unnecessary hoops

Don't let your client force the other side to '"jump through the hoops" of civil litigation' unnecessarily, at least not in Justice David M Brown's court. But that's just what Vera Wallerstein did in her litigation against the Business Development Bank and others: *Wallerstein v 2161375 Ontario Inc*, 2013 ONSC 1580. Justice Brown had given Wallerstein a timetable to respond the bank's motion for summary judgment dismissing the claim as being without merit. The bank made 'an extremely reasonable offer' to settle if Wallerstein consented to judgment, but she refused. Instead, she 'simply hung back, put the Bank to the expense of bringing a completely unnecessary motion, and then lost on the basis that the claim had no merit' – and Wallerstein no standing to sue in the first place.

Bad move, Vera: the judge characterised her conduct as 'a poster-case for all that is wrong with the civil motion culture in this city' because she had decided to stand on the sidelines, 'watching the moving party burn through unnecessary legal costs to prove the obvious'. In Justice Brown's view, 'only lawyers win under that kind of approach, and the civil justice system is not about making sure the lawyers win regardless of the lack of merit of their client's case'. (Words there for defence counsel as well.) The bank was awarded substantial indemnity costs.

[Link available **here**].

CIVIL PROCEDURE/LAWYERS/TORTS

Successful lawsuits don't always pay

Sandra Jones made a little bit of legal history when her claim against a co-worker resulted in the recognition of a tort of invasion of privacy (or 'intrusion upon seclusion', as the Ontario Court of Appeal ponderously called it): see *Jones v Tsige*, 2012 ONCA 32, reported in the Monthly Update for February 2012. Jones was awarded $10,000 in damages, but that was not the end of the story. Her lawyer's bill came to just over $127,000. Du Vernet, the lawyer, had received an assignment of any judgment Jones might win, to be set off against his fees and disbursements. He collected the $10,000 from the court and a further $50,000 from Jones, but had to bring a claim against Jones for the rest: *Du Vernet v Jones*, 2013 ONSC 928. Jones counterclaimed, alleging that Du Vernet had not advised or represented her properly and had breached his fiduciary duty towards her.

Allen J was satisfied that Jones had been served in 'an exemplarily professional fashion' by her counsel; the evidence showed that he had repeatedly pointed out the chances of success and the risks of failure, as well as the various options that were available to his client. It was 'no minor accomplishment' to win, 'against considerable odds', a case on a novel point of law. Du Vernet was entitled not only to the amount remaining from his representation in *Jones v Tsige* but also his costs in attempting to collect.

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

CLASS ACTIONS/PRIVACY

Individual issues overwhelm in data breach class action

A 'massive' data breach occurred at Hannaford Bros supermarkets over a 3-month period in 2007-08, resulting in the theft of customer financial information. Class proceedings were initiated, but a Maine judge has recently declined to certify the action, which sought recovery of costs incurred in obtaining new credit and debit cards, identity theft insurance and credit monitoring: *In re Hannaford Bros Co Customer Data Security Breach Litigation* (D Me, 20 March 2013).

Hornby J of the district court thought that based on the number of Hannaford customers who applied for replacement cards during the relevant period, the proposed class probably met the 'numerosity' requirement (even if not all replacement applications were necessarily related to the data breach). This was an appropriate case for class proceedings because the very small amounts being sought by any single customer would not make individual actions worthwhile – although the judge was clearly concerned that the only people who really stood to gain from the litigation were the plaintiffs' lawyers, any 'modest measure of corporate deterrence' notwithstanding. The commonality requirement was also satisfied: even though it wasn't clear whether Hannaford's liability might be for negligence or breach of contract, or whether its actions were the cause of loss, it was clear that all class members had the same case to make. Where things broke down for the plaintiffs

was when the judge considered the economic effects of the data breach. While all appeared to have suffered some loss as a result of it, not everyone responded in the same way: some had fraudulent charges to their accounts while others did not; only some bought insurance or credit monitoring; not all paid fees for obtaining or expediting delivery of new cards. It could be said that all members of the class had been required to mitigate loss as a result of the data breach, but in the end individual issues of causation and loss would predominate over class issues.

CONFLICT OF LAWS

Ontario is OK forum for claims arising from airline passenger's detention in Qatar for air rage

Fakhrul Kazi was travelling from Toronto to Dhaka, taking an Air Canada flight to Heathrow and a connecting flight on Qatar Airlines from London to Doha. He never made it to Dhaka: on the London-Doha leg of the journey, Kazi alleges that he was falsely accused by cabin personnel of smoking in the lavatory, claiming that he was searched and that airline staff found no evidence of cigarettes or a lighter. He was then offered a drink and accepted a glass of red wine. The cabin crew had a different version: Kazi was smoking in the loo, responded rudely and demanded 'more alcohol' (so not just the one glass of red). The crew notified security of Kazi's 'unruly' behaviour and he was arrested on landing in Doha. There, he was charged with two offences under local law: drinking alcohol (forbidden in the emirate if you're a Muslim, as Kazi is) and disturbing the peace. Kazi was locked up for nearly three months and sentenced to 40 lashes and a $550 fine. On his return to Canada, he sued the airline and its staff for failing to warn him of the rigours of the law of Qatar, which resulted in pain and suffering as well as loss of income resulting from the physical and psychological trauma of his brush with Qatari justice. The defendants accepted the jurisdiction of the Ontario courts to hear Kazi's claim, but contended that Qatar was the better forum for the dispute: *Kazi v Qatar Airlines*, 2013 ONSC 1370.

Master Muir applied the factors set out in *Club Resorts Ltd v Van Breda*, 2012 SCC 17, as follows. The location of the parties and witnesses was neutral: most of the defendants' witnesses would be located in Qatar or, in the case of Kazi's fellow passengers, other jurisdictions, but most would be able to give evidence in Ontario, including an expert asked to testify on Qatar law; Kazi's witnesses would be located in Ontario (where the airline had an office). Securing the attendance of agents of the government of Qatar might prove difficult, but Kazi would face the same difficulty and expense in getting himself and his witnesses to Doha. Returning to Qatar would also probably be distressing for Kazi personally. The applicable law of the claim was also neutral. The defendants argued it might be that of the UK, Qatar or Ontario, but that would need to be resolved wherever the action was heard. One side or the other would have to bear the costs of conducting the litigation in the other party's jurisdiction, and the master noted that Kazi is currently on social assistance. Other factors favoured Ontario: the contract between Kazi and the airline was probably governed by Ontario law, Kazi is an Ontario resident and Qatar Airlines has a registered office in the province. Enforcement of an Ontario judgment in Qatar might not be easy and could result in a Qatari court rehearing the whole case, which tended to favour Qatar – but rehearing (with the concomitant risk of a conflicting result) was not inevitable and it might not be necessary to enforce an Ontario judgment in Qatar anyway. There was no basis on which to interfere with the plaintiff's choice of venue.

[Link available **here**].

CONFLICT OF LAWS/CONSUMER PROTECTION

Quebec court refuses to enforce choice of forum in eBay user agreement

An eBay user with what Justice Nadeau of the Quebec Superior Court called 'very good eyes' will see that use of the auction site by Canadians is governed by Ontario and Canadian federal law, but that all disputes about it '*must* be resolved' (emphasis added) by the courts in Santa Clara, California. The judge thought it was weird that eBay and the customer would choose to have a dispute about their agreement governed by Canadian law but adjudicated in California. As for the 'must be resolved' bit, must schmust: under article 3148 of the *Civil Code*, a merchant offering services in Quebec cannot oust the jurisdiction of the Quebec courts. As a result, eBay was foiled in its attempt to have the particular claim before Justice Nadeau punted to Santa Clara. The plaintiffs, who alleged that they had lost out on an opportunity to sell limited-edition Nike running shoes at a vast profit because the auction site had unilaterally halted the sale, were allowed to proceed in Quebec: *Mofo Moko c eBay Canada Ltd*, 2013 QCCS 856.

[Link available **here**].

CONTRACTS

No implied duty of good faith in termination of automatically renewing contract, says Alberta CA

The duty of good faith in contract law was the flavour of the moment about 10 years ago and, like all fashions, has returned: it would be fair to say there has been a spate of decisions recently from Ontario, England and now Alberta.

The Alberta Court of Appeal has considered whether a contract with an automatic renewal clause required one party to terminate in good faith: *Bhasin v Hrynew*, 2013 ABCA 98. The contract in question was between CAFC, a scholarship plan dealer, and Bhasin, one of its dealers. CAFC appointed Hrynew, a competitor of Bhasin's, as auditor of its dealers' compliance with securities laws. Bhasin objected to this, fearing that he would have to disclose confidential business information to a rival. Bhasin also resisted Hrynew's CAFC-approved plan to acquire his business. CAFC terminated Bhasin's contract, which Bhasin alleged was an improper act of retaliation against him. Bhasin was initially successful: the trial judge found that CAFC had breached an implied term requiring it to reach its decision to terminate in good faith, a duty which either applied to all employment and franchise agreements or which was an implied term of this one based on the parties' original intention as to how it would operate.

The Court of Appeal reversed: (i) there is no general duty to perform contracts in good faith; (ii) while there is such a duty in the employment context, the duty there is narrow (not to terminate in a harsh or demeaning manner) and Bhasin was not an employee anyway; (iii) courts are reluctant to read in implied contractual terms, admit extrinsic evidence where contractual terms are unambiguous, relieve parties of their obligations except where they are unconscionable, or rewrite bad bargains with the benefit of hindsight. This contract had nothing in it to suggest that the parties intended it to be performed in good faith and contained no preconditions for non-renewal: it simply expired if one party gave notice of a desire to terminate or continued if the parties said nothing. Bhasin was not unequal in bargaining power: he had been advised by counsel and the termination clause had been negotiated. CAFC was entitled to terminate as it did, without

being subject to a requirement to do so in good faith. This is at odds with the now large body of Canadian law which has recognised that the exercise of contractual discretion does carry with it an implicit duty to act reasonably and in good faith: see, for example, *Mesa Operating Limited Partnership v Amoco Canada Resources Ltd* (1994) 19 Alta LR (3d) 38 (CA); *Marshall v Bernard Place Corp* (2002) 58 OR (3d) 97.

[Link available **here**].

That limitation of liability clause may not stand up when seen in context

Manchester Central Convention Complex Ltd (MCCC) engaged Kudos Catering to supply catering services at two of MCCC's venues. Their contract contained a clause which provided that MCCC would have 'no liability in contract, tort (including negligence) or otherwise for any loss of goodwill, business revenue or profits'. The relationship soured, and MCCC notified Kudos that it was terminating the contract. Kudos treated this as repudiation and sued for damages, including lost profits for the remaining 20 months of the contract's term. The trial judge concluded that the exclusion clause meant that Kudos was out of luck on its claim for lost profits.

The Court of Appeal thought there was more to it than simply looking at the limitation of liability in the one particular clause, clear as it was: *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd*, [2013] EWCA Civ 38. Seen as a whole, it was clear that the contract provided 'a basic working framework' for performance that was predicated on co-operation, as set out in a rather florid 'mission statement'. As a result, it was unlikely that the parties had really intended the contract to be capable of continuing performance if one party lost faith in the other; it was questionable, therefore, that it could have been enforced through seeking specific performance. With specific performance unavailable, the exclusion clause (if applied literally) would effectively leave Kudos without any remedy at all. It was 'inherently unlikely' that this could have been the intent of the parties, as it would render the agreement 'devoid of contractual content' by placing MCCC outside the reach of sanction for non-performance. The trial judge also failed to consider the effect of the contract's indemnity in favour of Kudos, which arose only in the event of MCCC's negligence. The exclusion clause could not sensibly be read as entirely restricting that right of indemnity, with the result that the correct interpretation of the limitation of liability clause was that it applied to 'defective performance of the Agreement, not to a refusal or to a disabling inability to perform it'. The appeal was allowed.

[Link available **here**].

CORPORATIONS/DIRECTORS' DUTIES/TORTS

Director can't sue company for injury resulting from breach of director's fiduciary duty

What happens when the sole director and shareholder of a company is injured as a result of the company's failure to fulfil an absolute statutory duty to maintain equipment in a safe state of repair? That was the question before the English Court of Appeal in *Brumder v Motornet Service and Repairs Ltd*, [2013] EWCA Civ 195. Brumder's finger was severed when he was climbing down from a raised hydraulic ramp in the workshop of Motornet, which specialised in servicing vehicles and conducting regulatory inspections. The trial judge held that Motornet was in breach of equipment safety regulations, which impose absolute and continuing obligations on employers, and that Brumder – as sole director of the company – had given

no consideration to the company's compliance with the regs. As a result, he was 100% contributorily negligent for Motornet's breach. Brumder argued on appeal that once Motornet was found liable, there should be no – or at least only a modest – apportionment of liability to him, on the grounds it was wrong to conclude that the accident resulted from a compliance failure which could be attributed to Brumder in his capacity as director.

Brumder's appeal was dismissed. Beatson JA thought it was open to the trial judge to conclude that if the equipment had been assessed as required, the defect that caused the accident would have been detected. The real issue was the extent to which Motornet's absolute liability for breach of the regs was subject to a defence that the injury suffered by the claimant was caused by the latter's own wrongdoing. In the end, Justice Beatson concluded that Brumder could not assert that the company had failed to do everything it could to ensure compliance, when it was only through his acts as director that the company could act. It was Brumder's failure to exercise his statutory fiduciary duties as director which had put Motornet in breach of the regs, so it followed that the company should be permitted to raise the defence of the claimant's own wrongdoing, making it unnecessary to consider the extent of fault and apportionment.

[Link available **here**].

CRIMINAL

Highly entertaining judgment takes 'a detour that might have confused Lewis Carroll'

'I suppose,' mused ODonnell J of the Ontario provincial court, 'that if perfectly pleasant young men weren't led astray from time to time by drugs, alcohol, broken hearts or rubbish on the internet, then the dockets of the provincial court wouldn't be quite as plump as they usually are.' Matthew Duncan was one such young man, although the precise reasons for his going astray are unclear from the reasons in *R v Duncan* (OCJ, 26 March 2013). A minor alleged *Highway Traffic Act* violation led to an 'unremarkable' altercation between Duncan and a cop, then arrest for assaulting a police officer: 'the bread and butter of provincial court'.

The detour down an '*Alice in Wonderland* garden path of trusts and jurisdiction and dollar amounts and contracts and natural persons and administrators' was asserted in a 'hodgepodge of irrelevancies' and 'internet-derived gibberish'. Repeating the old quip that ten thousand monkeys with typewriters would eventually replicate the works of Shakespeare (with witty footnotes explaining typewriters and Shakespeare to the youth of today), Justice ODonnell noted that 'sadly, when human beings are let loose with computers and internet access, their work product does not necessarily compare favourably to the aforementioned monkeys'. A further witty digression on the internet, more often than not a 'near psychotropic escape from any useful pursuit', albeit one with some 'benevolent manifestations'. While Duncan's argument that he was not subject to the jurisdiction of Her Majesty's courts was wholly without foundation, when the judge turned his attention to 'old-fashioned notions like the merits of the case', it was clear that the cop who arrested Duncan had no lawful basis on which to do so. Duncan had refused to identify himself to the officer (again on bogus jurisdictional grounds, we assume) after having failed to signal a right-hand turn, but it is an offence not to signal only when that would affect the operation of another vehicle; and there was no evidence to suggest that any other vehicle had been so affected. Since the officer had no lawful reason to ask Duncan for ID, much less to arrest him for failing to produce it, it was not unlawful

for Duncan to resist arrest. He was 'entitled to his acquittal and none should begrudge him it', but he did not leave the courtroom without some advice to disabuse himself of a mistaken belief in 'freedom from societal obligations' through 'some more productive reading' and to 'be more discriminating on what parts of the internet he models himself on in future'.

[Link available **here**].

EVIDENCE

Spoliation of evidence can include failing to preserve text messages and Facebook pages

Not a surprising conclusion, but a salutary reminder from the US district court in Colorado: *Christou v Beatport LLC*, (D Colo, 23 January 2013). Christou, the owner of a Denver nightclub, and a business partner called Roulier created Beatport, a commercial download site that sells electronic dance music tracks created by DJs, largely for DJs. The two fell out and litigation resulted: Christou claimed that Roulier had threatened not to promote DJ's on Beatport if they performed in Christou's clubs.

The merits have yet to be heard, but the interesting thing is the discussion of the spoliation (destruction) of evidence in the face of pending litigation. Roulier had failed, in pre-trial discoveries, to disclose text messages he had sent on his phone, which he claimed to have lost. There was no evidence to suggest that the loss of the telephone was anything but accidental or even that the texts contained relevant evidence (but hey, who knows when 'LMFAO' might have probative value). Jackson J thought that Roulier should have been more careful in responding to the plaintiff's 'litigation hold' letter (and perhaps with his personal property). An adverse jury instruction was 'too harsh' a sanction, but it was left open to the plaintiff to argue that a negative inference could be drawn from Roulier's failure to produce the texts he had sent.

In *Gatto v United Air Lines Inc*, (D NJ, 25 March 2013), the judge ordered an adverse inference to be drawn from the plaintiff's failure to preserve the contents of his personal Facebook page.

EVIDENCE/CIVIL PROCEDURE

Journalist's privilege in confidential source's information trumps law prof's request for *Norwich* order

Jeffrey MacIntosh, a U of T law prof, alleged that a *Globe & Mail* story on the ups and downs of the leveraged buy-out of BCE Inc. in 2008 contained both misrepresentations and insider information, in violation of Ontario securities law (or possibly in violation, anyway), information on which he relied in deciding to sell his call options in BCE at a significant loss. MacIntosh (through his trading company) sought a *Norwich Pharmacal* order requiring the newspaper's writer to disclose the identity of his confidential sources. Belobaba J gave all of this pretty short shrift. Noting that the OSC had declined to investigate the matter in spite of the professor's repeated urgings, the judge thought that most of the alleged violations of securities law probably weren't violations at all; the best that could be said was that some of them *might* be. Any public interest in identifying the people who provided information for the article was clearly outweighed by the competing goal of preserving the confidentiality of a journalist's sources.

The Ontario Court of Appeal has dismissed MacIntosh's appeal, but did not entirely agree with the reasoning of Justice Belobaba: *1654776 Ontario Ltd v Stewart*, 2013 ONCA 184. The

judge below got the tests for both a *Norwich* order and the application of the Wigmore criteria for case-by-case privilege slightly wrong: he applied an elevated standard for the plaintiff to meet in making a *Norwich* application, thinking a case involving freedom of expression required showing a stronger case than in other circumstances; this was more properly considered in the Wigmore analysis of whether the journalist's information should be protected by privilege or if the public interest demanded its disclosure. MacIntosh passed the first hurdle for obtaining a *Norwich* order in having a valid claim – although one that was admittedly weak. Where things fell down for him was in establishing that the interests of justice required disclosure of the information, because the defendants were able to show, for the purposes of the Wigmore analysis, that the relationship of the journalist and his source was worthy of protection and that the public was better served by protecting the identity of the informant than in revealing it. Things might have been different if MacIntosh had advanced a stronger case. As things stood, the better way to promote compliance with the disclosure requirements of the *Securities Act* was an action against BCE and its would-be acquiror.

[Link available **here**].

FIDUCIARIES/BANKING

Every banker's nightmare: a claim for knowing assistance in breach of trust

What may fairly be described as every banker's nightmare: bank A holds funds in an account held by trustees for a group of hundreds of investors; trustees transfer funds in breach of trust to an account at bank B, the holder of which dissipates the funds (presumably in cahoots with the trustees); bank A is sued for knowing assistance in the trustees' breach of duty. The alleged facts, essentially, underlying *Nicholson v Morgan*, [2013] WASC 110. The decision is actually just one on a motion to strike, but Edelman J (a judge to watch) provides an overview of Australian and English law on knowing assistance generally, and constructive knowledge in particular (noting the differences between Oz and England). Some, but not all, of the investors' claims were struck. It would be worth seeing this proceed to a trial on the merits and a decision from Justice Edelman.

[Link available **here**].

INSURANCE/CONTRACTS/UNJUST ENRICHMENT

Insurer pays out to wrong beneficiary, facilitating fraud, but not liable

Don't trust your lawyer second cousin is one of the morals of this little tale from Massachusetts: *Jackobiec v Merrill Lynch Life Ins Co* (1st Cir, 27 March 2013). Thaddeus Jackobiec and his brother Frederick were the sole beneficiaries of the estate of their mother, Beatrice Jackobiec; Thaddeus, blind since birth and dependent on his family for support, was also the beneficiary of the estate of his aunt Lillian Smillie. Before her death, the Jackobiecs' mother applied for a life insurance policy naming Frederick and the trust for Thaddeus created under the will of her sister Lillian as beneficiaries. Beatrice died, and at her wake the Jackobiec brothers met their second cousin Thomas Tessier, a lawyer, who seemed to be 'a natural choice' to administer Mrs Jackobiec's estate, but who proved 'a wolf in sheep's clothing'. Tessier and his brother Michael 'engaged in a campaign of forgery and subterfuge to raid the bank accounts of Frederick and Thaddeus and the estate of Beatrice, allegedly stealing over $2 million'. Having discovered the life insurance policy in favour of Thaddeus, Thomas Tessier had

Frederick removed as trustee and his brother Michael installed in his place, then created a bogus trust in favour of Thaddeus with Michael as trustee and remainderman. Thomas then notified the insurer of Beatrice's death and had the proceeds of the policy paid into the second trust. Michael endorsed the cheque from the insurer and split the nearly $100,000 it represented with his fraudster brother. Thaddeus sued the insurer for breach of contract and negligence (pursuing other remedies against the Tessier brothers).

The Massachusetts district court granted summary judgment in favour of the insurance company, concluding that the Tessier brothers would have stolen the money even if the cheque had been made payable to the correct trust; they had control over both trusts, so it really didn't matter which one was the payee. The First Circuit, taking a fresh look at the evidence, concurred with the district court. Even if the insurer had breached its contract, this was not the cause of the loss suffered by the beneficiary of the policy, which would have occurred anyway, given the Tessiers' 'unfettered control of the two trusts' and Thomas's admission in depositions that he intended to steal the money one way or t'other.

INTELLECTUAL PROPERTY

No monopoly in historical events, says NY district court

Gregory Murphy's copyright infringement suit is perhaps best summed up by the title of the article he wrote for a UK newspaper in 2011: 'The Day I Sat in Emma Thompson's Kitchen and Accused Her of Stealing my Movie'. Murphy and Thompson (the somewhat irritating actress and now film producer) both thought that the cinema should present the life of Effie Gray, a Victorian beauty who married the art critic John Ruskin but later caused a scandal when she successfully obtained an annulment (on the grounds the marriage had never been consummated) and wed the painter John Everett Millais. Murphy claimed that Thompson's screenplay for the as yet unmade *Effie* was based on his stage play, *The Countess*, which he had adapted for the screen. Thompson moved for dismissal of the claim, and won: *Effie Film LLC v Murphy* (SDNY, 22 March 2013).

Griesa J held that the two works were not substantially similar in the IP sense. They were, of course, substantially similar in recounting events in the lives of the historical figures they portrayed, but neither historical facts nor interpretations of them are capable of copyright protection. The main elements of the two works – plot, setting, characters – were therefore largely excluded from the realm of copyright. So too were *scènes à faire*, the set-pieces that are demanded by a work's 'other aesthetic and narrative choices': 'Thus,' said the judge, 'if a work is to be set in Victorian England, for example, travel by carriage, glittering ballrooms, stiff dinners, conversations over tea, and tensions arising from an overly-rigid system of class and gender roles are *de rigueur*. Similarly, when Venice is the backdrop, there can be little creativity in the decision to depict gondolas and canals'. This left the court to use its 'good eyes and common sense' in considering the 'total concept and overall feel' of the works in question. Here, the two scripts had no dialogue in common, no characters in common other than historical figures and took a 'vastly different' approach to the possible settings of the action. The result: 'two works narrating the same basic events but with greatly differing internal structures' and no substantial similarity in the technical sense.

PRIVACY

‘Reasonable suspicion’ of criminal activity required for forensic customs search: 9th Circuit

Howard Cotterman and his wife returned from a Mexican vacation, crossing the US border into Arizona. A routine computer records check by customs officials revealed that Mr Cotterman had been convicted in 1992 of sexual offences involving children and was ‘potentially involved in child sex tourism’. The couple were taken aside and subjected to ‘secondary inspection’. This included a search of Cotterman’s laptop, but the password-protection on it thwarted a detailed look at the contents of its hard drive. Cotterman offered to make the contents accessible, but the officers feared he would delete files surreptitiously or had somehow booby-trapped the computer. The Cottermans were let go, but the laptop was retained and subjected to a further search, which produced 75 pornographic images of Cotterman with children that were accessible without a password. A customs agent later managed to bypass Cotterman’s security and found a large amount of further incriminating evidence. Cotterman was charged with various offences but challenged the admissibility of the evidence found on his laptop.

An Arizona magistrate judge held that while the computer record of Cotterman’s conviction and the existence of password-protected files on the laptop gave rise to suspicions about him, this was not enough to justify the extensive search that was conducted; the threshold of ‘reasonable suspicion’ of criminal activity had not been met. A district judge agreed, and the US government appealed to the 9th Circuit. A majority in that court concluded that reasonable suspicion was *not* required and that the evidence was admissible, but ordered the case to be heard by the full panel of the court. As a result of a hearing *en banc* (as they like to call it down yonder), the 9th Circuit has held that the ‘forensic’ search of Cotterman’s laptop did not violate his constitutional rights: *USA v Cotterman* (9th Cir, 8 March 2013). The majority held that the reasonableness of a search (and seizure) will depend on the facts, and just because border security is important does not mean ‘anything goes’. A traveller’s laptop or other mobile devices may contain a wide array of intimate personal details in which there is a legitimate expectation of privacy, so the State had better have ‘reasonable suspicion’ in order to conduct intrusive (as opposed to routine, cursory) searches. Cotterman’s 1992 conviction was not enough on its own to support the fishing expedition that ensued, nor was the fact that Mexico has a bit of a reputation as a destination for child sex tourists. Password-protection is ‘commonplace for business travelers, casual computer users, students and others’, so that alone was also insufficient grounds for the forensic search. The totality of factors at play did, however, support the conclusion that the customs officers had reasonable suspicions with respect to the contents of the laptop. The three dissenting judges agreed the evidence should be admitted but thought the majority’s application of the standard of ‘reasonable suspicion’ was ‘unworkable and unnecessary’ and would compromise border security.

Interesting to compare and contrast with *R v Cole*, 2012 SCC 53 (reasonable but diminished expectation of privacy in employer-owned laptop), and *R v Fearon*, 2013 ONCA 106 (no warrant required for search of mobile phone that is not locked or password-protected).

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

PRIVACY/CLASS ACTIONS

Data breach claims against LinkedIn dismissed

Remember a while back when LinkedIn sent you a message advising you to change your password because of a security breach? That breach occasioned a lawsuit in the US (naturally): In *re LinkedIn User Privacy Litigation* (ND Cal, 5 March 2013). The proposed representative plaintiffs in that class action argued that the data breach, which involved the hacking of LinkedIn's computer systems and the posting of customer passwords on the internet, resulted in economic harm to those affected who had paid for premium memberships in LinkedIn.

LinkedIn's motion to dismiss the complaint was successful. Davila J pointed out that premium members did not pay for extra security; they got the same privacy protections as users who opted for the free, basic package. What premium members had paid for was 'advanced networking tools and capabilities' to enhance their usage of the site. It was also unhelpful for the plaintiffs' misrepresentation claims that they did not even allege that they had actually read LinkedIn's privacy policy. A claim for breach of contract also failed: if, as they contended, the plaintiffs did not receive the full benefit of their bargain with LinkedIn, that occurred before and not as a result of the breach – and they actually did get what they paid for. A claim for economic loss resulting from shoddy performance of services also didn't fly: the plaintiffs needed to show 'something more' than mere economic loss for having, in their minds, overpaid. The plaintiffs were given leave to amend their pleadings to put them on a surer footing.

PRIVACY/CRIMINAL

General warrant not enough for access to stored text messages; specific wiretap authorisation required

Two Telus subscribers in Owen Sound, Ont. appeared to be sending more than the usual 'LOL' or even 'LMFAO' kind of text messages. On the strength of a general warrant under s 487.01 of the *Criminal Code*, the local police asked Telus to produce all texts sent or received by the two individuals over the next two weeks, together with related subscriber information. Unlike most providers, Telus makes copies of texts that go across its network and stores them for a brief period of time, hitherto something probably not known to the teenagers, unfaithful spouses, drug dealers and prostitutes who rely on the fleeting and apparently untraceable nature of texting. The company sought to quash the warrant, arguing that because another, more specific mechanism exists under the *Code* for intercepting private communications, the cops needed to follow that more exacting procedure. The issue has now been decided by the Supreme Court of Canada: *Telus Communications Co v The Queen*, 2013 SCC 16.

Abella J (LeBel and Fish JJ concurring) reckoned that using the general warrant provision was really just a way to duck having to go through the hoops of a wiretap authorisation, which the police would have to do to obtain texts prospectively from a telco that did not store text traffic like Telus. (Whether a general warrant might work for past texts was a question for another time.) A general warrant is available only where there is no other statutory procedure for obtaining the evidence at stake. Part VI of the *Code* offers such a procedure, including requirements for notifying the subject of the

interception and a time-limit on the validity of the search. Text messages are sent with the expectation of privacy, and like other private communications should not be subject to the broad power of a general warrant. It was manifestly unfair to subject Telus subscribers to a less rigorous investigative standard than customers of other providers. Justices Moldaver and Karakatsanis agreed that the general warrant was invalid, but on narrower grounds: in their view it was unnecessary to consider whether the police were seeking to 'intercept' a communication for the purposes of Part VI, which Justice Abella had focused on; rather, the proposed investigation, if not perhaps actually a wiretap, was 'substantively equivalent' to one. The general warrant was invalid because the police had failed to satisfy the 'no other provision' requirement – again because they were essentially trying to avoid the rigours of the Part VI procedure. Cromwell J and McLachlin CJC dissented, on the grounds that the police were not proposing either to intercept private communications or do what was 'substantively equivalent'. They were seeking to obtain disclosure of texts already (lawfully) intercepted by Telus, which meant that a wiretapping authorisation was not necessary. A general warrant was not a way to get around the Part VI requirements, but instead a convenient and cost-effective way to conduct a criminal investigation.

The division in the Supreme Court is interesting, as it reflects the challenges judges face in adapting the law to new technologies and the various uses to which we put them, for good or ill. This is something we have seen in *R v Cole*, 2012 SCC 53, where a teacher had a legitimate (if diminished) expectation of privacy in the school-owned laptop on which he stored child porn; and in *R v Fearon*, 2013 ONCA 106, where a warrantless search of a mobile phone with no password protection was upheld as a valid incident of police powers of arrest.

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

PRIVACY/EDUCATION

No 'essentially unlimited right' to search student mobile phone

GC is in many ways your typical troubled teen: drug user, 'disposed to anger and depression', disciplined at school for swearing and texting in class and for fighting in the locker room. It was the texting that brought things to a head, though: *GC v Owensboro Public School* (6th Cir, 28 March 2013). GC's teacher confiscated his phone and looked at four text messages in order to make sure the teenager was not planning to do something harmful to himself (he had expressed thoughts about suicide) or others (he had punched in some lockers as well as classmates). GC was suspended and sued the school board.

The district court in Kentucky granted summary judgment for the board, but this has in large part been reversed by the 6th Circuit on appeal. The district court incorrectly concluded that GC had been afforded due process before being suspended. And the lower court was wrong to conclude that the search of GC's phone was OK: the school lacked reasonable grounds to do so, in the absence of evidence of illegal activity or real likelihood of harm. Moore CJ held that 'using a cell phone on school grounds does not automatically trigger an essentially unlimited right enabling a school official to search any content that is not related either substantively or temporally' to a suspected infraction.

General knowledge of a student's drug habits or depressive tendencies, 'without more', won't get you there. GC's claims that the school had failed to meet obligations under state law for special needs students was properly dismissed by the district court, however. While this one is from Kentucky (not generally a state with much judicial impact in Canada), it's being seen in the US as a case with significance beyond the confines of the state and the 6th Circuit.

PRIVACY/PERSONAL PROPERTY/TORTS

Just who owns that LinkedIn account?

Linda Eagle was one of the founders of Edcomm, a provider of online education services to the banking industry. She joined LinkedIn, using her Edcomm e-mail address but signing a user agreement that provided that the account was hers alone, even if used for an employer's purposes. Edcomm did not pay for her account and, while it encouraged its people to use the service, it did not have an official policy about use of LinkedIn. Eagle gave other Edcomm employees access rights so they could reply to invitations on her behalf and update her profile. After a take-over of the company, Eagle's position at Edcomm was terminated and her access to her LinkedIn account blocked. It appears that anyone searching for Eagle would, for a period of some weeks, have been directed to an Edcomm website and the profile of another employee (with some of Eagle's credentials still listed). Eagle sued, alleging privacy violations, misappropriation of personality, conversion, interference with contract and other wrongs that resulted in foregone sales through loss of her access to LinkedIn contacts. Some of these claims were dismissed, but others proceeded to trial in the Pennsylvania district court: *Eagle v Morgan*, 2013 US Dist LEXIS 34220.

Buckwalter SJ found there was ample evidence to support Eagle's claim that Edcomm had used her name for commercial or advertising purposes without authorisation, invaded her privacy and misappropriated her publicity and right to the commercial benefit of her name. Eagle did not establish that there had been identity theft, however, given that it seemed her information had inadvertently been left in the other Edcomm employee's profile. A claim in conversion failed because a LinkedIn account is 'an intangible right to access a specific page on a computer', not a chattel. The claim for tortious interference had some merit, but Eagle could not prove that she had suffered any damages as a result – a problem with her claim more generally. Eagle could not point to a contract, client, prospect or deal that could have been obtained through LinkedIn during the relevant period but which was lost as a result of her being locked out of her account. You couldn't just divide Eagle's annual sales by the number of LinkedIn contacts she had in order to arrive at a figure: that was merely 'creative guesswork'. Her claim for punitive damages failed: there was no evidence to suggest malice on the part of Edcomm; the company may simply have thought it had the right to control Eagle's account.

Edcomm counterclaimed, arguing that it was Eagle who had misappropriated the account when she eventually regained access to it, and unfairly competed with her former employer. The judge made short shrift of that: Eagle had no policy requiring use of LinkedIn, the user agreement was between Eagle and LinkedIn and there was no evidence to suggest that Edcomm had expended time and money in building up Eagle's list of contacts.

SECURITIES

SEC now likes social media (within limits)

The CEO of Netflix, Reed Hastings, got into trouble with the Securities and Exchange Commission – and not because people at the SEC were hard-pressed to find something decent to watch on a Sunday night. Hastings disclosed on his personal Facebook site that Netflix had exceeded one billion viewing hours per month for the first time, which had the effect of boosting the company's share price. What Netflix failed to do was issue a formal media release or file a Form 8-K, and the release if did issue later that day failed to mention the 1 billion number. The SEC undertook an investigation, concerned that it was not usual for an individual corporate officer to use a personal channel to communicate material, non-public information about a company; because only Facebook friends of Hastings would see the information, this might be selective disclosure that gave some investors an informational advantage over others.

The SEC did not ultimately pursue enforcement proceedings against Hastings or Netflix, but has now issued guidance that it is acceptable for company announcements to be made through social media like Facebook, Twitter and the like, provided investors have been alerted about which social media will be used to do so. Disclosure like that made by Hastings is unlikely to be OK, although the regulator admitted that every case will turn on its own facts.

[Link available **here**].

US Supreme Court expresses doubts about fraud on the market

In Amgen Inc v Connecticut Retirement Plans & Trust Funds (27 February 2013), the US Supreme Court has raised some big issues in securities law. The case is an investor class action which is still only at the certification stage. The central issues to decide were (1) whether the plaintiff needed to prove at this stage of the proceedings that Amgen's alleged misrepresentations about the safety of its products were material and (2) whether the reliance of every member of the proposed class on the misrepresentation was a common issue.

Justice Ginsburg, for the majority on issue 1, held that it was not necessary to establish materiality for certification: this was something that could be proved according to an objective standard on a class-wide basis (without individual issues predominating); if it could not, the claim as a whole would fail on the merits, given the central place of materiality in a claim predicated on securities fraud. Issue 2 is where things really got interesting. The court revisited the issue of fraud on the market, the idea (from *Basic Inc v Levison*, 485 US 224 (1988)) that investors are presumed to have relied on the alleged misrepresentations at issue, in order to relieve them of an otherwise unrealistic evidentiary burden. Not everyone has agreed with the soundness of the 'fraud on the market' theory, including some of the judges hearing *Amgen*. Justice Ginsburg didn't think it was necessary to reopen that question for the purposes of certification of this claim (or that that offered the best occasion to do so). Justice Alito (concurring) stated, in separate reasons,

that *Basic's* theory of fraud on the market 'may rest on a faulty economic premise'. Thomas and Kennedy JJ (dissenting) expressed their own doubts, while Scalia J (also in dissent), criticised fraud on the market as 'a judicially invented doctrine based on an economic theory adopted to ease the burden on plaintiffs bringing claims under an implied cause of action' – with the result that the materiality of the alleged misrepresentation and the plaintiffs' reliance on it ought to be established at the certification stage.

TORTS/SPORTS LAW

Now that golf season is upon us

Readers of the Monthly Update with good memories may remember coverage of *Phee v Gordon*, [2011] ScotCSOH 181, back in January 2012. Anthony Phee, a novice golfer, heard James Gordon, an experienced golfer, cry 'fore' at the Niddry Castle Golf Club on 7 August 2007, but barely had enough time to react (not more than 4.5 seconds, according to expert testimony) when Gordon's ball struck him in the eye and caused serious injuries. Gordon, who made the shot while playing another hole, claims he also yelled 'get down', but this was contested. It was also unclear whether Phee had ducked or looked up on hearing 'fore!' Although the judge (the wonderfully titled Lord Ordinary) was inclined to think Phee had ducked, it was too much to expect an inexperienced player to have reacted perfectly. Gordon, on the other hand, who testified that he had been playing an excellent round, had concentrated on his own shot and, overconfident of his own abilities, had failed to consider the safety of Phee's foursome on the nearby hole. The golf club was 30% liable for having failed to conduct a formal risk assessment of the course, post signs or improve course design through planting and fencing. Liability was assessed at a total of £400,000.

Both Gordon and the golf club appealed (or, as Scots law calls it, 'reclaimed'): [2013] Scot CSIH 18. In the Inner House (the appeal court), Lord Hodge referred to a number of golfing liability cases, both Scottish and English, noting that they are all 'very fact specific'. His Lordship didn't think it unreasonable to say that golfers owe a duty of care to avoid injuring other players and that golf clubs have a duty to minimise risks on the links through warning notices, fences and other measures. He agreed with the judge below that Gordon had been negligent in driving when he did, with Phee within range (and probably also for failing to ascertain that his warning cry of 'fore' had been heeded). The club was also at fault – more so, in fact, than Gordon. It ought to have been aware that some players would be experienced and others not, and that not all golfers would play in a safe manner (regardless of their level of experience). A sign at the 18th tee (where Gordon had driven the injuring shot) warning players to watch for golfers in the position of Phee would, if obeyed, have prevented the accident. Lord Hodge disagreed with the Lord Ordinary's apportionment of damages, holding that the club ought to bear the lion's share (80%, not 70%), although he thought it was right not to make Phee contributorily liable for failing to respond to Gordon's warning cry.

[Link available **here**].

TRUSTS/SOLICITORS

Flexible approach in applying *Quistclose* trust to funds paid into solicitor's account

A Quistclose trust, first recognised in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL), arises when a lender advances money for a borrower's specific purpose; the funds are held on trust until the borrower's expenditure takes place. When that event occurs, the borrower becomes a debtor *vis-à-vis* the lender; but if the event does not occur, the borrower holds the funds on trust for the lender and as a result the funds are unavailable to the borrower's other creditors.

In *Challinor v Juliet Bellis & Co,* [2013] EWHC 347 (Ch), a group of 21 investors in a property development scheme paid moneys into an account held by the solicitors for the scheme. The firm paid the moneys (over £2 million) to the special purpose vehicle (SPV) which owned the land. The investors contended that the funds were held subject either to escrow conditions or on a *Quistclose* (or other resulting) trust for them, and that payment to the SPV was therefore wrongful. The evidence (which was complicated and not without gaps) was insufficient to establish the contractual basis for an express or implied escrow agreement. On the *Quistclose* point, while there was nothing in writing that clearly stated the investors' intention that the funds were to be held on trust for an exclusive purpose, in the view of Hildyard J this did not necessarily rule out the existence of some sort of trust – although the lack of written evidence made the investors' case more difficult to establish. The judge was prepared, however, to take a flexible view of the nature of a *Quistclose* trust and found that on the facts it was clear to all parties that the funds were not to be made immediately available to the SPV until the terms of the larger transaction were finalised. It was therefore a breach of some kind of *Quistclose*-like resulting trust for the solicitors to transfer the funds to the SPV, and the investors were entitled to the relief they sought.

[Link available **here**].

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