



NEWSLETTER

Canadian IT Law Association

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Biotech Expert Evidence: Admissibility of Phylogenetic Analysis

The Ontario Superior Court has delivered its reasons for ruling regarding admissibility of evidence in [R. v. Aziga](#). The Applicant was charged with 2 counts of first degree murder and 11 counts of aggravated sexual assault. He was allegedly diagnosed and advised that he was HIV positive in late 1996. Consequently, he was counseled to advise sexual partners of his HIV status prior to engaging in penetrative sexual activity. The Crown further alleges that the accused subsequently engaged in unprotected penetrative sexual activity with 11 named complainants without disclosing his HIV status. The Applicant's alleged acts and omissions resulted in 7 complainants becoming HIV positive. Two of the complainants died from resulting complications and 4 were placed at a grave risk of being exposed to the virus.

Health Canada offered to assist in the police investigation of the case via the provision of testing specimens from the Applicant and seven infected complainants. The essence of the ensuing forensic analysis was to "first establish the strain characteristic of the HIV present in the plasma specimen and to subsequently analyze the region of the HIV genome appropriate for offering phylogenetic relationships" (para 5). A protocol, called the "National HIV & Retrovirology Laboratories Procedures for Molecular Phylogenetic Analysis of Forensic HIV Specimen" was adopted in the conduct of the test. Essentially, this protocol is designed to ensure that the phylogenetic procedure is conducted under very prudent, objective and credible ethical practices. A final report

of the result of the procedure was submitted by a Dr. Paul Sandstrom who performed the phylogenetic analysis on the collected blood samples. According to the result of the analysis after decoding, the Applicant's and his alleged victims' strains implicated an HIV subtype A virus which is said to be very rare in Canada and constitutes only 2% of the prevalent HIV infections. Surveillance data link a higher proportion of the strain to African, Asian and people of mixed ethnicities as opposed to Caucasians.

In this application, the Crown seeks to tender the testimony of Dr. Sandstrom in regard to the outcome of the phylogenetic analysis. The Applicant opposes the admission of the evidence for a number of reasons; including a claim that the methodology of the phylogenetic testing procedure was flawed, and fell below accepted scientific standards. The Applicant raised issues regarding the credibility of the chain of custody of the samples. Also, the Defence argues that the opinion of Dr. Sandstrom as set out in the evidence was inconsistent. That opinion was central to the case of the Defence and capable of supplanting the role of the triers of fact (the jury).

Rejecting the objections of the Defence, the court held that the evidence in question meets the threshold of reliability and, therefore, it is admissible. According to the court, "phylogenetic testing is not a novel science. It has been accepted as evidence in the United States and elsewhere ... as an accepted approach to determine the evolutionary distance between two things, namely the relationship between HIV samples which is a use to which it is being put in the instant case" (para 17). The court observed further that "the evidence being proffered does not deal with the ultimate issue of whether the accused infected the complainants with the HIV. It is but one piece of circumstantial evidence in the Crown's case. The fact that the phylogenetic analysis is important to the Crown's case is not a reason for raising the level of scrutiny on the *voir dire* as to admissibility. It is [still] open to the Defence to cast

doubt as to its accuracy and hence its weight in the presence of the jury” (para 21). The court noted that it is outside its province to pass judgment on the particular methodology, but only to determine whether the present scientific technology or theory has a foundation in science. In the circumstance, there is no question that phylogenetic analysis passes that test. And the jury’s role in evaluating any doubts raised by the Defence and in apportioning weight to the evidence has in no way been supplanted or compromised by Dr. Sandstrom’s expert evidence.

Criminal Law: Uttering Threats on a Blog

In *R. v. Fenton*, Judge Judith Shrier of the Alberta Provincial Court presided over the prosecution of a charge under s. 264.1(1)(a) of the *Criminal Code* of uttering a threat to cause death, specifically to Prime Minister Stephen Harper. The trial proceeded on the basis of an agreement statement of facts, which was attached to the original judgment (but is not appended to the online version, though the facts from the accused’s first trial on the charge, overturned on appeal, can be found [here](#)). Fenton maintained a blog called “Drunken Soldier,” and on four occasions in 2006-2007 he posted comments in which he threatened (in colourful language) to kill the Prime Minister. The posts were accompanied by photos which suggested Fenton, a janitor, was actually a soldier, and which he admitted were intended to make him look “like a psychopath” (para. 45). At his trial, Fenton admitted that he had posted the statements but denied both that they were threats and that he had formed the *mens rea* for the offence, characterizing the statements both as a joke and as political satire; he compared himself to Hunter S. Thompson and Jonathan Swift (para. 35).

Quickly finding that, viewed objectively, the words used did convey a threat, Judge Shrier considered the evidence regarding intent. She noted that in order for *mens rea* to be made out, the Crown had to prove that the threat was uttered “(1) with intent to intimidate or instil fear or, (2) ... with the intent that it be taken seriously” (para. 12). She agreed with and amplified remarks made by the judge in the earlier appeal regarding:

the difficulty of figuring out intention in the case of an internet posting, as opposed

to the situation where an accused person utters the threatening words in a face to face communication to someone they know. In that case it is generally easier to determine the accused person’s intention, given the facts of the parties’ relationship, or the tone of voice used. Because statements posted on the internet are available to the general public, there is no relationship and so determining the tone can be difficult. Justice Kenny noted because of the potential size of the audience, and the “cloak of anonymity” provided, an objective evaluation of the words and the context in which they were written is especially important (para. 18).

Judge Shrier noted many inconsistencies between Fenton’s insistence at trial that the statements had been joking or satirical, and statements he had made to the police indicating that he was venting his frustrations. She noted his testimony that he felt his blog would be particularly interesting to younger teenagers, as well as his intention to look “wild and potentially dangerous” (para. 33). She ultimately concluded that, while he had not intended to carry out the threatened acts, he did intend for the threats to be taken seriously. Accordingly, the Crown had proven the *mens rea*, and Fenton was convicted.

Domain Name Decisions

“burberry.ca”

In *Burberry Limited v. Daniel Mullen, c.o.b. Virgin Enterprises Limited*, a sole CIRA Panelist considered a dispute over the name burberry.ca. The complainant (“Burberry”) is a British company that has a worldwide trade in clothing, bags, scarves, etc., which it manufactures, distributes and retails. It has owned the Canadian-registered trademark BURBERRY since 1926 (renewed twice). It advertises in Canada, sells its products through Canadian retailers and in the 2007-2008 fiscal year had sales of over CAN\$22 million. The registrant (“Mullen”) resides in Charlottetown, PEI. He registered the domain name on 9 October 2004.

In considering whether the disputed domain name was “confusingly similar” to a mark held by Burberry, the Panelist noted that when read, as required, without the .ca suffix, the domain

name was identical to Burberry's mark. It was thus confusingly similar under 3.4 of the CIRA Policy. The Panelist next turned to whether Mullen had a "legitimate interest" in the domain name, under 3.6 of the Policy. Dismissing Mullen's submissions on the point as unresponsive, the Panelist noted that the domain name did not resolve to any website. This was sufficient to underpin a ruling that Burberry had provided some evidence that Mullen had no legitimate interest in the domain name. Finally, considering whether the registration was made "in bad faith" under 3.7 of the Policy, the Panelist noted that Burberry had submitted a 16-page list of over 800 domain names registered by Mullen, "dozens of which correspond to registered Canadian trade-marks owned by third parties" (p. 10). Burberry further submitted that Mullen had domain names transferred away from him in a number of previous cases, where panels had found that Mullen had registered in bad faith because he intended to prevent mark holders from registering the names. This, Burberry argued, allowed the Panel to draw an inference of bad faith under 3.7(b) of the Policy. The Panelist accepted this argument, and found it unnecessary to deal with Burberry's argument that, since Mullen was competing with it for internet traffic, bad faith was also made out under 3.7(c) of the Policy. The domain name was ordered transferred to Burberry.



"emusic.ca"

In *EMusic.com Inc. v. Mogul Arts Inc.*, a 3-member CIRA panel (Groom, Lametti and Richard, Chair) considered a dispute over the domain name emusic.ca. The complainant ("EMusic") is a New York-based company that runs a major online music downloading company via its website at emusic.com, which has over 4.5 million songs available for download. It has owned the CIPO-registered trademark EMUSIC since 2005. The registrant ("Mogul") carries on business in Ottawa. It registered the domain name on 17 January 2001.

The Panel began by noting that the Policy required EMusic to have had rights in the relevant mark prior to the registration of the domain name. Since its CIPO registration was several years after the registration of the domain name, EMusic had to demonstrate that it had prior use of the mark. The Panel held that EMusic had used the mark (in

association with its emusic.com website) since 1998, and that the website was "global" and accessible from Canada; in fact, several Canadian publications had run articles discussing the site in 1999. Accordingly, EMusic had prior rights, allowing it to sustain the complaint. Considering whether the domain name was "confusingly similar" to the mark, the Panel noted that the domain name was identical to the mark when, per 1.2 of the Policy, the .ca suffix was ignored. Mogul had also conceded the likelihood of confusion in its response, and therefore the Panel ruled that confusing similarity was made out. Turning to whether Mogul had any legitimate interest in the domain name, the Panel found that Mogul had failed to demonstrate that it could meet any of the criteria in 3.6 of the Policy. In particular, it ruled that the domain name did not describe the character or quality of any wares, services or business of Mogul since any music-related services did not currently exist on the website. However, as to whether Mogul had registered the domain name "in bad faith" under 3.7 of the Policy, the Panel held that none of the criteria under 3.7 were made out, specifically: a) Mogul had declined an offer from EMusic to buy the domain name for \$500, which indicated that it not registered for the purpose of selling the domain name; b) EMusic did not assert 3.7(b), and the Panel held that in 2001, EMusic was not as well-known as it is today and thus Mogul "could legitimately have ignored its existence" (p. 8); and c) there was no evidence that, by registering, Mogul had intended to disrupt EMusic's business, given that the expression was generic in 2001 and that Mogul was not a competitor of EMusic.

Accordingly, the Panel held that EMusic had failed to discharge its onus of proving that the registration was in bad faith, and its complaint was dismissed. Panelist Lametti appended a separate concurring opinion, where he appeared to indicate that the domain name had initially been registered in 1999 under the University of British Columbia predecessor regime to CIRA, and then re-registered in 2001. While the Policy indicates that the official CIRA date is the one that should be considered in determining confusing similarity, he felt that the spirit underlying the CIRA process required panels to take into account an earlier registration. Had that been done here, he noted, it was doubtful whether EMusic would even have been able to make out confusing similarity.

International Cases of Interest

In late December, media sources [reported](#) that Verizon Communications had won what is being called the largest ever cyber-squatting judgment against OnlineNIC, a San Francisco-based Internet domain registrar. A federal court in northern California awarded Verizon \$33.15 million to Verizon, accepting allegations that OnlineNIC had registered 663 domain names, deliberately chosen because of the likelihood that they would be easily confused with domain names owned by Verizon. The default judgment was based on awards of \$50,000 in damages per domain name. As Verizon itself has [reported](#), it has “won a string of similar cases,” in that it has won three contested applications for preliminary injunctions against cybersquatters.

Recognition Evidence: Admissibility of Video Identification

The Ontario Court of Justice has delivered its ruling on the admissibility of video identification evidence in *R v. Briand* ([hyperlink not available](#)) The two Defendants, Chad Briand and Tyrel Gibson were charged with several firearms and weapons-related offences. They selected a trial by judge and jury. The Crown’s case, for the most part, is based on evidence from security video tapes which captured “several young men waiting for, getting on and off and travelling in an elevator in an apartment building in the Regent Park area of Toronto” (para 1). The Crown’s allegation is that the two Defendants were among the men captured in the videotape in the elevator and adjacent lobby in which they appeared to be exchanging and manipulating a firearm. One of the Defendants, Gibson, concedes in the preliminary inquiry that a reasonable trier of fact could find that he was one of the men whose images were implicated by the apartment videotapes. The Crown counsel conceded that such a conclusion could not necessarily be made of the second Defendant, Briand. Consequently, the Crown proposed to call a police officer as the only witness to testify by way of *voir dire* to tender an opinion recognition evidence to support the Crown’s claim that the second Defendant, Briand was also implicated in the videotape. The officer’s evidence is premised on

his claim of personal familiarity “with Briand and that certain characteristics of one of the men in the videotape help confirm his recognition of that man as the defendant Briand” (para 2).

In his testimony, the officer “identified a number of Briand’s kinetic idiosyncrasies, including his posture and manner of walking, which he described in some detail, and his tendency when nervous to either look down or play with something on the ground with his shoe” (para 13). The officer’s testimonial descriptions of the accused changed somewhat between the bail review and the preliminary inquiry.

In accepting the officer’s testimony, the court held that “[a] “Leaney” hearing is a relatively rare example of a very common type of preliminary judicial proceeding designed to determine the admissibility of contentious evidence. The obligation to conduct a *voir dire* where, as here, the Crown seeks to lead evidence identifying a defendant as a person appearing in videotape finds authoritative purchase in the Supreme Court’s earlier-noted decision in *R. v. Leaney*. In that decision, the Supreme Court held that “the standard of proof beyond reasonable doubt, rather than balance of probabilities, is only required “in those rare occasions when admission recognition opinion evidence as coming, either generally or in the circumstances of the instant case, within those “rare occasions” that command application of ultimate burden of proof” (para 22). The appropriate threshold is whether the Crown has satisfied both criteria.

The court found that the officer “is sufficiently familiar with Chad Briand to identify personal features that permit him to express an informed opinion as to the basis of his recognition of the defendant. Briand has been an object of [the officer’s] forensic attention for many years, and he has had the advantage of both extensive observation of the defendant and of occasional, if usually brief, personal exchanges” (para 23). According to the court, it is worth noting “that the evidence at issue is not a classical identification evidence but, rather, [it is] a sub-species more appropriately called recognition evidence” (para 23). In holding that the officer’s recognition evidence of the Defendant was admissible at the latter’s preliminary inquiry, the court noted that such evidence is, however, not free of reliability concerns, but such concerns

do not compromise the evidence as to preclude its reception or prevent a fair assessment of its credibility and weight which is within the province of a trier of fact.

This newsletter is intended to keep members of IT.Can informed about Canadian legal developments as well as about international developments that may have an impact on Canada. It will also be a vehicle for the Executive and Board of Directors of the Association to keep you informed of Association news such as upcoming conferences.

If you have comments or suggestions about this newsletter, please contact Professors Robert Currie, Chidi Oguamanam and Stephen Coughlan at it.law@dal.ca.

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Pour tous commentaires ou toutes suggestions concernant le présent bulletin, veuillez communiquer avec les professeurs Robert Currie, Chidi Oguamanam et Stephen Coughlan à l'adresse suivante : it.law@dal.ca

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