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Breach of House Arrest: Reliability of Electronic Monitoring System

The Ontario Court of Justice has delivered its judgment in *R v. Sitaram*. On March 2010, the defendant was given 18 month conditional sentence for a number of minor robberies which had aggravated features, especially in regard to the age of his victims. At the time the crimes were committed, the defendant was an 18 year old youth. When he was on bail awaiting sentencing, he was convicted of a failure to comply with a recognizance. In part, as result of that conviction, the court imposed electronic supervision in order to ensure that he complied with the conditional sentence order. On August 2010, the Crown alleged that the defendant breached the house arrest provision of his conditional sentence. The defendant's electronic supervision program was operated by the Ontario Ministry of Community and Safety and Correctional Services, and the technologies for the program (including monitoring software) were provided, under agreement, by a UK Company, Serco Geografix Ltd.

The Crown alleged that the defendant breached his house arrest by being absent from his residence on August 17 between 9:45 p.m. and 10:06 p.m. – a period of 12 minutes. He was only allowed to be absent that evening until 8:00 p.m. The electronic supervision system to which the defendant was exposed had three components: a) the personal identification device (PID) in the form of ankle bracelet which emits radio signals to b) the site monitoring unit (SMU) installed in the defendant's home which then transmitted information regarding the defendant's movement to c) the central monitoring unit (CMU) which is used by the authorities at the Ontario Monitoring Center to monitor offenders under supervision like the defendant. On the date in question, at 9.45 p.m. the electronic monitoring system indicated via an absence alert that the defendant had returned within the range of the SMU in his home. It recorded an absence of 5 minutes. Consequently, telephone calls were made from the CMU but were never answered by the defendant. At 9.54 p.m., a second absence alert was also generated from the SMU to the CMU indicating an absence of 12 minutes 22 seconds by the defendant. Again, the CMU authorities followed up with phone calls to the defendant's house, which were never answered. The CMU authorities then called the police which visited the defendant's house. The defendant claimed that he did not hear the telephone calls from the CMU and that at all material times, he was sleeping in his room and did not leave from the site of his house arrest. For the most part, it is the defendant's case that the electronic monitoring system was faulty and not reliable and has been in the habit of raising false absence alerts in the past. The defendant's mother testified in his defence. The defendant corroborated his mother's testimony. The Crown called in testimony the contract director of Serco Geografix Ltd., an electronics engineer by profession, who provided vast technical details on the operations of the electronic monitoring device. He testified to the fundamental simplicity of the system in terms of its operation, accuracy and ease of installation, maintenance and its capacity for self-reporting of any malfunctioning. In essence he testified that:

> The system was so deliberately designed to filter out brief absences from the home or the odd of missed transmission. Such a brief absences do not generate an alert. The PID transmits once every roughly 25-30 seconds although it is not 100% consistent. The Site Monitoring Unit will not generate PID absence alert until ten sequential transmissions from

> the PID are not received. This approximate five minute margin is built into the system to forgive short absences. If someone leaves the house during a curfew, the system gives the offender the benefit of the doubt for 5 minutes. If the offender returns within 5 minutes, the Central Monitoring Unit will not receive any alarm. Furthermore, if for some reason, a few transmissions are missed, no alert is generated ... for a 15 minute absence, some 30 transmissions would have been missed and that was improbable unless the offender was truly absent (para 42).

The court noted that in evaluating the above testimony, it was fully conscious of the fact that Serco Geografix witness called by the Crown had "an inherent bias in supporting the reliability of the electronic monitoring system created by the company he had served for a number of years" (para 77). Nonetheless, the court was convinced that his testimony was credible and that the electronic monitoring system was a reliable detector of unsanctioned absences by the offender from his or her residence. It noted that to so hold does not necessarily mean that the court was making a finding that "the system can never fail or send a false alert in any particular case" (para 78). In contrast, the court found that both the defendant and his mother were not credible witnesses. The mother was naturally a biased witness interested in getting his son out of trouble. A testimony of the defendant's conditional sentence supervisor which was upheld by the court indicated that the defendant was in the habit of pushing the boundaries of his conditional sentence without regard to the consequences. The court found that the defendant was in breach of the house arrest term of his conditional sentence.

In suspending the conditional sentence, the court ordered the defendant "to serve 90 days of the unexpired sentence in custody and that the conditional sentence resume on his release from prison custody" (para 120). In coming to this decision, the court noted that the defendant "is an offender who is immature, irresponsible, and fails to appreciate, despite being repeatedly told, the true character of a conditional sentence order. While any breach is serious, given the nature of this 12 minute absence, the lack of criminality during his breach, the offender's youth, immaturity, and lack of prior record , and the positive features supporting his rehabilitation, it would be unjust to [completely] terminate his conditional sentence order at this point and order him to serve over a year in jail". (para 119).

Judicial Interpretation: Jurisdiction of Patent Medicine Price Review Board over Medicines "Sold" in Canada

The Supreme Court of Canada has delivered it decision in *Celgene Corp. v. Canada* (Attorney General). The Appellant is a New Jersey-based pharmaceutical distributor that sold Thalomid to Canadians since 1995 through the Special Access Program (SAP). The SAP allowed an entity like the appellant which has no Notice of Compliance (NoC) to sell medicine in Canada. Under the SAP, doctors in Canada placed orders for the drug which was packaged in the appellant's facility in the US and then shipped FOB to Canada. Payment was made in US dollars pursuant to an invoice prepared in New Jersey which was mailed to Canada. The transaction was not subject to Canadian taxes. Unused drugs were not distributed in Canada but were returned to New Jersey. In 2006, the appellant obtained a Canadian patent. Consequently, the Patent Medicine Prices Review Board advised the appellant that the Board has jurisdiction to request pricing information from the appellant from the time it first sold Thalomid under the SAP. Initially, the appellant complied but subsequently it declined to provide further information. The appellant's case is that under commercial principle, the medicine was "sold" in New Jersey and consequently the sale and pricing was outside the Board's authority. According to it, s. 80(1) (b) of the *Patent Act* limits the authority of the Board to medicine "sold in Canada". The Board averred that its mandate has a consumer protection orientation and includes protecting Canadians from excessive price for patented medicine and which in turn allows it to deal with sales of medicines that are regulated under Canadian law, including medicines delivered and used in Canada. The Board argued the SAP was a Canadian law and the appellant's sales under that program came under the Board's mandate. The Board's interpretation of its mandate was upheld by the Federal Court of Appeal. In

dismissing the appeal, the Supreme Court held that the legislative history and context of the *Patent Act*, especially ss. 80(1)(b), 83(1) and 85 support the argument that Board has authority over the sales of Thaomid to Canadians under the SAP program. Limiting the interpretation of sale under the Act to its technical and narrow commercial appeal will be inconsistent with and undermine the consumer protection mandate of the Board. The rejection of the commercial framework of interpretation of the concept of sale under the Act is a dictate of the latter's surrounding legislative context and purpose.

Firing of Employees for Facebook Postings Upheld

In a recent decision which has been described as "the first clear Facebook firing case in Canada," the British Columbia Labour Relations Board has upheld the termination for cause of two unionized employees for posting offensive comments on Facebook. In *West Coast Mazda v. United Food and Commercial Workers International Union, Local 1518*, the employer (Mazda) and the Union were engaged in collective bargaining talks in the late summer and fall of 2010. One employee, J.T., was a key union organizer and had a history of being confrontational with management, including his direct supervisor, F.Y. On 27 August 2010 J.T. posted on Facebook a reference to "accidents happening" in the auto shop in which he worked. F.Y. found this disturbing and reported it to upper management. Soon after, J.T. posted status updates and had online conversations with references to being "angry" and stabbing people in the face. He also posted a list of the top five kills from the TV show "Dexter", which is about a serial killer. In late September J.T. burst into a meeting being held between management, some employees and Worksafe B.C., and received a written warning and reprimand for this. J.T. then began a series of Facebook posts which, among other things, referred to F.Y. as "Fixed Ops/Head Prick" and made other personal, extremely derogatory comments about his supervisors, including some of a sexual nature.

On 30 September a piece-work employee and union supporter, A.P., was sent home early from work due to business being slow. A.P. made postings in which he referred to Mazda and its managers as "a f**in' joke…crooks…greedy lowlife scumbags," spoke favourably of products sold by one of Mazda's competitors, and said "the gloves are off…it's game time." After an interview with management in which both J.T. and A.P. denied making most of the posts in question (A.P. specifically alleging that his Facebook account had been hacked), both were terminated for making disrespectful, damaging and derogatory comments on Facebook, which "were inappropriate and insubordinate and created a hostile work environment for co-workers and supervisors" and "were likely to damage the reputation and business interests of the Employer." The letter of termination also stated that J.T. and A.P. had compounded their wrongdoing by being dishonest during the interview" (para. 54).

Before the Labour Relations Board, the employer argued that it was justified in terminating the two employees, given their conduct. The employees argued that the employer was motivated to terminate the employees by anti-union animus, which it was the employer's burden to disprove pursuant to s. 14(7) of the Code, and that the employer had been building files on J.T. and A.P. in order to manufacture a reason to terminate them. Neither employee had a discipline record, and Mazda's policy regarding Facebook use expectations was not clear.

In its analysis, the Board distinguished the Facebook postings from rude or derogatory comments made "on the shop floor," in that the instant postings contained "damaging comments about the Employer's business" (para. 97). Relying on the analysis of the Ontario Superior Court of Justice in *Leduc v. Roman* (reported in a previous issue of this newsletter), the Board found that the employees could not have had a serious expectation of privacy for their Facebook postings, given that their Facebook friends numbered in the hundreds and among these were former employees of Mazda. While the Board found it puzzling that the employer had begun to monitor J.T.'s Facebook postings on the same day as union certification, it ultimately accepted the employer's argument that it was unsure what to do about the Facebook postings and simply continued to monitor them until they became intolerable. Moreover, the employer had allowed the employees to be represented by the Union and had given them a chance to explain their behaviour. Accordingly, the Board concluded that the

employe was not motivated by anti-union animus. As to whether there was proper cause for termination, the Board found that the comments were "offensive and egregious" and that termination was not out of proportion to the nature of the conduct (para. 112). Neither employee's denials of making the postings were accepted as being credible. Accordingly, the terminations were upheld.

CRTC Sets Usage-Based Billing Rates for Bandwidth

In a 25 January 2011 decision, the CRTC has "determine[d] that usage-based billing rates [UBB] for an incumbent telephone carrier's wholesale residential Gateway Access Services or equivalent services, and for an incumbent cable carrier's third-party Internet access services, are to be established at a discount of 15 percent from the carrier's comparable usage-based billing rates for its retail Internet services" (from the summary). The formal question before the Commission was whether the major telecom providers—Bell and Telus, as well as cable companies—should be required to provide a discount to small-scale ISPs, which purchase bandwidth on a wholesale basis, from the major carriers' retail rates. Bell and Telus argued that no discount was necessary, because "UBB rates shape end-user behaviour and that different UBB rates would lead to different behaviours by carriers' and competitors' end-customers", and that there was no appropriate basis on which to formulate an appropriate discount rate. The wholesale ISPs argued that "discounted wholesale rates would provide a margin from which competitors can recover additional costs associated with wholesale UBB, including activities related to customer inquiries and potential discrepancies between carrier usage bills and competitor records." Additionally, these companies incurred significantly more financial risk than the major carriers, and that UBB would reduce "an anti-competitive cross-subsidy from competitors to carriers that results from wholesale UBB rates not being cost-based."

The Commission noted that smaller-scale ISPs are in a more difficult position relative to the larger-scale providers, because "wholesale UBB rates are an additional, direct, and unavoidable cost that competitors will need to recover from rates paid by their retail customers." Moreover, "in the absence of a discount on carriers' wholesale UBB rates relative to their comparable retail UBB rates, smaller competitors' ability to continue to differentiate their retail Internet services would be unduly impaired." Accordingly, it ordered a discount of 15% be applied to the wholesale purchase of bandwidth by smaller ISPs.

Media commentary on the decision thus far has been critical, most of it focusing on the fact that the major providers impose "usage caps" on retail customers in order to deal with data-heavy downloading, and that this decision negates the ability of the smaller retailers to offer unlimited usage packages—which otherwise allowed consumers to avoid the caps. Bell, on the other hand, has maintained that any managed discount is "simply unnecessary."

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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Le présent bulletin se veut un outil d'information à l'intention des membres d'IT.Can qui souhaitent être renseignés sur les développements du droit canadien et du droit international qui pourraient avoir une incidence sur le Canada. Le comité exécutif et le conseil d'administration de l'Association s'en serviront également pour vous tenir au courant des nouvelles concernant l'Association, telles que les conférences à venir.

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

Avertissement : Le Bulletin IT.Can vise à informer les lecteurs au sujet de récents développements et de certaines questions à portée juridique. Il ne se veut pas un exposé complet de la loi et n'est pas destiné à donner des conseils juridiques. Nul ne devrait donner suite ou se fier aux renseignements figurant dans le Bulletin IT.Can sans avoir consulté au préalable un conseiller juridique.