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Federal Court Strikes Down Cabinet Globalive Decision

In *Public Mobile v. Canada (Attorney General)*, Justice Roger Hughes of the Federal Court of Canada heard an application for judicial review of the decision by the federal Cabinet to allow Globalive Wireless Management Corp. to launch its Wind Mobile wireless brand. A 2009 CRTC decision had concluded that Globalive did not meet the Canadian ownership requirements under the *Telecommunications Act*, but the Cabinet had overruled that decision in December 2009 and allowed Globalive to operate in Canada. The application for judicial review of Cabinet's decision was brought by a competitor, Public Mobile Inc.

Ruling that Public Mobile did have standing to bring the application, Justice Hughes examined the decision of Cabinet to rescind the CRTC's earlier finding that under s. 16 of the *Telecommunications Act* Globalive was controlled "in fact" by non-Canadians (it being agreed by the parties that the company was controlled "in law" by Canadians). Justice Hughes noted that while the Cabinet did not disturb the CRTC's findings of fact regarding Globalive, it did draw different legal conclusions from those facts, and specifically it "stepped outside [the policy provisions of the *Telecommunications Act*] by inserting a previously unknown policy objective into section 7; namely, that of ensuring access to foreign capital, technology and experience" (at para. 107). He held that Cabinet had "misdirected itself in law" by inserting the new policy objective which was not consistent with the Act, and observed that "It is for Parliament not the Governor in Council to rewrite the *Act*" (at para. 117). He further ruled that, in stating in its order that its decision "is based on the facts of this particular case and has a significant direct impact only on Globalive," Cabinet had acted inconsistently with the Act, since "The Governor in Council cannot restrict its interpretation to one individual and not to others who may find themselves in a similar circumstance" (at para. 118).

Given that these "improper considerations were fundamental" to the decision (at para.119), Hughes J. ruled that it should be quashed. Federal Industry Minister Tony Clement has already announced that the federal government will appeal the ruling.

Service Contract Authorizes ISP Disclosure to Police

In *R. v. Brousseau* (no hyperlink available), Justice B.L. Croll of the Ontario Superior Court of Justice heard an application by the accused, Brousseau, to exclude evidence disclosed to the police by his ISP, Rogers, pursuant to s. 24(2) of the *Charter*. In May 2007 an officer investigating child sexual exploitation identified a computer with a certain IP address as having an active connection to a P2P network where child pornography was available, and determined that the computer was downloading child pornography. He established a connection with the computer and browsed a shared folder, in which he found child pornography. Using a domain name search he determined that the IP address had Rogers as its ISP, and emailed a "Letter of Request for Account Information Pursuant to a Child Sexual Exploitation Investigation" to Rogers, pursuant to the *Personal Information Protection and Electronic Documents Act* (PIPEDA). Rogers provided the name and address of the accused, as the subscriber linked to the IP address, and a police search of the accused's house yielded documents, a computer and discs which were alleged to contain child pornography.

The accused argued that his right to security against unreasonable search and seizure under s. 8 of the *Charter* had been infringed, and that the evidence

should be excluded under s. 24(2). He argued that since the police had not gotten judicial authorization to order to obtain the subscriber information from Rogers, the warrant was supported by illegally obtained information and thus the search was unconstitutional. Justice Croll first addressed whether the accused had a reasonable expectation of privacy in the items seized, finding that he did not. Noting that the files were in fact on a P2P network, she observed:

> given that the Applicant availed himself of file sharing software, I am of the view that it cannot be said that he had a reasonable expectation of privacy in the shared computer file. As stated in Ewanyshyn at para. 20, "the police learned of the contents of this computer because of the peer-to-peer software of the computer, and not because any name or address was given to them by Shaw, Mr. Ewanyshyn's ISP." In other words, anyone knowledgeable about navigating the internet could have accessed this shared computer file and found this information (at para. 12).

She also noted that the fact that Rogers was the ISP for the accused's IP address was a matter of public record, and thus not subject to any expectation of privacy.

Croll J. then turned to the issue of whether there was a reasonable expectation of privacy in the accused's subscriber information held by Rogers, an issue on which this newsletter has reported in the past and on which the lower courts have been divided. She noted that the information in question had been held at Rogers' offices, which weighed against an expectation of privacy. She further noted that in the contractual documents between Rogers and the accused, it was agreed that the customer did not own the IP address and that Rogers was authorized to disclose even confidential information to the police where the user was alleged to be involved in illegal activities. Accordingly, there was no expectation of privacy or confidentiality in any information held by Rogers. Moreover, the information itself did not reveal any core or biographical details about the accused, since it was "basic commercial information" (at para. 37).

Justice Croll also examined ss. 7(3) of *PIPEDA*, which authorizes organizations to disclose personal information to law enforcement. While the evidence indicated that Rogers typically complied with such requests, ss. 7(3) was in fact permissive and Rogers would have been free to refuse if it wished. "In this case, as part of their investigation, the police simply asked for information from a third party that is not bound by an obligation of confidentiality to the Applicant. In my view, this is something that the police must routinely be allowed to do as part of their job" (at para 45). In the result, the court held that the accused did not have a reasonable expectation of privacy in the subscriber information; thus, s. 8 of the Charter was not engaged. Justice Croll did rule that, if she was in error as to s. 8, the evidence would be admissible under s. 24(2) in any event. The application was dismissed.

Use of Keyword Advertising in Internet Marketing

The BC Court of Appeal has delivered its decision in *Private Training Institutions Agency v. Vancouver Career College (Burnaby)*. The appellant is a regulatory body responsible for overseeing career training institutions in BC. Following pressures from some of its members, the appellant approached the chambers judge to restrain the respondent from using the business names of other rival private career training institutions in its internet advertising strategy. The respond did purchase several keywords from internet search engines, including Google and Yahoo for the use of competitor's names as a keyword. Consequently, the respondent's name appeared preferentially on the list of names that pop up whenever users searched the internet using the competitors' names. According to the appellant, this conduct of the respondent contravened the appellant's Bylaw 29(1) which prohibits members from engaging in deceptive or misleading advertising. The appellant presented in evidence the testimony of two prospective students. One testified that her Google search for "Van-Arts" was directed to an internet page showing the names of two institutions: "Vancouver Art College" and "VanArts School". Assuming the two to be the same, she requested information from both schools and did receive telephone calls from both for which she realized that they were different. The second witness testified that she searched for Vancouver Community College; the respondent's name was the first on the resulting

internet page; leading her to consequently interview and enrol in the respondent school before she realized that the respondent was not Vancouver Community College. After cancelling her registration, the respondent refunded her registration fee. Despite these testimonies, the chambers judge was not persuaded that the respondent was involved in misleading advertising or in contravention of the appellant Bylaw. The judge concluded the respondent's use of keyword advertising, specifically its use of competitor's names in this form of internet marketing is not misleading. He found that even when regard is given to the consumer protection context of the appellant's mission, average consumers are entitled to some credit and are not "completely devoid of intelligence or of normal powers of recollection" (Para 14). He concluded that the two appellant witnesses were not misled by the respondent.

Upholding the chambers judge's decision (reported in a previous issue of this newsletter), the Court of Appeal held that his framing or identification of the issue in regard to whether a reasonable ground existed to believe that the respondent's use of keywords involving the names of competitors resulted in a misleading or likelihood of a misleading advertisement was the most appropriate enquiry. The court also agreed with the lower court's conclusion that the respondent's exploitation of keyword search for internet advertising did not contravene the appellant's Bylaw. However, the Court of Appeal rejected respondent's contention that "their keyword advertising is akin to advertising that places a business advertisement proximate to a competitor's listing in the Yellow Pages of a telephone book." The Court also rejected "the appellant's assertion that the proper analogy is to the white pages where individual names appear" (Para 26). According to the Court:

> These propositions seek to analyze the legal implications of the use of modern technology with practice and technology that bears no resemblance to it. The Yellow Pages are based on topics, not names. The white pages contain names, but no choices. An Internet page gives choices, names and topics. It is information technology carried far beyond the traditional (Para 27).

Removal of Accused's Information from Court Services Website

The BC Provincial Court has delivered its ruling in *R v. J.S.G.* The applicant in this case applied to have his name removed from the website maintained by the Government of BC which is operated by the Court Services Branch of the Ministry of the Attorney General. The website, known as Court Services Online (CSO): https://eservice.ag.bc.ca/cso/index.do, provides access to members of the public to information regarding cases taking place in courtrooms province wide. According to the court, the website is established in furtherance of transparency in the administration of justice and is operated subject to such limitations for good cause regarding protection of young persons, victims of crimes, informants, etc. The website contains a disclaimer against any guarantee or warranty of accuracy of information contained in it. The applicant was charged with common assault in 2006 and a trial was held the following year in which he was found not guilty and acquitted. He seeks by the present application to have the information regarding his case removed from the CSO. He premises his application on the grounds that he is a corrections officer and is concerned that the information in the CSO may be accessed by inmates.

The court noted that the present application, on the face of it, does not raise the issue of *functus officio* (a task performed) in which case the court is being called to reconsider a matter it has already adjudicated upon. The court also observed that should it have the power to order the removal of the applicant's information from the CSO, such power is essentially discretionary and ought to be exercised subject to appropriate procedure. After reviewing the *Criminal Code* and *Youth Criminal Justice Act* provisions regarding banning of the publication of certain information and the court's common law power to order publication ban, the court found that none of those grounds accommodate the present application. In dismissing the application, the court held that it is "unable to find that I have any authority or grounds to make an order requiring the Ministry of the Attorney-General to remove the applicant's name from the website" (Para 13). Expressing sympathy for the applicant, the court held further:

"I would encourage him [the applicant] to forward a copy of these reasons to the Ministry of the Attorney General ... and request that as a policy matter, they remove this entry from their website". For the purpose of this application, the court also ordered that the "applicant be identified only by initials when these reasons are posted on the Provincial Court judgment database" (Para 15).

Facebook Data: Preservation Order for Personal Injury Proceeding

The New Brunswick Court of Queen's Bench has delivered its ruling in an application in *Sparks v. Dubé*. The plaintiff and defendant were involved in a vehicle accident in Fredericton, December 2008. In January 2010, the plaintiff sued the defendants claiming special damages, interests on damages and costs of the action. She contends that she was undergoing physical health problems that arose from the accident, which were of enduring nature thus bringing her claim outside the $2,500 insurance claim cap on soft tissue injuries. Preparatory to examination for discovery and possible trial, counsel for the defendant engaged the services of a private investigator "to determine whether Ms. Sparks was a member of any social networks" (Para 13). The investigator deposed to affidavits disclosing that he found that the plaintiff has a personal webpage on both social networks Facebook and Linked and that she had for several years been a member of Facebook. As a Facebook member, the investigator revealed that he accessed certain aspects of Ms. Spark's posted information, i.e. only from those areas of her account that were available in what might be termed her "public space". The private investigator's affidavit contains colour prints of photographs downloaded from the plaintiff's Facebook profile as well as other identifying information including some information about her current address, her home town and a photograph found on her Profile that appears to be a formal photograph taken of her at the time of her graduation. Even though it was not clear that some of this information post-dated the accident, they were posted on Facebook after the accident. Pursuant to plaintiff counsel's generalized concerns regarding data destruction, in the words of the court, he brought an ex parte motion "requesting that a panoply of interrelated orders be issued compelling the downloading and preservation of all of the contents of the social network sites the Plaintiff is subscribed to at present. It requests that this task be performed by her personally under the court ordered direct supervision of her counsel" (Para 1). Justice Fred Ferguson acknowledged the overly intrusive nature of the detail of the order sought by the defendant-applicant.

However, after reviewing the defendant-applicant evidence and relevant authorities, the court found that the applicant has convinced it that an ex parte approach is suited for the present proceeding since having both parties present for the motion "would expose the currently unexposed data to an unacceptable risk that it may be removed from the Profile(s) of the Plaintiff before it can be secured" (para 84). It also found that evidence establishes that "the Profile sought for Facebook should be ordered preserved and secured by downloading and sealing" (para 86) but declined to suggest that there is basis for suspicion of interference in regard to plaintiff profile in the other social/professional network site, Linked, which was also accessed and investigated by the private investigator. Justice Ferguson then provided a detailed "Preservation Order and, in the alternative, an Interlocutory Injunction" which compelled the plaintiff :"1) to preserve and maintain without deletions or alterations the entire contents of her personal Webpage(s) on the social network Facebook including but not limited to photographs, text, links, postings, event details and video clips until further direction of the court". The court additionally ordered the plaintiff to also participate, where her participation is required, in the carrying out of further detailed consequential orders in support of the first order (Para 87(1)).

Foreign Caselaw: Cellphone a "Computer" For Criminal Sentencing Purposes

A recent decision by the U.S. 8th Circuit Court of Appeals upheld the finding of a district court that a sentence for a criminal offence could be aggravated by "use of a computer" where the computer in question was a cell phone. In *USA v. Neil Scott Kramer*, the accused pleaded guilty to transporting a minor across state lines for the purposes of criminal sexual activity, and admitted he had used his cell

phone to communicate with his victim. Under the relevant sentencing provision (18 U.S.C. § 1030(e)(1)), the district court judge increased Kramer's sentence by 18 months because he used a computer in the commission of the offence. On appeal, Kramer argued that a phone used only for communicating was not a computer, and even if a phone could be a computer the prosecution had not proven that his was.

In upholding the sentence, the Court of Appeals observed that while a cellphone might not be a computer in the colloquial sense, the definition of "computer" in the relevant statute is quite broad; it need only be "an electronic … or other high speed data processing device performing logical, arithmetic, or storage functions," which "captures any device that makes use of a electronic data processor, examples of which are legion." It also quoted from the US Sentencing Guidelines Manual, which sets out that aggravated sentencing for computer use was limited to cases where the computer was used "to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor," and "does not apply to every offender who happens to use a computer-controlled microwave or coffeemaker." It was also clear from the evidence that the phone in question "performs arithmetic, logical, and storage functions" when used for its basic functions. The sentence was upheld..

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.

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