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Askov Proceeding: Delay of Electronic Disclosure

The Nfld. and Labrador Supreme Court has delivered its ruling in *R v. Taylor* (hyperlink unavailable). All four accused persons took out an Askov application on the basis of unreasonable delay of their trial which allegedly compromised their right to trial within a reasonable time pursuant to the s. 11(b) of the *Charter*. For the most part the charges involved conspiracy to traffic in controlled substance, cannabis marijuana. They were granted bail on different conditions. In the present application, they allege generally that 50 months since charges were laid, the Crown has as yet to fix a trial date let alone provide all the required disclosure in a timely manner. Consequently, the applicants have continued to be burdened by the terms of their bail and by the trial hanging over them without closure in sight, a situation that has resulted in the truncation of their family and business lives.

The court found for the most part that the delays "were caused by Crown disclosure problems or delays with transcripts of preliminary inquiry not being provided in a timely manner" (para 17). The RCMP use of electronic disclosure ran into difficulties resulting in extra time to collect relevant warrants and wiretap evidence. However, the court found that some of the disclosure issues were "not always a Crown problem, but [were] because of the software packages being used and the volume of disclosure…" (para 62). Nonetheless, the court found that the defence co-operated with the Crown at all times; they were not obstructionist in their approach; indeed, they made some concessions to the Crown. The court rejected the suggestion that such concessions amounted to the waiver by the defence of their Askov rights. The court held that "it is clear that any waiver of a right to trial within a reasonable time can either be explicit or implied… the waiver must be clear and unequivocal" (para 68). The court found that for the most part, the defendants demonstrated that the delay resulted in real prejudice to them and, on balance of probabilities, a stay of proceeding pursuant to the Askov application was warranted.

Facebook Evidence in Personal Injury Proceeding

The Ontario Superior Court of Justice has delivered its ruling in *Leduc v. Roman*. In that case, the Plaintiff was involved in a car accident. He sued the Defendant for negligent driving which has allegedly resulted in limitations to the Plaintiff's personal life. When the Plaintiff was examined for discovery, the Defendant did not ask any questions in relation to the Plaintiff's Facebook profile. The Defendant subsequently discovered that the Plaintiff maintained a Facebook account, the publicly available part of which only showed the Plaintiff's name and picture. In the private part of the Facebiik account, the Plaintiff limited access only to his Facebook friends. In response to Defendant's production-related motion, the lower court, among other things, ordered the Plaintiff to copy and preserve every page from his Facebook pending the hearing of the main motion. On the return of the motion, the court declined to order the Plaintiff to produce the pages from his Facebook profile. The court held that the onus was on the Defendant to prove that the Plaintiff has relevant materials on his Facebook profile. Since the Defendant has only a picture of the Plaintiff from latter's Facebook profile, the Defendant's attempt to suggest that there is relevant information in the Plaintiff's Facebook profile amounts to speculation or a fishing expedition. According to the court, the Defendant's request for the entire site was far too broad and did not take into cognizance the fact that

the Plaintiff's Facebook profile hosts private as well as public page postings. The former entitled the Plaintiff to some expectation of privacy unless the Plaintiff provides reasonable basis to prove that there is relevant information therein.

In reviewing the Defendant's appeal, the Superior court held that "[a] party who maintains a private or limited access Facebook profile stands in no different position than one who sets up a publicly-available profile. Both are obliged to identify and produce any postings that relate to any matter in issue in an action" (para 32). The Court, however, agreed with the Master that "mere proof the Existence of a Facebook profile does not entitle a party to gain access to all materials placed on that site" (para 33). The court ruled that through examination for discovery parties will be in a position to narrow down what profile contents may be relevant for the case at hand. Since the Defendant did not have that opportunity, the Court noted that "trial fairness dictates that the party who discovers the Facebook profile should enjoy some opportunity to ascertain and test whether the Facebook profile contains content relevant to any matter in issue in an action" (para 34). The Court held that the Master's apprehension on the overly broader nature of the Defendant's motion to produce Plaintiff's Facebook profile was properly founded. Also the Master was right in ordering the preservation of the profile. However, he erred in exercising his discretion to dismiss the motion to produce without providing an opportunity to the Defendant to cross-examine the Plaintiff. The Court granted the Defendant leave to cross examine the Plaintiff on his Facebook profile.

Information Posted on Website not Concealed

In *Pearlman v. American Commerce Insurance Co.* the plaintiff held automobile insurance issued through the defendant, an American company. He was injured in a traffic accident in British Columbia, and made a claim in connection with that accident. Eventually the insurance company wrote to him to say that he had received the maximum medical benefits of $10,000 under his policy and that no further medical payments would be made on his behalf. The plaintiff wrote to the company because he learned from a lawyer representing ICBC that the company had signed a Power of Attorney with the Canadian Council of Insurance Regulators under which they were liable to pay medical benefits up to $150,000. The company wrote to say they were seeking legal advice, and the plaintiff filed a court action alleging bad faith, and in particular claiming that they had attempted to conceal the Power of Attorney. The Court of Appeal granted the company's application for summary dismissal of the plaintiff's claim. In particular on the issue of the Power of Attorney they held:

> 27 Nor is there anything in the allegation that the defendant concealed the Power of Attorney and Undertaking, or failed to reveal its existence to the plaintiff in a timely way. The PAU is a document readily available to the public. Its existence was known to ICBC, or its legal advisors, which is how it came to the plaintiff's attention in the first place. The evidence before the judge was that it was accessible on the website of the Canadian Council of Insurance Regulators. While it may be unfortunate that the defendant's employee was not familiar with the Power of Attorney and Undertaking and its ramifications, the defendant can hardly be accused of concealing or failing to disclose a document readily accessible on the Internet.

Jurisdiction in Defamation: Relevance of Internet Publication

The Ontario Superior Court of Justice has delivered the reasons for its decision on a motion by the Defendant in *Banro Corp. v. Éditions Écosociété Inc.* (the Defendant). The Plaintiff sued the Defendant for defamation, alleging that a book titled *Noir Canada Pillage, corruption et crininalité en Afrique (Noir Canada)* published by the Defendants in Montreal defamed the Plaintiff. The Defendants included the writer of the book (Alain Deneault) and two research and editing assistants as well as the publisher. All of them, including their place of business, were based in Montreal. The book was written in French and was widely distributed across Canada via book stores, including those in Toronto. The book was also available for purchase on the Defendant publisher's

website. The book was the subject of a speech delivered in Toronto by one of the research and editing assistants to the writer. It was also referenced in many websites in newspaper articles available and accessible in Ontario and the rest of Canada.

On its part, the Plaintiff is a publicly quoted exploration company in the business of exploration and development of gold properties. Its corporate head office is in Toronto, ON. It carries out exploration and development activities in the Democratic Republic of Congo (DRC) which are supported by offices and employees in Ontario, UK, South Africa and DRC. *Noir Canada*'s "exploration" of the Plaintiff's ownership and exploration of its properties in the DRC was the subject of the defamatory proceedings.

In the present motion, the Defendants move for a stay of the Plaintiff's action arguing that there is no real and substantial connection between the subject matter of the action and Ontario, and that Quebec is the proper Province to assume jurisdiction in the present action. In its argument, the Plaintiff's case is that the [Ontario] court should assert both presence-based jurisdiction and assumed jurisdiction. In agreeing with the Plaintiff, the court found that the Defendant was carrying on business in Ontario by disseminating copies of the book for sale in book stores in Ontario and by making the book available for sale in Ontario via the internet. The court found that "Dissemination of *Noir Canada* and the allegedly defamatory statements occurred in Ontario, as well as in other locations, by virtue of *Noir Canada*'s sale and marketing in Ontario by the defendants via, among other venues the internet and in the speech given by the Defendant, William Scaher, in Toronto" (para 21). The court found that even though the alleged act occurred in Quebec that fact was not determinative as the act also occurred in Ontario and via the internet. According to the court, "The tort of defamation is not complete until publication. Publication occurs where it is received, for example, where it is downloaded from the internet or where the book is read" (para 23). Responding to the Defendant's argument, the court observed that "[e]ven if Ontario judgment could not be enforced in Quebec, such a judgment could be of significant value to the plaintiff in restoring the plaintiff's reputation in Ontario".(para. 54).

On-screen Information on Airline Passenger Manifest Attracting Reasonable Expectation of Privacy

The Nova Scotia Supreme Court found a violation of section 8 of the *Charter* when police obtained information from a Westjet computer monitor without a warrant or an application under *Protection of Privacy and Electronics Document Act (PIPEDA)* in *R. v. Chehil*. The accused had been charged with possession of cocaine for the purposes of trafficking. The police had attended at the offices of Westjet at the Halifax International Airport and looked at the passenger manifest for a Vancouver flight arriving in Halifax. They did not have a search warrant or the permission of any passengers, but rather were simply permitted by Westjet staff to look on screen at the manifest. They were not investigating any particular person, but as they looked at the manifest they discovered that the second last ticket issued was a one-way ticket which had been paid for in cash shortly before departure and that the passenger had only one checked bag. Based on that information the officer testified that he formed reasonable suspicion that the accused, who was the passenger, was a drug courier in possession of drugs. The police then separated his bag after the flight arrived and had it examined by a sniffer dog, which indicated the presence of narcotics. When the accused picked up his bag he was arrested for possession of narcotics, and his bag was broken open without his permission, where three kilograms of cocaine were found. The accused applied to have the evidence excluded, on the basis of violations of his section 8, 9 and 10 Charter rights.

MacDonald J. held that the application should be granted and that the evidence should be excluded. He based this decision solely on a finding around the police search of the passenger manifest, without finding it necessary to consider the subsequent detentions and searches. MacDonald J. noted that the information recorded on the Westjet manifest went to a biographical core of personal information. The evidence showed that the airline potentially recorded a great deal of information: the head of the Corporate Security Department for Westjet testified that it was "unlimited". The information recorded could reveal physical disabilities of a passenger, possible mental

disabilities, allergies, religious affiliation, a passengers' attitude toward other religious affiliations, and reasons for travelling and with whom. MacDonald J. noted that this information was not available to the public and would be protected under the Protection of *Privacy and Electronics Document Act (PIPEDA)*. Further the search was taking place in a private office, not in a public area of the airport, and a member of the travelling public would have a reasonable expectation of privacy in this information.

MacDonald J. went on to conclude that the police obtained this information without any authority to do so. They did not have a search warrant and they had not made a request under *PIPEDA*. In any event the information would not have been available under *PIPEDA* if they had made a request, because the police were not engaged in an active investigation or gathering intelligence, but instead were undertaking a fishing expedition. Although *PIPEDA* did allow information to be released for law enforcement purposes, that did not mean that the police were entitled to simply consult the manifest whenever they wanted to see whether they saw anything suspicious. Further, Westjet had violated its own policy in allowing the police to look at the manifest on screen. He found telling that the police and the Westjet staff both recognized that more formality would be needed if the police had wanted a hard copy of the manifest printed. Accordingly there was a violation of section 8.

The evidence of the cocaine was real evidence and its admission would not render the accused's trial unfair. However, the breach was serious enough to warrant the exclusion of the evidence. The police had simply developed the habit of going to the Westjet office and consulting the passenger manifest whenever they chose to, and staff at the airport had allowed them to do so. This was not a good faith investigation as the police knew the proper procedure to follow to obtain this information and ignored it. This was either a flagrant violation of the rights of the accused or ignorance as to the scope of the police officer's authority, but in either event the breach was serious enough to warrant the exclusion of the evidence, even though it was crucial to the Crown's case.

This case provides an interesting contrast to other recent decisions, such as the Saskatchewan Provincial Court decision in *R. v. Trapp*, 2009 SKPC 5, (see the IT-Can newsletter of February 5, 2009) which have relied on *PIPEDA* in a way that (ironically given its title and purpose) has tended to erode privacy protection. In a variety of lower court rulings, judges have been deciding that it is possible for police to obtain subscriber information from internet service providers, for example, simply by making a request under *PIPEDA*, rather than going through the process of applying for a warrant (though against that approach see *R. v. Kwok*, [2008] O.J. No. 2414). The rationale seems largely to have been that *PIPEDA* allows release of information for law enforcement purposes: courts have not been taking that to mean that *PIPEDA* is not violated when the information is released under a warrant, but instead to provide an alternative basis for obtaining information which does not require judicial scrutiny. In *Chehil*, on the other hand, MacDonald J. relies on the fact that the information in the passenger manifest would be protected by *PIPEDA* as one of the justifications for finding that passengers would have a reasonable expectation of privacy in the information. He does also note, of course, that even the requirements for releasing information under *PIPEDA* were not met, so the decision is not necessarily inconsistent with previous cases.

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

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