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Early Adoption of Sedona E-Discovery Principles

The Supreme Court of Nova Scotia and the Nova Scotia Court of Appeal recently released tentative versions of the new Nova Scotia Civil Procedure Rules. The province's Rules Revision project has been under way for several years, and the formal release of the new Rules is set for April, 2008. Among the new rules that make up the pre-trial discovery regime is Rule 16, entitled "Disclosure of Electronic Information." This is a unique rule among Canadian civil jurisdictions, dealing with the often-contentious matter of disclosure obligations relating to electronic documents. It is clearly designed to incorporate the kind of flexibility required to deal in an efficient matter with what can sometimes be extremely labour-intensive and expensive procedures. Rule 16.01 sets out that the goal of the Rule is to provide for the discharging of electronic disclosure obligations in one of three ways: (1) by agreement between the parties; (2) by adherence to the Rule, which acts as a default standard; or (3) by judicial order if neither of the first two options is achievable. Rule 16.03 also imposes specific obligations regarding the "Duty to Preserve Electronic Information" once litigation has commenced. The new Rule was clearly influenced by the Sedona Canada Principles Addressing Electronic Discovery (reported on in the February 7, 2008 newsletter) and likely represents the first effort to incorporate them into a civil procedure regime.

Domain Name Disputes: Greediest Cybersquatter Yet?

In *Bank of Montreal v. Chris Bartello*, a 3-member CIRA panel (Biron, Moyse and Branson, Chair) considered a dispute over the domain name bmofield.ca. The Complainant is the Bank of Montreal (the "Bank"), an international banking institution well-known by the acronym "BMO." This acronym is incorporated into fourteen registered trademarks held by the Bank, as well as pending registration of several marks related to the "BMO Field," a stadium named after the Bank. It appeared that the Registrant ("Bartello") had obtained the disputed domain name two days after the appearance of news releases regarding the opening of BMO Field and the fact that the Toronto FC Soccer Club would play there. In a blatant display of cybersquatting, the website displayed a "For Sale" sign and provided the Registrant's hotmail address. When contacted by counsel for BMO, Bartello invoked the expense to which BMO would have to go to have the domain name transferred, and offered to convey it to them for one year's season tickets to the Toronto FC soccer matches. The evidence also indicated the Bartello had registered domain names containing the names of various versions of the Xbox, Toyota products and exhibitionplacestadium.ca, *inter alia*. The panel had little trouble ascertaining that the registration amounted to "hijack," as well as being "abusive and opportunistic" (para. 28), and ordered the domain name transferred to BMO.

Journalist-Source Privilege and the Internet

The issue of the extent to which the concept of "journalist" has been changed by the nature of the internet, and the extent to which this has an impact on legal issues, continues to bubble up in case law. The issue previously arose, for example in *R. v. LeBlanc*, discussed in the December 14, 2006 newsletter. Most recently the issue arose in the

Ontario Court of Appeal decision in *National Post v. Canada*, though only as a peripheral question which ultimately was not crucial to the court's decision.

The case concerned an array of warrants issued in order to obtain from a reporter, through the offices of the *National Post*, an envelope in which confidential information had been leaked. The particular information concerned a document that appeared to be a copy of a Business Development Bank of Canada loan authorization for a hotel in then Prime Minister Jean Chrétien's home riding, and which potentially showed that Chrétien was in a conflict of interest. The police were seeking the document and envelope in order to try to determine who had sent them. There were a variety of issues in the case, including the extent to which, if at all, the document and envelope were protected by journalist-confidential source privilege. The reviewing judge had relied on the existence of such privilege in quashing the warrants.

On appeal, the Crown argued that this portion of the decision was mistaken. In particular they claimed that:

> …in today's society we have no principled basis to distinguish between those journalists who are entitled to confidential source relationships and those who are not. Today, many persons, especially by using the internet, may be called "journalists" or "the press" because they disseminate information to the public, yet may not merit the journalist-confidential source privilege (para 98).

It seems clear that this issue will need to be addressed in a more complete fashion in some future case. In this case, the court was content to observe that since journalist-confidential source privilege was settled on a case-by-case basis, it was sufficient that the National Post certainly fell within the parameters of those persons who might be entitled to the privilege. The court chose not to address "the boundaries of legitimate journalism" (para 99). On the particular facts of the case they found that there was no claim of privilege.

Narrowed Grounds for Challenging Breathalyzer Readings

Bill C-2, the *Tackling Violent Crime Act*, which among other things changes the basis upon which the results of a breathalyzer test can be challenged in court, has received Royal Assent. Under the new amendments, the basis for attempting to rebut the presumption that a person's blood alcohol level was the same at the time of the test and at the time of the reading has been considerably narrowed.

Under the previously-existing legislation, section 258(1)(c) created the presumption that the test results also showed the person's blood alcohol level at the time of the offence. However, that presumption was simply said to be made "in the absence of evidence to the contrary".

Under the new provision, the test reading is said to be "conclusive proof" of the person's blood alcohol level at the time of the offence. This presumption is now capable of being rebutted only by offering evidence tending to show all three of the following:

(i) that the approved instrument was malfunctioning or was operated improperly,

(ii) that the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80 mg of alcohol in 100 mL of blood, and

(iii) that the concentration of alcohol in the accused's blood would not in fact have exceeded 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed.

A similar limitation on the basis for challenging the presumption has been made when blood samples have been taken.

The goal of these amendments is to limit challenges to those relating to the actual functioning of the technology concerned, and therefore to remove various possible defences based primarily on actions of the accused. This is made most clear by the further provision which has been incorporated into the *Criminal Code*:

(*d.01*) for greater certainty, evidence tending to show that an approved instrument was malfunctioning or was operated improperly, or that an analysis of a sample of the accused's blood was performed improperly, does not include evidence of

(i) the amount of alcohol that the accused consumed,

(ii) the rate at which the alcohol that the accused consumed would have been absorbed and eliminated by the accused's body, or

(iii) a calculation based on that evidence of what the concentration of alcohol in the accused's blood would have been at the time when the offence was alleged to have been committed.

Privacy: Commissioners Release New Video Surveillance Guidelines

On March 6, 2008, the Privacy Commissioner of Canada and the Information and Privacy Commissioners of Alberta and British Columbia jointly released the *Guidelines for Overt Video Surveillance in the Private Sector*. The Introduction to the Guidelines notes that they were designed to respond to the increased use of surveillance video by private sector entities. Many companies and property owners, particularly retailers, use it for security and crime control purposes, while other uses such as allowing parents to view their children's daycare facilities, are becoming more common. The Guidelines are designed to allow these organizations to tailor their use of surveillance in order to comply with applicable privacy legislation, but do not apply to covert surveillance such as is conducted by private investigators or by employers.

The Guidelines first offer "10 things to do when considering, planning and using video surveillance:"

1. Determine whether a less privacy-invasive alternative to video surveillance would meet your needs.
2. Establish the business reason for conducting video surveillance and use video surveillance only for that reason.
3. Develop a policy on the use of video surveillance.
4. Limit the use and viewing range of cameras as much as possible.
5. Inform the public that video surveillance is taking place.
6. Store any recorded images in a secure location, with limited access, and destroy them when they are no longer required for business purposes.
7. Be ready to answer questions from the public. Individuals have the right to know who is watching them and why, what information is being captured, and what is being done with recorded images.
8. Give individuals access to information about themselves. This includes video images.
9. Educate camera operators on the obligation to protect the privacy of individuals.
10. Periodically evaluate the need for video surveillance.

These are followed by a Q&A section that addresses various aspects of surveillance use, including how organizations should organize and develop policies to ensure consistency and compliance with the legislation.

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.

Disclaimer: The IT.Can Newsletter is intended to provide readers with notice of certain new developments and issues of legal significance. It is not intended to be a complete statement of the law, nor is it intended to provide legal advice. No person should act or rely upon the information in the IT.Can Newsletter without seeking specific legal advice.

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.