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Part 1 of this newsletter is prepared by Professors Teresa Scassa, Chidi Oguamanam and Stephen Coughlan of the Law and Technology Institute of Dalhousie Law School. Part 2 of this newsletter is prepared by Professors Pierre Trudel and France Abran of the L.R. Wilson Chair in Information Technology and Electronic Commerce Law, Université de Montréal.

Les auteurs de la première partie du présent bulletin sont les professeurs Teresa Scassa, Chidi Oguamanam et Stephen Coughlan de l'Institut de droit et de technologie de la Faculté de droit de l'Université de Dalhousie. Les professeurs Pierre Trudel et France Abran de le Chaire en droit des technologies de l'information et du commerce électronique L.R. Wilson de la Faculté de droit de l'Université de Montréal ont rédigé la seconde partie du présent bulletin.

Part 1

Computer Law

The British Columbia Supreme Court has delivered its decision in the case of *Coreco Inc. v. British Columbia*. In 1997, the Plaintiff acquired the assets of Logical Vision Ltd. for $4,103,000. The terms of the asset purchase agreement allotted $3,884,937 to software. Following the sale, the Plaintiff's tax liabilities (7% of purchase price) were assessed under the *BC Social Services Tax Act* (1996) by the Commissioner of Social Service Tax. The Act defines tangible personal property to include software. The Plaintiff appealed the assessment to the Minister arguing inter alia that the software was not used in BC and that the tax payable should be prorated based on the use of property outside BC. Further, Plaintiff argued that a 1998 amendment of the Act which excluded software source code in non-executable form from taxation should retroactively apply to the transaction. For the plaintiff, because software as used in the asset purchase agreement included source code and other non-taxable items, the assessment (for equating the term software as used in the agreement with its statutory meaning) was erroneous. The Minister dismissed the petition on all grounds and the Plaintiff appealed to the BC Supreme Court.

Upholding the Minister's decision, the Court (McEwan J) dismissed the appeal. It held that however distinct source code may be from software (executable code), the distinction was not legally recognized by the statute in force at the time of the asset purchase agreement was made. Consequently, the court found that "'source' code was properly within the definition of software at the time of the sale" (¶ 24). The court held that on evidence, the Plaintiff failed to establish the existence of other specific non-taxable items. On the claim that the software was not used in BC, the court found that the Plaintiff's dealing with the software outside BC did not amount to actual leasing, rather adduced evidence suggested "that the software purchased has been used by the petitioner [the Plaintiff] to create subsequent versions" (¶32).

Criminal Law – FLIR as Authority for Use of Police Sniffer Dog

In *R. v. McLay*, 2006 NBPC 6 the police were patrolling the Moncton Acadian Bus Terminal as part of the Jetway project aimed at identifying drug couriers using public means of transportation. The police had with them a dog trained to detect odors of controlled substances. The officers noticed the accused leaving a bus and behaving in what they considered to be a suspicious way. One officer spoke to the accused, as he was seated on a bench, and asked him whether he would mind if the police dog sniffed his duffle bag. The accused replied "yea", which the officer testified he took to indicate consent to the sniffing, but which the accused testified meant that yes, he did mind. The accused did accompany the officer to the dog, where the dog gave a positive indication, and the accused was immediately placed under arrest. The accused brought *Charter* challenges based on ss. 7, 8, 9 and 10 of the *Charter*, of which only the s. 8 issue will be discussed here.

The issue was decided, analogizing to the Supreme Court of Canada's decision about Forward Looking Infrared Scanners in *R. v. Tessling*, on the basis that

"the technology of the dog's nose" (para 38) did not infringe on a reasonable expectation of privacy and therefore that there was no search. In *Tessling*, the trial judge noted, FLIRs were found to be an external search, non-intrusive, and "mundane in the data produced" (para 34). The information obtained did not touch upon a "biographical core of personal information" or intimate details of the individual's lifestyle and so did not attract a reasonable expectation of privacy. The same, the trial judge held here, can be said of dog sniffing. The accused had "knowingly expose[d] to the public" (para. 38) the odor, even though it was not actually detectable by human smell alone, just as a house's heat signature is not detectable. The information obtained did not go to a biographical core of personal information not affect the dignity, integrity and autonomy of the subject any more than does a FLIR, though the information produced by a dog's nose is of greater reliability. The technology of the dog's nose was not so complex and mysterious as to alarm the public, and so the accused had no reasonable expectation of privacy, and there was no s. 8 violation.

Note that in *Tessling* the Supreme Court did not describe the information gathered as "mundane", as the trial judge here does, but as "meaningless", which entered significantly into the Court's conclusion that there was no reasonable expectation of privacy. Here, the moment the dog indicated that there were drugs in the duffel bag, the accused was arrested.

Comment on the issues raised in this case at the IT.Can blog.

E-Mail and Solicitor Client Privilege

The Alberta Court of Queen's Bench has delivered its decision in *SLC v. LCC* [2006] AJ No. 222 (hyperlink not available). In this case, the Defendant husband wrote an e-mail to the Plaintiff wife on the subject of telephone access to children of the marriage. The wife forwarded the said e-mail to her solicitor with a commentary about the mail as well as a paragraph on the Plaintiff's potential position on the subject of the Defendant's e-mail which was expressed to be contingent upon the husband's conduct during the rest of ongoing litigation. In the course of sending the e-mail to her solicitor, the Plaintiff also inadvertently sent it to her husband. In addition to acknowledging via another mail that "I am sure that this was not intended for me, however, it is interesting", the husband made this apparently privileged communication available to thirteen different e-mail addresses involving sixteen persons all of whom were strangers to the law suit. Some of the individuals were surprised upon receiving the communication and seven of them e-mailed their responses to the Plaintiff wife expressing their surprise. The Plaintiff wife has now brought an application asking the court for an injunction against further disclosure of privileged information by her husband and an order against the Defendant for costs on a solicitor and client basis.

While barring the Plaintiff from further circulation of the email and its attachments to strangers to the litigation, the Court (Lee J) held that "[i]nformation that is obtained in the course of litigation is also subject to implied undertaking to the Court by the recipient of that information that the recipient will not make a collateral or ulterior use of such information" (¶7). The Court, however, declined the second leg of the Plaintiff wife's application by holding that even though the husband's conduct was blameworthy, he could not be awarded costs on solicitor and client basis. According to the Court, the case's considerable history shows that the wife has sent provocative mails previously to the husband "goad[ing] him into further conflict" (¶12). Again, even though it was a privileged communication, the e-mail in issue was not so clearly marked. The husband is a lay person who is representing himself in court and is not in a position to appreciate the importance of solicitor client privilege. The husband's conduct did not jeopardize the safety of the children of the marriage. Lastly, the wife must bear some responsibility for her erroneous conduct in handling the e-mail. Consequently, the court awarded a party and party cost for the application.

Comment on the issues raised in this case at IT.CAN.blog

Jurisdiction in Telecom and Broadcast Regulation

The Manitoba Court of Appeal has delivered its decision in *Shaw Cable Systems (SMB) Ltd. v. MTS*

Communications Inc. The Appellant (Shaw) and the Respondent (MTS) were licensed broadcast distribution undertakings (BDU) under the Broadcast and Telecommunications Acts. In 2001, the CRTC issued a public notice outlining four principles regulating new transfer regime when a broadcasting subscriber changed to BDUs. In general, these principles required parties to respect the integrity of properties they did not own and to refrain from damaging competitors' distribution systems, cable drops, customer service enclosures and panel boxes. Shaw sued MTS in the Court of Queen's Bench alleging that while converting broadcasting/ telecommunication service MTS unlawfully and improperly disconnected and interfered with pieces of equipment belonging to Shaw. According to Shaw, MTS disconnected telecom input cables, ground cables, damaged and converted Shaw's property. Shaw sought an order of prohibitory injunction, as well as general and special damages for what it characterized as MTS's acts of trespass, negligence, private nuisance, breach of contract, and interference with contractual and economic relations. MTS moved to dismiss Shaw's action on the grounds that CRTC has elaborate and competent jurisdiction pursuant to both statute and its 2001 public notice. Shaw's argument rested inter alia on the grounds that: a "claim in tort mandates that the action [to] proceed in court" (¶6); the 2001 CRTC public notice applied to "inside wire" procedure –"wire used for distribution of programming services that extends to a defined 'demarcation point'" (¶17) and not to external distribution equipment/facilities which MTS operations compromised. (Regarding external distribution equipment, the public notice was silent); CRTC through its policies or public notice does not have the legal competence to restrain MTS from acts constituting damage to or interference with private property.

The Court of Queen's Bench found for MTS. It held that the CRTC's enabling statute, policy guidelines, public notices and regulations provide comprehensive dispute resolution scheme and that Shaw's claims and orders sought are well within CRTC's unassailable jurisdiction and administrative competence. In this ruling, the Court of Appeal noted that the silence of the public notice in issue regarding external facilities as opposed to inside wire regime is not an attempt to exclude the former by the general requirement (under the public notice) of competitors to protect and maintain the integrity of incumbent property. That same requirement extended by implication to external equipment or distribution facilities. According to the Court of Appeal, the regulations in the public notice "inevitably impact on rights and obligations when a change in BDU occurs, relating to equipment and facilities including both inside wire and outside distribution facilities, but this does not change the heart of the matter to a private law dispute …"(¶65).

Police Monitoring of Public Spaces with Video Cameras: Privacy Commissioner and RCMP Guidelines

The Privacy Commissioner has issued guidelines on the use of video cameras by police to monitor public spaces. The guidelines were produced from the work of a discussion group established by the Privacy Commissioner and the RCMP along with other stakeholders, which was prompted by the Privacy Commissioner's investigation into police video surveillance in Kelowna, British Columbia. The guidelines are designed for general and overt video surveillance of public spaces, rather than for the targeted surveillance of a particular suspect, or for surveillance of private spaces such as a cell block.

The introduction to the guidelines notes that the greater temptation to use video surveillance in recent years has overlapped with changes in technology, relating both to cameras and to facial recognition software and other computer programs, which have made such surveillance easier at a practical level. As a result, the potential for scrutiny of everyone in public spaces, whether they have done anything wrong or not, is greatly increased, thereby decreasing the level of privacy and anonymity in people's daily lives.

The guidelines do not bind either the RCMP in establishing video surveillance or the Privacy Commissioner in investigating it.

The guidelines include that:

1. Video surveillance should only be deployed to address a real, pressing and substantial problem.

2. Video surveillance should be viewed as an exceptional step, only to be taken in the absence of a less privacy-invasive alternative….

4. Public consultation should precede any decision to introduce video surveillance.

8. Fair information practices should be respected in collection, use, disclosure, retention and destruction of personal information.

13. The video surveillance system should be subject to independent audit and evaluation.

14. The use of video surveillance should be governed by an explicit policy.

The Privacy Commissioner's website contains the complete guidelines, along with commentary on each individual component.

Comment on the issues raised by these guidelines at the IT.Can blog.

2ième partie

Guide sur le gouvernement en ligne – Québec

Le déploiement du gouvernement électronique constitue l'un des fondements de la modernisation de l'État en Occident. Dans le cadre de sa mission qui est d'aider les organisations à être plus productives et à contribuer au bien-être des citoyens en utilisant les technologies de l'information comme levier de transformation et d'innovation, le CEFRIO a réalisé un guide pratique sur le gouvernement électronique.

Issu de son projet de recherche *Services électroniques aux citoyens et aux entreprises*, qui met en lumière les attentes des citoyens québécois et les stratégies permettant de relever les défis en la matière, le Guide sur le gouvernement électronique présente des pratiques exemplaires dont les intervenants concernés pourront s'inspirer pour réussir cette transformation socio-organisationnelle, lesquelles favoriseront l'amélioration des services offerts aux citoyens et aux entreprises.

Cet outil de référence est destiné à toutes les personnes intéressées au développement du e-gouvernement des secteurs public et privé. On y aborde, notamment, la définition des besoins des citoyens et des entreprises, la gestion du changement et les ressources humaines, le financement et la promotion des services de gouvernement électronique ainsi que l'évaluation de leur impact.

Guide sur le gouvernement en ligne, CEFRIO.

Le positionnement juridique des moteurs de recherche

Sans les moteurs de recherche, il serait difficile d'accéder effectivement à la masse considérable d'information disponible dans les réseaux. L'étude passe en revue les principales questions qui se posent au regard du cadre juridique des moteurs de recherche : ce qu'ils font, la réglementation qui s'applique à leur activité, le pourquoi de la réglementation spécifique des moteurs de recherche et leur qualification au regard des textes des instances européennes. L'auteur conclut que « pour proposer des moteurs de recherche plus 'neutres', mais aussi amener le public à en faire usage, il sera inévitable d'envisager une certaine forme d'intervention des pouvoirs publics. Celle-ci pourrait être justifiée par un devoir d'assistance encore en gestation au sein de la société de l'information. »

Nico VAN EIJK, *Moteurs de recherche : Cherche et tu trouveras? Positionnement juridique des moteurs de recherche, IRIS Plus-Observations juridiques de l'observatoire européen de l'audiovisuel*, édition 2006-02, Strasbourg, Observatoire européen de l'audiovisuel.

Les mesures techniques ne portent pas atteinte au droit de copie privée – France

Dans un arrêt du 28 février 2006, la Cour de cassation a invalidé une décision de la Cour d'appel de Paris du 22 avril 2005 qui avait interdit l'utilisation de dispositifs anticopie empêchant la reproduction d'un DVD d'un film (Mulholland Drive). La Cour d'appel avait alors interprété le test de l'article 9.2 de la Convention de Berne à l'effet que la reproduction d'une œuvre est permise sans autorisation à la condition que ce soit un cas spécial d'une part, que la reproduction ne porte pas atteinte aux droits d'exploitation normale de l'œuvre et enfin qu'elle ne cause pas de préjudice injustifié aux intérêts légitimes de l'auteur. Mais la Cour de cassation donne une interprétation différente à ces critères. Elle insiste sur la nécessité d'apprécier les risques de préjudice au regard des risques inhérents à l'environnement numérique quant à la sauvegarde des droits de l'auteur. Est également mentionnée, la nécessité de considérer l'importance économique que l'exploitation de l'œuvre sous forme de DVD représente pour l'amortissement des coûts de production. Par conséquent, il est possible d'interdire la constitution d'une copie privée par des mesures techniques de protection. Mais l'arrêt ne dispense pas l'industrie de respecter les exigences d'information des consommateurs sur la présence de dispositifs anticopie sur les DVD.

Cass (fr) 1ère ch. Civ., arrêt du 28 février 2006. Commentaire de Sévérine MAS, « Copie privée privé de copie, » Juriscom.net.

Qualification d'un forum de discussion : un lieu privé ouvert au public

La qualification des forums de discussion donne lieu à de nombreux débats. En France, la jurisprudence a dû se pencher sur cette question aux fins de qualifier les situations où il était allégué des actes de publication, soit de diffusion dans un lieu public. La décision du Tribunal de Grande Instance de Melun devait décider si un message était diffusé sur un forum public- donc accessible à tous- ou sur un lieu privé. Le tribunal a constaté que l'accès au forum était ouvert à tous, à condition de respecter les règles de bonne conduite qui le régissent et de décliner son identité. Une fois réalisées ces conditions, la personne désireuse de s'exprimer sur le forum devait expédier un courriel au maître du forum en lui demandant l'activation de son compte et en précisant son nom d'utilisateur. De cela, la Cour infère la conclusion que le forum n'est pas directement accessible à tous. Un filtrage est effectué même si celui-ci se fonde uniquement sur les déclarations des internautes qui veulent participer. D'où la conclusion qu'en l'espèce, le forum constitue ni un lieu privé, ni un lieu public mais un lieu privé ouvert au public.

Agathe Lepage observe que cette décision donne l'impression qu'entre la qualification de lieu public et celle de lieu privé, il en existerait en apparence une troisième voie intermédiaire. Mais lorsqu'on y regarde de près, c'est d'un forum privé qu'il s'agit puisque le maître du site a le pouvoir d'exclure un participant qui ne se plie pas aux règles ayant cours en ce lieu. Ainsi, « entre le privé et le public, la jurisprudence balance et l'interprète hésite… ».

Agathe LEPAGE, *Entre privé et public, le forum privé ouvert au public*, Communication-commerce électronique, no 2, février 2006, p. 41.

Diffusion de photos en ligne sans l'autorisation du modèle

La société Montorgueil est condamnée pour avoir diffusé des photos de femmes nues sur Internet. Il n'est pas suffisant, en droit français, de détenir les droits de propriété intellectuelle sur les œuvres. Il faut également détenir l'autorisation de la personne photographiée. Dans cette décision, le tribunal tient en compte les caractéristiques du support Internet et de la diffusion étendue que cela implique.

Shé D. c. Société Montorgueil, Légalis.net.

À signaler :

Christophe VERDURE, *Les hébergeurs : victimes ou régulateurs de la société de l'information?*, Droit & nouvelles technologies, 22 février 2006. Revue du droit applicable aux hébergeurs en droit européen et en droit belge.

MINISTÈRE DES SERVICES GOUVERNEMENTAUX, Bulletin E-veille, mars 2006, Numéro consacré au thème « Fracture numérique et initiatives gouvernementales ».

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 Teresa Scassa, Chidi Oguamanam and Stephen Coughlan at it.law@dal.ca if they relate to Part 1 or Pierre Trudel at pierre.trudel@umontreal.ca if they relate to Part 2.

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 la première partie du présent bulletin, veuillez contacter les professeurs Teresa Scassa, Chidi Oguamanam et Stephen Coughlan à l'adresse électronique it.law@dal.ca ou en ce qui concerne la deuxième partie, veuillez contacter Pierre Trudel à pierre.trudel@umontreal.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.