



# NEWSLETTER

Canadian IT Law Association

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This newsletter is prepared by Professors [Robert Currie](#), [Chidi Oguamanam](#) and [Stephen Coughlan](#) of the Law and Technology Institute of [Dalhousie Law School](#).

Les auteurs du présent bulletin sont les professeurs [Robert Currie](#), [Chidi Oguamanam](#) et [Stephen Coughlan](#) de l'Institut de droit et de technologie de la [Faculté de droit de l'Université de Dalhousie](#).

## Debt Repayment Plans for Disconnected Telephone Subscribers

The CRTC has recently considered the current arrangements by telephone companies allowing involuntarily disconnected customers to obtain service. Although the Commission made no firm order, it has [indicated](#) that steps need to be taken to improve the situation.

In a previous [decision](#), the CRTC decided that incumbent local exchange carriers (ILECs) were not permitted to disconnect or threaten to disconnect customers for non-payment if the customer (a) has made partial payments sufficient to cover outstanding arrears and/or (b) is willing to enter into and honour a reasonable deferred payment agreement. Subsequently the CRTC noted that most ILECs had not complied with this requirement: in general all ILECs other than SaskTel required customers to repay the debt in full and pay a security deposit and reconnection fees before restoring service. Accordingly the CRTC [ordered](#) the ILECs to undertake an 18 month pilot debt repayment plan, based on the SaskTel plan. Among other things the plans were to include the requirements that (a) a debt repayment schedule would be established; (b) no interest would be charged on the amounts owing; (c) security deposits would be waived; and (d) the reconnection fees would be spread over six months.

With the pilot project completed, the CRTC noted that although many customers had obtained renewed service as a result, default rates had been high, ranging from 40% to 81%. They found the pilot project inconclusive as to whether the benefits

outweighed the costs. They therefore decided not to order that the pilot project be continued on a permanent basis.

The CRTC also concluded, though, that there remained a problem, even if there were better solutions, such as measures reducing the number of disconnections in the first place. Accordingly they encouraged ILECs to review their practices regarding debt repayment agreements with a view to reducing avoidable disconnections. In particular they suggested that customers would benefit from being notified of sudden increases in their outstanding debt without waiting until the next billing statement, so that they could take the necessary measures to avoid disconnection. In addition the CRTC requested the Commissioner for Complaints for Telecommunications Services Inc. to track complaints related to credit management issues and to reconnection policies with a view to determining whether further action, such as the development of an industry code, was required.

## Production Orders – Compensation not to be Provided

The Supreme Court of Canada, with its decision in [Tele-Mobile Co. v. Ontario](#) has settled an outstanding issue relating to the production order scheme added to the *Criminal Code* in 2004. That scheme allows police or other public officers to apply to a judge for a production order, which requires a person to either produce documents or to prepare documents based on records already in existence, and to deliver them to the police. Typically such orders are aimed at corporations such as telecommunications companies or banks, when the police are seeking data relating to cell phones, internet access, or banking transactions. The standard for obtaining a production order is the same as that for obtaining a search warrant, but they are used in situations where the police have no concerns about compliance on the part of the person on whom the order is served. A production

order is in a way a reflection of the reality of how search warrants were actually executed against such companies: rather than literally searching the records themselves, the police would deliver the warrant to the company which would assemble the requested information. However, a significant difference is that in a search warrant it is at least nominally the police who are required to do the work of searching. With a production order, that work – and the associated cost – is assigned to the person on whom the order is served.

It was that cost which was at issue in *Tele-Mobile*. The applicant, Telus, argued that a judge issuing a production order had the authority to also order compensation for the associated costs: the Crown argued that there was no such authority. The Supreme Court of Canada, relying on the wording of the statute, the legislative history of the section, and the responsibilities of good citizenship, concluded that the Crown's position was correct and decided that there was no ability for a court to order compensation.

The legislation did not explicitly refer to any ability for a judge to order compensation. However, Telus suggested two bases upon which a judge might be so authorized nonetheless. First, at the initial stage of issuing the production order, the judge was entitled to attach terms and conditions: one such condition, they argued, could be the payment of compensation. Secondly, at a later stage it was possible for the person upon whom the production order had been served to apply for exemption from the order. Telus argued that this exemption application should be taken to implicitly include an ability to order the payment of compensation. The Court rejected both suggestions.

At the early stage, the Court held, allowing an order for compensation to be a potential condition would be inconsistent with the nature of the scheme. The hearing at which a production order was sought was conducted *ex parte*, and was intended to be a cost-effective and timely mechanism. It was therefore ill-designed for considering “the potentially complex and contentious question of cost” (para 46). There are some circumstances in which third parties are given notice of applications, such as applications of production of confidential records, but that had not been done in this case.

Even more telling, the Court held, was the legislative history of the provision. The Court noted that well before the production order scheme was introduced into the *Criminal Code*, Telus had initiated an application to the CRTC, which was joined by various other telecommunications companies, proposing a tariff that would apply to court-ordered wiretaps and production of confidential subscriber information to law enforcement agencies. The CRTC held that it did not have jurisdiction to grant the application, and noted that:

If there is a concern that the current regime (where compensation for compliance with court orders is left to the discretion of the courts) is not appropriate given the potentially mounting costs, it is open to Parliament to address the issue explicitly through legislative amendments. (para 33)

Subsequently, Parliament issued a consultation document inviting submissions on modernizing the law surrounding intercepting communications and obtaining information of assistance in the investigation of crime. In that consultation process Telus and other telecommunications companies made submissions arguing that the police should remain responsible for the associated costs of gathering the information. In addition the General Counsel for Telus made a submission, in response to arguments from law enforcement agencies, stating that “TELUS recommends that the proposed legislation expressly require that [law enforcement agencies] compensate service providers for their reasonable costs of providing lawful access services” (para 37). Nonetheless the Department of Justice issued a discussion paper on the proposed new legislation, in which it considered and rejected the idea of specifically providing for compensation in the legislation. The legislation at issue was introduced six months later in its current form, and did not specifically mention the possibility of compensation.

The Court noted that:

42. While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language

in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders.

In addition, the Court concluded that it was reasonable to expect Telus and similar companies to shoulder certain costs as part of their obligations as good corporate citizens. Witnesses and jurors are not typically compensated for expenses incurred nor for their lost wages, the Court noted. Further, the norm is that no compensation is paid in the case of those obliged to comply with general warrants, assistance orders, applications under the *Mutual Legal Assistance Act*, or under various non-criminal schemes where compliance with court orders is required. There are a few cases where compensation is available, but in those cases the governing legislation specifically provides for costs to be awarded.

The Court did accept that there was a much greater likelihood that Telus and similar companies would be subject to production orders than would others. They held, however, that this should simply be regarded as the cost of choosing to do business in that particular field, and did not justify exceptional treatment. The Court noted that the annual costs to Telus arising from production orders were estimated to be \$662,000.00, which was not a pittance. Considered in relation to gross earnings, however, this was "the equivalent of a person earning \$100,000 a year having to spend up to \$58 to comply with jury duty" (para 68). It did not warrant a departure from the general rule of non-compensation.

Finally the Court noted that Telus and others were not entirely without a remedy. It was possible to apply, after the production order had been issued, for exemption. This process did not, as the applicant had argued, allow for compensation to be ordered. However, section 487.015(4)(b) specifically provided that an organization could be exempted from complying with a production order where the judge was satisfied that "it is unreasonable to require the applicant to produce the document, data or information". This remedy essentially made the situation an "all or nothing" one. Compliance

might be reasonable, in which case the organization was responsible for the cost. On the other hand the cost involved was one basis upon which compliance might become unreasonable, in which case the organization was freed completely from the obligation to comply. The Court declined to try to specify a more precise test for "reasonableness", holding that that term was well-known in the law and fact specific. They did observe that the analysis:

will be informed by a variety of factors, including the breadth of the order being sought, the size and economic viability of the object of the order, and the extent of the order's financial impact on the party from whom production is sought. Where the party is a repeated target of production orders, the cumulative impact of multiple orders may also be relevant. (para 67)

This part of the Court's analysis did leave open the possibility of private arrangements for compensation being negotiated in individual cases. In essence the Court recognized that where it seems likely a third party would be able to persuade a court that compliance would be unreasonable, that third party and the police might agree on compensation in exchange for compliance, rather than go to court on the "all or nothing" issue.

## Domain Name Decisions

### "SCOTIABANKTHEATRE(S)"

A SINGLE MAN PANEL (DAVID LAMETTI) OF THE Canadian Internet Registration Authority (CIRA) has delivered its decision in a complaint by [The Bank of Nova Scotia \(the Complainant\)](#) against [Mario Rayo](#) (the Registrant) in which two domain names: SCOTIABANKTHEATRE.CA and SCOTIABANKTHEATRES.CA were in issue. Earlier, the Complainant had succeeded against the Registrant under the UDRP process in a parallel proceeding over the .com analogue of the same domain names and had the domain names transferred to it by the same Registrant.

The Complainant is a well known Canadian bank with international clout. It is generally called SCOTIA BANK. It has registered to its credit diverse renditions of the SCOTIABANK mark totaling almost 20 Canadian trademarks and 400 others worldwide. Also,

it is the owner of domain name Scotiabank.ca and its .com analogue. In the last year, the Complainant started acquiring naming rights to large movie theatres in conjunction with Cineplex, a leading Canadian cinema operator in major cities across Canada. Several of the cinema theatres were renamed Scotia Theatres in extension of the SCOTIABANK mark and goodwill. About a week after the renaming of the theatres, the Registrant registered the domain names in issue. Subsequently, in a vaguely written entreaty, the Registrant requested “expression of interest” in the domain names from the Complainant. Meanwhile, the subject domain names did not resolve to active websites. An e-mail correspondence from the Complainant to the Registrant was not answered. For the purpose of this proceeding, the Registrant did not respond to requests to receive Complainant’s documentation. The Provider selected a single panelist pursuant to CIRA rules.

The panel had no difficulty in finding that pursuant to paragraph 4.1 of the *CIRA Domain Name Dispute Resolution Policy*, the Complainant has established that the domain name in issue was confusingly similar to the marks in which it has rights and that the Registrant registered the mark in bad faith and had no legitimate interest thereto. In specific regard to the requirement that the mark be “confusingly similar” the Panel observed: “It is strong enough to raise a connection in the mind of the average consumer, as a matter of first impression and based on the appearance, sound or ideas suggested by the mark, between the Complainant and the domain names in question notwithstanding the addition of the descriptive words “theatre” or “theatres”. The simple addition of a descriptive word may not be enough to negate the confusing similarity”. The Panel noted that Registrant’s case, if any, was not helped by the fact that lately the Complainant has deliberately chosen to extend the scope of the mark to movie theatres. Finally, the Panel further observed that “There is now, in effect, a protection at common law for SCOTIABANK coupled with theatres”



#### “BMOFIELD”

A THREE MEMBER CIRA PANEL (CECIL O.D. BRANSON, Chair) has delivered its decision in a complaint by [Bank of Montreal \(the Complainant\)](#) against [Chris Bartello](#) (the Registrant) in respect of the domain

name: BMOFIELD.CA. The Panel found as of fact that the Registrant registered the domain name in issue two days after the Complainant made a public announcement of the opening of the “BMO Field”, a soccer stadium named after the Complainant’s trademark and acronym concerning which the Complainant has signed a ten year naming rights agreement with Toronto Football Club. The domain name in issue hosts a webpage in which there is a “For Sale” sign displayed, indicating that “This domain is for sale” and soliciting offers. The Complainant’s cease and desist letter to the Registrant was not answered. In the present proceeding, the Complaint maintains that it is the owner of almost 15 other similar trademarks registered prior to the domain name in issue. It has also filed before CIPO three trademark applications for BMO FIELD, BMO FIELD & DESIGN (2). It argues that the domain name is confusingly similar to its trademarks, that they were registered in bad faith and that the Registrant has no legitimate interest in them.

The Panel found that the domain name was confusingly similar to the Complainant’s marks and that the Registrant did not have a legitimate interest in the mark. With specific regard to the requirement of bad faith on the Registrant, the Panel found that pursuant to Rule 3.7 of *CIRA Domain Name Dispute Resolution Policy*, it must be established that the Registrant’s registration of the name is (a) for purpose of transfer to profit (b) that it engaged in a pattern of registering names incorporating third party marks and (c) the Registrant’s act was aimed at disrupting the business of the Complainant. According to the Panel, these conditions are “alternative and not cumulative”. While finding for the Complainant in regard to the first two, the Panel found that “the Complainant failed to (sic) induce evidence to substantiate” that the Registrant has the objective of disrupting its business. In order to prove that, it is required that the parties be competitors, a term that is loosely or broadly construed. It found that “the webpage of the Registrant displayed under the domain name does not contain any pointers or links to competitors’ web page offering products directly competing with the Complainant”.

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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](mailto: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](mailto:it.law@dal.ca)

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