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The Ontario Superior Court has delivered its ruling in *Dublin v. Montessori Jewish Day School of Toronto and Ors.* The plaintiff was the head (and an ex officio member of board) of the defendant school where his infant son who suffered from a medical condition associated with occasional incidents of incontinence was a student. In October 2003, Dr. Dublin took a leave of absence as result of depression. During his absence, the school and its new board chair, Ms. Nashman and another defendant, Kim Pasternak (the acting head and board member), were alleged to have been negligent, in breach of trust and contract and to have intentionally inflicted emotional harm on the plaintiff's infant son, Ephraim. While the plaintiff was absent, it was also alleged that the board began a process that culminated in his alleged wrongful dismissal in May five months after he resumed work in January 2004. At a meeting of the board, before the resumption of the plaintiff, Ms. Nashman was authorized to contact a lawyer in a matter relating to conflict of interest in the school's infrastructure and questions arising from Dr. Dublin's absence as head of the school. She then contacted a Mr. David Steinberg, her long-standing friend, who was retained to act on behalf of the school.

On October 2003, Ms. Nashman sent an e-mail to Mr. Steinberg using her husband's e-mail account. Her husband is not a member of the board. The e-mail "alludes to the involvement of third parties in its composition" (¶ 21). The plaintiff later saw a copy of the e-mail which was disclosed inadvertently during the ensuing litigation. He refused to return it to the defendants and claimed that it is evidence of the defendants' malice and bad faith. However, the defendants claimed that the e-mail was a privileged client-solicitor communication. They brought a motion before Master Albert who after inspecting the message ruled that it was privileged and should be returned to the defendants. The plaintiff appealed.

The court found that the communication may have met all the requirements of lawyer-and-client-privilege. However, the court notes that exception to such privilege apply when a client knowingly initiates a communication in furtherance of unlawful act, criminal or tortuous. The court held that "there is no reason why the exception should not include communications perpetrating tortuous conducts that may become the subject of civil proceedings" (¶ 39). It also ruled that "the exception for communications to facilitate a crime or fraud applies to the circumstances of the case at bar, which concern the commission of various intentional torts against Dr. Dublin and his son" (¶ 44). In conclusion, the court found that "[t]he e-mail communication which I have read, *may* – and emphasize the word "may" – because the point remains to be proven, show that the defendants, or at least the author of the e-mail message, intended to inflict emotional harm to Dr. Dublin and his family" (¶ 45).

The court, P.M. Perell J, took time to entertain the following reflections:

> In the contemporary world of information excess, apart from the ever more burden of collecting documents from myriad of technological resting places, when preparing an affidavit, a lawyer is confronted with many difficult questions. Does the document have a semblance of relevance to the action as pleaded? If the document is relevant to the issues in the proceedings, then is it subject to privilege? And there are many privileges, including lawyer and client privilege, litigation privilege, a special relationship or Wigmore privilege, settlement communication privilege, spousal privilege, self-incriminating privilege,

public interest immunity, informant privilege, judicial privilege, and privilege granted by statute. And the categories of privilege are not closed.... If the document is privileged then is it caught by an exception to privilege; for example, the crime or fraud exception, or the innocence at stake exception, or the public safety exception? Or, if the document is privileged, has the privilege been waived advertently or inadvertently? And if the privilege has been waived inadvertently, can the privilege be reasserted? (¶ 2).

Comment on the issues raised by this Bill at the IT.Can Blog

Interception of Telecommunications – Proposed Legislation

A private member's bill, Bill C-416, which would require telecommunications service providers to provide subscriber information to the government, and allow the government to intercept communications, in relation to national security concerns has been filed with Parliament. *The Modernization of Investigative Techniques Act*, according to the summary, "requires telecommunications service providers to put in place and maintain certain capabilities that facilitate the lawful interception of information transmitted by telecommunications and to provide basic information about their subscribers to the Royal Canadian Mounted Police, the Canadian Security Intelligence Service, the Commissioner of Competition and any police service constituted under the laws of a province".

The Bill requires those who provide telecommunications services to have particular abilities to gather information concerning the use of the facilities. In particular the providers must be able to intercept communications generated by or transmitted through their services, isolate and intercept particular communications and transmission data, and provide information that permits accurate correlation of all elements of intercepted communications. In addition providers must be able to "enable simultaneous interceptions by authorized persons from multiple national security and law enforcement agencies of communications of multiple users". A provider which installs new software is required to obtain a version of the software which most increases its ability to meet these operational requirements, even if this will require the provider to acquire additional software licenses or telecommunications facilities.

In addition the Bill would permit the Commissioner of the Royal Canadian Mounted Police, the Director of the Canadian Security Intelligence Service, the Commissioner of Competition and the chief or head of a provincial police service to designate any employee or class of employees whose duties are related to protecting national security or to law enforcement. Under section 17(1) of the Bill such designated employees would be entitled to require a telecommunications service provider, on written request, to provide any information in the service provider's possession or control respecting the name and address of any subscriber to any of the service provider's telecommunications services and respecting any other identifiers associated with the subscriber. The Bill sets out no requirements of prior judicial authorization before any such request is made.

Each agency is only entitled to have a maximum of five, or of 5% of its employees (whichever is larger) so designated. However, such requests can also be made by non-designated persons. Section 18 of the Bill would permit any police officer to request the same information if:

(a) the officer believes on reasonable grounds that the urgency of the situation is such that the request cannot, with reasonable diligence, be made under subsection 17(1);

(b) the officer believes on reasonable grounds that the information requested is immediately necessary to prevent an unlawful act that would cause serious harm to any person or to property; and

(c) the information directly concerns either the person who would perform the act that is likely to cause the harm or is the victim, or intended victim, of the harm.

In such circumstances the Bill requires the police officer to inform the telecommunications service provider of his or her name, rank, badge number and the agency in which he or she is employed and state that the request is being made in exceptional circumstances and under the authority of this subsection.

Each agency would be required to conduct internal audits concerning the use of the powers in sections 17 and 18. In addition, the Bill permits the Privacy Commissioner, on reasonable notice, to conduct an audit of the practices of the Royal Canadian Mounted Police or the Commissioner of Competition to ensure that information gathered through the use of these powers is not used for other purposes.

Comment on the issues raised by this Bill at the IT.Can Blog 

Internet-Invitation and Tortuous Liability

The Ontario Superior Court of Justice has delivered its ruling in a motion for summary judgment seeking to dismiss the plaintiff's suit in *Oyagi v. Grossman*. In this case, the defendant a 17 year-old boy, held a house party against his parents' counsel before they left for vacation. He advertised the party over the internet and invited friends and acquaintances which included the plaintiff. The party was attended by 30 people known to the defendant and had in all about 100 people in attendance, most of them unknown to the defendant. It lasted from noon to about midnight. Alcohol was served and gate fee was collected. Because of random arrival of people unknown to the defendant, including those who claimed to belong to a gang, he lost control of the party. Some items were stolen at the house including the plaintiff's wallet. As the plaintiff, who is also a 17 year-old girl was leaving the party, from her location at the Grossman's driveway she noticed someone running with a sack over his shoulder to a waiting car. Along with others, she suspected that the person may be a thief running from the Grossman house. They pursued and caught up with the person and surrounded the idling car which he entered. However, suddenly, the driver put the car into motion and accelerated into the plaintiff who was then standing on the road directly in front of the vehicle. She was seriously injured and the car sped away. The plaintiff drank about a total of 3 beers at the party but she did not seem to have been under the effect of alcohol at the time of the incident.

In the present motion by the defendant for the dismissal of the plaintiff's action, the defendant argues that he owed no duty of care to the plaintiff and that the latter's action does not raise any genuine issue for trial. Relying on *Childs v. Desormeaux* the defendant argues that "hosting a party where alcohol is served does not suggest the creation or exacerbation of risk of the level required to impose a duty of care to members of the public … that a person who accepts invitation to attend a party does not park his (her) autonomy at the door" (¶4). The plaintiff, however, argues that the duty care is owed to the plaintiff pursuant to Anns test and that Occupier's liability applied. In dismissing the defendants motion, the court held *inter alia* that "[t]he environment created by Geoff [the defendant] was dangerous by its very nature. He was under age and sent internet invitations to his so-called "buddy" list and he mentioned that alcohol would be available at the party. He was inviting other under-age teenagers to his party…in inviting over the internet such persons to come to party where alcohol is being served one can reasonably expect to attract a very different kind of crowd than would an invitation to a roundtable discussion on Greek philosophy" (¶6).

Comment on the issues raised by this Bill at the IT.Can Blog 

Privacy Commissioner on SWIFT

On April 2, 2007, the Office of the Privacy Commissioner released the report and conclusions of its investigations pursuant to an allegation that European-based Society for Worldwide Interbank Financial Telecommunication (SWIFT), inappropriately disclosed to the US Department of the Treasury (UST) personal information issuing from or transferred to Canadian institutions as part of the post 9/11 crack-down by the US authorities. SWIFT is a financial cooperative in which some Canadian financial institutions have stakes. It supplies messaging services and interface software to several financial institutions across the globe. The allegation was in relation to SWIFT's compliance

with UST's subpoenas issued to it in respect of some data it held in its US-based operating centre. Swift acknowledged that personal information arising from and transferred to Canadian financial institutions was likely part of the data disclosed to the US authorities. The Privacy Commissioner's investigation was essentially to determine if there was a breach of *PIPEDA* by SWIFT and associated Canadian financial institutions, especially six of such institutions that were alleged to have been involved in the matter. Among other things, the investigation reviewed the contractual documents guarding the relationship between those institutions and SWIFT.

The investigation concluded that because SWIFT operates in Canada, has Canadian shareholders, deals with many Canadian financial institutions and collects personal information on commercial basis in the course of its business, it has a significant Canadian presence and therefore subject to *PIPEDA*. The commissioner found that SWIFT, however, did not contravene the Act when it disclosed personal information pursuant to the UST subpoena and that such disclosure came within the exception to consent under the *PIPEDA*. However, SWIFT is ordinarily bound to comply with the Canadian law in such dealings that are not covered under the exceptions. In regard to other Canadian financial institutions investigated, the commissioner found that the contractual arrangement between them and SWIFT did not contravene *PIPEDA*. In all, however, the report frowned at quick resort to subpoena by authorities outside Canada in order to access personal information. For the commissioner, if US authorities desired to obtain information about financial transaction relating to Canada, a better option than subpoena would be to explore the existing information-sharing practices that have regard for transparency and respect for privacy protections such as Canada's anti-money laundering and anti-terrorism financing regimes.

Telecommunications Services – Accessibility Issues

The Canadian Radio and Television Commission has concluded that there may be merit in expanding the scope of alternative format obligations and requiring that electronic information be made accessible to persons who are blind. These issues will be considered in a future proceeding which will deal with unresolved accessibility issues for persons with disabilities in general.

This conclusion arose in the course of a decision concerning whether Bell Canada was responsible for a failure to adequately provide "Smart Home" services to clients who were building a home. The complainants entered into an agreement with a developer to build a new home which was to include various communications services and equipment, and would integrate household systems, such as heating, lighting, and security, into the home's inside wiring. In addition, the complainants would have access to these systems by use of non-visual means. The complainants asked Bell Canada to provide them with operating manuals, technical specifications, and instructions for various equipment and services. The complaint alleged that Bell Canada had refused these requests and had retaliated against the complainants.

The Commission dismissed these aspects of the complaint. It found that the communications package in question was not offered by Bell Canada but by the developer, and that no regulated telecommunications services were included in the communications package. They concluded that Smart Home functions were not a specific service: they were an integration of various household systems, including telecommunications services, but were not directly associated with the provision of Bell Canada's regulated telecommunications services. The Commission also concluded on the evidence that Bell Canada had not retaliated against the complainants for having made a complaint.

On the more general issue of providing an adequate level of service to customers who are blind, the Commission concluded that there might be merit in expanding the scope of alternative format obligations and requiring that electronic information be made accessible to persons with a visual disability.

Carriers are already obliged to make available billing statements, bill inserts sent to subscribers about new services or changes in rates for existing services, any bill inserts that are mandated from time-to-time by the Commission, and information setting out the rates, terms, and conditions of the service in alternative formats. This obligation arises from a previous decision of the Commission. The Commission noted that that previous decision dealt

specifically with printed billing information and did not contemplate electronic information. Because electronic information is becoming increasingly common and in some circumstances is a substitute for traditional print information, the Commission concluded that it might be reasonable to require that accessible electronic information be made available to persons with a visual disability, where such electronic information is provided to non-visually impaired subscribers.

However, the Commission concluded that it did not have sufficient information on the record of this particular complaint to make any decision. They held that it would be more appropriate to address the issues in the context of all local exchange carriers, rather than just Bell Canada, and in the context of persons with various disabilities, rather than just for persons who are blind. Accordingly the Commission announced its intention to initiate a future proceeding to address unresolved accessibility issues for persons with disabilities.

In a related decision the Commission concluded that there was no reason for it to regulate terminal equipment as it relates to persons who are blind. The Commission had not regulated the technical aspects of terminal equipment for over 20 years, and noted there was already a range of terminal equipment offering audio output of screen information, and various models of terminal equipment offering tactile markings, Braille add-ons, and different sizes and designs of keypads to increase accessibility for persons who are blind. The Commission concluded that a market for terminal equipment with accessibility features for persons who are blind had developed, including a range of features and prices, and that there was no evidence to suggest that that market would not continue to develop in the future.

Trade Mark Law

The Federal Court of Appeal in Toronto has delivered its ruling in *BMW Canada Inc. v. Nissan Canada Inc* in a motion for a stay of a Federal Court judgment and order pending appeal. BMW sued Nissan for infringement and depreciation of goodwill in respect of certain BMW trademarks contrary to section 22 of *Trade-Marks Act*. The trademarks in issue are M and M6 which Nissan uses in the marketing of its Infiniti brand of cars. The Federal Court judge found that BMW failed to make a case for trademark infringement and depreciation of goodwill but that Nissan was liable for passing off. Consequently, the court made several orders against Nissan, including a restraining order against it from using the trade marks M and M6 in association with automobiles, parts and accessories and from directing public attention to its wares in any way likely to cause confusion with BMW trademarks. Nissan was also ordered to deliver up to BMW or destroy under oath " all literature, invoices, packaging, signs, advertising, promotional or marketing material, printed matter…in particular, materials that included the letter M or the symbol M6 as trade-mark". In its motion for stay, Nissan contended that its compliance with the order will cause irreparable harm if the order was not stayed pending appeal. Specifically, Nissan argued that it relies on family branding in promoting the Infiniti M family of vehicles which is the practice among luxury vehicle makers. It led evidence to show that "other manufacturers use this type of family branding, even using the letter M to designate a class" (¶ 6). It contended that if it succeeded on appeal, it would revert to family branding to market Infiniti M vehicles and that obeying the court order will send a suspicious signal and negative message to its loyal and potential customers about the viability of its M class vehicles.

In granting the application for stay, the Court of Appeal relied on the Supreme Court decision in *RJR-Macdonald Inc. v. Canada (AG)* which laid down a three-part test for grant of stay: existence of serious question to be tried, whether party seeking stay will suffer irreparable harm if application is refused, determination of which party will suffer greater harm granting or refusing the application. In resolving these considerations in favour of Nissan, the court found that Nissan has already established the harm it has suffered as a result of the injunction. Moreover, to comply with the order, "Nissan will have to incur expense in revising its promotional materials such as it brochures and websites to remove references to M and M6. BMW, however, has failed to provide an undertaking as to damages, thereby preventing Nissan from recovering these costs should it succeed on appeal" (¶ 8).

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.

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 Teresa Scassa, 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.