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This newsletter is prepared by Professors Teresa Scassa, Chidi Oguamanam and Stephen Coughlan of the Law and Technology Institute of Dalhousie Law School.

Les auteurs 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.

Broadcasting Act – Exemption for New Media

The CRTC has found that proposals by Bell Mobility Inc., TELUS Mobility and Rogers Wireless Inc. (all in collaboration with MobiTV) to provide mobile television broadcasting services over wireless handsets are exempt from regulation under the *Broadcasting Act*. The services to be provided, the CRTC held, do qualify as broadcasting, but are exempt under the new media exemption. This exemption means that these new methods of broadcasting will not be bound by Canadian content regulations, among others.

The new media exemption was created in 1999 based on several factors. The Commission was of the view that new media made a positive contribution to the attainment of the objectives of the *Act*: they enhanced opportunities for Canadian expression, and Canadian content was in fact, the Commission found, present on the Internet in the absence of regulation, and indeed was important to developing new Canadian media businesses. Accordingly services delivered over the Internet were not bound by regulations otherwise governing broadcasters.

The services to be provided by Bell, TELUS and Rogers permit customers with a compatible handset and a subscription plan to obtain real-time access to audio-visual content. The video content would be converted to a format accessible through the mobile browsers, and would be streamed through the Internet to the wireless handsets. The providers argued that the service qualified as "broadcasting services delivered and accessed over the Internet" and therefore fell within the new media exemption.

Many parties had made submissions to the CRTC opposing granting the exemption for this service. The Canadian Association of Broadcasters argued in an essentially technical fashion that the system employed closed proprietary architecture at each "end" of the transaction, and so was not really delivering the service over the Internet. Accordingly, they argued, the system was really a Broadcasting Distribution Undertaking (BDU), rather than involving the providers acting as Internet Service Providers (ISPs), and so the exemption should not apply. Various groups representing artists or cultural interests, in contrast, argued on a policy basis that it was important to continue to have Canadian content regulations generally applicable. Broadening the exemption too widely, it was argued, would create a two tier system in which some broadcasters were required to have Canadian content and others were not, which would inevitably weaken the protection offered.

The CRTC was not persuaded by either type of argument. With regard to the technical question, the Commission concluded:

> 30…the television signals are sent by MobiTV via the public Internet to the Internet gateway of the mobile carrier in question. From there, they are routed to the appropriate tower and transmitted wirelessly for the last mile to the user's handset. To access the signals, the user must connect to the Internet using a web browser. The wireless carrier may provide the user with a separate icon to facilitate activation of the service rather than requiring it to type in a URL.
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> 31 In the Commission's view, this would not differ from how an ISP would usually provide its subscribers with Internet access, i.e., through use of dial-up or high-speed access for the last mile. The evidence presented by the CWTA does not indicate, as some parties argued, that the wireless carriers have

established a dedicated connection to MobiTV or that the Internet is used for only part of the journey of the data. The Commission considers that the carriers' wireless networks function only to establish a connection to the Internet, just as any ISP, be it a cable or digital subscriber line ISP, would connect subscribers to the Internet.

With regard to the argument that the new media exemption threatened to undermine the goals of regulating and protecting Canadian content, the Commission held:

> 41… the mobile broadcasting services, as described, are unlikely to compete significantly with traditional broadcasting services due to the limitations of the wireless technology employed, the battery life and screen size of the handset, the poor image and audio quality and the type and range of programming choices offered by the mobile broadcasters.
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> 42 Further, the Commission is of the view that the market for mobile television broadcasting services, while still in its early stages of development, will likely differ from the market for conventional broadcasting services. The CWTA noted in its reply comments that mobile broadcasting services are primarily aimed at people who are away from their homes, perhaps riding a bus or waiting in a doctor's office or at an airport, and who are interested in viewing programming in short segments lasting only a few minutes at a time.
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> 43 … Accordingly, the Commission considers that mobile television broadcasting services can offer additional benefits to Canadian broadcasters by expanding the audiences for Canadian programming, and to Canadian producers by expanding the opportunities to create and license new content.

The CRTC concluded that there was no need to review the existing new media exemption, at least with a view to restricting its application. However, it did acknowledge that mobile television broadcasting through means other than the Internet was likely to be a question of increased importance in the future, and that some of these new services would not fall within the new media exemption. Accordingly they held that it was necessary to consider whether a further exemption was necessary to permit these alternative technologies to be pursued while still remaining exempt from the *Broadcasting Act*. They noted that:

> Whether or not these services are delivered and accessed over the Internet, the Commission remains of the view, for the reasons detailed above pertaining to the similarities between new media and mobile television broadcasting, that such mobile television broadcasting services are unlikely to become substitutes for conventional broadcasting services or to interfere with the abilities of conventional broadcasters to meet their obligations under the Act. Accordingly, in *Call for comments on a proposed exemption order for mobile television broadcasting undertakings,* Broadcasting Public Notice CRTC 2006-48, 12 April 2006, the Commission has called for comments on a proposed exemption order in respect of mobile television broadcasting undertakings whose services are of the type or similar to those that were the subject of this proceeding, but are not necessarily "delivered and accessed over the Internet."

In the same decision, the CRTC also approved a similar proposal from LOOK Communications Inc., though on a slightly different basis. LOOK argued that it would transmit content through a BDU to customers with the receiving apparatus, but that it would distribute services it was authorized to deliver under its broadcasting license, and therefore in accordance with the requirements of the *Broadcasting Distribution Regulations*. Although noting that LOOK had not provided the same level of detail about its method of delivering the service as the other licensees, the CRTC indicated that if the service was in fact to be provided as described, it would fall under LOOK's license.

Comment on the issues raised by this decision at the IT.Can blog.

Criminal Law – Use of Cell Phone Records

In *R. v. Cole*, [2006] O.J. No. 1402 (no hyperlink available) the Ontario Superior Court of Justice dealt with an application to exclude cell phone records obtained by the police under a search warrant. The accused was charged with four robberies of Rogers Video Stores. The cell phone records were relevant not because of the content of any telephone calls or because of who the calls were placed to, but because the records demonstrated that the accused was in the geographical proximity of the four video stores at the times of the robberies. The police were able to obtain the records because they had seized the accused's cell phone from him at the time of his arrest. An officer had then removed the identification chip from the phone and used it to identify the phone as part of his application to obtain a warrant from the cell phone company (coincidentally also Rogers). The accused argued that his s. 8 right to be free from unreasonable search and seizure had been violated in a number of ways, and that as a result the evidence should be excluded under s. 24(2) of the *Charter*.

The trial judge reasoned on the assumption that the police had unlawfully retained the accused's cell phone when they ought to have made a return of it in accordance with s. 489.1 of the *Criminal Code*. Assuming that to be the case, the police ought not to have been entitled to remove the identification chip, and therefore the particular warrant issued would not have been available: without the chip there was no way of identifying the cell phone as the accused's and therefore seeking his records. However, the trial judge held that, although the search might therefore have violated s. 8, it was relevant in considering the admissibility of the evidence that the records would nonetheless have been available through warrants sought in either of two other ways. Since the accused's name was known, the police could have telephoned all cell phone service providers and in that way discovered that it was the records of Rogers that needed to be searched. Alternatively, the accused had given his cell phone number to the booking officer when he was arrested. Given the accused's name and cell phone number, the trial judge held, the police, like any other member of the public, could determine over the Internet whether the accused subscribed to a particular cell phone service. The trial judge admitted the evidence.

The accused had argued that Rogers ought not to have confirmed even the simple question that the accused was a subscriber when asked that question prior to the warrant being issued, but the trial judge felt that this simple piece of information did not attract a reasonable expectation of privacy making the question into a search. In any case, the trial judge held, the issue did not matter if the information was in any case available to anyone through use of the Internet.

An issue also arose over execution of the warrant. The warrant was to be executed between noon and 6:00 p.m. on January 28 2005. The officer faxed the warrant to Rogers within that time frame, but in fact for a variety of reasons Rogers did not produce the necessary information from its computers for several months. Nonetheless the trial judge held that this qualified as execution within the specified period. The officer had sent the warrant to Rogers at the appropriate time, and although he did not go to their offices personally, this was a sensible and practical decision since "without Rogers' cooperation, [execution] would have been impossible given the technical nature of the computerized search." (para. 21).

Email Communication

The Ontario Superior Court of Justice has delivered its ruling in *Triton Tubular Components Corp. v. Steelcase Inc.*

Triton applied for protection under the Companies Creditor Arrangement Act (CCAA). This was opposed by Triton's major creditor, Textron Financial Services Canada Ltd. The latter preferred the appointment of a receiver. However, Triton was successful in obtaining a protection order under the CCAA. The original order to this effect was open-ended and did not prescribe limitation on funds to be paid to counsel and other professional services. It also provided no limit for administrative charge to secure such fees in priority to secured creditors. Textron challenged this form of opened-ended order and after parties' negotiations, a more detailed but rather ambiguous "Amended and Restated Initial Order" was issued which, among other things, made professional

services disbursements subject to Triton's cash flow projections.

In Triton's restructuring attempt, it isolated three large accounts receivables for collection. The largest such account and the one in issue here was that of Steelcase Inc. which owed over $1m. In a preliminary finding, Steelcase was determined to be subject to the CCAA claims procedure. Pursuant to this process, Triton furnished Textron with a budget for the cost of determining the claim. Textron had the option to fund the process and debit Triton or the latter may solicit third party funding. Such third party may then have priority of refund over Textron.

Triton's solicitors, Cassels Brock, submitted to it via e-mail a budget for Steelcase hearing with a total estimate of $75,000, qualifying the same in the following words: "[t]his is obviously simply an estimate and therefore subject to the actual progress of the matter (and does not factor in any appeal)" (¶32). By e-mail, Triton forwarded the Cassel Brock budget to Textron. In its funding letter, Textron undertook to fund "Triton's counsel costs for the claims determination procedure 'up to an amount not to exceed $50,000 plus GST and disbursements approximately $20,000 … [n]otwithstanding the foregoing, Textron may, in its sole discretion, choose to increase such funding as required" (¶34). This information was not copied to Cassels Brock. The latter's eventual total cost for the hearing was $428, 558.60. This was as a result of the escalation of the claims process against Steelcase. The process even went on appeal.

Cassel Brock estimated $20,000 to $35,000 for the appeal hearing, and indicated that "[v]arious things could happen which keep the costs down further… but we should plan for that range". Eventually, over $1.2m was recovered from Steelcase. Cassels Brock posted an appeal bill of $141, 914.77. Considering this and other costs outstanding, a total of $800, 000 was held in trust pending the outcome of the present motion while the balance was credited to Textron. Textron argued that Cassels Brock was bound by its estimates and that any costs in excess thereof amounted to extended credit to Triton and should not have priority over Textron as secured creditor.

The court found that "amended and restated initial order" was ambiguous, especially for not dealing with "what happens if the budget is not sufficient and lawyers have already committed to the process" (¶ 66), making it inevitable for the court to deal with the problem after the fact. The court held that the lawyers' claims succeeded both under the "amended order" and under the Solicitors Act. However, such claims are expected to be reasonable in view of the complex antecedents and ambiguity over the e-mail communications between the parties and the disparity between the estimated costs and the eventual bills. Exercising its discretion, the court fixed the hearing cost at $350,000 and the appeal at $141,914.77, and affirmed that the solicitors have first charge to recover over Textron.

Analyzing the impact of email communications between the parties, the court observed that Textron intended their above quoted e-mail "to mean that they were continuing to fund the claims process, but only to the extent of the budget. Apparently, Cassels Brock … did not understand it the same way. The email is certainly open to the interpretation (sic) the Textron would fund the claims process, whatever it was. The exchanges of email highlight miscommunications between parties, and point to the dangers of email communication generally. As a more informal, speedy method of communication, with its attendant expectation of a virtually immediate response, emails create fertile breeding ground for misunderstanding and increasingly heightened emotions" (¶40).

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.

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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 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.