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Facebook Subscription is not a Consumer Contract

The Quebec Superior Court has delivered its judgment in a motion for class action authorization against Facebook and in a De Bene Esse motion for declinatory exception by Facebook in *St-Arnaud c. Facebook Inc.* In the class action motion, the petitioner, through the motion seeks an amendment to limit the proposed class action to Quebec residents only, especially to a group he identified and described as follows: "all physical persons (including their estates, executors or personal representatives), corporations, and other entities, in the Province of Quebec, who were subject of either misrepresentation, breach of privacy, invasion of privacy, breach of confidence, or other wrongful practices by the Respondent in regard to their personal information, including the loss of or unauthorized disclosure of said personal information by the Respondent to third parties, or any other group to be determined by the Honourable Court (hereinafter (...) "Group Members", the "Group" or "Users" (para 3). The petitioner quickly abandoned the inclusion of "corporations" in the "group.

It is the petitioner's case that whereas Facebook originally provided users with a simple one-click method which enabled them to keep their information private except for designated heads of information, including users' name, profile photos, friend's list, etc., recent privacy policy introduced by Facebook (between April 2009 and January 2010) resulted in making previously protected personal data of users publicly available information. The petitioner argues that Facebook had reset the default privacy setting for certain types of information users post on Facebook so that such information can be accessed by everyone irrespective of their not being Facebook members, a process that enables Facebook to trade with personal information of users without authorization, which was in breach of Facebook's original contract with users. In effect, Facebook privacy revisions have eliminated the one-click option as well as set up a control mechanism or application programming interface that is deliberately designed to be deceptive, confusing and ineffective as a way of enabling Facebook to misappropriate the personal information of users for third party access in furtherance of Facebook's commercial objectives.

Facebook argues that users of the site agree to be *continually* bound by Facebook terms of use as existed in January 2007, and as modified and as existed at the time the petitioner's motion for authorization arose. Facebook terms of use to which users subscribe has a forum or jurisdiction selection clause that specifically names the courts in Santa Clara County, California as having jurisdiction and, in effect, eliminates the jurisdiction of Quebec Superior Court; hence the latter is a *forum non conveniens*. Contrary to the petitioner's case, Facebook argues that Article 3149 of the *Quebec Civil Code (Q.C.C.)* does not apply to the present case. That article confers jurisdiction on a Quebec authority to hear an action involving a consumer contract ... if the consumer's residence or domicile is in Quebec, even though the consumer reserves the right to waive such jurisdiction.

In its ruling, the court finds that "the jurisdiction clause is binding on the petitioner and members of his group and that "[i]t has the effect of removing jurisdiction from the Superior Court of Quebec over the dispute presented in the Motion for Authorization" (para 44) for class action. In regard to whether Article 3149 of the *Q.C.C.* applies to this case, the court held that a consumer contract to which that Article applies includes contracts of adhesion (i.e. contracts drawn by one party without room for negotiation). Even though the Facebook

contract takes the nature of contract of adhesion, "Facebook does not have consumer relationship with its Users. Access to Facebook website is completely free. Therefore, there exists no consumer contract when joining and accessing the website, because it is always free. A consumer contract is premised on payment and consideration. It must be an onerous contract ..." (paras 51-54). The court concluded that "Article 3149 is clearly not applicable to the present case given that we are not dealing with a consumer contract" (para 56). In regard to *forum non conveniens*, the court cites Article 3135 of the *Q.C.C.* which gives the court the discretion to decline jurisdiction in favour of a foreign authority and concludes, on authorities, that "California and Quebec are equally capable to judge the present case" and that *forum non conveniens* does not necessarily apply. However, it notes that "the need for a Quebec judgment that is recognized in a Santa Clara Court favours California". The court found, as of fact, that the petitioner clearly accepted and submitted to the Santa Clara Court's jurisdiction. It granted Facebook's motion for declinatory exception and dismissed the petitioner's motion.

Disclosure of Breathalyzer Maintenance Logs

The Alberta Court of Queen's Bench considered the disclosure obligations of the Crown with regard to approved screening devices (ASDs) and breathalysers with the decision in *R. v. Pol*. Issues relating to the workings of these pieces of equipment have particularly come to the forefront since the "evidence to the contrary" defence in section 258 of the Criminal Code was amended nearly three years ago. Since that time the defence can only succeed if the accused offers evidence tending to show all of three things:

> that the approved instrument was malfunctioning or was operated improperly, 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 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.

As a result, accused are more frequently seeking technical information. In this case, the accused sought a number of pieces of information about the ASD based upon which the police officer formed reasonable grounds to demand a breath sample. This included a copy of the calibrations of the ASD before its use in the case and after, the maintenance log for the screening device, and the maintenance log for the breath simulator used in calibrating the ASD. In addition, the accused sought information about the breathalyser, including the Standard Alcohol Solution change records immediately prior to and after the use in the case, the maintenance log for the breathalyzer, the maintenance log for the breath simulator used in conjunction with the breathalyser and a copy of the breathalyzer use and calibration check log. Ultimately the application judge ordered some but not all of this material disclosed.

The judge noted that there had been previous case law with regard to maintenance records (particular of the ASD) in which there had been disagreement over what disclosure scheme was relevant. If the records were seen as being in the hands of the Crown then they were subject to the broad disclosure obligations set out in *R. v. Stinchcombe*. On the other hand if the records were seen as third party records rather than fruits of the investigation, then the narrower production scheme in *R. v. O'Connor* would apply. Previous cases had refused disclosure based on the conclusion that the *O'Connor* rules applied and that the accused was unable to meet the necessary "likely relevance" standard. Subsequently, however, the Supreme Court of Canada had handed down its decision in *R. v. McNeil*, creating a middle ground between the *Stinchcombe* and *O'Connor* standards. On that scheme, where records were in the hands of a third party like the police but could be relevant to the accused, the Crown had an obligation to obtain those records and disclose them, rather than require an *O'Connor* type hearing. It was the *McNeil* regime which ought to apply, the judge held.

Nonetheless, none of the technical information sought with regard to the ASD was ordered disclosed. The judge held that the ASD served only one role in the proceedings, which was to help determine whether the officer who made the breathalyser demand had reasonable grounds to do so. The calibration check on the ASD performed prior to its use here (and recorded on a sticker placed on the

instrument) would be relevant, and that information had been disclosed. Any of the other information – the maintenance log or calibrations performed later, for example – were unrelated to the issue of what was in the officer's mind at the time he made the demand. No matter what disclosure scheme was applied, therefore, that information was not relevant and did not need to be disclosed.

The accused was successful in obtaining some material relating to maintenance of the breathalyser itself. For example, the accused had been provided with a certificate stating that annual maintenance had been done on the machine: the judge noted that in providing that certificate the police were conceding that it was a relevant issue. The certificate itself, however, disclosed nothing about the work which was actually done *as* maintenance, and so the accused was also entitled to the material based upon which that certificate was issued. The accused was not, however, entitled to the maintenance log itself, because it was not sufficiently established that information about whether the machine had been working properly in the past would be relevant to whether it was working properly at the time of its use in the case. For similar reasons the Standard Alcohol Solution change records relating to the period after the machine's use in the case were not relevant (and those relating to immediately prior had been disclosed. Finally, the information backing up the certificate relating to the breath simulator and the use and calibration check log for the relevant time period were ordered disclosed.

MSN Chat Logs as Proof of Liability for Murder

The accused's conviction for murder in *R. v. J.F.* was upheld in the Ontario Court of Appeal. The interesting feature of the case for purposes here is that the evidence of his guilt came primarily from MSN chat logs.

The accused was dating a 15 year old girl, and that girl and her 16 year old sister had formed a plan to kill their alcoholic mother by getting her drunk and then drowning her in the bathtub, so that her death would appear accidental. The issues in the case on appeal related to the admissibility of certain evidence (which was found admissible under the co-conspirator's exception to the hearsay rule), character evidence, and other issues. No errors were found at trial, with one exception: the trial judge had not adequately explained to the jury the findings of fact that would be necessary for the accused to be found guilty as a party rather than as a principal. However, the Court of Appeal concluded that this was a harmless error.

The MSN chat logs contained various statements from the accused in which he suggested that the girls should incorporate Tylenol 3 into their plan in order to be certain that their mother did not wake up when put in the tub, that she would still drown eventually even if she got out of the tub after taking some water into her lungs, discussed ways of creating an alibi, so on. The Court of Appeal noted that the accused's central argument was that these comments were not meant to be taken seriously. The Court of Appeal held that if this argument were accepted, then the accused would have been found not guilty whether liability was based on being the principal or being a party: if it was not accepted, the accused would certainly be found guilty. Accordingly, although the trial judge did not properly explain the potential party liability, this error was in context harmless and the conviction was upheld.

Search Warrant Obtained by Fax

The Alberta Court of Queen's Bench has discussed the standards applicable to obtaining warrants through various means with the decision in *R. v. Hatton*. The police in that case had obtained a search warrant through the telewarrant provisions in the *Criminal Code*: specifically it had been obtained by fax. One officer had prepared the affidavit which was faxed as part of the application, and she attested that she had personal knowledge of everything in it. In fact most of the content had been told to her by another officer. The affidavit was conclusory and many allegations were unsupported, which was particularly problematic because the officer would not have been able to elaborate had she been asked questions, since the information was not in fact her personal knowledge.

The court observed that the strictness of the warrant requirements could be seen as a spectrum, with a personal appearance at one end and a warrant obtained by fax at the other. When the officer

appears personally the justice can ask questions and clarify matters, and can observe the officer in the course of doing so. The same is true, the court held, when the warrant is applied for over skype or closed circuit television. A telephone application, raises the standard: the justice can still seek clarification or amplification, but can only here, not see the affiant. Finally:

> 38 ...the *Code* and courts require the highest standard of disclosure when the peace officer appears before the justice by "means of telecommunication that produces a writing." Currently, a peace officer makes this kind of search warrant application by sending an information to obtain a search warrant form ("Information") through a fax machine. Conceivably, it could also be done by way of a document exchange through a computer using, for example, a portable document format.
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> 39 Why is a higher standard of disclosure required? The justice neither sees nor hears the peace officer. Unless the justice identifies something in the text of the Information that requires clarification or amplification, the justice will, quite rightly, assume that the matters that the peace officer has outlined in the Information are true and accurate.

In this case that high standard was not met. The problems included not only that the affiant did not have direct knowledge of the facts attested to, but that some of the information (the reliability of a tipster, for example) was not sufficient supported. Further, other issues in the case included that the officer had not included an explanation as to why it was impracticable to obtain the warrant in person, as was required by the statute. Ultimately the warrant was found to have been improperly issued, rendering the search a warrantless one in violation of the accused's section 8 rights: the evidence was excluded.

From Electronic Repair to Electronic Fraud?

The Ontario Superior Court of Justice has delivered its ruling in a motion for summary judgment pursuant to Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194 in *Cao v. Whirlpool Corp.* In this case, the plaintiff alleges that the defendants provided him with defective repair services and were involved in electronic surveillance and several espionage activities, including home invasion, illegal handling of identification information, electronic mail fraud as well as theft via the internet of the plaintiff's personal files, data and other sensitive information. As a result, the plaintiff seeks $200M damages against the defendant. It is the plaintiff's story that he purchased a Maytag refrigerator in 1999. In 2003, he contacted Maytag's call centre and requested service for the product by which time the warranty on it had expired. Consequently, the plaintiff was referred to a third party, Factory Appliance Parts and Services Inc. whereof he became responsible for ensuing service fees. In 2004, the plaintiff contacted Maytag via its web home page and expressed his displeasure with service information on the website. In response, a Maytag customer representative contacted the plaintiff and promised to send him a use-and-care guide for the product. In 2006, Maytag was acquired by Whirlpool. In 2008, the plaintiff made a formal complaint against Whirlpool to the Customer Protection Branch of the Ministry of Small Business and Customer Services and alleged that the defendant engaged in deceptive repairs and in electronic monitoring of the plaintiff as well as in blocking the plaintiff's internet services, tapping of the plaintiff's telephone and in setting up of a spy server in a vacant house next to the plaintiff's home. In its response to the complaint, the defendant advised that they did not receive any letters by e-mail from the plaintiff. It, however, pointed out that it does contact customers, periodically, in regard to promotional materials but it had no indication or record that the plaintiff opted out of the receipt of regular promotional materials.

In part, the plaintiff claims that following the repair of the Maytag refrigerator, which was carried out by the defendant in concert with their authorized repair company, he started experiencing problems with his fax machine and computer in addition to several internet disruptions and electronic inversion and interferences with his systems. He alleges that his garage was broken into by two agents of Whirlpool in an attempt to install a GPS in his car with a view to tracking his movement. In addition, his home was broken into but nothing was stolen while newspapers delivered to his home went missing.

As well, he claims that his e-trade account with TD Waterhouse was tampered with while he was continually under surveillance from a car parked in front of his house. All of these and more, the plaintiff claimed, were the handiwork of the defendant. The plaintiff supported these claims against Maytag/Whirlpool Corp. with some documentary evidence that included metadata printouts as well as e-mail printouts from his computer on which he made some endorsements of events.

In upholding the defendant's motion for summary judgment, the court noted that even though "it would appear that misfortune has befallen him [the plaintiff] with respect to his computer" (para 16), there were no expert reports providing correct interpretation of the plaintiff's metadata. As well, the court noted that the plaintiff admits that he makes no claim to being a computer expert. Consequently, the court found that "based on all evidence submitted, I find that there is nothing to establish that Whirlpool caused or contributed to the events or problems of which the plaintiff complains (para 16). In dismissing the plaintiff's claim, the court ordered each party to bear the cost of the motion for summary judgment.

Still on Business Method Patent

The Federal Court of Appeal Ottawa has delivered its ruling in a motion by the Canadian Life and Health Insurance Association for leave to intervene in the appeal by Canada's Attorney General and the Commissioner of Patents (*AG Canada and Commissioner of Patent v. Amazon.com*) against the decision of Phelan, J. in *Amazon.com, Inc. v. Canada (Attorney General)*. In the latter decision, the Federal Court judge disagreed with the decision of the Commissioner of Patents in which she denied Amazon.com's patent entitled "Method and System for Placing a Purchase Order via a Communication Network", also known as "one-click patent application". According to its claim, the said Amazon.com patent comprises an invention which enables internet shopping by way of a single click while dispensing with the need for the purchaser to check-out or supply any additional information. The Commissioner rejected the claims on the grounds, inter alia, that it did not conform to s.2 of the *Patent Act* and, as such, the invention was not a patentable subject matter. In the judge's opinion, the crux of the Commissioner's decision to exclude the patent hinged on the perceived non-patentability of "business method patent" in Canada to which category the one-click patent application belongs. The judge held that there is an absolute lack of authority for the exclusion, in Canada, of business method patents and concluded that business method patents can be patented in appropriate situations.

The present interveners are described as "representative bodies with public mandates whose members represent important stakeholders in the financial services industry" (para 6). They take the position that the ramification of the present appeal goes beyond the interest of the respondent (Amazon.com) and touches on the issue of patentable subject matter in Canada, especially the question of business methods. They argue that: "The net result of the decision to issue on appeal could be to allow the patenting of ideas, or mental steps, such as many of the methods and steps involved in the creation, use and analysis of financial data, methods of managing financial portfolios and investments, methods of creating and managing insurance contracts, methods used to calculate risk or to analyse actuarial, mortgage and underwriting data, financial models and investment strategies and methods for conducting online banking, with the result that their members would be directly impacted" (para 7). Overall, the interveners share the position of the appellants, who do not object to the present motion. The interveners maintain they have important and valuable perspectives in regard to the potential effect of the outcome of the appeal on their industrial sectors. The respondent (Amazon.com) in opposing the motion argues, among other things, that the interveners have introduced new issues, especially those bothering on the policies regarding the granting of the so-called business methods which, Amazon.com maintains, is outside the scope of the present appeal. In siding with the interveners, the court held that it is satisfied that the interveners met the six prerequisites for the granting of intervener status pursuant to *Rothmans, Benson & Hedges Canada Inc. v. Canada (Attorney General)*. Specifically, the court held that the outcome of the appeal may affect the rights of members of the insurance and banking industries who consistently

use methods and processes that would be directly affected by the test to be articulated by this court" (para 10).

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.

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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

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