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Breathalysers and Statutory Presumptions

With its decision in *R. v. Gibson* and *R. v. MacDonald,* the Supreme Court of Canada has severely restricted the use of "straddle evidence" in breathalyser cases, which is intended to rebut the statutory presumption that the accused's blood alcohol level at the time of testing was the same as that at the time of the offence (referred to as the presumption of identity). Straddle evidence is expert evidence showing that, based on the accused's consumption of alcohol and elimination rate, his or her blood alcohol level at the time of the test might have been over but might have been under the legal limit of .08 – that is, it straddles the limit. Four of the nine judge would have eliminated the use of such evidence entirely, and so held that the defence could not succeed in these companion cases. The other five judges would allow straddle evidence in certain cases, though three of those five held that the evidence in these cases was not sufficient. As a result the conviction of MacDonald and the overturning of Gibson's acquittal were upheld.

The conclusion that straddle evidence should sometimes be allowed will be of only short term significance, since amendments to the *Criminal Code* which would have the effect of limiting the type of evidence which can rebut the presumption of identity will come into effect shortly (see the IT.Can newsletter of March 7, 2008).

Justice Charron for the plurality of four judges noted that in adopting the breathalyzer scheme, and in particular the presumption of identity, Parliament had acted upon a number of assumptions. Parliament would have been aware that different people have different absorption rates and elimination rates, and that people respond differently to varying amounts of alcohol. In creating not merely an offence of driving while impaired, but of driving with a blood alcohol concentration of over .08, therefore, Parliament had in effect deliberately adopted a legal fiction which was reflected in the various presumptions involved. Although those presumptions could be rebutted by evidence to the contrary, such evidence had to do something more than show that the presumptions were a legal fiction. To be admissible evidence had to show that the presumption was inaccurate on this occasion for some particular reason, not that the presumption should not generally be made.

Justice Charron held that straddle evidence merely attacked the presumption itself, rather than rebutting it in an individual case. If expert evidence showed that the accused's blood alcohol rate was, for example, between .04 and .09, then it showed that the accused was among the group of people that Parliament had intended to target. Only expert evidence showing a range of blood alcohol levels which fell entirely below the limit of .08 could be evidence tending to show that the accused had not exceeded the legal limit.

For LeBel J. (MacLachlin C.J. and Fish J. concurring) the important issue was that the accused was not only required to rebut the presumption that the blood alcohol level at the time of testing and the time of the offence was the same, but that he or she was also required to provide evidence tending to show that his or her blood alcohol level at the time of the offence was below .08. The issue, therefore, was what sort of evidence could "tend to show" that point. Expert evidence showing that *every* person of the sex, age, height and weight of the accused would have had a blood alcohol content below the legal limit would be clearly relevant. If the evidence were instead (as straddle evidence is) that most people or some people would be below the legal limit, the evidence did not become inadmissible, but it became

less probative. Justice LeBel held that the weight to be given would depend on the facts, and so evidence that the accused's blood alcohol level would have been between .04 and .082 might be sufficient to raise a reasonable doubt. Less compelling evidence (such as that in these two cases, ranges of .04 to .105 and .064 to .109) was still admissible, but did not raise a reasonable doubt.

Justice Deschamps (Binnie J. concurring) concluded that straddle evidence not only was admissible in general, and that it should be seen as raising a doubt when its "prevailing direction" placed the accused's blood alcohol level below the legal limit. On that basis Gibson, with expert evidence placing him between .04 and .105, had rebutted the presumption. For other reasons Deschamps J. would have ordered a new trial for MacDonald.

Electronic Discovery Decisions

There recently have been a number of decisions regarding the disclosure and relevance of electronic documents. In *Vector Transportation Services Inc. v. Traffic Tech Inc.*, Justice Perell of the Ontario Superior Court of Justice considered an appeal from the decision of a Master who had ordered a defendant ("Cox") to produce his personal laptop to a forensic expert retained by the plaintiff ("Vector"). In the action, Vector was alleging that Cox, who had gone to work for Vector's competitor, Traffic Tech Inc., was soliciting Vector's clients for his new employer. Vector had produced copies of e-mails forwarded by Cox to them, of which Cox claimed he no longer had possession since he had deleted them. Vector requested that Cox be ordered to produce his computer to Vector's expert, who would search the memory for references to the names of Vector's clients in order to ascertain whether Cox was soliciting them via e-mail.

In upholding the Master's decision that the laptop should be produced, Justice Perell made reference to a number of decisions regarding electronic discovery, and also made what may be the first judicial reference to The Sedona Canada Principles Addressing Electronic Discovery since the release of that document earlier this year (reported on in the February 7, 2008 issue of this Newsletter). He noted that, in principle, Ontario Rule of Civil Procedure 30.06 allows for the production and inspection of any electronic storage medium where there is "any evidence" that a relevant document resides there. Justice Perell further made reference to Sedona Principle 2, which prescribes a notion of proportionality in e-discovery in order to avoid excessive cost and impinging on privacy and confidentiality. In this case, Justice Perell stated that the Master had either ruled that there was an undisclosed document in the laptop, or had ruled that the requested order was reasonable given the relevance of the evidence, the carefully-defined search and Vector's willingness to pay the costs associated with disclosure. Accordingly, he dismissed the appeal and ordered the laptop produced.

Other decisions have emerged from personal injury litigation. Each involved the social networking website Facebook, and each is at least a potential cautionary tale of how plaintiffs' Facebook use can undermine their litigation positions. In *Murphy v. Perger* (Ontario S.C.J., 24 September 2007, unreported; e-mail robert.currie@dal.ca for a pdf version) the plaintiff had been injured in a car accident and had advanced a claim for damages stemming from her loss of enjoyment of life and her ability to participate in social activities. The defendants became aware of a Facebook group called "The Jill Murphy Fan Club," which was authored by the plaintiff's sister but (the plaintiff's lawyer conceded) controlled by the plaintiff. The public part of the group had pictures of the plaintiff engaged in social activities, and the defence sought access to the private part of the site where (the court accepted) there were likely more photographs. In ruling that access must be granted, Justice Rady noted that the photographs "are, of course, documents" which were subject to disclosure if relevant (para. 9), and stated that it appeared that the photos could be relevant both to testing the plaintiff's credibility and to assessing the value of the claim for damages (para. 11). In response to the plaintiff's argument that the defence was simply on a "fishing expedition" on the off chance there might be relevant photos, Justice Rady referred to the fact that the plaintiff had already disclosed other photographs of herself prior to the accident, in support of her claim for damages, and therefore that photos must be relevant. The court weighed the potential invasiveness of the production order and whether such an invasion of privacy was

out of proportion to the need for the photos, but was comforted by a finding that "[t]he plaintiff could not have a serious expectation of privacy given that 366 people have been granted access to the private [portion of the] site" (para. 20). Justice Rady ruled that "the defence is to be provided with copies of the web pages posted at the plaintiff's private site" (para. 21).

This particular chicken came home to roost in *Goodridge (Litigation guardian of) v. King*, where the plaintiff had been injured in a car accident, and the question before the court was whether her injuries constituted "a permanent serious disfigurement or a permanent serious impairment of an important physical, mental or psychological function" (as this would engage the operation of a section of the Ontario *Insurance Act* which governs whether or not the defendant is to be held liable for the injuries). In support of her argument that her injuries met this threshold, the plaintiff led evidence that she had scarring on her face and shoulder and that this caused her embarrassment and impaired her enjoyment of life. Justice Platana, in ruling that the scarring did not meet the threshold of "seriousness," gave weight to the fact that the plaintiff had posted pictures of herself on Facebook in reaching a finding that the scarring "does not appear to have interfered with her normal, everyday life in any way" (para. 128).

Privacy: Federal Plan Regarding Disclosure of Security Breaches Faces Tough Criticism

Canwest News Service has recently reported on Industry Canada's Data Breach Notification Proposed Model. The model suggests that the decision regarding whether and when companies should tell customers about a security breach which has resulted in the loss of personal data will be left to the discretion of organizations. The proposal is to impose a duty only when a high threshold is met: "In the event of a data breach where an organization determines there is a high risk of significant harm to individuals resulting from the breach, the organization is required to notify affected individuals as soon as is reasonably possible after detection of a breach." No financial penalty will attach to failure to report to customers. John Lawford of the Public Interest Advocacy Centre (PIAC) is quoted as saying that the government's consultation process on this matter has "gone off the rails… You could defend yourself [by saying], 'I never disclosed the information because we determined ourselves that there was not a high risk of significant harm. It was just a moderate risk of significant harm'." PIAC itself has described the proposal as "Carte Blanche for Business Data Spills." Their representations to the stakeholder meeting held by Industry Canada on 11 April 2008 can be found here.

Reasonable Expectation of Privacy

Since the Supreme Court of Canada's decision in *R. v. Tessling*, which found that the use of a Forward Looking Infrared scanner (FLIR) to detect the heat emanations from a building did not constitute a search, a debate has been carried on in lower courts over the extent to which the use of various technology does or does not intrude on a person's reasonable expectation of privacy. The particular context in which this has most often (though not exclusively) arisen is in the police use of sniffer dogs to detect narcotics. The issue has been whether the heat emanations which could be detected by the FLIR, which were found in *Tessling* to be meaningless and not to attract a privacy interest, were analogous to the scents which could be detected through the use of dogs but not with the unaided senses.

With the companion decisions in *R. v. Kang-Brown* and *R. v. A.M.*, the Supreme Court has now settled that particular issue, concluding that the use of a sniffer dog is a search. Because of the nature of the splits among the judges (all nine justices participated in both decisions, rendering four judgments in each case), the broader issue of whether *Tessling* was meant to change the approach to determining when technology does and does not intrude on privacy is less clear.

In *Kang-Brown*, the accused was confronted by the police as he retrieved his luggage in a Calgary bus terminal. After a relatively brief interaction with the accused, a police officer had a sniffer dog brought over, which indicated the presence of narcotics in the accused's bag. The accused was then arrested and his bag was searched, turning up 17 ounces of cocaine and a small amount of heroin. At trial the accused argued that the use of the sniffer dog

was a warrantless search, and therefore a violation of section 8 of the *Charter*. The trial judge found, however, that the odours from the bag emanated freely in a public place, and were not information in which the accused had a reasonable expectation of privacy. The Alberta Court upheld that decision, holding that *Tessling* had fundamentally changed the approach to privacy.

In *A.M.*, the police randomly visited a high school where they had an open invitation from the principal to bring their sniffer dog on any occasion. The spent roughly two hours in the school, during which time students were required to remain in their classrooms. Toward the end of the search the sniffer dog indicated the presence of drugs in a backpack which was in the gymnasium. A search of the bag did turn up narcotics, but the accused objected that they had been found through an unreasonable search. The Ontario Court of Appeal upheld the acquittal at trial, finding that both the sniff and the physical inspection were unreasonable searches. On the issue of reasonable expectation of privacy, they held that the proposed analogy between odours emanating from a backpack and heat emanating from a building was not a helpful one.

Although the issue had been controversial, not only in the cases under appeal but in other decisions, all nine judges agree that the accused in *Kang-Brown* did have a reasonable expectation of privacy in the contents of his bag, and that the use of a sniffer dog violated that expectation. In *A.M.* seven of the nine judges held that there was a reasonable expectation of privacy: the two who disagreed (Deschamps and Rothstein J.J.) did so primarily based on the fact that the search occurred in a school, that the possibility of dog searches had been publicized, that the backpack was left alone in an empty room and similar factors, rather than on anything to do with the method – that is, a dog's sense of smell – by which the search was conducted. Indeed, although the argument that use of the sniffer dog did not constitute a search at all was the foundation of the Court of Appeal's argument in *Kang-Brown*, discussion of that issue is virtually absent from the Supreme Court's judgment. Seven of the nine judges in that case simply take it for granted that there was a search, and so do not discuss that issue at all: the reasonableness of the search, rather than whether there was a search, is what divides them. Only Justice Deschamps (Rothstein J. concurring) discusses the issue at all. She notes that the dog functioned as an investigative tool, detecting not only what was in the air around the bag but also what was in the bag itself. This inference intruded on the accused's information privacy, since whether he had come into contact with a controlled substance was an intimate personal detail of a biographical nature.

In *A.M.* Justice Binnie (Chief Justice MacLachlin concurring) also talked about the proper application of *Tessling* and other cases dealing with the use of technology as it intrudes on privacy. He suggested that the Alberta Court of Appeal approach in *Kang-Brown*, which treated "emanations" as a generic category of their own lacking constitutional protection, was incorrect. Any analogy between infrared cameras and a dog's nose was not important: what did matter was that "[t]he dogs pointed the police to the sniffer dog's equivalent of a smoking gun" (para 39). It was the importance of the information revealed – which led immediately on its own to the accused's arrest in *Kang-Brown* – which mattered. However, Justice Binnie said, *Kang-Brown* and *A.M.* were not intended, any more than *Tessling* had been, to chart the future of information privacy: "[t]he s. 8 jurisprudence will continue to evolve as snooping technology advances" (para. 40).

It is not entirely clear to what extent Justice Binnie speaks for a majority in those statements. Four other judges (Justice LeBel J. with Fish, Abella and Charron JJ. concurring) agree with Justice Binnie's conclusions on that issue, though they do not explicitly adopt his reasons. The actual division between the judges in each case is fairly complex.

In each decision, four judges (Justice LeBel *et al.*) conclude that the dog sniff was a search, that it was not authorized by any statute, and that no common law power authorizing it should be created. Accordingly, the search was an unreasonable search because it was not authorized by law. They also concluded, in accordance with longstanding standards, that reasonable grounds would be required to authorize the search. Four other judges (Justice Binnie and Justice Deschamps' judgments) agree that there was a search and that no statute authorized it, but hold that a common law power based on the lower standard of reasonable *suspicion* should be created to allow for sniffer dog searches. Of those

four judges, two (Binnie J. and MacLachlin C.J.) held that the reasonable suspicion standard was not met on the facts of either case: as a result, a majority of six judges find that there were unreasonable searches. In *Kang-Brown* Justice Deschamps held that the reasonable suspicion standard *was* met, while in *A.M.* she concluded the accused had no reasonable expectation of privacy: in either case she found that there was no s. 8 violation. Justice Bastarache in each case would have found a common law power for the police to use sniffer dogs based not only on reasonable suspicion of a particular person, but also on the lower standard of "generalized" suspicion relating to a place where drugs were likelier to be found.

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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