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Disclosure of Facebook Pages in Civil Action

In *Kent v. Laverdiere* an application for disclosure of the current content of Facebook and MySpace pages for three plaintiffs was dismissed. The three were suing the defendant in connection with injuries suffered by one of them in a dog attack more than five years previously. The matter had been set down for trial and the scheduled date was four weeks from the time of the motion. The Master dismissed the motion partly for that reason. She noted that the material sought was about 1500 pages, and that a great deal of it consisted of "blogs and e-mails entirely authored by third parties who are not involved in this litigation, which, in some cases, pertain exclusively to their own lives. Photos of these unrelated individuals are also included among the materials sought" (para 4). As a result, the materials would have to be extensively reviewed and vetted with a view to privacy concerns, which the plaintiffs estimated would take a minimum of 75 hours. In addition, the Master noted, there was likely to be dispute between the parties on issues of relevance, with the result that further directions would be sought form the court. The Master concluded that granting the application would amount to delaying the trial, which she had no jurisdiction to do.

Entirely apart from that consideration, however, the Master held that she would not have granted the application had it been brought earlier. She noted that the examinations for discovery had taken place four years previously, and that social networking sites had already been a prominent feature of young people's lives at that point. She also noted that for the most part what plaintiffs were actually seeking when they sought disclosure of Facebook pages was photographs, and that photographs had been relevant evidence for a very long time: she held

> The fact that these photos are now mounted on a site that can be viewed by certain pre-determined individuals where a plaintiff maintains a private Facebook account does not make these photos any more relevant than they were before the existence of Facebook or, arguably, more public. Again, there is no suggestion that questions were asked about photos of any of the plaintiffs at discoveries. (para 12)

In this case, the discoveries had been completed and the plaintiffs had certified that they were ready to proceed to trial. In essence, the Master found that the defendant should be held to that:

> 13 Uxbridge counsel was candid when questioned about the timing of this request. When the court expressed concern that Uxbridge counsel was dredging up all its personal injury defence files at this time to seek plaintiffs' Facebook pages regardless of the stage of the litigation in each case, I was told that was, indeed, what they were doing.
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> 14 This is not a practice that the court should encourage. While parties may have ongoing obligations of disclosure when new facts or documents arise that have a bearing on a case, there has to be some certainty regarding the start and finish of the discovery process of an action.

Domain Name Disputes

"yachtworld.ca"

In *Yachtworld, Nova Scotia Company, U.L.C. v. Clift's Marine Sales (1992) Ltd. & Angus Yachts*, sole CIRA panelist Elizabeth Cuddihy heard a dispute regarding the domain name yachtworld.ca. The Complainant ("Yachtworld") is a Nova

Scotia company that is a Canadian licensee of a Virginia, USA company called Dominion Enterprises. Dominion has owned the registered trademark YACHTWORLD in the U.S. since 1997, and has licensed use of the mark to Yachtworld since 2003; it applied to register the mark in Canada in July, 2008. Dominion and its licensees jointly operate the website yachtworld.com, an online yacht sales website and "the internet's leading online marine publication," which lists over 100,000 yachts for sale in 120 countries. The website has been available in and accessed from Canada since 1996. The Registrant ("Clift's") is a Mississauga, ON company, which had registered the disputed domain name on 9 November 2000 and then apparently redirected it to its own website, cliftsmarine.com. It did not respond to the complaint.

Panelist Cuddihy first examined whether the domain name was "confusingly similar" to the mark under 4.1(a) of the CIRA Policy. She held that while the mark had not been registered in Canada at the relevant time, Yachtworld had nonetheless been using the mark in its advertising and promotion since 1996, thus giving it common law rights to the mark that grounded the complaint. The domain name itself was identical to the mark, thus making it "confusingly similar" (paras. 32-35). Turning to whether the registration had been made "in bad faith" under 4.1(b) of the Policy, she noted Yachtworld's evidence that Clift's had once been a member of the Yachtworld website and concluded that it therefore had knowledge of the mark well before the date of registration (para. 39). Also, it was clear that Clift's was a competitor of Yachtworld, and its redirection of the domain name to its own website made it clear that Clift's was "trading on the goodwill associated with the Yachtworld Mark by misdirecting consumers to its competing website, thereby potentially benefiting from diverting this traffic to his site" (para. 40). This grounded a finding that the registration had been done primarily for the purpose of disrupting the business of Yachtworld, which constituted "bad faith" under 3.7(c) of the Policy. Finally looking to whether there was evidence that Clift's had "no legitimate interest" in the domain name, Panelist Cuddihy held that the evidence showed that Clift's could not bring itself under any of the criteria of "legitimate interest" listed in 3.6 of the Policy, and that Clift's itself had not led any evidence on the point. Accordingly, it had no legitimate interest. The domain name was ordered transferred to Yachtworld.

Electronic Disclosure in Criminal Cases

In *R. v. Oszenaris* the Newfoundland and Labrador Court of Appeal rejected a claim that disclosure by electronic means (in particular a case management system call "SUPERText") had not constituted adequate disclosure because of the uncertainty of counsel for the accused that she would find all the information on the CDs, because of her lack of familiarity with the technology. The Court of Appeal had held that a claim of inadequate disclosure based on its electronic format should point to some technical flaw in the software that created difficulty in accessing the information (see the IT.Can newsletter of November 13, 2008). The accused sought leave to appeal to the Supreme Court of Canada, which has now been dismissed without reasons.

Federal Government Tables Anti-Spam Bill (and Tries to Fix the Do-Not-Call List)

On 24 April 2009 Minister of State for Science and Technology Gary Goodyear, on behalf of Industry Tony Clement, tabled Bill C-27, which would enact the *Electronic Commerce Protection Act* if passed. The bill comes nearly four years after the recommendation of the National Task Force on Spam that such a law be created. The primary purpose of the proposed statute is to combat spam: as the government's summary states, it "prohibits the sending of commercial electronic messages without the prior consent of the recipient and provides rules governing the sending of those types of messages, including a mechanism for the withdrawal of consent." Or, as Minister Clement put it in a recent speech, "Our proposed Electronic Commerce Protection Act will deter the most dangerous forms of spam, such as identity theft, phishing and spyware, from occurring in Canada, and will help drive spammers out of Canada." The main prohibitions, set out below, are on: the sending of unsolicited spam e-mail (s. 6), the alteration of transmission data in an electronic message (s.7) and the unauthorized

installation of computer programs (s. 8):

> **6.** (1) No person shall send or cause or permit to be sent to an electronic address a commercial electronic message unless
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> (*a*) the person to whom the message is sent has consented to receiving it, whether the consent is express or implied; and
>
> (*b*) the message complies with subsection (2).
>
> (2) The message must be in a form that conforms to the prescribed requirements and must
>
> (*a*) set out prescribed information that identifies the person who sent the message and the person — if different — on whose behalf it is sent;
>
> (*b*) set out information enabling the person to whom the message is sent to readily contact one of the persons referred to in paragraph (a); and
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> (*c*) set out an unsubscribe mechanism in accordance with subsection 11(1).
>
> [. . . .]
>
> **7.** (1) No person shall, in the course of a commercial activity, alter or cause to be altered the transmission data in an electronic message so that the message is delivered to a destination other than or in addition to that specified by the sender, unless the alteration is made with the express consent of the sender or in accordance with a court order.
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> **8.** (1) No person shall, in the course of a commercial activity, install or cause to be installed a computer program on any other person's computer system or, having so installed or caused to be installed a computer program, cause an electronic message to be sent from that computer system, unless the person has obtained the express consent of the owner or an authorized user of a computer system or is acting in accordance with a court order.

The Bill provides for both administrative penalties against those who infringe, and a private right of action for injured parties which will allow them to seek both damages related to injury, loss or expenses, and statutory damages for the contravention. The statute is to be enforced in tandem by the Office of the Privacy Commissioner of Canada, the CRTC and the Competition Bureau—each of which will have the power to share information with foreign agencies enforcing similar laws. Also, as Michael Geist has remarked, buried at the back of the Bill (and not mentioned specifically in the government's summary) are measures designed to repeal the provisions of the *Telecommunications Act* that set up the national Do Not Call List. In its place is a scheme appearing to provide a presumption that all telephone users should not receive unsolicited commercial telephone calls, unless they opt in.

Internet Defamation

The Supreme Court of Canada has dismissed leave to appeal in the defamation case of *Fromm v. Warman*. Warman had worked as an investigator for the Canadian Human Rights Commission and in his personal capacity had filed complaints before the CHRC with respect to hate speech on the internet. The Canadian Association for Free Expression Inc. (of which Fromm was the director) had at various times referred to Warman on their website as "an enemy of free speech, a member of the thought police, a high priest of censorship, and an employee who abused his position at the CHRC in order to limit freedom of expression and pursue his own ideological agenda" (see the IT.Can newsletter of December 13, 2007). Warman had succeeded in his libel action at trial and had been awarded $30,000. On appeal the Ontario Court of Appeal found that the trial judge's findings of malice were soundly based in the evidence and awarded $10,000 in costs. Fromm applied for leave to appeal, claiming that the comments made were fair comment on matters of public interest. The Supreme Court (Binnie, Fish and Charron JJ.) dismissed the application without reasons, and with costs.

Reliability of Printed Copy of Email

Hamilton v. Jackson dealt with an issue of custody and access of an infant. One issue between the parties concerned the behaviour of the mother, Hamilton, who had been under the influence of

alcohol at a certain point while caring for the baby. Her fifteen year old son had been concerned been concerned enough that he had intervened and had taken the child from her temporarily, which involved an altercation of some sort. The father of the child, Jackson, had not been present at the time, but introduced a printed version of an email from a third person who had been there, Galloway. The printed version of the email referred to a knife, to hitting, and to bruises suffered by various participants. Galloway was called as a witness by the father, but she stated she did not make the statements about a knife and bruising, and could not recall making the statements most heavily relied on by him. The trial judge noted:

> 17 Neither party tendered the electronic version of the email or any metadata relating to it. As this was not done in this case, I am left with conflicting versions as to what Ms. Galloway emailed to Mr. Jackson. It is possible to alter the text of an email. Ordinarily such alteration can be detected by a forensic review or simply by viewing the metadata of the email. Given the way in which emails are created and sent, I must exercise great caution in considering what they purport to contain.

Ultimately the trial judge decided not to accept the father's evidence where it conflicted with that of others.

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.

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