l'Association canadienne du droit
des technologies de l'information

May 21, 2010

IT.Can NEWSLETTER

Canadian IT Law Association

www.it-can.ca

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

Les auteurs du présent bulletin sont les professeurs Robert Currie, Chidi Oguamanam et Stephen Coughlan de l'Institut de droit et de technologie de la Faculté de droit de l'Université de Dalhousie.

Appearance by Means of Video Conference

The British Columbia Supreme Court has issued an order allowing the appearance of three witnesses at trial by means of videoconference with its decision in *Nybo v. Kralj*: the decision suggests an attitude of increased openness towards such appearances.

On the third of day a fifteen day civil trial in Vancouver, the plaintiff applied to have the evidence of three witnesses heard by way of videoconference. The trial judge noted that the plaintiff had provided no details as to the arrangements for the videoconferencing, and had not give five days notice to the trial coordinator, as requested in the court's protocol for such requests. In addition, none of the three witnesses had been subpoenaed and there were no affidavits from the witnesses explaining why they could not attend court. One witness was in Penticton British Columbia, a second in Toronto Ontario, and the third in the United States. Plaintiff's counsel indicated that the three witnesses did not want to miss time from work to attend the trial, though none had any illness or infirmity preventing them from attending.

Despite what might be seen as these deficiencies, the trial judge granted the application. She noted that the British Columbia Evidence Act permitted the giving of evidence by teleconference, unless "one of the parties satisfies the court that receiving the testimony in that manner would be contrary to the principles of fundamental justice". In considering that question, the Act directs a judge to consider the location and personal circumstances of the witness, the costs that would be incurred if the witness had to be physically present, the nature of the evidence the witness is expected to give, and any other circumstance the court considers appropriate. This approach, she held, puts the onus on the party who wishes to deny the use of the technology.

The only justification offered here was that the witnesses did not want to leave work and family commitments in order to testify. Justice Dillon noted that such reasons might not in the past have been given great weight. However, given the approach in the act and the distance at least two of the witnesses would have to travel, she granted the application.

Defamation vs. Privacy in Anonymous Internet Posting

In *Warman v. Wilkins-Fournier* (hyperlink not available) the plaintiff brought a defamation action under Rule 76 of the *Rules of Civil Procedure, R.R.O. 1990 Reg. 194* (as amended) against the defendants, as named defendants and eight John Doe defendants regarding alleged defamatory postings on an internet board called Free Dominion (the message board). The defendants were administrators and moderators of the message board. Freed Dominion allowed only registered users to post messages or commentaries on various political and social issues. The eight John Doe defendants were alleged to have posted the offensive messages using pseudonyms.

Pursuant to the defamation action, the plaintiff brought a motion before a motions judge to compel the defendants to release the IP addresses for the alleged defamatory postings by the John Doe defendants, including the e-mail addresses with which they registered as users of the message board as well as subscriber information they provided incidental to such registration. The information sought to be released was to enable the plaintiff identify the John Doe defendants so as to serve them the statement of claim in the substantive action. In granting the plaintiff motion, the motion's judge rejected the argument of the defendants that

the plaintiff/applicant was required to establish a prima facie case of defamation by affidavit evidence before an order of disclosure they requested could be granted. The motions judge ruled that disclosure was mandatory because the plaintiff/applicant did establish that the information was relevant and not protected by privilege.

In upholding the present application by the defendants/applicants to set aside the ruling of the motions judge, the court that held even though the *Charter* does not apply to strictly private litigation between litigants not involving state action, where one party to a suit relies upon government action, such as the action of the court in the enforcement of *Rules of Civil Procedure* requiring the production of information which potentially infringes another's *Charter* rights, then the latter are engaged. The court noted that privacy interests of both the plaintiff and the John Doe defendants are also directly engaged. The former's right to privacy may be compromised by the alleged libellous postings. For the John Doe defendants, they may have a reasonable expectation of privacy since they elected to make their postings anonymously. Revealing their identity may also even compromise their freedom to express political opinion. Similarly, it may even compromise their personal security.

The court held that "in order to prevent the abusive use of the litigation process, disclosure cannot be automatic where *Charter* interests are engaged. On the other hand, to prevent the abusive use of the internet, disclosure also cannot be unreasonably withheld even if *Charter* interests are engaged" (para 24). After reviewing a number of relevant cases, the court concluded that "where privacy interests are involved, disclosure is not automatic even if the plaintiff establishes relevance and the absence of any of the traditional categories of privilege" (para 27). In cases where the *Charter* is engaged, disclosure is not automatic, and to hold otherwise would enable "unmeritorious action for the sole purpose of revealing the identity of anonymous internet commentators, with a view to stifling such commentators and deterring others from speaking out on controversial issues. For this reason, commencement of a defamation claim does not trump freedom of expression or the right to privacy" (para. 33).

The court found that the motions judge did not have the benefit of extensive submissions on the issues now canvassed. Even though he seemed conscious of privacy interest of the John Doe defendants, he did not seem to have given consideration to the freedom of expression aspect. Further, the court found that the "motions judge did not take into consideration whether the Respondent [plaintiff] established prima facie case of defamation before ordering disclosure of the documents sought by the Respondent. In our view, the omission to do so constituted an error of law" (para. 45). Allowing the appeal, the court remitted the matter to another motions judge for reconsideration based on the guidelines and principles outlined by the court in the present ruling.

Sexually Explicit Luring Through Facebook Text Messages

On May 11, 2010, a Dartmouth (Nova Scotia) Provincial Court handed a one-year conditional sentence to a 30 year old former junior high school teacher who pleaded guilty to a charge of luring a sixteen year old girl over the internet through sexually explicit Facebook text messages. The Crown admitted that the complainant initiated the contact over Facebook "and had to go to some lengths to try to draw out of the accused the conversation" that embedded the incriminating conduct.

Last fall, the complainant added the accused and some of the teachers in her former junior high school as her Facebook friends. Shortly, she visited the accused in her former junior high school to autograph a copy of the book written by the accused. During that visit, the girl had some emotional conversation with the accused former teacher regarding her life. She was then in depressed and upset state. After the meeting, the accused hugged the complainant. A month later, the complainant started sending text messages persistently to the accused with a view to getting more incriminating evidence since she was under the belief that something was wrong with the accused. Among other things, the complainant inquired of the accused whether she was attracted to him and, if so, what part of her body he considered most attractive. After some hesitation, the accused failed for the baits.

Following continued text messaging forth and back between the two, the accused wrote suggestive, lascivious and incriminating things through the text conversations. The complainant showed the text messages to her high school principal who called the police. One of the lascivious conversations in the text messages formed the substance of the present charge of luring an under aged child over the internet for which the accused pleaded guilty. The Crown had to drop an additional charge of sexual exploitation. Following his arrest and charge, the accused resigned from his teaching job in February. In imposing the conditional sentence for this so called "low-end" form of luring, Judge Castor Williams ordered the accused to submit his DNA to the police for the national databank. The court imposed conditions include six month house arrest, curfew from 11pm to 6am for the remainder of the sentence, counselling and assessment and non-contact with the complainant/ victim.

E-Discovery and Threshold for Default Judgement

In *Canreal Management and Corp. v. Mercedes-Benz Canada Inc.*, the plaintiff, a property management and real estate services company, claims that it was retained by the defendant to assist in the identification and acquisition of property for the defendant's auto dealership in BC. The plaintiff alleges that it actually identified such a property and assisted the plaintiff in preparing an offer. Even though the offer did not go through, the plaintiff kept pursuing the deal. However, the defendant eventually purchased the property for $14.5m without reference to the plaintiff, claiming that it had no contract with the plaintiff. At the BC Supreme Court, the plaintiff claims 3 percent of the purchase price of the property or $456,750 including GST as its commission for the transaction. From the outset, plaintiff's counsel insisted upon a general demand for discovery of documents, including electronic ones incidental to the alleged contract. Also, counsel specified the category of the documents that he considered relevant. According to him, for almost a year the defendant ignored requests for delivery, failed to search for documents or deliberately withheld same. The counsel is of the opinion that the defendant has been deliberately obstructive or grossly negligent, hence the plaintiff brings the present motion for an order to strike out the defendant's appearance or, in the alternative, for striking out the statement of defence for failure to make full discovery and consequently entitling the plaintiff to default judgment.

In response to the plaintiff's motion, the defendant representative swore to an affidavit detailing the defendant's best effort through its information technology department for the conduct of electronic search of the documents requested by the plaintiff. Such an effort has been partially successful and results have been forwarded to the plaintiff. The affidavit also indicates that there are still prospect for more documents being turned in, especially through access to archived electronic files of ex employees, but pointed out that the process will take a long time. Meanwhile, not satisfied with the claim of the defendant, the plaintiff's counsel determined that a certain former employee of the defendant resident in Luxemburg was likely to be the person most conversant with the alleged contractual relationship between the plaintiff and the defendant in respect of the transaction in issue. During his examination, the employee led evidence leading to the discovery and delivery of additional documents, a development that contradicted the affidavit evidence of the defendant which created the impression that the latter left no stone unturned in discovering and delivering documents.

The court found that defendant efforts to identify and produce relevant documents, including electronic records, have been neither thorough nor as timely as necessary and that the defendant did not provide satisfactory explanation for the dilatory or piecemeal approach to document production. Even though the defendant has so far produced more than 6000 pages of documents, "the adequacy of disclosure is not judged by volume" (para 22). The court found that plaintiff may be justified in its prejudice over the conduct of the defendant. However, the court has the duty to balance the prejudice of the plaintiff with that of the defendant "that would arise if it is denied the opportunity for what may be a meritorious defence. I am not persuaded that the inadequacies in the defendant's document discovery are so egregious as to justify the ultimate, Draconian remedy that the plaintiff seeks" (para. 35). Adopting the BC Court of Appeal approach in *Muscroft v. Euroceptor*, the court preferred to

exercise restraint over the option of striking out the defence. Instead it ruled that the plaintiff was entitled to cross-examine the defendant's representative on his affidavit evidence with a view to further discovery and further examination of previous witnesses as may be necessary.

Disclosure of DVD Recordings

The Ontario Superior Court of Justice has issued a stay of proceedings on the basis of a violation of the right to a trial within a reasonable time with the decision in *R. v. Farry*. The primary factor leading to this result was the unexcused failure to have disclosed a copy of the DVD recording of events in the breathalyser room.

The trial had not taken place until 15 months after the charges were first laid. The initial cause of delay in the case had occurred at the first appearance, when the DVD had not been available, thereby necessitating an adjournment. This was not the only delay in the case, but there was no justification for it.

The trial judge had described the case as close to the line, but had denied the claim of a violation of the right to trial within a reasonable time. On appeal, the Superior Court of Justice overturned this decision. Trotter J. noted that the reasons in the case were inadequate. The trial judge had properly characterised the facts as close to the line, but had not then engaged in any analysis to explain why the claim should not succeed. Rather, his reasons consisted largely of "expressed frustration with the volume of s. 11(b) cases coming before the Court, as well as the manner in which trial counsel had conducted the case".

In fact, Trotter J. held that a feature of this case which was shared with many others was a justification of granting the application: the fact that DVD recordings of the breathalyser room were frequently and unjustifiably not available in a timely way. He held:

> 11 Before addressing the issue of the appropriate order, I wish to point out that I do share the motion judge's view about the delay involved in the disclosure of the DVD. This type of delay, which is caused by the police, is a common occurrence in the Ontario Court of Justice. In our digital world, in which data is so easily shared, there is no good reason why a copy cannot be produced in a very short period of time. In this case, it should have been available by the first appearance date (which was over a month following the arrest). Meaningless appearances are routinely made in the Ontario Court of Justice while everyone waits for the police to make copies of what transpired in the breathalyzer room. These needless appearances clog the already busy courtrooms in this province. This is unacceptable.

Ultimately Trotter J. overturned the accused's conviction and entered a stay.

National Do Not Call List Violations

The CRTC has confirmed its initial decision with regard to violations of the National Do Not Call list with relation to Infax. Infax is a company which faxes telemarketing communications to businesses. On three successive days it had sent faxes to a consumer whose number had been registered with the National Do Not Call list. In addition, Infax had not registered with the National Do Not Call List, and had not paid the applicable subscription fees. Each of the fax, the failure to register, and the failure to pay fees constituted an offence, and the CRTC adjudged that each offence had been committed each time the fax had been sent. Accordingly, Infax had been fined and administrative monetary penalty of $1,000 per offence, for a total of $9,000.

Infax sought a review of that order. They argued that they only faxed telemarketing communications to businesses, and that the complainant's telephone number had only been included on the list by mistake. This error, they argued, fell within the due diligence defence which was available to them. Further, they argued that had the consumer contacted them, they could have corrected the error and removed his number within 24 hours. They also argued that they should only be penalized once for each offence, and therefore ought only to be ordered to pay $3,000. In addition, they claimed that there was a change in circumstances, in that they had since registered with the National Do Not Call list.

The CRTC rejected all of these arguments, finding that there was not any substantial doubt as to the correctness of the original decision. Infax had in fact placed the three telephone calls. Although the placing of those calls might have been an error, Infax had not shown that it had been duly diligent: in particular, it had not registered with the National Do Not Call list, which would have allowed them to implement policies and procedures to honour consumers' requests that they not be contacted by way of a telemarketing telecommunication.

The CRTC also found it irrelevant that the consumer had not contacted Infax to request removal from its calling list. They noted that the very point of the National Do Not Call list was so that consumers did not have to make requests of individual telemarketers, and could register with the list in order to ensure that telemarketers did not contact them. The burden, the CRTC held, was on Infax, not on the consumer, to see to it that no telemarketing calls were made.

In addition, the CRTC reaffirmed the administrative monetary penalties of $9,000, on the original basis that each call had constituted three offences, and three calls had been made. There might have been a change in circumstances since, in the sense that Infax had since registered with the list. However, that action did not alter the fact that Infax had at the time not been registered and so had committed the nine offences. Accordingly there was no substantial doubt with regard to any part of the decision, and the administrative monetary penalty was upheld.

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