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

May 31, 2007

IT.Can NEWSLETTER

Canadian IT Law Association

www.it-can.ca

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.

Demand for Photo Licence for Use with Facial Recognition Software Violating Freedom of Religion

The Province of Alberta's decision to require that all driver's licences contain a photograph, so that the photograph could be entered into a database of facial recognition software, has been struck down by that province's Court of Appeal as violating religious freedom, and not being a demonstrably justified limit under section 1. In *Hutterian Brethren of Wilson Colony v. Alberta*, a constitutional challenge to a change in regulations to the province's *Traffic Safety Act* was upheld.

From 1974 (when photo licences were introduced in the province) until 2003 the regulations allowed for non-photo driver's licences in some circumstances. In particular such were frequently obtained by members of Hutterite communities, since the Hutterite Brethren hold the view that to willingly have one's photograph taken is a sin. At the time the regulation was changed there were roughly 450 non-photo licences in the province, more than half of which were held by Hutterites.

The province changed its regulations to require all driver's licences to have photographs in order to create a database for the use of facial recognition software. The province argued that this database was necessary to prevent identity theft, facilitate harmonization with other provinces and countries and to reduce terrorism. They argued that drivers' licences were a widely accepted form of identification that could be used to gain other fraudulent documentation. Further, use of a digital photograph to minimize the security threats posed by fraudulent licences would be consistent with many of the inter-jurisdictional harmonization agreements Alberta was seeking to enter. The province also argued that requiring photos for its facial recognition database would mean that it would not be possible for an applicant to fraudulently claim the identity of an individual already in the system; and that it would not be possible for an individual already in the system to apply for a second licence using a false name.

The province had offered some accommodation to the Hutterite Brethren, but all of the proposals made by the province would still have required that photographs be taken and be placed in the facial recognition database, and so these proposals were unacceptable to the Hutterites. The province, in turn, was unwilling to consider any compromise which did not involve inclusion in the database. There was no real issue in the case that the regulation violated freedom of religion, and so the issue was whether that violation was justified under section 1.

The majority of the Court of Appeal held that it was not. They accepted that there was arguably a sufficiently important objective for the change in the regulations, though not the one proposed by the province. The province had argued that the objective of the legislation was to prevent identity theft, facilitate harmonization with other provinces and countries, and reduce terrorism. The court agreed that these would be sufficiently important objectives for legislation to have, but did not accept that these goals could really be said to be the objective of legislation concerning driver's licences. If legislation concerning mandatory universal identity cards were introduce, the court said, those objectives could be weighed in the balance, but in this case a driver's licence must be considered as aimed simply at highway safety. In that much more limited context, the province had conceded that it did not require photo licences for the purpose of driver identification at the side of the road: it had

managed for 30 years without such a mandatory requirement. Rather, the purpose of the mandatory photo was to make sure that everyone who applied for a licence was included in the provinces facial recognition database. Accordingly the highway traffic related aims of the photo requirement were merely to prevent an individual from applying for a licence in another person's name and to prevent a single individual from obtaining two licences. These were sufficiently important objectives to get past the first hurdle in the section 1 analysis, though they were much more limited than the goals the province had suggested.

The legislation failed, however, in the proportionality aspect of the section 1 analysis, in large part because of this more limited goal. The court noted a number of reasons that the legislation might not be seen as rationally connected to its goal, and could not be seen as either minimally impairing or proportional in its effects. First, there were over 700,000 Albertans without driver's licences, who were therefore not in the facial recognition database. Even when those who were under-aged were removed from that figure, there would still be tens of thousands of people in whose name anyone seeking to obtain a licence fraudulently could apply. Against that risk, the threat posed by the 450 non-photo licence issued on religious grounds was small. Further, the effect of the mandatory photo requirement amounted a complete ban on driving for Hutterite Brethren: no option such as providing a licence prominently stating that it could not be used for identification purposes had been considered. In addition, there was no evidence that there had ever been any instance of the use of non-photo licences for the kind of fraud anticipated in the 30 years such licences had existed. The impact on the Hutterite Brethren would be enormous, and out of proportion to any benefit obtained by the province. As a result the court struck down the amended regulation and upheld the chamber judge's decision that the mandatory photo requirement could not be enacted.

Domain Name

In *Yellow Pages Group Co. v. Coolfred Co.* a three member CIRA panel: Donovan, Groom and Scassa (Chair) considered a dispute over the domain name yellowpage.ca. The complainant is incorporated under the laws of Nova Scotia and its principal place of business is located in Quebec. It owns Canadian registered trade-marks YELLOW PAGES and YELLOWPAGES.CA which were registered on June 27, 1980 and February 2, 2003 respectively in association with wares and services relating generally to advertising, publications and internet services. The complainant also claims that it has used the two trade-marks since 1948 and 1997 respectively. The registrant registered the disputed domain name yellowpage.ca on November 8, 2000. The complaint led evidence to the effect that for a period until 2006 the domain name resolved to a site parked with DomainSponsor.Com. Twice the complainant sent cease and desist letters to the registrant in regard to the parked site. Even though the registrant did not respond to the letters, the domain name subsequently ceased to resolve to the site and at the time of the present proceeding it did not resolve to any website.

In their decision the panelists found that CIRA domain name dispute resolution policy requirements in regard to establishing that the disputed dot-ca domain name is confusingly similar to the mark in which the complainant has rights, and lack of registrant's legitimate interest in the domain name were met in the present circumstance. The complainant discharged the burden of proving that the registrant had no legitimate interest in the domain name which the registrant did not successfully disprove. Not only that the complainant has "rights" in the marks in question, but also, although the registrant's domain name registration predate the registration of one of the complainant's marks, "the Complainant had clear, and long established rights in the Mark YELLOW PAGES, and these Rights predate the Registrant's registration of the disputed domain name by many years" (¶ 16). However, in regard to establishing that the registrant registered the domain name in bad faith, the panel found that the complainant failed to satisfy it even though it noted that the required proof is on balance of probabilities. Specifically, the panelist found that "any initial connection between the domain name and DomainSponsor.Com (a competitor of the complainant) was without the knowledge of the Registrant, and that he received no revenue from the arrangement" (¶26). Similarly, complainant's evidence that the registrant planned to sell domain

names in its website in a section thereto under construction "is not adequate evidence of any offer to sell the disputed domain name" (¶27) or proof of bad faith. In all other considerations, the panelists found that the complainant failed to prove that the registrant acted in bad faith by registering the domain name. Consequently, the panel declined to order the transfer of the disputed domain name to the complainant.

Meanwhile, the registrant requested for compensation in the amount of $5,000. This is based on its claim that that the complainant initiated the complaint "for the purpose of attempting, unfairly and without colour of right, to cancel or obtain a transfer of any Registration which is the subject of the proceeding" pursuant to para 4.6 of CIRA policy. Responding, the panel held that since the complainant clearly had rights in its marks and the registrant had no legitimate interest thereto, consequently, the registrant's request for compensation was denied.

Family Law: Wife's Access to Husband's Computer Hard Drive

The Ontario Superior Court of Justice has delivered its ruling in *Stergiou v. Stergiou*. In that case, the wife seeks temporary orders for among other things, the production of the hard drive to her husband's personal computer for imaging. According to the wife, this will reveal details of the husband's involvement in his family's various business enterprises which he now conceals. The parties separated in 2006 after a marriage of barely over 4 years which produced two children aged 2 years and 8 months respectively. After the separation, the husband lived in the matrimonial home while the wife and the two children lived with her parents in another address. In a bid to deny the wife access to the matrimonial home which was registered in her name and solely owned by her, the husband changed the locks on the house. While she waited for a locksmith to come and assist her gain access to the property, the husband and his brother surreptitiously removed 14 boxes of documents from his home office. The wife claims that the removed documents relate to her husband's income and active involvement with his late father's lucrative real estate and other businesses and possibly to other lucrative investment property the husband was interested in purchasing overseas. This was contrary to her husband's consistent disclosure of zero income in his financial statements during the relevant years. The husband was able to do this by apparently taking advantage of the intermingled nature of his financial affairs with the family companies and the support of his brothers. According to the husband, the boxes contained client documents that have no bearing to the present action. The wife claims that her husband computer will reveal information about his financial and business standing which will be in contrast to his financial statements.

The court found that the husband's claims are contradictory as they lack credibility. His conducts are likeable to a "scorched earth policy" such that he has shown determination "to go tremendous lengths in his efforts to defeat the wife's legitimate claims" (¶ 34). According to the court, "[a]lthough the rules clearly encompass this requirement, the husband's affidavit of documents contains no disclosure with respect to electronic documents" (¶ 30). The court notes that the evidence and documentation produced in the proceedings lend support to the conclusion that the husband has not been candid about his home computer. In agreeing to the wife's prayer, the court also agreed with her proposal that an independent counsel be retained to parse any matters or information in the hard drive that may have implication for solicitor client privilege after which the content of the her husband's personal computer hard drive will be delivered to the wife's solicitor.

Roadside Screening Device – Need for Reasonable Grounds

In *R. v. Padavattan*, the accused was stopped by a police officer, Bellion, who formed a reasonable suspicion that the accused had alcohol in his system and demanded that the accused provide a breath sample for an approved roadside screening device. Bellion then called a second officer, Hunt, to the scene, and Hunt administered the test in Bellion's presence. At trial, after rejecting a *Charter* motion raised by the defence, the trial judge raised the question of whether the evidence should be excluded because the Crown had not proven that

Hunt had a reasonable suspicion that the accused had alcohol in his system. After hearing argument, the trial judge concluded, based on prior case law, that section 254(2) of the *Criminal Code* required that the person who performs the roadside testing must personally have had a reasonable suspicion about alcohol in the accused's system. The trial judge therefore found that the test had been done illegally and excluded the evidence.

On appeal to the Ontario Superior Court of Justice, Ducharme J. overturned the trial judge's decision. Ducharme J. distinguished between a number of different requirements, and after carefully considering the case law concluded that none of the earlier decisions imposed the requirement that the trial judge in this case felt was present. Further, there was no policy reason to read the *Criminal Code* in that fashion, nor any ambiguity in the language. Ducharme J. concluded that the statute and the case law established a number of rules concerning roadside screening, including that the officer who makes the demand must have had a reasonable suspicion that the person has alcohol in his body, that an officer other than the one who first stops an accused is entitled to make a demand so long as he or she has reasonable suspicion, and that only an officer who has formed a reasonable suspicion is entitled to require an accused to accompany him or her for the purpose of being tested. Nothing in the statute or the case law, however, required that the officer who physically performed the test must also have reasonable suspicion about alcohol in the accused's blood. To read the section in that way, Ducharme J held, would amount to reading into the section words which simply were not there: the *Code* permits an officer to require an accused to provide a breath sample, but the *Code* does not say "provide a breath sample *to that officer*". Further, creating such a requirement would obviously not advance the goal of eliminating impaired driving, but it would also do nothing of value to help protect the rights of drivers: it would be to impose a burden on the Crown for no useful purpose. Accordingly the trial judge's decision was overturned.

Use of Email Received By Mistake

The Ontario Superior Court of Justice has laid out some guidelines to be considered in circumstances where one counsel is unintentionally sent an email not intended for him or her to receive. In *Boyd v. Fields*, the applicant had applied to examine a non-party witness prior to trial, and the witness, through counsel, had opposed the motion. The motion had not been completed, but counsel for the witness sent respondent's counsel (who had not been present) an email outlining her impression of how matters had gone, and how she intended to proceed. Respondents counsel accidentally faxed a copy of the email to the applicant along with other documents, and the applicant sought to use the email on the continuation of the motion. Whether the email could be so used was then contested in front of Czutrin J., who was hearing the initial motion. Czutrin J. described the email as "personal, informal and one might say 'email-style stream of consciousness', no doubt embarrassing to the author once disclosed to others who were clearly not the intended recipients".

Czutrin J. concluded that the email ought not to be allowed to be used in the motion. In large part this was because the judge concluded that the contents of the email were not relevant to the merits of the motion about whether to allow examination of the non-party witness: it was simply a discussion of strategy and an assessment of how the motion had gone so far. More importantly Czutrin J. noted that in general courts should discourage counsel from taking advantage of situations where emails or other documents end up in opposing counsel's hands by mistake. Normally such documents should not be admitted "unless the probative value significantly and materially outweighs the prejudice and the civility and avoidance of sharp practice that counsel owe to each other and the administration of justice". Those criteria might be met where failing to admit a document would result in a miscarriage of justice, or where not disclosing certain information would hide a criminal act or endanger a person. Since no such circumstances existed in this case, the email was not admitted.

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

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