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Les auteurs de la première partie du présent bulletin sont les professeurs Anne Uteck et Teresa Scassa de l'Institut de droit et de technologie de la Faculté de droit de l'Université de Dalhousie. Les professeurs Pierre Trudel et France Abran de le Chaire en droit des technologies de l'information et du commerce électronique L.R. Wilson de la Faculté de droit de l'Université de Montréal ont rédigé la seconde partie du présent bulletin.

Part 1

Contract Law

In *Dell Computer Corporation c. Union des consommateurs*, the Quebec Court of Appeal ruled that an arbitration clause in an online consumer contract was not enforceable against the consumer.

The consumer in this case, Dumoulin, had entered into an online contract to purchase a computer. The price listed for the computer on the web site was incorrect, and was substantially lower than the actual price of the machine. The appellant/respondent informed Dumoulin that the price listed was incorrect, and informed him that he would have to make a new order at the corrected price. Quebec's consumer protection watchdog Union des consommateurs became involved, and sought to certify a class for a class action proceeding against Dell. Dell raised in response the arbitration clause.

The Court noted that it was not correct to assume that the arbitration clause required the dispute to be resolved outside of Quebec, or that it would not involve the application of the laws of Quebec. As such, it did not fall afoul of article 3149 of the *Civil Code* of Quebec. However, the Court declined to find the arbitration clause applicable in this case because, contrary to art. 1435 of the *Civil Code* of Quebec, it had not been brought expressly to the attention of the consumer at the point of formation of the contract. The Court noted that the clause was an external clause by reference. The order page of the appellant's web site stated "All purchases subject to your Customer agreement or Dell's Standard Terms of Sale". This language was in smaller characters and at the bottom of the page. The Court noted that the reason for this was to avoid distracting the consumer from the primary objective of purchasing the product. It was not mandatory for the consumer to click on the link to the terms in order to complete the sale, or to click on any button indicating acceptance of the terms. Further, if the consumer did click on this link he would have to follow a further link to the National Arbitration Forum website for information about the nature of the arbitration process. The Court ruled that the onus was on the appellant to show that, at the point of sale, the consumer was aware of the content of the arbitration clause and the rules governing the arbitration. The respondent was unable to establish these facts.

Copyright Law

The Canadian Private Copying Collective was recently successful in its application for an order to recover unpaid levies under the private copying provisions of the *Copyright Act*. The CPCC established that the respondent Computer Warehouse Outlet Inc. had been importing and selling blank audio recording media without reporting this to the CPCC or paying the relevant levies.

Domain Names

In *Reitmans Canada Ltd. v. Pilfold Ventures*, the Complainant sought the transfer of the domain name additionelle.ca. The registrant did not respond, and the dispute was heard by sole panelist Paul Donovan.

The complainant holds a registered trademark for ADDITION-ELLE, and had pending applications for other phrases or designs containing those words. It is also the registrant of the domain names addition-elle.com, additionelle.com and addition-elle.ca. The panelist found that the complainant thus had

rights in the mark "addition-elle" prior to the date of registration of the disputed domain name. He also found that the disputed domain name was confusingly similar to the mark, notwithstanding the presence of the hyphen. He noted that the pending applications, which were based either on proposed use or a date of first use after the date of registration of the disputed domain name, would not have been sufficient on their own to establish the complainant's rights in the mark.

A complainant bears the burden of establishing that the disputed domain name is registered in bad faith. Donovan noted that because it is sometimes difficult for a complainant to prove a registrant's bad faith intentions, some leeway can be given. In this case, he accepted that the fact that the complainant's trademark is a distinctive mark in Canada, and that the complainant is "a leader in the Canadian market of women's plus-size fashion apparel" (para 43), there was sufficient evidence that the registrant had registered the name in order to "prevent the Complainant, or the Complainant's licensor or licensee of the Mark, from registering the Mark as a domain name" under para 3.7(b) of the CIRA Dispute Resolution Policy (CDRP). With respect to the added requirement that the complainant demonstrate a pattern of behaviour on the part of the registrant, Donovan noted that the registrant in this case had also been the registrant of the disputed domain name in the *Sleep Country Canada* case, and in *ROW Limited Partnership v. Pilford Ventures Inc.*, notwithstanding the fact that the complainant in *ROW* had not succeeded in establishing bad faith. Donovan also went on to find that the registrant had registered the domain name "primarily for the purpose of disrupting the business of the Complainant" under paragraph 3.7(c) of the CDRP. The disputed domain name resolved to a site that contained links to direct competitors of the complainant. Donovan also found that the complainant had provided sufficient evidence to establish that the registrant had no legitimate interest in the domain name. The disputed domain name was ordered transferred to the complainant.

In *Credit Counselling Society of British Columbia v. Solutions Credit Counselling Service Inc.*, the complainant sought transfer of the domain name nomoredebts.ca. Both the complainant and the respondent offered credit counseling services. The president of the registrant company was a former employee of the complainant.

The complainant established that it had used the unregistered trademark NOMOREDEBTS in Canada since September 5, 2001. The mark was used in various forms of advertising of its services in a range of media. The registrant registered its domain name on July 19, 2004. The three member panel (Edward Chiasson Q.C., Roger Kerans and David Wotherspoon) accepted that the complainant had rights in the mark NOMOREDEBTS that predated the registrant's registration of the disputed domain name. This conclusion was arrived at notwithstanding the registrant's arguments that the complainant's use of the mark was not sufficient for it to have acquired distinctiveness. The panel ruled that proof of acquired distinctiveness was not required under the policy. The panel also concluded that the mark and the domain name were confusingly similar.

In considering the issue of bad faith, the panel noted that the registrant was a former employee of the complainant, and was clearly aware of the complainant's use of the mark. As the registrant provided no explanation for why it registered the domain name, the panel was prepared to infer "that it registered the Domain Name with a view to attract to itself business from those who had come to recognize the Complainant's Mark, that is, primarily for the purpose of disrupting the business of the Complainant". (at p. 6) The panel also ruled that the registrant had failed to establish that it had a legitimate interest in the domain name. The panel ordered the transfer of the domain name.

In *DRN Commerce Inc. v. REPO DEMO Park and Sell of Canada Ltd.*, the complainant sought transfer of the domain name drn.ca. The complainant did not hold a registered trademark in the acronym DRM, but argued that it had used the acronym, which stood for Debt Recovery Network, in a variety of contexts. In contrast with the *Credit Counselling* case discussed above, the three member panel (James E. Redmond, Q.C., R. John Rogers, and Jacques A. Léger), noted that it was incumbent on the complainant to demonstrate that it had acquired common law trademark rights through use. The panel examined the use of the mark in relation to the services of the complainant

and was satisfied that the use made of the mark was sufficient. The panel also found the domain name drn.ca to be confusingly similar to the mark DRN, and that the registrant had no legitimate interest in the mark. In making a finding of no legitimate interest, the panel drew a negative inference from the respondent's failure to provide any evidence to show it had rights in the mark.

In considering the issue of bad faith, the panel noted that "showing actual bad faith with positive evidence can be quite difficult", and took the view that it could "take into consideration surrounding circumstances and draw inferences to determine whether or not Registrant's actions are captured by paragraph 3.7." (at p. 8) The panel accepted that the complainant bore the initial burden to establish bad faith, but took the view that "once a prima facie case of bad faith has been made by Complainant… it is up to the Respondent to either justify its business conduct, explain it, or demonstrate satisfactorily the contrary." (at p. 8) The panel was prepared to infer bad faith based upon the facts that the parties were competitors, the registrant was familiar with the complainant's business and use of the mark, and the domain name was composed solely of the mark. They found that the registration was primarily to disrupt the complainant's business by creating confusion. Transfer of the domain name was ordered.

Privacy

The British Columbia Information and Privacy Commissioner ha released his first decision under the B.C. *Personal Information Protection Act* (PIPA). In K.E. Gostlin Enterprises, Order P05-01, Commissioner Loukidelis upheld the practice of a Canadian Tire franchise, operated by an organization, K.E. Gostlin Enterprises, of collecting personal information from customers returning goods to the store. The complaint arose after a customer went to the store to return an item. She provided the sales receipt, but declined to provide her name, telephone number and birth date as requested by the customer service clerk. The customer service manager told the complainant that the information was needed to protect against fraud. When asked for a copy of the organization's privacy policy, it could not be located, but was told one would be provided to her later. When the complainant continued to resist providing her personal information, the store processed the refund without the information, but the customer service manager told the complainant that, in the future, the store may refuse to process refunds if this information is not collected. In response to her written complaint to the store, the general manager responded by assuring the complainant that personal information "is not sold, shared or released to any party unless required by law" and that the information is required for the "protection of our business and more importantly, our customers" because controlling losses ensures competitive prices and allows for follow-up if there is an error in processing returns.

In response to the formal complaint under PIPA, the Commissioner was satisfied that "there is a real, not a merely perceived or minimal, problem with the fraudulent return of stolen goods by supposed customers, with or without a sales receipt" and the collection and use of identifying personal information was an important feature of the organization's overall loss-reduction strategy. Applying the s.11 reasonableness standard, he finds the practice appropriate in the circumstances and in accordance with s.7(2), necessary for the purpose of detecting and deterring fraudulent returns of goods. Commissioner Loukidelis goes on to conclude that the organization does not disclose the information to anyone except as required by law, as for example police to investigate fraud or theft. Thus, the organization could require customers seeking to return goods provide this limited identifying information, but the Privacy Commissioner made clear that the organization could not collect and use this information to conduct customer satisfaction surveys without their consent. In this regard, the Commissioner recommended the organization's printed notices of purpose for collection be clarified. As well, he ordered the organization to formulate a records retention policy and destroy or anonymize personal information once it is no longer necessary as required under s.35(2).

A recent *PIPEDA* Finding involved a real estate broker publishing the names of the top five sales representatives in a paid advertisement in a real estate flyer. The broker had bought a statistical report from a third-party organization, which included the representative's name, the franchise name, the

number of units sold, their value, average days on the market, the average sale price per agent and the ranking by number of units sold and dollar value. Much of this information was available through the local real estate board's Multiple Listing Service (MLS) system. Members of the real estate board sign a user agreement that allows them to use the MLS system. Users consent to the collection, retention and disclosure of all information submitted in the form of listings which makes up the MLS database. However, the MLS system could not do comparative analysis nor rank agents in a given area. In the Assistant Privacy Commissioner's view, there was no implied consent as members would not have reasonably expected the information they consented to provide for listings to be used and disclosed for a comparative analysis for advertising by other real estate brokers, and the user agreement did not contemplate such a use or disclosure. Accordingly, she determined that the broker used and disclosed the complainant's personal information, without their consent, contrary to Principle 4.3 and for a purpose that a reasonable person would not consider appropriate in the circumstances, contrary to s.5(3) and therefore, the complaint was well-founded.

The Canadian Privacy Commissioner has posted the Position Statement on the *Anti-Terrorism Act*. In the submission to the Subcommittee on Public Safety and National Security, the Commissioner questions the necessity of the measures provided for by the *Anti-Terrorism Act*, calls for critical assessment of the issue of proportionality and makes several practical recommendations to address the "cumulative impact" of these measures on the privacy rights of Canadians. In the Commissioner's view, the overall effect of the *Act* is: first, the surveillance powers of security and intelligence and law enforcement agencies have been overly broadened; second, the constraints on the use of those same surveillance powers have been unduly weakened; and finally, government accountability and transparency have been significantly reduced. To address these concerns the federal Privacy Commissioner has made several recommendations aimed at containing surveillance, increasing oversight and promoting transparency, as well as dealing with the need for a continuing review of the *Act* and the development of a comprehensive privacy management framework for national security.

2ième partie

Interprétation de la notion de « renseignements nominatifs » – Relevés d'appels de téléphone cellulaire

La ville de Blainville fournit au maire un téléphone cellulaire pour fins d'emploi et le numéro de téléphone n'est pas accessible aux citoyens. Elle se pourvoit contre une décision de la Commission d'accès à l'information lui ordonnant de communiquer à l'intimé les relevés d'appels du téléphone cellulaire du maire pour les années 2000, 2001 et 2002.

Le tribunal infirme la décision de la Commission d'accès à l'information entre autres au motif que les renseignements figurant sur la facturation d'un téléphone cellulaire constituent des renseignements nominatifs confidentiels protégés par l'article 54 de la *Loi sur l'accès*. Il est bien évident qu'un numéro de téléphone n'identifie pas une personne physique mais il permet néanmoins de le faire en composant le numéro sans pour autant « mettre en branle toute une enquête ». Ce n'est pas uniquement l'identité d'une personne physique dans l'abstrait qui constitue un renseignement protégé par l'article 54 mais également le contexte dans lequel cette personne peut être identifiée, savoir la communication ou même la tentative de communication téléphonique pouvant l'identifier. Quant à l'article 102 de la *Loi sur les cités et villes* qui donne aux citoyens le droit de connaître l'usage que la municipalité fait de leur argent, par exemple les montants utilisés par le maire dans l'utilisation du téléphone cellulaire qu'ils lui ont payé, il s'applique dans la mesure où il respecte par ailleurs la confidentialité des renseignements confidentiels dans les documents consultés.

> « En l'instance, ce renseignement a été communiqué à l'intimé qui est maintenant en mesure, à l'instar de tous les autres citoyens, de demander des comptes au maire et à l'appelante si les sommes d'argent dépensées au chapitre de l'utilisation du téléphone cellulaire leur paraissent excessives. Toutefois, le maire et l'appelante n'ont aucun compte à rendre au public sur la destination ou la provenance des appels téléphoniques puisque ces renseignements sont du domaine privé. Il ne faut pas oublier que les intérêts privés dont il est question ici ne sont pas uniquement ceux du maire mais concernent aussi les tiers dont les numéros de téléphone apparaissent à la facturation. Ces derniers peuvent aussi avoir intérêt à ce que le grand public ne sache pas qu'ils ont eu une communication avec le maire. »

Blainville (Ville de) c. Larouche, 2005 IIJCAN 17454 (QC C. Q.), 500-80-002875-046, 3 mai 2005.

Expectative de vie privée à l'endroit d'une photographie contenue dans le dossier scolaire

Un accusé, demande l'exclusion de certains éléments de preuve, soit des photographies saisies par les policiers dans les dossiers informatisés de l'établissement scolaire qu'il fréquentait, aux fins de confectionner une parade d'identification devant être soumise aux témoins à charge. La question en litige est de savoir si la saisie d'une photo de l'accusé par les policiers dans les dossiers informatiques de l'établissement scolaire sans le consentement de l'accusé est, ou n'est pas, admissible en preuve.

Le tribunal conclut que l'accusé possédait une attente subjective au respect de sa vie privée à l'égard de cette photo

> « en ce sens que l'usage historique de ce bien serait une utilisation pour les fins pour lesquelles il a été colligé, soit des fins scolaires. D'autant plus qu'en principe la relation entre l'étudiant et l'école en est une de confiance ».

De plus, l'attente de l'accusé est raisonnable sur le plan objectif. En effet,

> « il nous apparaît cependant raisonnable de penser que des étudiants du niveau secondaire ayant l'âge de l'accusé, pour ne pas parler de leurs parents, peuvent difficilement s'attendre à ce que la photo exigée par l'école à des fins administratives et de gestion de la clientèle dans un contexte d'activités scolaires se retrouve dans des dossiers policiers d'enquêtes

> criminelles, portée à l'attention de témoins ou de victimes et en preuve dans un procès criminel à caractère public ».

Il y a eu saisie au sens de la *Charte canadienne des droits et libertés de la personne*.

R. c. A. (K.), Cour du Québec, 525-03-031067-051, 6 avril 2005, EYB 2005-90644.

Frais d'appels interurbains via Internet par modem téléphonique

La demanderesse réclame de Bell Canada une somme de 324.03 $ qu'elle a dû payer pour des communications effectuées à Sao Tomé. La défenderesse a démontré que les appels interurbains ont été faits via modem téléphonique. Un enquêteur a établi que les communications ont été effectuées vraisemblablement à la suite d'un manque d'attention ou que la demanderesse n'a pas porté attention aux instructions sur le site web relativement aux coûts d'accès. Le Règlement de Bell Canada adopté en vertu de l'article 65 de la *Loi sur les télécommunications* prévoit que « les abonnés sont responsables du paiement de tous les appels, faits de leurs appareils et des appels qui y sont acceptés, peu importe par qui ». Le tribunal conclut que la prépondérance de preuve milite en faveur de la défenderesse et rejette la demande.

Drapeau c. Bell Canada, Cour du Québec, Division des petites créances, 505-32-017416-042, 7 mars 2005.

Contrats « click wrap » – Québec

L'auteur examine la décision *Aspencer1.com Inc. c. Paysystems Corporation* (C.Q., 500-22-101613-043, 31 janvier 2005, voir *Bulletin IT.Can*, 12 mai 2005) qui rend inopposable aux internautes le contenu des contrats « click wrap » (expression du consentement par le clic de souris). Cette décision va à la fois à l'encontre d'une pratique très répandue sur le web et de la position jurisprudentielle existante dans le reste du pays. Elle confirme toutefois une position doctrinale qui veut qu'un « clic » ne soit pas suffisant.

Nicolas VERMEYS, *Les click wrap aux oubliettes? L'affaire Aspencer1.com c/ Paysystems Corporation*, juriscom.net, 31 mai 2005.

Paiement sur l'Internet – France

Face à la progression du commerce électronique, la question du paiement sur l'Internet est primordiale, à la fois pour l'acheteur et le vendeur. Ce deuxième rapport de l'Observatoire de la cyber-consommation examine la question des paiements en ligne par carte bancaire et celle des outils alternatifs dédiés au paiement de petites sommes, le micro-paiement et le porte-monnaie électronique. Les conclusions sont plutôt rassurantes :

> « il apparaît que de multiples techniques permettant de protéger le consommateur ont été mises en œuvre dans le secteur du paiement par carte bancaire sur l'internet. Parallèlement, de multiples solutions alternatives se sont développées, particulièrement dédiées au paiement de petites sommes. »

L'Observatoire constate la nécessité de développer la sensibilisation des internautes en matière de nouvelles techniques d'escroquerie, comme le phishing (hameçonnage), par la diffusion de conseils pratiques. Il souligne aussi l'importance de renforcer la protection des postes informatiques des particuliers. Dans le secteur du micro-paiement, une réflexion devrait être menée en matière d'information du consommateur lors d'achats de biens immatériels par mobiles ou d'obtention de codes d'accès.

Forum des droits sur l'Internet, *Les paiements sur l'Internet*, Deuxième rapport de l'Observatoire de la Cyber-consommation, 19 mai 2005.

Dossier médical personnel – France

En France, la loi no 2004-810 du 13 août 2004 relative à l'assurance maladie crée, entre autres, le dossier médical personnel (DMP). Cette loi emporte la reconnaissance au bénéfice des médecins d'un accès en ligne, via la carte vitale, aux feuilles de soins. La concrétisation et la mise en œuvre des principes entourant la mise en place du DMP, prévue pour la

mi-2007, seront précisées dans un futur décret du Conseil d'État pris après l'avis de la CNIL. L'auteur fait le point sur la mise en œuvre du DMP, tout en faisant ressortir la complexité d'un tel outil.

Thibault VERBIEST, *Vie privée et santé : le dossier médical personnel fait son chemin en France*, Droit et Nouvelles Technologies, 12 mai 2005.

À signaler

A l'avant-veille de la discussion du projet de loi « droit d'auteur et droits voisins dans la société de l'information » devant le Parlement français, Juriscom.net propose un dossier composé de liens vers les principales ressources juridiques permettant d'analyser et de comprendre le débat en cours sur les mesures techniques de protection, les systèmes DRM (*Digital Right Management*) et les systèmes d'échange de fichiers protégés ou non entre particuliers dits « *peer-to-peer* ».

Lionel THOUMYRE, *Hyperdossier sur le droit d'auteur et les droits voisins dans la société de l'information – ACTUALISATION*, juriscom.net, 2 juin 2005.