



NEWSLETTER

Canadian IT Law Association

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Breathalyser – Evidence to the Contrary

The results of breathalyser tests are subject to two presumptions in their use as evidence in court: the presumption of accuracy (that the reading accurately shows the accused's blood alcohol level at the time the reading is taken) and the presumption of identity (that the accused's blood alcohol level at the time the reading is taken is the same as the accused's blood alcohol level at the time of the driving). Either presumption can be displaced by evidence to the contrary. In December 2005 the Supreme Court of Canada considered the question of how to decide whether an accused had proven on balance that the presumptions should not be relied upon. In [R. v. Boucher](#) they held that, in deciding whether to accept an accused's evidence to the contrary, a judge could not take into account the results of the breathalyser test (absent the presumption of accuracy) set out in the certificate. They held that to do so would be circular reasoning, overturning the decision of the Quebec Court of Appeal in the court below.

On this point [Boucher](#) also contradicted what had been the governing authority in Ontario, [R. v. Suttie](#), but the Supreme Court made no explicit reference to [Suttie](#) in its decision. This silence has left some confusion over how to proceed in Ontario lower courts, as evidenced in the recently decided [R. v. Peglar](#). The accused had been stopped at an impaired driving checkpoint and had had difficulty rolling down his window. The officer who had stopped him observed a moderate odour of alcohol and felt that the accused was slurring some words, as well as having bloodshot eyes. The officer arrested

the accused at that point for impaired driving. The accused was after that given a breathalyzer test, on which his readings were both 140 milligrams.

At trial the accused testified concerning the amount of alcohol he had drunk that evening, which included some wine and beer: his wife also testified, confirming what the accused had said. He also led the evidence of a forensic toxicologist, who had tested the accused to determine his rate of elimination of alcohol from his system. Based on that test and on the accused's evidence of the amount he had had to drink, the expert testified that the accused would have had to have an additional 4.7 glasses of wine and 4.8 bottles of beer to reach the blood alcohol level indicated by the breathalyzer. Although other issues arose, the central question in the case was whether the accused had raised evidence to the contrary rebutting the breathalyser readings.

The trial judge noted that [Boucher](#) had held it to be circular to rely on the breathalyser results themselves in assessing evidence to the contrary. He noted, however, that:

There has been some controversy in recent authority as to whether the circular reasoning prohibition applies, as well, to *viva voce* breathalyser evidence where the presumption of identity, but not accuracy, is in issue: [R. v. Snider](#), 2006 ONCJ 65 (Can LII); [R. v. Lilek](#), [2006] O.J. No. 1158 (Ont.S.C.J.). In addition, concern has been expressed that the prohibition may serve to undermine the principle that requires the weighing of all relevant evidence before making any finding of fact or credibility: [Snider](#); [Lilek](#); and “[Another View on R. v. Boucher](#)”, April 7, 2006, [Items of Interest](#) (Ont. C.J.). (para. 72)

Ultimately the trial judge decided that the “circular reasoning” prohibition prevented him from relying on the actual numbers in the certificate in assessing the evidence to the contrary, but that he was still

entitled to consider the circumstances of the testing, such as the use of an approved instrument in proper working order, its operation by a qualified technician and evidence that the instrument was accurate when properly set up and operated.

Having reached this conclusion, however, the trial judge nonetheless held that the accused had provided evidence to the contrary. There was no reason to reject the accused's testimony as to the amount which he had drunk, which was supported by the wife's testimony. It was unlikely that, knowing he would be going out to pick up his daughter, the accused would have drunk as much alcohol as the expert evidence showed was necessary to produce a reading of 140 milligrams. Accordingly the trial judge rejected the breathalyser evidence and acquitted the accused on the "over 80" charge. Based on other evidence in the case he also found reasonable doubt about whether the accused was driving while impaired and also acquitted him on that charge.

Possession of Child Pornography – Proof of Possession of Computer Images

In *R. v. Panko*, the accused took his laptop computer to a computer service outlet for repairs. After ordering a part and completing the repairs, a technician double-clicked some of the icons on the screen and found images of child pornography. The technician consulted with the owner of the store and, after taking several days to decide what to do, they reported the images to the police. The police obtained a warrant to obtain the computer and search its contents. A police officer then used the "Encase" program to bypass the accused's password and view the contents of the hard drive, finding 91 images of child pornography.

The officer acknowledged that the laptop's desktop screen contained only an unremarkable set of icons, and that the images would only be revealed if the appropriate icons were double-clicked. The officer also testified that there were three ways in which the images could have come to be on the computer: through "active acquisition" by the accused downloading the images, through "passive acquisition" in which by means of a Trojan or cookie

some other person placed unsolicited material on the hard drive, or by some other person actively using the accused's computer to download material without the accused's knowledge. The accused argued that on these facts the Crown had failed to prove possession by the accused of the images. The trial judge agreed, acquitting the accused.

The trial judge noted that for the Crown to prove that an accused has possession of something it is required to show physical contact by the accused with the item, knowledge of the nature of the item, and some measure of control. These criteria had been developed, the judge noted, in the context of physical items, and therefore it was necessary to reason by way of analogy as to how they would apply in the case of computers or other electronic media.

Physical contact is normally a straightforward requirement. In the context of a computer, the judge held that an appropriate analogy was to consider whether the material was in plain view when the computer was turned on. In this case, nothing on the computer desktop screen provided any indication of the contents of the hard drive.

Knowledge is an essential prerequisite to possession, but need not be proven through by an express admission of knowledge on the part of the accused. It can also be established indirectly on the basis of an inference from other facts which are proven, or through proving wilful blindness on the part of the accused. Here, the accused refused to reveal his password to the technician, but there were many perfectly good reasons a person might choose to do that, and that fact did not allow the court to infer that the accused knew there was child pornography on his computer. Similarly no inference could be drawn from the accused having repeatedly called the repair shop regarding the status of his computer, which was a normal response. The sheer number of images also did not lead to an inference of knowledge, given that none of the images, or their nature, was visible on the desktop.

There was no evidence of control of the images by the accused beyond the fact that they were on his computer. In particular, there was no evidence of the accused having downloaded or accessed child pornography from any other source through the use

of his computer. In the absence of such evidence, it was not possible to conclude beyond a reasonable doubt that the accused had possession of the material in the necessary sense, when the evidence at trial showed that there were possible innocent explanations for the presence of the material on his computer. The trial judge held:

¶ 107 In the context of computers, I find on the evidence, it is neither straightforward nor self-evident that a limited physical control of a computer can lead to any useful inferences of criminal knowledge or control.

Accordingly the Crown had not established possession and the accused was found not guilty.

[Comment on the issues raised in this case at the IT.Can blog.](#) 

Privacy

The Federal Privacy Commissioner has released a report titled: [Government Accountability for Personal Information: Reforming the Privacy Act](#). Noting that the *Privacy Act* has not been amended or updated since it came into force in 1983, the Report describes the *Act* as being “urgently in need of modernization”. Particular areas of concern that are identified include trans-border data flows, data matching, and the relationship of privacy and national security concerns. The Report calls for an expansion of the scope of the *Privacy Act* to cover “all bodies or offices through which public funds are expended”, unless specifically excluded. A broader definition of personal information to cover both recorded and unrecorded information is called for, along with expanded federal court powers. The report also calls for normative changes which would bring *Privacy Act* provisions more closely in line with those in the *Personal Information Protection and Electronic Documents Act* (PIPEDA).

Telecommunications Policy – Proposed Policy Directive to CRTC

The federal government has tabled a proposed [policy directive](#) in Parliament, which will direct the Canadian Radio-television and Telecommunications

Commission (CRTC) to take a market-based approach to regulating the telecommunications industry. Under s. 8 of the *Telecommunications Act*, the Governor in Council is authorized to give “directions of general application on broad policy matters with respect to the Canadian telecommunications policy objectives”. This is the first time that this power has been used. Before the directive becomes binding on the CRTC, there is an opportunity for representations to be made by interested parties.

The proposed policy directive calls on the CRTC to “rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives” and when using regulation to use measures “that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives”. In addition the directive sets out a number of criteria with which any regulations should comply, including that any regulations “should neither deter efficient competitive entry nor promote inefficient entry” and that “interconnection arrangements and access regimes, including access to buildings, in-building wiring and support structures, should, to the greatest extent possible, be technologically and competitively neutral, in order to enable competition from new technologies and not to artificially favour either Canadian carriers or resellers.”

[Comment on the issues raised in this case at the IT.Can blog.](#) 

Trade-marks

The Supreme Court of Canada has released two important decisions on trade-marks. Both cases deal with the issue of the degree of protection which should be afforded to famous marks.

MATTEL, INC. v. 3894207 CANADA INC. INVOLVED a challenge by Mattel, the holder the registered trademark BARBIE for dolls and toys, to the application for registration of the trademark BARBIE’s & DESIGN for a restaurant chain. Mattel had argued that the fame of its BARBIE related trade-marks was such that they “may not now be used in Canada on most consumer wares and services without the average consumer being led to infer the existence of

a trade connection with the owners of these famous brands.” (at para 7) The Trade-marks Opposition Board had rejected Mattel’s arguments. This decision was upheld on appeal by the Federal Court, and by a unanimous Court of Appeal.

Binnie J., writing for the majority of the Court (LeBel J. issued a short concurring judgment) upheld the decisions of the courts below. In doing so, he confirmed that the appropriate standard of review of decisions of the Board was one of “reasonableness”. Binnie J. emphasized that the “purpose of trade-marks is to create and symbolize linkages.” (para 23) While he acknowledged that it might be possible for a trade-mark to have become so well known that it would cause confusion if it were used in relation to any wares or services, he observed that for the most part, this would not be the case. He maintained that confusion as to source remains key, and that such confusion must be established on the facts of each case. In the context of an opposition proceeding, he noted that the onus lay on the party attempting to register a challenged trade-mark to show that “use of both trade-marks in the same geographic area will not create the likelihood of confusion.” (para 31)

Binnie J. was critical of the use of survey evidence in this case. He noted that the issue in a case such as this is whether there is a “likelihood of confusion”, and that “[i]f the survey is not responsive to the point at issue, it is irrelevant.” (para 44)

The court accepted that famous brands can receive a broader ambit of protection under the *Trade-marks Act*. However, the protection is not absolute: the demonstration of a likelihood of confusion is still required. Binnie J. noted that “[i]f the result of the use of the new mark would be to introduce confusion into the marketplace, it should not be accepted for registration “whether or not the wares or services are of the same general class.” (para 63) He carefully considered two previous Federal Court of Appeal cases, *Pink Panther* and *Lexus*, and clarified that the cases did not require that there be “some resemblance or linkage to the wares in question”. (para 65) Not only need there be no resemblance between wares or services, the wares or services of one party do not need to be of the same general class as those of the other. The focus remains on the issue of consumer confusion. As Binnie J. put it: “a difference in wares or services does not deliver

the knockout blow, but nor does the fame of the trade-mark. Each situation must be judged in its full factual context.” (para 72)

Dealing with the specific marks at issue in the case, Binnie J. accepted that Mattel’s BARBIE mark was famous, but emphasized that its fame was strongly associated with dolls and doll accessories. He stated: “The doll business and the restaurant business appeal to the different tastes of a largely different clientele.” (para 78) The fact that famous brands might be widely licenced for a broad range of products and services was a factor that should be kept in mind. However, he noted that “[t]he very specificity of BARBIE dolls in the mind of the consumer arguably constrains its capacity for growth.” (para 82)

IN *VEUVE CLICQUOT PONSARDIN V. BOUTIQUES CLIQUOT Ltée* the Court considered arguments of trademark infringement, and an application to have the respondent’s trademarks expunged from the Register. The appellant was a French champagne house which holds registered trademarks for VEUVE CLICQUOT and other related marks. The respondents were the owners of a small chain of women’s wear shops in the Montreal and Ottawa regions. They held the registered trademark CLIQUOT. The courts below had found in favour of the respondents, and the Supreme Court of Canada ultimately agreed and dismissed the appeal.

Like the Mattel case, discussed above, this case involved a famous mark. It is different from Mattel in that, in addition to claims of confusion, the plaintiff/appellant raised claims of depreciation under s. 22 of the *Trade-marks Act*. While the mark VEUVE CLICQUOT had predominantly been used in association with wine and champagne, it had, in recent years been used on a variety of promotional items, including some articles of clothing.

In *Veuve Cliquot*, the marks used by the parties were not identical. Not only did the respondent not use the word “veuve” in its mark, its spelling of Cliquot was different from that of the appellants. Nevertheless, the appellants argued that there was a likelihood of confusion in that consumers might assume an association between the clothing boutiques and the champagne house. They also argued that the association of the word “cliquot” “with a mid-range women’s clothing store robs the

appellant's mark of some of its luster, blurring its powerful association with top quality luxury goods, and thereby diluting the distinctive qualities that attract high-end business." (para 15)

Binnie J., for the unanimous court, again emphasized in this case that "the purpose of trade-marks is to function as a symbol of the source and quality of wares and services, to distinguish those of the merchant from those of another, and thereby to prevent 'confusion' in the marketplace." (para 18) As in *Mattel*, he characterised the test person as "a casual consumer somewhat in a hurry". (para 21)

Binnie J. accepted that the mark VEUVE CLICQUOT "carries an aura of luxury which may extend outside the wine and champagne business". (para 26) Further, he noted that "fame (or strength) is a circumstance of great importance because of the hold of famous marks on the public mind." (para 27) Nevertheless, he reiterated that a consideration of confusion requires a weighing of the factors set out in s. 6(5) of the *Act*. Even though the appellant's "aura of luxury" might extend beyond wine and champagne, Binnie J. noted that the respondent's business was "mid-priced women's clothing", and that there was little to suggest that ordinary consumers would be confused.

Binnie J. explained that the s. 22 depreciation argument was "treated as something of a poor cousin" by the appellant, but that it was raised more forcefully at the Supreme Court of Canada because of the intervention of the International Trademarks Association. The Court considered the arguments raised, which drew heavily on the U.S. experience with its anti-dilution legislation, as well as similar provisions in the EU and the United Kingdom. He noted that the courts in those jurisdictions have been quite circumspect in their application of anti-dilution provisions.

Regarding s. 22, Binnie J. observed that, in Canada, a section 20 confusion argument has generally been preferred where available. He stated that s. 22 has four elements:

Firstly, that a claimant's registered trade-mark was used by the defendant in connection with the wares or services - whether or not such wares and services are competitive with those of the claimant. Secondly, that the claimant's

registered trade-mark is sufficiently well known to have sufficient goodwill attached to it. Section 22 does not require the mark to be well known or famous (in contrast to the analogous European and U.S. laws), but a defendant cannot depreciate the value of the goodwill that does not exist. Thirdly, the claimant's mark was used in a manner *likely* to have an effect on that goodwill (i.e. linkage) and that the *likely* effect would be to depreciate the value of its goodwill (i.e. damage)." (at para 46)

Regarding the first element of "use", the court accepted that even use of a misspelled trade-mark would suffice, as long as "the casual observer would recognize the mark used by the respondents as the mark of the appellant". (at para 48) However, there would have to be a "link" in the ordinary consumer's mind between the mark used by the defendant and that of the plaintiff. There can be no depreciation if there is no association. Binnie J. noted that the trial judge had found no evidence of this link, and he ruled that the appellant's argument thus failed at this stage. He nevertheless went on to consider the other elements of the test.

Regarding goodwill, Binnie J. cited a few authorities which attempted to define "goodwill". He noted that "in ordinary commercial use, it connotes the positive association that attracts customers towards its owner's wares or services rather than those of its competitors." (at para 50) Fame is not a requirement, according to Binnie J.; nevertheless, s. 22 "presupposes the existence of significant goodwill capable of being depreciated by a non-confusing use." (at para 53) He provided a list of factors to take into consideration, including:

...the degree of recognition of the mark within the relevant universe of consumers, the volume of sales and the depth of market penetration of products associated with the claimant's mark, the extent and duration of advertising and publicity accorded the claimant's mark, the geographic reach of the claimant's mark, its degree of inherent or acquired distinctiveness, whether products associated with the claimant's mark are confined to a narrow or specialized channel of trade, or move in multiple channels, and the extent to which the

mark is identified with a particular quality. (at para 54)

Binnie J. found that there was “considerable” goodwill attaching to the plaintiff/appellant’s mark.

The third consideration is the “likely connection or linkage made by consumers between the claimant’s goodwill and the defendant’s use”. (para 56)

Noting that “likelihood is a matter of evidence not speculation” (para 60), Binnie J. pointed out that the trial judge had found that the ordinary consumer would not have made an association between the respondent’s shops and the appellant’s mark. In such a context, there could be no impact on the goodwill associated with the mark.

Regarding the fourth element, the likelihood of depreciation, Binnie J. stated that “disparagement

is a possible source of depreciation, but the value can be lowered in other ways, as by the lesser distinctiveness that results when a mark is bandied about by different users.” (at para 63) Although offering a caution regarding the different legislative context, Binnie J. canvassed U.S. anti-dilution case law to offer examples of “tarnishment”, which is an element of depreciation. He then stated: “I do not suggest that the concept of “depreciation” in s. 22 is necessarily limited to the notions of blurring and tarnishment. Canadian courts have not yet had an opportunity to explore its limits.” (at para 67) With respect to the facts before it, the Court found there was no evidence to establish a “likelihood” of depreciation. The appeal was dismissed.

[Comment on the issues raised in these cases at the IT.Can blog.](#)



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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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