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

June 24, 2004

IT.Can NEWSLETTER

Canadian IT Law Association

www.it-can.ca

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## Defamation

Blondin J. of the Quebec Superior Court has ruled recently on a defamation claim relating to an Internet web site. The case, *Bernard c. Transport Loignon Champ-Carr Inc.*, involved a dispute between neighbors over the rezoning of agricultural land to allow a trucking company to expand its operations. The rancorous dispute between the plaintiffs and the company led to an award of substantial damages against the defendant for its actions. The defendant counterclaimed for $20,000 in damages for harm to his reputation arising from a web site created by the plaintiff that targeted the defendant company and its activities. The web site also displayed photographs of the defendant's business, employees, and activities.

Blondin J. ruled that the web site contained factual information that was accurate and of public interest. In her view, the photos were legitimately taken as part of the process of gathering evidence for the trial. Thus the taking of the photos was simply an exercise of the plaintiff's legal rights. The site also contained a caricature that featured an armed cowboy riding on one of the defendant's trucks. Blondin J. rejected any claim in relation to this image, noting that the defendant had not provided any evidence that he or his company suffered any losses as a result of the distribution of the caricature.

## Jurisdiction

A recent decision of the Nova Scotia Supreme Court emphasizes the "carrying on business" criterion in assessing whether to enforce the default judgment of an inter-provincial court. Although the facts in *130296 Ontario Inc. v. 2334425 Nova Scotia Ltd.* do not involve the Internet, the Court's findings are relevant to the problem of jurisdiction within Canada of activities conducted online.

The case involved an application to set aside the registration of an Ontario judgment in Nova Scotia. The Nova Scotia *Reciprocal Enforcement of Judgments Act* allows the Court to set aside the judgment of another court where a judgment debtor neither carries on business nor ordinarily resides within the jurisdiction of the original court. The Court held that the Applicant's only connection to Ontario was a signed contract. The Court emphasized that the Applicant "had no office (nor any other type of physical presence)" in Ontario, and did not carry on business in the province. The Court approved of an earlier Nova Scotia Court of Appeal decision, *Ellerbrok v. Hortico Inc.* (1996), 148 N.S.R. (2nd) 74, which held that a phone call and fax to Ontario did not constitute carrying on business in that province. The Court agreed that the facts of the current case involved more than just a phone call, but still concluded that extending a license of its product to an Ontario company did not mean that the Applicant was extending its business to Ontario. Consequently, the registration of judgment in Nova Scotia was set aside.

The agreement in question did contain an attornment clause, by which the laws of Nova Scotia were to be applied to the agreement and the parties irrevocably attorned to the jurisdiction of the courts of the Province of Nova Scotia. However, the Court concluded that "clauses of this nature cannot be used to oust the jurisdiction of a substantially connected province like Ontario". The lack of such a substantial connection, rather than the attornment clause, was determinative for the Court.

## Privacy

**Ontario Privacy Commissioner Ann Cavoukian** recently released her 2003 Annual Report to the Ontario government. The Report urges that a

top priority for the government should be "the introduction of made-in-Ontario privacy legislation that will cover the private sector" and praises the private-sector privacy legislation in British Columbia and Alberta as models the government should consider adopting.

**In *Erwin Eastmond v. Canadian Pacific Railway***, Lemieux J. of the Federal Court overturned a finding of the federal Privacy Commissioner that video surveillance of employees at Canadian Pacific (CP) amounted to a breach of *PIPEDA*. The cameras were also the subject of a union grievance.

CP had installed six digital video cameras in the maintenance and repair portion of its main rail yard near Toronto. The installation of the cameras provoked a complaint by an employee to the Privacy Commissioner. The complaint alleged that the installation of the cameras was done in secrecy, was unwarranted in relation to any security problems, and that it could be used to monitor the performance of employees in a manner that "would be an affront to human dignity." (at para 2).

It was established that a notice had been posted by the employer indicating when the cameras would begin taping, where the cameras were located, and what the purpose of the taping was. The employer intended the system "to protect against theft, vandalism, unauthorized personnel and incidents related." The notice also indicated that only authorized managers and CP police would view the tapes, and that the information would not be used to monitor employee performance. All entrances to the areas had signs installed which indicated that the area was protected by video surveillance.

The Privacy Commissioner made a finding that the complaint was well founded. He recommended that the cameras be removed. Central to his finding were his views that there was insufficient evidence of a real security problem at the CP rail yard. The applicant employee made an application to the Federal Court under s. 14 of *PIPEDA* for an order confirming the Privacy Commissioner's finding, and ordering removal of the cameras.

CP challenged the jurisdiction of the Privacy Commissioner to make the original finding in the case. In their view, the matter should have been dealt with under a grievance procedure. Lemieux J. rejected that argument, finding that "Parliament's intention was not to exclude unionized works from *PIPEDA*'s scope." (at para 99). He further ruled that "the essence of the dispute before me does not arise from the collective agreement." (at para 99). Classifying PIPEDA as a "fundamental law of Canada", he distinguished this case from the earlier federal court decision in *L'Ecuyer v. Aeroports de Montreal*, 2003 FCT 573. In that case, Pinard J. had dismissed an application under s. 14 of *PIPEDA* on the basis that an arbitrator had exclusive jurisdiction over the matter. Noting that in *L'Ecuyer*, Pinard J. "did not have the benefit of full argument on the point", he also ruled that the nature of the dispute between the parties in the two cases was different. Lemieux J. characherized the essential characteristic of the dipute between the parties as "a complaint made by the applicant against CP alleging CP's violation of *PIPEDA*" (at para 110). In the circumstances, therefore, the Privacy Commissioner had jurisdiction to deal with the complaint.

Lemieux J. noted that s. 13(2)(a) of *PIPEDA* gives the Privacy Commissioner the discretion to defer a complaint if he or she considers it more appropriate for the complainant to first exhaust a grievance procedure. He took the view that "a respondent to a complaint must at the earliest opportunity raise this issue with the Privacy Commissioner if that respondent thinks another review procedure is available. A respondent is not entitled to raise alternative review after the Privacy Commissioner has issued his report." (at para 117).

Arguments were also made with respect to the appropriate standard of review of the Privacy Commissioner's report in an application made under s. 14 of *PIPEDA*. Lemieux J. noted that such an application is not an application for judicial review, nor is it a statutory appeal. It is a *de novo* exercise of the judge's own discretion. Lemieux J. would accord the Privacy Commissioner "some deference in the area of his expertise which would include appropriate recognition to the factors he took into account in balancing the privacy interests of the applicant and CP's legitimate interest in protecting its employees and property." (at para 122). However, he chose to accord no deference to the findings of fact of the Privacy Commissioner, noting that the evidence produced before him "is considerably

different than that gathered by the Privacy Commissioner's investigation." (at para 123)

On the issue of the breach of obligations under PIPEDA, Lemieux J. overturned the decision of the Privacy Commissioner, who had found that CP's purposes in collecting the information were not appropriate. Lemieux J. reached his conclusion after considering the following questions:

- Is camera surveillance and recording necessary to meet a specific CP need;
- Is camera surveillance and recording likely to be effective in meeting that need;
- Is the loss of privacy proportional to the benefit gained;
- Is there a less privacy-invasive way of achieving the same end? (at para 127)

He emphasized the need for a flexible and contextual analysis of the purposes for personal information collection.

Lemieux J. conducted an extensive review of arbitral jurisprudence dealing with issues of video surveillance. Based on his review of the facts and the case law, he concluded that "a reasonable person would consider CP's purposes for collecting by recording the images of CP employees and others on video camera appropriate in the circumstances." (at para 174). Factors that influenced his conclusion included the notice given through warning signs, the fact that collection is not limited to CP employees, that the collection is brief and not continuous, that the recordings are not used to monitor work performance, that they are kept under lock and key, and only accessed if there is a reported incident. Further, Lemieux J. rejected the applicant's view that appropriateness of collection had to be assessed based on past events. Instead, he concluded that it was legitimate to take deterrence of future incidents into account in assessing the appropriateness of the surveillance.

Finally, Lemieux J. ruled that consent was not required to collect the information pursuant to s. 7(1)(b) of *PIPEDA*. That provision allows for collection without knowledge or consent where to do otherwise would "compromise the availability or the accuracy of the information and the collection is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province."

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 Michael Deturbide, Anne Mussett and Teresa Scassa 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 Michael Deturbide, Anne Mussett et Teresa Scassa à l'adresse suivante : it.law@dal.ca