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Access to Computerized Records

The Ontario Superior Court of Justice has interpreted the Toronto Municipal Freedom of Information and Protection of Privacy Act (MFIPPA) in a manner that limits the obligation of organizations to provide information to the public. In *Toronto Police Services Board v. Information and Privacy Commissioner* a journalist, James Rankin, had applied to the Toronto Police Services Board (the Board) for certain electronic data contained in the Board's Criminal Information Processing System (CIPS) and Master Name Index (MANIX). The Board refused access to the information saying that to fulfill the request would necessitate the creation of records by the Board. This decision was overturned by the Assistant Commissioner of the Information and Privacy Commissioner/Ontario (IPC), but on judicial review the Superior Court upheld the Board's refusal.

The information requested by Rankin consisted of an electronic copy of data in the CIPS system. However, in his request he indicated that he did not want access to personal information or information that could potentially be used to identify individuals. As a result he requested that the names of individuals referred to on the computer record be replaced with randomly-generated, unique numbers. Rankin also requested an electronic copy of data contained in the MANIX database, again indicating that he did not want access to personal information or information that could be used to identify individuals. He again asked that names be replaced with randomly-generated unique numbers and that home address information be limited to the full postal code of each individual.

The Board refused to provide the requested information on the basis that such records did not exist. They maintained that each entry on CIPS was specific to an occurrence and did not provide a unique identifier for all individuals whose information was contained in the database. Therefore, replacing names with unique numbers would require them to introduce an entirely new field to the system, in order to add a unique number in place of each individual's name. Doing so, they claimed, would require the creation of a new algorithm. In that event fulfilling the request would require them to create new records, and they maintained that they could not be required to create new records under MFIPPA.

The Assistant Commissioner did not accept the Board's argument and ordered them to comply with the request. He held that the analysis depended on two main issues: whether the basic information existed in a recorded form in the identified database and was capable of being produced from machine readable records by means of a computer hardware and software or any other information storage equipment and technical expertise normally used by the institution, and whether the process of producing the information would unreasonably interfere with the operations of the police. He concluded that a unique identifier did exist in a form accessible through the police's CIPS system and that they were capable of being produced from a machine-readable record. He also concluded that replacing the unique identifiers with randomly-generated numbers did not change the nature of the information, but simply "anonymized" the information: in that event it did not result in the creation of new information or a new record. Finally, he concluded that although producing the record would be time-consuming and would result in certain inaccuracies, the process would not unreasonably interfere with the operations of the Board. It was on that basis that he ordered it produced.

The Superior Court held that the Assistant Commissioner had ignored a crucial part of the

analysis. The definition of record in MFIPPA, they noted, included the requirement that the record "is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise *normally used by the institution*" (emphasis added). The emphasized words, the court held, imposed a requirement that information requested would only constitute a "record" if it could be produced using computer hardware and software normally used by the institution. In this case, they held, the Assistant Commissioner had not considered that question at all.

Further, they held, the evidence showed that this requirement was not met. The evidence was that a simple algorithm could be created which would replace the unique identifiers with random numbers. But if the algorithm had to be created, the court held, then the record would not be produced with software "normally used by the institution". In that event the request for information should not be granted.

Comment on the issues raised in this case at the IT.Can Blog.

Civil Procedure: Information From MySpace Web Page

The Ontario Superior Court has delivered its ruling in *Weber v. Dyck*. The proceeding is in regard to an application for leave to bring a motion for production from the plaintiff for information and documents pursuant to Rule 48.04(1). According to the Rule, the result of parties consenting to laying an action for trial is that no party shall initiate any motion or form of discovery unless with leave of court. The information and documents are those dealing with the three activities of the plaintiff that purportedly took place after her examination for discovery on October 13, 2005. The substantive action arose from a motor vehicle accident in February 11, 2003 for which the plaintiff alleges she sustained serious and permanent injuries to her left wrist and her body as well as some emotional and psychological trauma. Pursuant to the Bill 59 insurance regime, the plaintiff has the burden to establish that her injuries met the statutory threshold under section 267.5(5) of the *Insurance Act*. To the extent relevant to the present report, the plaintiff disclosed at the time of her examination for discovery that she was an enrolled year one MBA student at the University of Windsor and that she earned part-time income by teaching piano and playing piano at weddings. She disclosed that her plans were for employment after graduation and for vacation jobs.

The defendants learned that the plaintiff has a MySpace web page. There, she posted undated photographs of herself and disclosed some other information about herself. In addition to other information, she indicated that she resides in Toronto and has a new job. Further investigation showed that she worked as a Brand and Marketing Analyst for Level 5 Strategic Brand Advisors and that she is a recent MBA graduate. The defendant wrote demanding some documents relating to the information on the MySpace web page. That request culminated in the present motion. The court found that "[i]n order for the plaintiff to succeed in obtaining the right to further production of information and documents after a case has been placed on a trial list, they must meet the requirement of Rule 48.04(1)". The test which the authorities have applied for granting such leave is that "there must be a substantial or unexpected change in circumstances such that a refusal to make an order… would be manifestly unjust" (para 8). On this basis, the court discountenanced all other information that the defendant requested but found that the only evidence that was relevant for the purpose of Rule 48.04(1) was the information that "the plaintiff graduated on or about December 20, 2006, and that she had obtained a job and moved to Toronto when they discovered her MySpace web page". The court then ruled that even though the changes were not unexpected, "not only has the plaintiff had change in circumstances since this matter was placed on the trial list relating to her educational status, there has been a substantial change relating to her career, employment status and her place of residence." (para10). The court held that "it would be manifestly unjust in these circumstances not to grant leave for the defendants to bring this motion" (ibid).

Criminal Procedure: Sufficiency Of Legal Aid Hours

The Ontario Superior Court of Justice has delivered its ruling in *Ontario v. Ahmad* In this case the applicants – 17 of them (known in the media as the "Brampton 17") – are all males of different age brackets. They were charged with a variety of terrorism offences under Part II of the *Criminal Code*. All of them were represented by counsel pursuant to different legal aid certificates issued by Legal Aid Ontario (LAO). The allotted legal aid hours were determined on the basis of LAO's procedures for big case management. While the details of their claims in the present application are different, generally, however, they want the court to determine that their rights to a fair trial have been compromised on the basis of inadequacy of the number of hours allowed them for the preparation of the preliminary hearing or the refusal to authorize the retention of co-counsel for the preliminary hearing or both. They argue that because of these their *Charter* rights under ss. 7 and 11 (d) are threatened. They seek a number of remedies pursuant to s. 24(1) of the *Charter*; including particularly a stay of proceedings until arrangement for appropriate funding of their counsel can be made.

For the most part, the applicants' motivation in this application is that the number of hours allotted by the LAO is inadequate to access the disclosure made by the prosecution. That "one hard drive contains a database of 86,725 records made up of 82,000 text files of monitor summaries of intercepted communications, and 4,525 other records which include witness statements, surveillance reports, debriefing reports of undercover agents, and other reports and documents" (para. 6). All of the documents can be searched with software known as Supertext. In all, the court acknowledged that the quantity of disclosure made by the prosecution was substantial.

Upon reviewing the evidence of the applicants, the court found that this is not a case that raises a unique situation, and as such does not merit the appointment by the court of a particular counsel by way of a *Fisher* order (i.e. in reference to the court's power to appoint counsel on its own even though counsel are already on record pursuant to the legal aid certificate). Also, the court found that there is no proof the legal aid certificate was inadequate, in that there is no proof that a competent counsel could not be found under the terms of the existing certificate. Further, the court held that the applicants failed to demonstrate that the restrictions on their hours of preparation would lead to an unfair trail. It found that the applicants also failed to prove that the Supertext software was difficult to navigate and noted that some of the counsel did not take the training provided for the use of the software. In addition, some of them still had unexpended credit hours for preparation of the preliminary hearing to draw from. The court found that the prosecution improved the arrangement of the disclosure in a manner that facilitated the applicants' access to them. In addition, the presiding judge at the preliminary hearing met extensively with counsel and they "worked very hard to achieve a written agreement as to what evidence would be presented at the preliminary hearing" (para. 44).

In regard to the *Charter* rights of the applicants, the court held that the *Charter* did not expressly constitutionalize the right to state funded counsel; and moreover, in this context the applicants are required to prove a violation of their rights on prospective basis. All the applicants' counsel accepted the legal aid certificate and voluntarily took on the professional responsibility to their clients and the court by remaining on record. There is no evidence to suggest that no other lawyers are prepared to represent the clients on the terms of the legal aid certificate. Indeed, there are five co-accuseds whose lawyers did not participate in the present application who are determined to work on the terms of the legal aid certificate. Having accepted a legal aid certificate, the counsel had an obligation to proceed on the terms of the certificate or to assist their clients to find other competent counsel who would so do. For the court to make the order requested by the applicants when it has not been established that other competent counsel will not take the case or that the applicant counsel have taken full advantage of the Supertext software would equate to making an order for which the prerequisites are lacking.

Satellite Broadcasting and Telecommunications Services Licenses

A licensing initiative launched last year (see the IT.Can newsletter of July 13, 2006) has resulted in the issuing of licenses for ten new satellites to be used for broadcasting and telecommunications services in Canada. The first of these satellites could be providing services as early as 2010.

Ciel Satellite LP and Telesat Canada will build and launch these new satellites, which will help to fully implement high-definition television in Canada as well as providing new telecommunications services such as satellite-based broadband internet service and Internet Protocol Television. These new satellites will also help connect all regions of Canada, in particular the North. Satellites launched as the result of this initiative may be providing services as early as 2010.

A total of 29 satellite licences were available for assignment, but only 12 were actually awarded. Two Canadian satellite operators – Ciel Satellite LP (Ciel) and Telesat Canada (Telesat) made application. Ciel was awarded seven licences through this process while Telesat received five. Telesat already operates satellites providing telecommunications and broadcasting services throughout the Americas, but Ciel is new and its addition will mean that there is a choice of satellite operators in the market.

The applicants will be required to demonstrate that they comply with all regulatory requirements and conditions of licence for Canadian satellite operators, including Canadian ownership and control requirements, following which radio licences can be issued authorizing the operation of the satellites. The remaining 17 unassigned licences will remain available for assignment.

Science, Technology and Innovation Council

The first steps towards the creation of a new federal Science and Technology and Innovation Council were taken with the appointment of a Chair for that body. Dr. Howard Alper, a Visiting Executive at the International Development Research Center and Distinguished University Professor at the University of Ottawa, has been appointed to head the new agency. He was the first recipient of the Gerhard Herzberg Canada Gold Medal in Science and Engineering, and has received a number of other awards for his work in the sciences.

The council will consist of a Chair and 10 to 12 members, and will be located within the offices of Industry Canada. The intended role of the Council is to be a non-governmental advisory body providing the Minister of Industry with policy advice on science and technology issues. It will also produce regular national reports measuring Canada's Science and Technology performance against international standards of excellence.

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 Chidi Oguamanam and Stephen Coughlan at it.law@dal.ca.

Disclaimer: The IT.Can Newsletter is intended to provide readers with notice of certain new developments and issues of legal significance. It is not intended to be a complete statement of the law, nor is it intended to provide legal advice. No person should act or rely upon the information in the IT.Can Newsletter without seeking specific legal advice.

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 Chidi Oguamanam et Stephen Coughlan à l'adresse suivante : it.law@dal.ca

Avertissement : Le Bulletin IT.Can vise à informer les lecteurs au sujet de récents développements et de certaines questions à portée juridique. Il ne se veut pas un exposé complet de la loi et n'est pas destiné à donner des conseils juridiques. Nul ne devrait donner suite ou se fier aux renseignements figurant dans le Bulletin IT.Can sans avoir consulté au préalable un conseiller juridique.