

IT.CAN NEWSLETTER

Canadian IT Law Association

www.it-can.ca

This newsletter is prepared by Professors [Robert Currie](#), [Chidi Oguamanam](#) and [Stephen Coughlan](#) of the Law and Technology Institute of [Dalhousie Law School](#).

Les auteurs du présent bulletin sont les professeurs [Robert Currie](#), [Chidi Oguamanam](#) et [Stephen Coughlan](#) de l'Institut de droit et de technologie de la [Faculté de droit de l'Université de Dalhousie](#).

Electronic Research as a Disbursement

In *Griffin v. Summerside (City)*, the Prince Edward Island Court of Appeal disallowed the bulk of a litigant's claim for Quicklaw research as part of the disbursements portion of a costs award. The party had claimed \$9,783, which the Court of Appeal observed was out of proportion to the amounts claimed by the opposing parties for electronic research: \$760 and \$906. The court noted that electronic research might simply be law firm overhead as part of library expense rather than an assessable disbursement. It would be necessary to show that the disbursement was reasonably necessary to advance a party's position, by saving a lawyer's time and thereby being cost-effective for the particular litigation file, in order not simply to be overhead. In that event, there needed to be an explanation of the need for the research, which would allow the reasonableness of the expenditure to be scrutinized. In the absence of any such elaboration, but on the assumption that some electronic research would have been reasonable, the disbursement was reduced to \$906.

See also *Ayangma v. Eastern School Board*, in which for similar reasons the PEI Court of Appeal reduced a claimed disbursement of \$706.74 for electronic research to \$250.

Gray Market Satellite Receivers

The Ontario Superior Court of Justice has upheld an interlocutory injunction against a defendant alleged to be engaged in the gray market sale of DIRECTV to Canadian consumers, with its decision in *DIRECTV*,

Inc. v. Donaldson. DIRECTV is licensed by the U.S. Federal Communications Commission to distribute satellite television programming in the United States, Alaska: it includes major cable network programming, major studio movies, special event programming on a pay-per-view basis, and sports and special interest programmes and packages. Although DIRECTV is the largest provider of satellite-delivered subscription television programming signals in the United States, it is not licensed to sell DIRECTV Programming in Canada.

DIRECTV alleged that the defendant (Haskell) was engaged in "gray market" selling of DIRECTV receivers. The "gray market" for DIRECTV operates by selling receivers to Canadian customers, and then using a false U.S. address to misrepresent that the customer is a United States citizen. DIRECTV led evidence, by way of affidavits, that the defendant had sold DIRECTV receivers to Canadian customers.

The defendant argued that there were uses to which DIRECTV receivers could be put other than to obtain DIRECTV programming. They argued that there were a number of legal uses for the equipment in Canada:

- (a) as a satellite radio receiver;
- (b) to receive Dish Network programming;
- (c) as "free-to-air satellites"; and
- (d) for digital video recording ("DVR Recording")
- (e) to receive Advanced Television Systems Committee ("ATSC") signals;
- (f) to store digital picture files; and
- (g) to store digital music files.

DIRECTV contested each of these claims. They argued that their receivers could not legally be used as satellite radio receivers, and could not, as a matter of fact, be used to receive Dish Network or "free-to-air" programming. With regard to the last four claims, they led evidence that these functions were only possible when the receiver was used in conjunction

with their service. For example, the receiver could be used for digital video recording, but only of DIRECTV programs. Similarly, the receiver could not actually store digital files, although it could be used to connect a television with a computer containing such files: in that case, however, it would need to receive a DIRECTV signal for the software to work.

The court noted that the test for granting an interlocutory injunction to a plaintiff was that

- (a) there is a serious question to be tried;
- (b) it will suffer irreparable harm if the relief is not granted; and
- (c) the balance of convenience favours the granting of an injunction, i.e. the plaintiff will suffer greater harm, relative to the defendant, from the refusal of the remedy pending a decision on the merits.

Here, the court concluded that the evidence presented by DIRECTV created a strong prima facie case that the defendants were illegally selling DIRECTV receivers, which would make them liable for fraud, fraudulent misrepresentation, conspiracy, conversion, unlawful interference with economic relations, and unjust enrichment. In that event the first criterion was met. The court also found that the second criterion was met. With regard to the balance of convenience, the court was persuaded that the plaintiff had shown a strong prima facie case that the defendant had contravened the *Radio Communication Act* and had aided and abetted other persons unknown in doing so. In that event, it was appropriate to find that the balance of convenience favoured the plaintiff. Accordingly, the interlocutory injunction was granted.

Internet-based Evidence

In *Berkovits v. Canon Canada Inc.*, the Ontario Superior Court of Justice struggled with the question of the value of evidence which was gleaned from the internet. The plaintiff was seeking to certify a class to pursue a class action claim against Canon Canada, with regard to various types of cameras they manufactured, allegedly negligently. The particular complaint was that the cameras ceased functioning after displaying an “E18” error message. The statement of claim alleged that the problem was widespread

and was caused by a defect in the internal processor of the cameras.

The defendants, Canon, sought to have struck an affidavit filed by the plaintiff in support of the certification application. The nature of the affidavit was summarised by the court:

3. The evidence at issue is contained in a report dated January 15, 2010, prepared on behalf of the plaintiff by Josh Joffe, P.E. Mr. Joffe has searched the internet for comments about the “e18” error message and Canon products. He concludes, among other things, that based on his investigation “[t]he E18 Error is either the largest or one of the largest most frequently occurring complaints about digital cameras on the internet.” He also concludes that “[w]ith regards to lens errors, there is meaningfully more ‘chatter’ on the internet with respect to Canon than other digital camera brands.”

Canon disputed this claim. They had filed two expert reports of their own, which argued that the plaintiff’s evidence was misleading, and based on false assumptions, incorrect data, misuse of statistical models and illogical reasoning. They also argued that much of the web data relied upon by the plaintiff was fake, possibly deliberately so.

The actual issue to be settled was not whether to strike the affidavit, but whether that application should proceed prior to the certification hearing itself, or at the same time as the certification. The court concluded that it made most sense to hear both matters together.

The court noted that evidence obtained from the internet could not all be treated in one fashion:

It does not make sense, on the one hand, to conclude that any and all information pulled from the world-wide web is inherently unreliable and ought to be given zero weight; on the other hand, it makes equally little sense to open the door to admitting into court absolutely anything placed on the internet by anybody. (para 8, quoting *ITV Technologies Inc. v. WIC Television Ltd.*, 2003 FC 1056, aff’d. 2005 FCA 96.

Given that, the court held, it was more sensible to look at the affidavit evidence in the context of all

the evidence. It might transpire that the affidavit evidence was of relatively little importance when seen in that light. Further, it would be more efficient to hear the matters together: as the court noted,

In light of the relative novelty of the use of internet evidence and the importance of the issues to the parties, it seems quite probable that there will be appeals of both the evidentiary ruling and the certification decision. It seems to me that it would promote speed and efficiency to have the two issues proceed in tandem. (para. 15).

Accordingly the motion to strike was delayed to be heard along with the certification action.

Internet Luring

The Supreme Court of Canada has handed down a decision on the offence of internet luring and the various presumptions around age incorporated into the accompanying *Criminal Code* provisions, with its decision in *R. v. Levigne*. The accused was charged under section 172.1, which prohibits the use of a computer to communicate with an underage person or a person whom the accused believes to be underage, for the purpose of facilitating the commission of a specified sexual offence. The offence requires: (1) an intentional communication by computer; (2) with “a person who is, or who the accused believes is” underage; (3) for the specific purpose of facilitating the commission of an enumerated secondary offence with respect to that person.

In the accused’s case, he had engaged in a number of sexually explicit chats with “etownjessy13” (“Jessy G” in the chat logs) over a period of several weeks. Eventually he had arranged to meet with Jessy G for the purpose of performing oral sex on him. On the internet Jessy G had represented himself as a 13 year old grade seven student, but he was in fact a police officer. The accused was arrested when he appeared for their meeting. The Court observed that:

[25] ... the anonymity of an assumed online profile acts as both a shield for the predator and a sword for the police. As a shield, because it permits predators to mask their true identities as they pursue their nefarious intentions; as a sword (or, perhaps

more accurately, as a barbed weapon of law enforcement), because it permits investigators, posing as children, to cast their lines in Internet chat rooms, where lurking predators can be expected to take the bait — as the appellant did here.

Since the police officer was not in fact underage, the question in the case was whether the accused believed him to be. On the one hand, the profile for etownjessy13 indicated that he was 18 years of age; on the other hand, Jessy G said to the accused on several occasions that he was only 13 and would not have been able to make a profile if he had put that age. More important than the evidence to the decision, however, were the statutory presumptions built into the Criminal Code.

Section 172.1(4) provides that “It is not a defence... that the accused believed that the person referred to in that paragraph was at least eighteen years of age... unless the accused took reasonable steps to ascertain the age of the person.” The trial judge, however, had held that this requirement for the accused to take reasonable steps was not relevant, because the accused was not raising a defence. Rather, the trial judge held, the accused’s belief that the person communicated with was underage was one of the elements of the offence which the Crown was required to prove.

In attempting to prove that element, the Crown would be assisted by section 172.1(3), which states that:

(3) Evidence that the person ... was represented to the accused as being under the age of eighteen years... is, in the absence of evidence to the contrary, proof that the accused believed that the person was under that age.

However, the trial judge found that the accused had raised sufficient evidence to the contrary. “Evidence to the contrary” did not have to persuade the trier of fact, it only needed to have probative value tending to show that the presumption was not true. In this case the accused pointed to etownjessy13’s age as shown in the profile, and to his belief that moderators would remove anyone underage from the public chat rooms. The trial judge found that these explanations were not shown to be lies, and could

reasonably possibly have been true: in that event the Crown could not rely on the presumption. In that case, the Crown had not proven beyond a reasonable doubt that the accused believed the person to be underage.

The Supreme Court of Canada upheld the Court of Appeal decision, which had overturned the judgment at trial and substituted a conviction. In essence, they found that the trial judge had applied the relevant Code sections in reverse order. The starting point in a trier of fact's reasoning ought to be the presumption in section 172.1(3). Since Jessy G had been represented to the accused as underage, the accused was presumed to have believed that Jessy G was underage. At that point it became up to the accused to rebut the presumption: in doing so, the accused was governed by section 172.1(4). That is, to show evidence to the contrary, the accused was required to show that he had taken reasonable steps to ascertain Jessy G's age.

Approached from this perspective, the evidence offered by the accused did not satisfy the burden placed on him. Indeed, the Court held, far from taking reasonable steps, the accused took no steps to ascertain Jessy G's real age. The belief that moderators would remove someone underage from the public chat room was irrelevant, since the conversations in question here took place in a private chat room. Purporting to rely on the age in the profile after having been informed that that age was false was also not taking a reasonable step. In that event, the presumption of knowledge applied in the first place and was not rebutted: in that event a conviction was properly entered.

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 Robert Currie, 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.

Copyright 2010 by Robert Currie, Chidi Oguamanam and Stephen Coughlan. Members of IT.Can may circulate this newsletter within their organizations. All other copying, reposting or republishing of this newsletter, in whole or in part, electronically or in print, is prohibited without express written permission.

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 Robert Currie, 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.

© Robert Currie, Chidi Oguamanam et Stephen Coughlan, 2010. Les membres d'IT.Can ont l'autorisation de distribuer ce bulletin au sein de leur organisation. Il est autrement interdit de le copier ou de l'afficher ou de le publier de nouveau, en tout ou en partie, en format électronique ou papier, sans en avoir obtenu par écrit l'autorisation expresse.