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

August 24, 2006

IT.Can NEWSLETTER

Canadian IT Law Association

www.it-can.ca

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Civil Procedure – Execution of Anton Piller Order

The Supreme Court of Canada has delivered its ruling in *Celanese Canada Inc. v. Murray Demolition Corpn*. The Appellant, Celanese, is the proprietor of a plant for the production of vinyl acetate in Edmonton. It decided to demolish the plant taking deliberate steps to not compromise valuable proprietary information associated with the plant's design and processes. It retained the Respondents for the demolition exercise. Subsequently, the Appellant discovered that the Respondents and their associates, including specifically Canadian Bearings, attempted to copy certain proprietary information and processes in the guise of rendering demolition services. Consequently, it expelled Canadian Bearings from the premises and sued it on the basis of alleged stealing of vital technology uncovered during the demolition which the Appellant claimed had been used without authorization in the construction of a vinyl acetate plant in Iran.

The Appellant obtained and executed an *Anton Piller* order from the motions judge that enabled it to search and secure vital information from the Respondents. The mode of execution of the search of the Respondents' computer facilities pursuant to the Anton Piller order was central to the appeal in this case. In the Court's words, the search was conducted "in circumstances that could be described as mildly chaotic" (¶ 7). Attempts were made at identification and isolation of the electronic documents suspected to be privileged in collaboration with Respondents' lawyers. However, for the most part, the Appellant mismanaged about 1, 400 electronic documents suspected to be relevant but were not conclusively screened for potential solicitor-client privilege claims. Those documents were nonetheless downloaded onto a hard drive, converted onto CD-ROMs, sealed and initialed by both the Respondents' lawyers and court appointed independent supervising solicitor. No inventory of the seized records as required under the terms of the *Anton Piller* order was taken. Without reference to the Respondents' lawyers, the Appellant lawyers had access to the sealed electronic documents, including a CD which contained copies of e-mails which they transferred onto their computer with the approval of the independent solicitor. The CD was discovered to contain privileged communication, some of solicitor-client nature. When the Respondents' lawyers became aware that the Appellant lawyers had accessed privileged documents, they demanded immediate return of the documents "whether in print form or electronic" (¶ 15) but the Appellant's lawyers declined, and claimed that the privileged information had been deleted from their systems.

The Respondents brought a motion seeking to disqualify the Appellant lawyers from acting in the proceedings and any related matters. The motions judge dismissed the motion. On appeal, the Divisional Court upheld the Respondents' motion and ordered the removal of Appellant's lawyers, a decision that was later reversed by the Ontario Court of Appeal. The court held that the onus is on the moving party (Respondents) to establish that the opposing party would use the privileged information in a prejudicial manner and that the remedy of disqualification is not automatic but applied only where the prejudice occasioned cannot be realistically overcome by other remedies.

While agreeing with the Court of Appeal that the remedy of disqualification is not automatic, the Supreme Court reversed the rest of the appeal court's decision on all grounds. It affirmed its decision in *MacDonald Estate* and held that there is no onus on the moving party to adduce any further evidence as to the nature of confidential information

other than establishing that the opposing lawyer has obtained solicitor-client privileged information and that the onus of rebutting the presumption of prejudice lies upon the party who obtained such information (¶¶ 42, 43). Such a party is in a better position to take responsibility for the information it has obtained. The Supreme Court noted that an *Anton Piller* order prima facie puts a party against whom it is issued at a fundamental disadvantage and the Court refrained from putting additional burdens on such party. It observed that despite the general deficiency in the details of the *Anton Piller* order, especially in regard to the absence of "any provision to deal with solicitor-client confidences, the absence of specific terms in the *Anton Piller* order does not relieve the searching solicitors from the consequences of gaining inappropriate access" (¶41).

The Court observed that even though the Appellant lawyers' conduct could not be described as "egregious", "a violation of privilege that is not as a result of "egregious" conduct may give rise to disqualification", especially where the proceeding is at a preliminary stage. However, the Supreme Court limited its order of disqualification to the lawyers' participation in the present proceeding and/or their ability to render advice relating thereto. This was a moderation of a more extensive approach of the initial order of the Divisional Court which the Supreme Court upheld. The court held further that *Anton Piller* order is special order issued by courts under very strict conditions and in extreme cases. It is aimed at preserving potentially vital evidence and not at allowing the exploitation of such evidence by a party who already stands at some advantage in relation to an opponent.

Privacy

The Office of the Information and Privacy Commissioner of Alberta has released Order P2005-001 which relates to a complaint against Doctor Dave Computer Remedies Inc. The complainants were two former employees of the respondent organization. The complained that their personal information, consisting of their names, home and email addresses and home phone numbers were posted on websites and disclosed to employees of the organization after they had ceased to be employees, and for the purpose of encouraging current employees to commence litigation against them. The organization did not appear at the oral hearing, and provided only a brief response to the complaints. In their response they indicated that the Alberta *Personal Information Protection Act* did not apply to the complainants, as they were independent contractors. They argued that only 'individuals' could file a complaint under the *Act*, and that the complainants, as independent contractors, were corporations and not individuals. They also argued that the exemption in *PIPA* relating to business contact information applied in this case. Essentially, the collection, use or disclosure of business contact information is excluded from the *Act* where that collection, use or disclosure is "for the purposes of contacting an individual in that individual's capacity as an employee or an official of an organization and for no other purpose" (s. 4(3)).

Frank Work, the Information and Privacy Commissioner addressed a number of different issues in formulating his order. Mr. Work first determined that in general the burden of proof of establishing the basis of the complaint rests with the complainant, and that the organization bears the burden of showing that any collection, use or disclosure was authorized by the *Act*.

Mr. Work considered whether the information provided by the complainants supported a finding that the information posted on the websites was posted by the organization. He retained an expert in the field of electronic transmissions to determine whether it was reasonable to conclude that the samples of emails and other electronic disclosures originated with the organization. He accepted the qualification of the expert that "it is difficult to make categorical findings with respect to computer technology as email headers can be forged, addresses can be spoofed and timestamps/raw data can be modified." (para 15). Nevertheless, based on the expert's report, he found it reasonable to conclude that the documents originated with the organization, and noted that the organization provided no response on this issue.

Mr. Work accepted that under s. 46(2) of *PIPA* only an 'individual' can make a complaint, and he defined 'individual' as meaning "a single human being." (para 19). He ruled that the complainants in this case were individuals, and were employed as such

by the organization. He rejected the organization's arguments that the information in question was 'business contact information', noting that "[o]nce a person is no longer an employee there is no longer *business contact information*." (emphasis in original, para 23)

Mr. Work ruled that the information disclosed by the organization was personal information that it had under its control when it was the employer of the complainants. While the *Act* contained specific provisions relating to permitted uses of 'personal employee information', he ruled that these provisions were not all applicable, since at the time of the use and disclosure of the information, the complainants were not employees, and the information was therefore no longer 'personal *employee* information'. Thus the use and disclosure of this information would have to be treated as a use and disclosure of 'personal information'. He then addressed the implications of s. 21(1)(*a*) of the *Act*, which reads:

> 21(1) Notwithstanding anything in this Act other than subsection (2), an organization may disclose *personal employee information* about an individual without the consent of the individual if
>
> (a) the individual is or *was* an employee of the organization, or…. [emphasis added].

He reconciled his finding that the personal information of former employees is not personal employee information with s. 21 which refers to such information in relation to a person who "is or was" an employee by stating:

> … I believe that the Legislature envisioned situations that would require disclosure of *personal employee information* of former employees, such as to pay pensions or to provide other post-employment benefits, or for tax reasons, as examples. Therefore, the Legislature decided to dispose with rules respecting the collection and use of employee information after someone ceases to be an employee, but kept the disclosure of employee information of former employees under section 21 of the Act, provided that an organization met the requirements for disclosure of *personal employee information* under section 21(2). [Emphasis in original] (para 47)

Mr. Work then went on to consider the circumstances in which such information could be disclosed and noted that the purposes for disclosure could only be ones related to the employment relationship. He ruled that the disclosures made in this case were not related to the employment relationship, and were therefore not legitimate disclosures of employee personal information.

Mr. Work next considered whether the disclosure of personal information could be justified under the more general provisions of the *Act* dealing with personal information and not personal employee information. He concluded that the organization did not have the authority to use or disclose the information in questions. He further concluded that the purposes for which the information was used and disclosed were not reasonable or appropriate.

The Privacy Commissioner of Canada has launched an investigation into the practices of the Society for Worldwide Interbank Financial Telecommunication (SWIFT). This organization is a financial co-operative based in Europe that facilitates messaging services between financial institutions in more than 200 countries, including Canada. The investigation was launched to determine whether SWIFT has improperly disclosed personal financial information about Canadians to foreign authorities. A News Release about the investigation indicates that complaints about several Canadian-based financial institutions will also be investigated. (Read SWIFT's response to similar concerns raised in the US media).

Rights in Ideas

In *Plews v. Pausch* Justice Veit of the Alberta Court of Queen's Bench dealt with a claim by a former doctoral student against his ex-supervisor. The student alleged that the professor had plagiarized his ideas after he expressed his ideas to his then supervisor in a discussion about potential thesis topics. The professor later published an article on a similar topic. Sometime after the initial discussion, and the publication of the article, the student had requested and received a change of supervisor. Although the defendant Dr. Pausch remained on Plews' committee, he did not read any drafts of Plews' thesis. The plaintiff Plews alleged breach

of copyright, breach of confidence and breach of fiduciary duty on the part of the professor.

Veit J. characterized the case as one in which ideas were sought to be protected. He noted that while copyright protected the expression of the ideas and not the underlying ideas, "the law will protect certain ideas in certain circumstances". (at para 65) The basis for this protection is not entirely clear. Veit J. identifies intellectual property law, contract, tort and notions of fiduciary obligation as all playing a potential role.

Veit J. ruled out copyright infringement in this case, noting that there was no indication that Dr. Pausch had ever read any of Plews' thesis drafts. He noted that "there is no evidence that Dr. Pausch saw any rough form of Mr. Plews' dissertation until the distribution that was made in March 1998, that is, until long after Dr. Pausch had delivered his own article on the dialectic of seeing." (para 70) In addition, Veit J. observed that the Pausch article and the dissertation dealt quite differently with the very general "idea".

Veit J. also dismissed the argument that Dr. Plausch owed Plews a duty of confidentiality. He observed that "[t]he notion of confidentiality goes beyond the law of even non-textual copyright because it protects pure ideas, i.e. concepts that have been expressed but not reduced to written form." Veit J. found that no such duty arose in this case largely on the basis of his finding that the idea conveyed to Dr. Plaush was insufficiently developed to give rise to any such duty. He described Plews' expression of his idea as being of the "Wouldn't it be great…" (para 80) variety, and found that it was "too vague and general to qualify for protection as confidential information". (para 82)

Veit J. found that Dr. Pausch, as supervisor and later as a member of Plews' doctoral committee, owed a fiduciary duty to Plews. He found that Dr. Pausch owed a higher standard of dealing to Mr. Plews than the standard established by law because of the particular relationship of professor to student. He stated that: "Dr. Pausch owed to Mr. Plews those duties which the academy impose upon professors and that might not be imposed by the law generally." (para 89) He recognized "a convention in the academy concerning the recognition of the contribution of others to one's work." (para 90) Nevertheless, Veit J. found no breach of Dr. Pausch's fiduciary obligation. He stated: "Mr. Plews had not actually developed an idea – he had only thought of developing an idea within an area where many others, including Dr. Pausch, had also thought of developing ideas." (para 91)

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