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

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Facebook and Privacy

The Privacy Commissioner of Canada has completed her review of Facebook, finding that it has satisfactorily resolved the outstanding privacy concerns arising from a complaint it had investigated. In May of 2009, the Canadian Internet Policy and Public Interest Clinic filed a complaint with the Commissioner concerning some aspects of the Facebook site. After an investigation, the Commissioner found some of those complaints to not be well-founded, some to be well-founded but already resolved, and others to be well-founded but not resolved. In August of 2009 Facebook agreed to make changes to satisfy the Commissioner's concerns, and was given one year to deal with them. It was those issues which the Commissioner has now found to be resolved.

One major concern had related to Facebook applications, such as games and quizzes, created by third party developers. At the time of the complaint Facebook had no technical safeguards to restrict those developers from accessing the personal information or users or their online friends, and users were not informed of the information that applications were accessing and why.

The changes to Facebook now prevent applications from accessing information until the user has given express consent for each category of personal information to be shared. Users adding an application are now advised that the application wants access to specific categories of information, and are asked to click "Allow" to consent to that. As part of their investigation, the Privacy Commissioner's Office developed a test application and confirmed that they could not access information unless the user specifically allowed them to do so.

The Commissioner had also raised concerns that privacy settings were not accessible enough to users. Facebook has since implemented changes which include:

> Allowing users to select a low, medium or high privacy setting;
>
> A per-object privacy tool permitting users to set an "easily configurable setting on every piece of content at the time of uploading or other sharing."
>
> A privacy tool that would be presented to all users and encourage them to review their privacy settings; and
>
> A privacy tour for new users which would explain privacy settings.

The Commissioner also noted that Facebook now explains its privacy policy more clearly, and that users were required to confirm their privacy settings following a redesign of the site in December 2009.

The Commissioner noted that her office had received additional complaints since the initial one of more than a year ago, relating to Facebook's invitation feature and "like" button. Although investigation of those complaints was still ongoing, the complaint of May 2009 has now been fully resolved. The Commissioner noted:

> I would like to express my sincere appreciation to Facebook for the cooperation it has provided throughout our discussions. We recognize that some of the changes needed in order for Facebook to meet its legal obligations in Canada were complex and time-consuming to implement. Ultimately, Facebook has made several privacy improvements that will benefit its users around the globe. I believe we have also demonstrated that privacy protection does not stand in the way of innovation.

Screening Device Delays and Technical Requirements

The British Columbia Supreme Court reviewed the meaning of the term "forthwith" with regard to Approved Screening Devices (ASDs) with its decision in *R. v. McInnes*. At issue in particular in the case were questions of whether it was required, and permissible, to delay the test to prevent inaccuracy due to the recent ingestion of food, sugar or alcohol.

The accused was stopped by an officer as he left the drive-through window of an A&W in the early morning hours. The officer formed the suspicion that the accused had alcohol in his bloodstream and so made an ASD demand. The officer then asked the accused whether he had had anything to drink from the soft drink cup in his possession, and the accused replied that he had drunk some root beer. The officer therefore did not administer the test immediately, but rather waited for ten minutes before doing so.

The officer testified that he had received training from the RCMP during which he had learned that he should wait for 10 minutes before administering a test if a suspect had smoked or ingested food recently, in order to avoid particles or sugars gumming up the ASD and producing an inaccurate reading. He also testified that he understood at the time he should wait for 10 minutes if a suspect had recently consumed alcohol. He also testified that he had learned from another officer the correct waiting period for recent smoking and food ingestion was 5, not 10, minutes and the correct waiting period for recent alcohol consumption was 15, not 10, minutes.

In addition, evidence from an expert in the use of an ASD was led. This evidence was to the effect that there was no requirement to wait at all before administering an ASD simply because a suspect has ingested food. That expert also testified the RCMP protocol is to wait 3 minutes after smoking and 15 minutes after the recent ingestion of alcohol in order to obtain a reliable test result.

The net result was that the officer had waited until ten minutes had passed to administer the ASD, but that this was not necessary on any scientific basis ground. The accused therefore argued that the demand had not been legally made, and further that the accused's opportunity to contact counsel had been wrongly delayed. As a result, the accused argued, the breathalyser certificate which was eventually obtained should be excluded.

The trial judge disagreed, finding that there was no illegality and admitting the evidence. On appeal the British Columbia Superior Court upheld that decision. The trial judge had noted that the earliest point at which the ASD could actually have been administered was after seven minutes, so the real delay in the case was only an additional three minutes. The appeal court held that the requirement in the statute – that the ASD be administered "forthwith" – had been complied with. That requirement has to be interpreted in accordance with the technical requirements of the instrument. Police are not automatically entitled to wait fifteen minutes before administering an ASD: on the other hand, a result taken before fifteen minutes has passed will not be reliable if the accused has just ingested alcohol. Accordingly, the length of time which will constitute taking the sample "forthwith" depends on the exigencies of the use of the equipment and its accuracy.

In this case, the officer erroneously believed that it was necessary to wait an additional three minutes before the ASD would be able to provide an accurate result. However, the trial judge had concluded that this still amounted to taking the sample "forthwith". That was a factual conclusion on the part of the trial judge, and therefore could only be overturned based on a palpable and overriding error. As there was no such error, the Superior Court upheld the decision.

Websites and Circumstantial Evidence

The Alberta Court of Appeal held that in some circumstances it is appropriate to rely on evidence obtained from a website in order to convict an accused without proof that the accused was responsible for that website, with its decision in *R. v. Juneja*. The accused ran two massage parlours, and was charged with running a common bawdy house, living off the avails of prostitution, and procuring women to become prostitutes. There was evidence of various types, including testimony from undercover officers and from women who had been employed at the accused's establishment, all of which went to

the issue of whether sex was for sale at the massage parlours. In particular, however, the Crown also led evidence of newspaper advertisements and of websites advertising the accused's massage parlours. The accused objected to the use of this evidence.

The accused argued that the websites were not shown to have been created or commissioned by the accused or by anyone working at either establishment. Given that there was no link between him and the websites or the advertisements, the accused argued, they could not be used against him.

The Alberta Court of Appeal noted that the evidence overwhelming showed that the websites were about the right establishments, and showed and described the actual women working at them. They also contained correct contact information for the accused's massage parlours. The Court of Appeal acknowledged that there was no proof it was the accused who had placed the ads or built the websites: "[i]n theory, some stranger could spontaneously and generously somehow have got these photos and inserted these advertisements and websites, all with contact information only for the appellant's businesses." However, they noted that there did not need to be proof beyond a reasonable doubt of individual pieces of evidence. Very few people would have been in a position to gather the material which was on the websites, and the content of the websites was largely verified by live witnesses. The websites were circumstantial evidence of the sale of sex at the massage parlours, which could be weighed along with the other evidence, whether those websites were linked to the accused or not.

Website Ownership and Civil Discovery

The Ontario Superior Court of Justice ordered a non-party to appear for examination in order to obtain information identifying the owner of a website in *Latner v. Doe*. The plaintiff, Joshua Latner (Joshua), discovered a website which included pictures of him and a blog, which he felt was defamatory to him. The photos on the website were posted from an account hosted by Photobucket, which allows users to create photo albums. The administrator of the account was identified as John Doe, though he or she was held out on the Photobucket site as "joshlatner." Joshua obtained a court order requiring both Google and Photobucket to release information to him to assist him in identifying John Doe, as a result of which he obtained the IP address from which John Doe made his postings. Pursuant to a further court order, Joshua discovered the IP address was assigned to his brother Steven Latner (Steven). He therefore sought the order permitting cross-examination of his brother, in order to obtain his assistance in identifying John Doe. Steven argued that a court order requiring him to attend to be cross-examined was not necessary nor in keeping with the objectives of proportionality, and that he should have been given an opportunity to come forward with this information without the need for a motion and court order.

The Motions Judge granted the order. There had been some exchanges of information between the parties prior to the motion, though Steven had provided very little until shortly beforehand. He had suggested that there were approximately five computers in the house, and that although some had passwords, they were typically left on and so a password was not really needed to make use of them. He argued that there were no logs regarding usage and so he could not tell who had used them. The Motions Judge noted that this information was quite minimal and not helpful. There was no reference to who lives or works in the house such that they would have access to the computers. There was no indication where they were each located in the house and who would have access to each; whether the internet access was high speed or dial up; or whether the line was secure or easily hacked into. The Motions Judge noted that there was no information whether anything like this had ever happened in connection with Steven's computer before nor any insight into who might have used the account to make the posts.

The judge noted that five criteria needed to be met to grant the order, and that all five were:

1. There is reason to believe that Steven has information relevant to the matter in issue: the IP address from which the blog emanates is registered to Steven. While he may not be able to state unequivocally who was responsible for this publication, he certainly is well placed to provide information as to who it could have been and to help sort this out. As his IP address was used, one would have thought he, too, would want to know how this could have

happened without his authority or even his knowledge;

2. Joshua cannot get this information from anyone he is entitled to examine for discovery: The action is currently being brought against John Doe due to the difficulty establishing Doe's identity. As a result, there is no defendant who can be examined for discovery at this time and there won't be one until John Doe is identified;

3. It would be unfair for Joshua to proceed to trial without having an opportunity to examine Steven: as this blog was posted from Steven's IP account, Joshua has satisfied that criterion, too. Steven is likely to have some information that can assist in getting to the bottom of this;

4. The examination (60-90 minutes has been proposed) is not of an unreasonable duration nor unfair to Steven: Further, it would not delay a trial that cannot occur until such time as Doe is identified; and

5. Joshua must show a prima facie case of defamation and that his claim is reasonable and being advanced in good faith: Based on a review of the contents of the blog, included in the record, I am satisfied, that this criterion has also been fulfilled.

In essence, the Motions Judge concluded that the order was necessary because, left to himself, Steven would have continued to provide as little information as possible. As she noted, it "does not take a computer whiz to devise a list of the questions he could have anticipated and to provide responses in anticipation", but Steven had chosen not to do so. As a result, the examination was ordered.

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.

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