



NEWSLETTER

Canadian IT Law Association

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Civil Procedure – Withdrawal of Admission

The Ontario Superior Court has delivered its ruling in [Farlinger v. Hood](#). In the original action, the plaintiff claimed damages in the amount of \$2m, 25% interest in certain software and another 25% interest in the telephone dating concern of the First Media Group Inc. The plaintiff alleged that his interest in the business in which he was a partner was wrongfully terminated. In their defence, the Defendants claimed that First Media Group Inc. had by 1998 discontinued the use of the software in issue and that some changes to the software had been made to which the plaintiff could not lay claim. In refusing the plaintiff's request for production of documentary evidence relating to those changes, the defendants expressed concern that such evidence contained confidential information that might be exposed to a competitor for which the plaintiff now worked. Meanwhile, the defence counsel confirmed to the plaintiff in writing that the software changes in issue would not be used in the defence of the plaintiff's claims.

Pending the trial of the first action, the plaintiff issued a new notice of action seeking new monetary damages against First Media Group Inc. and a number of its affiliates as new corporate defendants for the use of the software since 2001. In all, "[t]he New Action raises causes of action and facts that are found in the Original Action, adds numerous new party defendants, adds causes of action for breach of fiduciary duty and breach of trust, and increases the amount of damages claimed from \$2 million to \$40 million" (¶19). Consequently, the defendants' new counsel brought a motion seeking to withdraw

the admission made in respect of the first action. Among other reasons, the defendants argue that they were now not worried about disclosing confidential information in the software because First Media has replaced the software entirely.

Rejecting the plaintiff's opposition to the defendants' motion to withdraw the admission, the court held that it would grant the motion to withdraw if three conditions are satisfied: if the withdrawal gives rise to a triable issue, if there is reasonable explanation for the withdrawal, and if such withdrawal will not be prejudicial to an opposing party in ways that monetary costs cannot compensate. After an analysis of the facts, the court upheld the motion to withdraw. It ruled that "[t]he effect of allowing the defendants to withdraw the admission means that they can assert a new defence to the damage claims based on alleged changes to the software... this new defence may require some expert evidence from a computer specialist...this will require additional discovery. All of this is allowed in the terms that I attach to my order. This will impose additional cost on the plaintiff but that cost is no different than if the admission has never been made. It is not costs thrown away" (¶ 44). The court affirmed that the rationale for bringing the motion was obvious and compelling given the change in circumstances.

Criminal Procedure And Privacy – incriminating Voice Sample And Charter Rights

The British Columbia Supreme Court has delivered its ruling in [R v. Adam et al](#) (link currently unavailable). In this case, the accused was charged with two counts of conspiracy. Part of the Crown's evidence included intercepted private telephone communications. During the preliminary hearing, Agent Del Re was examined by the Crown and cross-examined by defence counsel in the presence of all the accused. The latter were advised that the Agent would not be present at the trial and to take that

into consideration while cross-examining him. Also, they were informed that pursuant to section 715 of the *Criminal Code*, the Crown would be seeking to have the Agent's evidence at the preliminary proceeding introduced into evidence at the trial. In a lengthy KGB *voir dire* at the trial, the Agent gave his testimony by video conference from Italy and was cross-examined by all counsel. A particular accused was not represented by counsel at the preliminary hearing. This accused then opposed the Crown's application under section 715 of the *Criminal Code* and therefore the admission of the Agent's preliminary evidence at the trial. He argued that he may have been reluctant to ask questions of the Agent for fear that it would have presented officers a potential opportunity to identify his voice on the intercepted private communications. Such a consequence, he claims would be in breach of his privacy rights under section 8 of the Charter.

Reviewing the application and relevant authorities, the court affirmed that "the surreptitious recording of the accused's voice by the police for future voice identification did not amount the violation of his right to the security of his person under section 7 of the Charter" (¶19). In relation to section 8 of the Charter, again, the court affirmed that the applicant had no reasonable expectation of privacy in the sound of his voice and that taking of voice sample does not necessarily amount to penetration of the applicant's body and removal of any substance from it. In regard to the facts of the present case, the court found that "there is absolutely no evidence before me that anyone used the voice of any of the accused in court proceeding to confirm voice identification of the intercepted telephone communications" (¶12). According to the court, section 715(1) of the *Criminal Code* is both a codification and expansion of the common law exception to the hearsay rule. That sections "is not concerned with the fact of cross-examination but with the opportunity to cross-examine" (¶27). The court found "that none of the accused was deprived the opportunity to cross-examine Agent Del Re. In this regard, it is significant that whatever counsel forgot to cross-examine Agent Del Re about at the preliminary hearing, they are able to cross-examine him on the KGB *voir dire* when he testified via video conference. The evidence on the

KGB *voir dire* is now part of the evidence on this trial" (¶28).

Comment on the issues raised in this decision at the IT.CAN blog



Domain Names

IN *CHOICE HOTELS INTERNATIONAL, INC. AND CHOICE Hotels Canada Inc. v. Daniel Cox*, a three person panel, chaired by W.A. Derry Millar, considered a dispute over the domain name choice-hotels.ca. The first complainant, a U.S.-based company owns Canadian registered trademarks for CHOICE HOTELS, CHOICE HOTEL and CHOICE HOTELS INTERNATIONAL (ALL since 2004). The second complainant is a Canadian company which operates under the trade name Choice Hotels Canada, Inc. since 1993, and which is licensed to use the registered trade-marks. The complainants also hold domain name registrations for choice-hotels.com, choice-hotel.com, choicehotels.com, choicehotel.com, and choicehotels.ca. The registrant registered the domain name choice-hotels.ca in 2006. The domain name resolves to a site hosted by DomainSponsor.com. The site is part of a revenue program in which referral fees are paid when Internet users are redirected to its websites. The registrant's choice-hotels.ca site provided a series of links to various hotel or related businesses. Although the complainant's websites were among those listed, the list included many competitors of the complainant.

The panel had no difficulty in finding that the disputed domain name was confusingly similar to a mark in which the complainants held rights. They also found bad faith on several bases. They were prepared to infer a bad faith motive from the registrant's lack of response to the complainant's correspondence and to the complaint. They noted, in addition, that the fact that registrant had registered 111 other domain names that incorporated or were very similar to third party trade-marks was further evidence of bad faith. Finally, they found that the website to which the disputed domain name resolved also established bad faith. They found that the registrant was a competitor of the complainants because "[h]e earns fees by directing Internet users to the websites of the direct competitors of the Complainants"

(para 88), and that, absent an explanation from the registrant, it was reasonable to infer that the registration of the disputed domain name was done “to disrupt the business of the Complainants by directing Internet users seeking the hotels of the Complainants to their competitors.” (para 89) The panel was of the view that the complainants had met their burden of establishing that the registrant had no legitimate interest in the domain name. The panel ordered the transfer of the domain name registration to the Canadian company, Choice Hotels Canada.

IN *CHOICE HOTELS INTERNATIONAL INC. V.*

Montanbault, a three member panel considered a dispute over the domain name comfort-inn.ca. The complainant was a U.S.-based company which owned Canadian trade-mark registrations for COMFORT INN (since 1983), and COMFORT INN & design (since 1991). The registrant registered the comfort-inn.ca domain on March 30, 2006. Although the name resolved to a basic “under construction” web page, the description in his registrant information for the domain name indicated that the domain name was of great value and that anyone interested in it should contact him. When the complainant contacted the registrant about the domain name, he offered to sell it to them for \$30,000.

The panel, chaired by Barry C. Effler quickly reached the conclusion that the domain name was confusingly similar to the complainant’s registered trade-marks, and that the complainant’s trade-marks pre-dated the registration of the domain name. The panel also determined that the offer to sell the domain name amounted to bad faith within the meaning of the CDRP, and that the registrant had no legitimate interest in the domain name. The panel ordered the domain name to be transferred to the complainant.

Internet Law: Reliability of Internet Source – Wikipedia

The Federal Court in Montreal has delivered its ruling in *Fi v. Canada*. This case was an application for judicial review of decision of a Pre-Removal Risk Assessment Officer (PRRA) of the Immigration Canada. The PRRA Officer had rejected the applicant’s application for protection under section 112(1) of the *Immigration and Refugee Protection*

Act (the Act). The applicant based his claim for protection on both his nationality as a Palestinian and on imputed political opinion. The PRRA Officer recognized that the applicant’s documentary evidence was enough to establish an “objective fear” by members of the Palestinian population in West Bank territories occupied by Israeli army, an experience that had attendant limitation on freedom and economic activity. However, the PRRA was not satisfied in regard the applicant’s “personalized risk” of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment” (¶4); having not been persuaded by the evidence of the applicant in regard to personalized risk.

The court acknowledged that “where an impugned PRRA decision is considered globally as a whole, the applicable standard of review should be reasonableness simpliciter” (¶6). Also, the court noted that the interpretation of specific section of the Act should be assessed on the basis of correctness and the PRRA’s finding of fact should not be impeached unless, it was made in “perverse or capricious manner without regard to the evidence before the PRRA officer” (*ibid*). The court found that in this case the PRRA violated applicant’s right to procedural fairness. Specifically, “the PRRA officer consulted relevant documentary extrinsic evidence found on the internet, upon which the applicant was not given an opportunity to comment” (¶8). The court ruled that “[i]n particular, the use of information from the Wikipedia website is highly questionable, as the reliability of its sources has not been demonstrated to the court. For this and other reasons the court allowed the applicant’s application and set aside the decision of the PRRA Officer. It referred the matter back for re-determination by a different PRRA Officer.

[Comment on the issues raised in this decision at the IT.CAN blog](#)



Privacy

In *S.C. (Re)*, Conacher J.P. denied a search warrant in relation to a child sexual exploitation investigation. The search warrant was in part based on information about the identity of the target of the search that had been supplied to the police by the target’s ISP. A detective with the Toronto Police Service had sought

disclosure from Bell Canada of the name and address of the user of a particular IP address. The Informant had justified the request for information on the basis that the *Personal Information Protection and Electronic Documents Act* (PIPEDA) permitted disclosure of this information when it was made to a government institution and is related to the purpose of enforcing a law of Canada.

Conacher J.P. noted that the information which had been supplied by Bell Canada “is information around which a citizen would have an expectation, and a reasonable one, of privacy.” (para 6) As a result, there was a presumption that prior judicial authorization would be required to obtain the information. Conacher J.P. considered the relevant provisions of PIPEDA. Section 7(3)(c.1)(ii) permits the disclosure of personal information without the knowledge or consent of an individual only if that disclosure is:

(c.1) made to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that

...

(ii) the disclosure is requested for the purpose of enforcing any law of Canada... carrying out an investigation relating to the

enforcement of any such law or gathering intelligence for the purpose of enforcing any such law....

Conacher J.P. emphasized the words “identified its lawful authority” in 7(3)(c.1), and took this to mean that evidence of “legal authority” is required, and that PIPEDA on its own “does not establish the authority for obtaining and possessing the information.” (para 9) Conacher J.P. stated: “In the absence of express authority within the legislation, the Charter right to to have one’s reasonable expectation of privacy interfered with, except through prior judicial authorization with all the protections that affords, must govern.” (para 11) He then concluded that the information in the Information to Obtain a warrant that was before the court did not establish “a reasonable nexus between the matters being investigated and the individual and residence identified as the targets for the warrant to search.” (para 12).

Comment on the issues raised in this decision at the IT.CAN blog



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.

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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

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