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Part 1 of this newsletter is prepared by Professors Anne Uteck and Teresa Scassa of the Law and Technology Institute of Dalhousie Law School. Part 2 of this newsletter is prepared by Professors Pierre Trudel and France Abran of the L.R. Wilson Chair in Information Technology and Electronic Commerce Law, Université de Montréal.

Les auteurs de la première partie du présent bulletin sont les professeurs Anne Uteck et Teresa Scassa de l'Institut de droit et de technologie de la Faculté de droit de l'Université de Dalhousie. Les professeurs Pierre Trudel et France Abran de le Chaire en droit des technologies de l'information et du commerce électronique L.R. Wilson de la Faculté de droit de l'Université de Montréal ont rédigé la seconde partie du présent bulletin.

Part 1

Confidential Information

In *Harris Scientific Products Ltd. v. Araujo*, the Alberta Court of Queen's Bench considered the nature of the duty owed by a fiduciary employee who is fired from his job. Clackson J. stated: "It is obvious that an employer may need some protection against disclosure or use of its secrets by its trusted ex-employee. That need exists without regard to why the employment ended. In my view it is illogical to make protection of trust dependent upon whether the employee severed the employment contract." (at para 13). However, Clackson J. went on to note that resigning employees are not in the same position as employees who are fired: "it is preferable to bind the resigning employee for a longer period simply because he has had time to plan for his departure and make provision for his future. He should be in a position to at least attempt to negotiate a resolution which serves both is interest and the interest of his employer. However, the fired employee has less opportunity to plan and less leverage to negotiate a reasonable compromise. As well, the employer has had more opportunity to plan and act to protect its secrets before it fires the employee. Therefore the protection period should be shorter." (at para 15).

Copyright

The Court of Appeal of Ontario has released its decision in *Robertson v. Thompson Corp.* The case involved a dispute over the inclusion, without permission or additional compensation, of freelance contributions to the print version of the *Globe and Mail* in three electronic databases: Info Globe Online, a CD-ROM and the electronic version of the Canadian Periodical Index (CPI). The case turned on whether the electronic databases were reproductions of the collective work of each edition of the *Globe and Mail* newspaper, or whether the inclusion of the freelance articles amounted to an unauthorized reproduction of those articles.

The motions judge had decided that the *Globe* had infringed the copyright of the freelance authors. Cumming J. had found that the collective work of each edition of the *Globe and Mail* newspaper was not reproduced in the electronic databases; rather, the databases consisted of reproductions of the articles contained in the newspapers. He had, however, found that Robertson did not have standing to seek a restraining order against the *Globe*. He also rejected the argument that the agreement between Robertson and the publisher conveyed a proprietary interest in her copyright and therefore had to have been in writing. Robertson appealed on these last two points; the publisher cross-appealed on the main copyright issue.

The Court was unanimous in rejecting Robertson's appeal on the issues of standing and the nature of the agreement with the *Globe*. In seeking an order on behalf of a class of plaintiffs to restrain publication of articles in the electronic databases, Robertson had relied upon s. 13(3) of the *Copyright Act*. This section, which provided that in general terms, employers owned the copyright in work done by their employees, nonetheless provided that "where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as a part of a newspaper, magazine or similar periodical." (s. 13(3), *Copyright Act*). The Court was of the view that this was a personal,

non-assignable right, closer to a moral right than to one of the economic rights of copyright. (at para 106) Further, the Court ruled that this was a right to restrain "publication" and not reproduction or communication to the public by telecommunication. Weiler J.A. wrote: "Since the Internet is a form of telecommunication, it is arguable that the Act does not give the employee the right to restrain communication of his or her work in an Internet database." (at para 111).

The Court also rejected the argument that Robertson's publication agreement with the *Globe and Mail* was void if it were not in writing, because it conveyed a proprietary interest. Robertson had argued that the *Globe* was asserting it had a right to republish the article in any form, and that this right was "so broad as to amount to a proprietary interest as opposed to an oral license or permission." (at para 93). Weiler J.A. agreed with the motion judge that "as Robertson had not granted an exclusive interest to the *Globe* and continued to possess the copyright in her work, she had not granted a proprietary interest to the *Globe*." (at para 97).

The publisher cross appealed on the main issue in the case: whether the reproduction of the articles in its electronic databases infringed copyright. On this issue, the Court was split. Weiler J.A., writing for the majority, arrived at the same result as the motion judge, although for slightly different reasons. She was critical of the motion judge for relying excessively on U.S. case law in reaching his decision. She took the view that "The Canadian Act more evenly balances the freelance writer's ownership of copyright in her original work with the newspaper's copyright in its compilation or collective work." (at para 57). She also took the view that the motion judge had overlooked the significance of the right, under Canadian law, of the owner of the copyright in a collective work to reproduce a substantial part of the work in any material form. (at para 60).

Weiler J.A. stated that "the fact an electronic indexing feature can be used to identify an individual article does not in and of itself result in the violation of copyright." (at para 67). More specifically, "the fact one can isolate and view an article from the collective work by the use of electronic software, does not necessarily mean that the dominant or overall purpose of the collective work, a newspaper, is lost. This ability to isolate an individual article simply means the collective aspect of the work is not always visible…" (at para 67). She also noted that "the fact that the *Globe* is engaging in a different economic activity does not necessarily infringe the individual freelance authors' copyright." (at para 68). She was critical of the motion judge for not taking full account of "the principle of media neutrality or of a copyright holder's right to create a new collective work from its existing collective work." (at para 69). She nevertheless concluded that the arrangement of the newspaper in the electronic databases was not sufficiently preserved to enable the court to conclude that these databases amounted to reproductions of the collective work. Citing the Supreme Court of Canada's recent decision in *CCH Canadian*, she took the view that any editorial input by the newspaper into the individual articles was not sufficient to give the *Globe* any copyright in the articles. In her view, "The selection of the articles and the changes made to an author's individual article are relatively minor and of a factual mechanical nature. These types of changes cannot grant the *Globe* collective copyright in the articles themselves." (at para 79). She went on to note that "the qualitative aspect of the newspaper is not preserved." (at para 81).

Weiler J.A. also noted that while the traditional print version of the *Canadian Periodical Index*, which indexed articles by author and subject and provided references to the print versions, was unobjectionable in terms of copyright law, and was a work in which the publisher would have copyright, the electronic version was more problematic. Because the electronic version of the *Index* allowed users to link to articles that appeared in their search results, "the articles cannot be a reproduction of the CPI.Q, and the publisher's copyright in the CPI.Q cannot extend beyond what was published as part of that collective work or compilation." (at para 84).

Blair J.A. dissented on the cross-appeal. In his view, "the databases contain a collection of back issues of the electronic version of the *Globe*, each edition of which comprises the "collective work" of the *Globe*, or a substantial part of that collective work." (at para 121). He argued "The facility of being able to see one article alone is simply an incident of the technology. How a reader chooses to read the content of a

newspaper cannot be the deciding factor as to whether or not it is a collective work." (at para 116)

Privacy

The B.C. government has introduced amendments to its *Freedom of Information and Protection of Privacy Act* (FOIPOP). Bill 73 is intended to deal with the possible impact on privacy rights in B.C. of the U.S. *Patriot Act*. Section 215 of the U.S. *Patriot Act* provides for *ex parte* applications to force companies or individuals within the reach of the Act to produce a range of documents which include "books, papers, documents and other items" (which can include electronically stored data) for investigations related to terrorism or "clandestine intelligence activities". Section 215 of the *Patriot Act* applies to "United States persons" which includes individuals and corporations incorporated in the U.S. The concern in B.C. is that outsourcing of data-processing to U.S. companies might place the personal information of B.C. residents in the hands of the U.S. government. Among other things, the proposed amendments would require that "A public body must ensure that personal information in its custody or under its control is stored only in Canada and accessed only in Canada", except in certain circumstances. (Bill 73, s. 2). The B.C. Information and Privacy Commissioner has been studying the impact of the U.S. *Patriot Act*, and has received a substantial number of submissions on this issue. The Commissioner is due to release his report at the end of October; the amendments have been proposed in advance of the release of that report.

The most recent decision (Case #279) issued by the Office of the Privacy Commissioner of Canada involves a complaint arising from surveillance of employees at work. The company had installed web cameras at two locations within its offices, both pointed in such a way as to capture employees' identity and movements. The cameras operated continuously, but did not record. Also, the audio content of the cameras could be monitored. The Company cited security and managing employee productivity as the reasons for installing the cameras. With respect to the security reasons, the Company argued that the web cameras were necessary because alarms were being set-off accidentally and because of "occasional allegations" of theft and harassment. No cameras were located at the main entrance and swipe cards were used to monitor access to the building. Prior to the installation of the cameras, other means to measure productivity were in place, such as telephone and e-mail monitoring, and software to restrict internet use. Of particular concern to the company was, in their view, the unsatisfactory productivity of staff in the help desk area during off-hours when managers were not on site. For cost reasons, the Company rejected the idea of hiring more supervisory personnel to work outside daytime hours. The Company claimed that productivity improved with the introduction of the cameras. Following the complaint by a former employee about the installation of web cameras, the Company issued a workplace privacy policy outlining the purposes for the cameras.

Consistent with earlier Findings on workplace surveillance, Case #273, Case #269, Case #265, Case #264 and Case #114, the Assistant Privacy Commissioner considered the appropriateness of the company's purposes in accordance with s.3 of *PIPEDA* and the reasonableness of the collection of personal information as required under s.5(3), concluding that the complaint was well-founded. According to Assistant Commissioner Black, less intrusive methods of addressing the security alarm existed; the evidence presented by the company did not indicate that problems associated with theft and harassment were "so prevalent and compelling" as to justify this type of privacy-invasive measure; the company already employed "comprehensive measurement and enforcement tools" with respect to productivity; and the surveillance "was tarring all employees with the same brush." In her view, "the underlying purpose for the cameras really appeared to be one of deterrence." Assistant Commissioner Black could not support the use of the web cameras in this case because the company had not achieved a balance between the right of privacy of individuals with respect to their personal information and the organization's needs. The company was given 45 days to confirm that the cameras had been removed.

2ième partie

Compétence de la cour – Atteinte à la réputation par voie de courriel – Québec

Il s'agit d'un avis de dénonciation d'un moyen déclinatoire pour absence de compétence territoriale de la Cour du Québec du district judiciaire de Québec. Selon l'article 68 alinéa 2 C.p.c., une action personnelle peut être portée devant le tribunal du lieu où toute la cause d'action a pris naissance ou, dans le cas d'une action fondée sur un libelle de presse, devant le tribunal du district où réside le demandeur, lorsque l'écrit y a circulé.

Selon le tribunal, le recours entrepris par le demandeur est une action en dommages et intérêts pour atteinte à sa réputation personnelle à la suite de l'envoi par Internet d'un courriel diffamatoire. Un libelle diffamatoire diffusé par courrier électronique ne peut être assimilé à un libelle de presse au sens de l'article 68 alinéa 2 C.c.p. qui vise un libelle publié dans un journal. Quant au lieu où la cause d'action a pris naissance, le courriel, tel que produit, ne permet pas d'identifier son lieu d'envoi. Le demandeur, qui en avait le fardeau, n'a donc pas démontré que la cause d'action a pris naissance dans le district judiciaire de Québec et le tribunal fait droit à l'avis de dénonciation de la défenderesse.

Bélanger c. Bédard, Cour du Québec, 200-22-028763-043, 31 août 2004.

Accès à l'information – Québec

La Commission d'accès à l'information a publié des lettres types qui sont des modèles pour aider le citoyen à adresser ses demandes dans les organismes publics (demandes d'accès à un document ou à des renseignements personnels, de rectification ou de justification de l'utilisation de renseignements personnels) et dans les entreprises (demandes d'accès, de rectification, de justification et de retrait de renseignements personnels d'une liste nominative). Des modèles sont aussi prévus lorsqu'un citoyen veut faire une demande de révision ou pour soumettre une demande d'examen de mésente à la Commission.

Utilisation du courrier électronique au travail – France

Une salariée a été congédiée pour avoir utilisé la messagerie électronique à des fins non professionnelles pendant les heures de travail. La Cour d'appel de Bordeaux a décidé que les messages envoyés et reçus par un salarié sur une adresse électronique générique de l'entreprise dans le cadre de son travail, consultables sur son seul poste, avaient le caractère de messages personnels. Les messages étaient individualisés et n'étaient émis et reçus que depuis le poste informatique utilisé.

Commentant cette décision, le Forum des droits sur l'internet est d'avis qu'une *« telle reconnaissance très large du caractère personnel des messages semble donc condamner tout contrôle de l'employeur sur ces derniers quant bien même il aurait respecté toutes les formalités nécessaires. Si on peut voir dans cette décision une avancée importante dans le domaine de la reconnaissance d'une vie privée pour le salarié au sein de l'entreprise, il n'est pas sûr qu'elle soit bien opportune ne serait-ce qu'au regard des risques de communication par des salariés indélicats de données confidentielles. »*

Forum des droit sur l'internet, *Utilisation de la messagerie au travail : l'arrêt Nikon surpassé?*, 1er septembre 2004.

Voir également le rapport final du Forum des droits sur l'internet, *Relations du travail et internet*, 17 septembre 2002.

Voir aussi, Gérard HAAS, *Utiliser la messagerie électronique pour émettre des injures et des menaces antisémites est nécessairement une faute grave!*, Clic-droit, 14 septembre 2004.

À signaler

Laurent TEYSSANDIER, *L'accès aux données de connexion de l'internaute*, 27 septembre 2004.

Legalis.net, *EMI de nouveau condamné pour ses dispositifs anti-copie*, 5 octobre 2004. La société EMI a mis en place un système de protection anti-copie sur un CD de Liane Foly afin d'en limiter la copie mais n'avait pas informé les consommateurs du risque de ne pouvoir lire l'album sur certains lecteurs

de CD. Dans un arrêt du 30 septembre 2004, la Cour d'appel de Versailles confirme que EMI a manqué à son devoir d'information du public et s'est rendu coupable de tromperie sur l'aptitude à l'emploi du CD qui n'était pas lisible sur tous les autoradios.

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 Anne Uteck and Teresa Scassa at it.law@dal.ca if they relate to Part 1 or Pierre Trudel at pierre.trudel@umontreal.ca if they relate to Part 2.

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 la première partie du présent bulletin, veuillez contacter les professeurs Anne Uteck et Teresa Scassa à l'adresse électronique it.law@dal.ca ou en ce qui concerne la deuxième partie, veuillez contacter Pierre Trudel à pierre.trudel@umontreal.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.