



NEWSLETTER

Canadian IT Law Association

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Civil Procedure: Anton Piller Order on Trial

In an *ex parte* application ([hyperlink not available](#)) Brunswick News Inc. has persuaded the Court of Queen's Bench in Saint John, New Brunswick, to issue an Anton Piller order against one of its employees, Mr. William Kenneth Langdon. Langdon has resigned from a senior position with Brunswick News Inc. where he was the publisher of the Woodstock Bugle-Observer, one of the publications in the Brunswick News Inc.'s stable. Langdon plans on starting a new publication under the banner of Carleton Free Press. The new paper is expected to be launched in November and to circulate in the Woodstock area. However, Mr. Langdon has been accused by his former employers of wrongfully accessing their confidential and proprietary business information which he hopes to exploit in his new venture. According to Brunswick News Inc., Langdon's conduct which is capable of resulting in significant loss and damage to Brunswick News Inc. also amounts to breach of his employment agreement with Brunswick News Inc. In issuing the Anton Piller order which authorized the search of Langdon's office, home, computer and vehicle, the court appointed officials from KPMG Canada to conduct the search and inventory the evidence resulting therefrom. The search, which was conducted on September 27, yielded several documents, including cash-flow breakdowns, advertising rate analysis, income statements, flyer routes and a resume. While Brunswick Inc. has a different understanding of the significance of these sized materials, for Langdon, the documents have no bearing to his new venture of starting a newspaper.

According to him, he collected them for review outside of office hours while he was still employed by the Applicant. Meanwhile, Brunswick Inc has scaled down its original pleas which would have had Langdon restrained from soliciting all Bugle-Observer's advertisers, customers and suppliers to 15 major local advertisers, certain contractors as well as correspondents and Bugle-Observer delivery people. Ruling on this latest prayer has been reserved by Judge Glennie until Friday November 2, 2007. This case has attracted media interest, especially regarding the nature, frequency of use and proprietary of Anton Piller order in Canada.

Privacy and Public Scrutiny: Disclosure of Remuneration of Senior Official

The Alberta Office of the Information and Privacy Commissioner (AOIPC) has issued [Order F2006-007](#). This order results from an application which requested all records in the custody or control of Alberta International and Intergovernmental Aboriginal Relations which is a Public Body relating to the appointment of a senior official. In response to the request, the Public Body provided a copy of the contract between it and the senior official in question. However, it severed information regarding some details including salary, benefits, employment responsibilities and names of parties to the contract. This action was not acceptable to the Applicant and an attempt to resolve the disagreement by mediation was unsuccessful. In this application, the Applicant seeks the review of the Public Body's decision to exclude these categories of information arguing that there is no justifiable basis for the exclusion under the province's *Freedom of Information and Protection of Privacy Act* (the Act). According to the Public Body, it relied on sections 17(1) and 25 of the Act to withhold the relevant information. Essentially, section 17 provides for withholding of "personal information" in circumstances that will result in unreasonable invasion of third party's personal

privacy. Section 25 grants discretion on Public Body to withhold information that could reasonably be expected to harm its economic interest.

In considering the Public Body's submissions, the Adjudicator observes that the Act is sufficiently elaborate in regard to the application of section 17. That section specifies factors to be considered when a determination is made regarding the issue of unreasonable invasion of personal privacy of third parties. The issues including consideration of public scrutiny of government activities, exposing of third party to unfair financial and other harms, the fact that information is supplied in confidence; that it is likely to be inaccurate and that it may unfairly damage the reputation of persons. The Adjudicator found that the information which relates to salary, bonus, performance plan, vacation and benefit entitlements, rental accommodation, severance payout were personal in nature. However, the Public Body did not consider the effects of s. 17(2)(e) which allows disclosure of such range of information when it is about "an officer, employee or member of a public body or member of the staff of a member of the Executive Council". It held that the "Disclosure of information falling under 17(2)(e) is not an unreasonable invasion of privacy. Once 17(2)(e) is found to apply, no further weighing is required" (¶17). According to the Adjudicator, disclosure of senior official's remuneration and benefits to public scrutiny is clearly encouraged by the provincial government to encourage accountability and government has taken necessary steps under statute and by directive to promote this expectation. According to the Adjudicator, "public accountability and interest is similarly at the heart of the terms in which public bodies hire senior officials" (¶30).

In regard to withholding the signatures of parties to the contract, the Commissioner found that "the parties, other than the Third Party in this case, were acting as representatives of the public body and government when they signed the contract. The contract would not have been binding on the Public Body had its representatives signed in their personal capacities" (¶47). However, in accordance with existing precedent, the Adjudicator found that signatures are personal information. Because the parties here signed in their official capacities, it justifies the disclosure of the signatures pursuant to section 17(5) of the Act.

Considering the applicability of section 25 of the Act which permits for discretionary withholding of information by the public body where such information could harm its economic interest, the Commissioner found the focus of the provision is harm deriving from disclosure of specific information. There must be a relation between the harm and disclosure of specific information. Consequently, the argument of the Public Body that the severed information would harm it and the Government of Alberta in future negotiations does not meet this requirement. Overall, the argument lacks merit. In all, the Public Body's invocation of sections 17 and 25 of the Act to withhold personal information was found to be untenable under the Act. Consequently, the adjudicator ordered the Public Body to disclose the entire Third Party contract information to the Applicant.

Privacy: Federal Privacy Commissioner Tables Parliamentary Report

On October 17, 2007 the Privacy Commissioner of Canada, Jennifer Stoddart, tabled her [Annual Report to Parliament on the *Privacy Act* for 2006-2007](#). At the forefront of the report was the Commissioner's submission that the need for reform to the federal *Privacy Act*, Canada's public sector privacy law, has become urgent. This is primarily due to the leaps and bounds by which technology has grown since the *Privacy Act* was introduced in 1982, which has created new kinds of privacy problems that were not contemplated in framing the legislation and to which it is not properly equipped to respond. "In 1982," the Commissioner writes, "the Internet, global positioning systems, Radio Frequency Identification Devices (RFIDs), cross-border outsourcing and data mining were novel ideas. Today, these technologies are commonplace and are the key issues keeping privacy advocates up at night. Another generation of technologies that carry privacy risks - brain scans and smart dust, for example - is just around the corner."

The Report surveys several areas where the impact of new and emerging technologies on privacy occurs in a legal vacuum, or at least where the legislation is woefully inadequate to protect the privacy of Canadians. In particular, the *Privacy Act* is deficient

with regard to “Fair Information Principles”, in that it provides no regulation of data matching, including data mining and aggregation, or rules for protecting Canadians’ private information under online government systems. Another pressing issue is transborder data flows, particularly the sending of personal information by Canadian government actors to offshore locations. This is typically done either for law enforcement purposes, especially security, or by way of outsourcing of government information processing work to offshore private sector agencies. The report notes: “Once information leaves Canada, it may become subject to the laws of a foreign country, including search and seizure laws. It may no longer be under the control of Canadian organizations or government institutions, except where there are contractual provisions.” It flags the Maher Arar matter, accessing of information by American officials under that country’s *PATRIOT Act*, and the activities of the Society for Worldwide Interbank Financial Telecommunication (SWIFT) as relevant examples. (See earlier newsletter story on SWIFT [here](#), and the Privacy Commissioner’s final decision on the matter [here](#)).

The Report concludes that the *Privacy Act* should be amended to provide for some concurrence between the appropriate transborder disclosure of information by governments and Canadians’ demand that their information receive protection in accordance with national standards.

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.

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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 Robert Currie, Chidi Oguamanam et Stephen Coughlan à l’adresse suivante : it.law@dal.ca

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