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Electronic Voyeurism

In *R. v. Rudiger*, Justice Voith of the British Columbia Supreme Court heard an appeal from the conviction, in provincial court, of an accused for possession of child pornography and voyeurism. The accused had been parked in his van at Rotary Lake, an artificial lake and park suitable for families and children. A person in attendance at the park called the police and reported that the accused was video-taping children playing in the park. When police arrived they told the accused that there had been a report of someone video-taping children and gave him a *Charter* caution, to which the accused replied that he had been filming the "yummy mummies" in the area and not children. The officers were suspicious of this explanation, as the majority of people in the park were children in swimwear and there were no mothers or caregivers in swimwear. The accused handed the officers his video camera, which also took still photos. On the camera the officers observed video that included images of children and a close-up of the genital area of a female child. The accused was arrested and convicted at trial of, *inter alia*, voyeurism under s. 162(1)(c) of the *Criminal Code*.

Section 162(1)(c) provides: "Every one commits an offence who, surreptitiously, observes – including by mechanical or electronic means – or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy," for a sexual purpose. On appeal, the accused argued that the trial judge had erred in finding that the subjects of the video had a reasonable expectation of privacy while in a public park. Justice Voith began by noting that the trial decision might have been the first to address this relatively new offence. He reviewed the trial judge's findings that the video made extensive use of the zoom function to focus on the genital or anal areas of female children, including those being changed by their caregivers. While the law under section 8 of the Charter did not strictly apply in the context of interpreting a section of the Criminal Code, its foundational concepts would help to develop the applicable notion of privacy.

Justice Voith rejected the accused's argument that, in the circumstances of this case, the subjects of the videos had no reasonable expectation of privacy, noting the propensity of technological devices to affect the otherwise "public" context of being in a public park:

> One can conceive of many examples where a person, sitting in a park, has his or her privacy interests interfered with. A person, sitting on a park bench, who reads or writes in her diary does not reasonably anticipate that someone may, with a telephoto lens, be reading that diary. A person sitting on a park bench with a friend does not expect that their conversation may be overheard and recorded with sophisticated eavesdropping equipment. A woman who lies on a blanket in a park does not anticipate a person can, with a telephoto lens, peer up her skirt (para. 91).

The use of technology, Voith J. held, can transform a setting expected to be reasonably private into a non-private one, in opposition to the reasonable expectations of the individuals involved. This was aggravated by the fact that technology, as well as enhancing the ability to see or hear more acutely, could also enable the recording or preservation of conduct or communications. While s. 162(1)(c) has a separate requirement of surreptitious recording, that requirement was also "relevant both to when an expectation of privacy can be said to reasonably exist and to then giving content to the expectation once established" (para. 100). The assessment of expectation of privacy in the section must keep

pace with technological developments. Drawing on the Supreme Court of Canada's rulings in Tessling, Duarte and Wong, he rejected the simple argument that anyone going to a public park accepts the risk of being captured on camera, regardless of the form, content or intent of the video. The kind of observation in question, he ruled, was outside the expected "public" nature of the activities. The trial judge's finding that there was a reasonable expectation of privacy, for the purposes of the section, was upheld.

Extradition Bail Denied (in part) Because of Internet Activities

In *U.S.A. v. David*, Justice Forestell of the Ontario Superior Court of Justice heard an application for bail by David, who was sought by the U.S. for immigration fraud. The specific allegation was that David operated a law firm in New York, through which he and associates filed fraudulent applications to the U.S. Dept. of Labor on behalf of foreign nationals who paid for the applications. The evidence before the court indicated that David had been suspended from the practice of law in New York and had been living in Canada for the past four or five years, but had kept filling out forms (mostly online forms) and making applications for clients of his firm in New York—essentially conducting his practice from Canada, by way of the internet and telephone. Forestell J. accepted these facts as secondary grounds justifying the denial of bail, stating: "Mr. David is not permitted to practice law in New York, but on his evidence continues to have involvement with his former firm and to perform work for them. While I cannot conclude that Mr. David was committing offences when he filled out immigration forms for his former associates in New York, his conduct raises serious concerns about the likelihood that he would obey restrictions imposed by this Court when he appears to have little regard for the terms of his suspension from the New York bar" (para. 38).

Obstruction Conviction for Forwarding Fabricated Facebook

In *R. v. Tippett* (no hyperlink available), Justice A.C. Seaborn of the Newfoundland and Labrador Supreme Court, Trial Division, presided over a sentencing hearing on a conviction for obstruction of justice. The accused had been facing a trial for second-degree murder, which was to commence on 19 January 2009. On 7 January 2009, six days before jury selection was to begin, the accused forwarded to his lawyer, via e-mail, what purported to be Facebook messages between two people, "Stamos" and "Hobson." In them, Hobson copied Stamos on a conversation between Hobson and the mother of the alleged murder victim, in which the mother stated that the death was an accident and the accused was not responsible, but that she could not tell anyone. The accused's lawyer forwarded the messages to the Crown, which agreed to postponing the trial pending a police investigation. The "lengthy" investigation by the police's Computer Forensics Unit revealed that the Facebook messages were fabricated, and the accused admitted knowing this to be the case when he sent them to his lawyer and further that he intended to delay the trial. He was convicted of obstruction of justice but sentenced to time served.

Costs Award in Blogging Defamation Case

In *Baglow v. Smith*, Justice Peter Annis of the Ontario Superior Court of Justice presided over a costs motion arising from an earlier, successful, motion for summary judgment by the defendants in an action in defamation via blogging (reported in the 22 September 2011 issue of this newsletter). Given the nature of the underlying action, which had been (or been close to) a case of first instance, the plaintiff requested "an order awarding the defendants no, or only nominal, costs on a public interest basis that an action in defamation involving Internet blogging raised a novel point of law and a novel fact situation" (para. 2). On the summary judgment motion, Annis J. had found in part that the "public conversation" nature of the blog dialogue was such that it anticipated a reply to remove "the sting of libel," and that this supported a finding of the comments not

being defamatory. He commented: "I nevertheless accept the plaintiff's point that defamation on Internet blogs constitutes a novel issue of some public importance, not the least of which is due to ubiquitous practice of blogging and the "virtual" nature of the medium in which these comments are made" (para. 7). However, the parties were clearly also pursuing private interests which were affected by the public interest issues. Therefore, the court reduced the defendants' costs by half.

Supreme Court of Canada grants leave in employee laptop privacy case

The Supreme Court of Canada has just granted leave to appeal from the decision of the Ontario Court of Appeal in *R. v Cole*, 2011 ONCA 218, which found that a teach had a reasonable expectation of privacy with respect to a school-issued laptop computer.

The Respondent, Cole, was a teacher in Ontario. Following what appeared to be suspicious or unusual network use, a network administrator remotely connected to Cole's school issued computer and examined portions of the hard drive related to his internet history and another drive. The administrator found a file contained nude images of a student at the school. It was later found that the student in issue had sent the photos to another student, but Cole had access that student's account and had obtained the photos. On request of the principal, Cole surrendered his computer to the school and the board's technicians copied the files in issue and provided them to the police. Police determined that a search warrant was unnecessary to examine the computer, as the school advised them that it was school property. Police viewed the material and charged Cole with possession of child pornography and fraudulently obtaining data from another computer hard drive. At trial, the evidence was excluded as the court concluded he had a valid expectation of privacy in the contents of the laptop. The summary conviction appeal judge overturned the decision, concluding that the trial judge erred in concluding that the expectation of privacy was reasonable.

The Court of Appeal allowed Cole's appeal, set aside the decision below and remitted the matter for trial, concluding that the expectation of privacy was reasonable given the following facts:

- The teacher had exclusive possession of the laptop;
- he had the school board's permission to use the laptop for personal use;
- he had permission to take the laptop home on evenings, weekends and summer vacation;
- there was no evidence the board actively monitored teachers' use of laptops;
- the board had no clear policy to monitor, search or police the teacher's use of his laptop.

Supreme Court grants leave in case involving police obtaining text messages

The Supreme Court of Canada has just granted leave from the decision of the Ontario Court of Appeal in *R. v. Telus Communications Company*, 2011 ONSC 1143. In this case, police were seeking to obtain from Telus Communications, on a prospective daily basis, all text messages sent and received by two Telus subscribers as well as related subscriber information. Police obtained a general warrant and assistance order for the information, which covered text messages already in storage and text messages as they were transferred into storage. The Court noted that Teles receives in the order of ten thousand police requests annually, but only a small fraction are "general warrants", so the telecommunications company brought this as a test case regarding such extraordinary warrants. (As the Court observed, "the Criminal Code provides that a general warrant is not available if any other statutory provision provides for the type of order sought.")

Telus argued that a production order was available for the messages already in existence prior to the issuance of the order and that an interception order would be appropriate for the disclosure of the daily text messages. The crown conceded the first argument and the Court focused on the second; namely, whether an order to produce, on a daily basis, text messages amounts to an interception and, if not, whether a general warrant is appropriate.

The court concluded that since the messages were being retrieved from a data store that was not inherent in moving the messages from the sender to the recipient, they are not "intercepted" when disclosed in this manner. (Other techniques involve real-time diversion of messages at the time of transmission, which would be an interception.)

Ontario Court concludes search of cell phone was unlawful; evidence excluded

Following an arrest in connection with a heroin importation investigation, police seized a cellular phone from one of the suspects and subsequently perused the contents. The phone revealed a number of text messages, which were believed to be to and from an alleged co-conspirator. Police later exchanged text messages with the suspect and phoned the number after the suspect had been arrested to confirm that he was in possession of the relevant phone. The defendant argued that the search of the cell phone was an unlawful breach of the defendant's privacy rights and should be excluded under the Charter. The Court determined, in R. *v. Burchell*, 2011 ONSC 6236, that the evidence should be excluded as reviewing the contents of the phone was unlawful.

The Court said, at paragraph 55: "If the police had found a sealed box of files in the applicant's vehicle, no one would credibly argue that the officers could conduct a detailed analysis of the files as part of their power to search incident to arrest. There is no reason in principle why the search of a phone should be treated any differently."

Trial judge refuses mistrial request due to internet comments

In the course of a trial for second degree murder, the defendant made a motion for a mistrial due to comments posted on the website of the local newspaper. The comments suggested that the defendant was guilty of a second killing. Madam Justice Holmes, in *R. v. Pattison*, 2011 BCSC 1407, refused the request, stating that "a mistrial should only be declared in the 'clearest of cases' where there has been a 'fatal wounding of the trial process' which cannot be cured by remedial measures. The court referred to the instructions given to the jurors at the outset of the trial and concluded:

> [19] Blogs and the wide dissemination of opinions and information, reliable or otherwise, by way of the internet are a reality in the contemporary world. It is in large part because of this that judges give juries instructions such as those mentioned above. Time and again case authorities have expressed confidence in the ability of jurors to follow the presiding judge's instructions about how they are to perform their important task. The very jury system depends on their doing so.

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 Professor Robert Currie, Director of the Law & Technology Institute, at robert.currie@dal.ca.

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 le présent bulletin, veuillez communiquer avec le professeur Robert Currie à l'adresse suivante : robert.currie@dal.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.