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This newsletter is prepared by Professors Anne Uteck, Teresa Scassa and Chidi Oguamanam of the Law and Technology Institute of Dalhousie Law School.

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E-Laws

The Attorney General of Ontario has introduced Bill 14, *Access to Justice Act*. Schedule F to that Act is a new statute, the *Legislation Act*. Part IV of that Act, makes the text of statutes and regulations on the e-laws website an "official copy" of the law and an official copy is presumed to be an accurate statement of the law, unless the contrary is proved.

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

Defamation

In *Mallard v. Killoran*, the Saskatchewan Court of Queen's Bench ruled that a defendant was in contempt of court when documents were published after an interim injunction had been granted to the plaintiff restraining the defendant from "making and publishing further statements whether oral or written and whether distributed via the internet or otherwise or making or permitting the further distribution and publication of statements about any or all of the plaintiff's to this action, about the plaintiff's clients, and about the plaintiff's professional advisors."

The plaintiffs complained about many e-mails which formed the basis of the application. Whole or parts of these e-mails were conceded as not violating the order. Several of the emails were found by the Court not to be in contravention of the order on the basis that they were merely procedural matters, did no more than outline rules of court in the public domain or said nothing about any of the plaintiffs or their advisors or the defamation action. However, the Court does find that certain e-mails constitute a breach of the order. First, in the first paragraph of a seven page e-mail to several third parties, the defendant wrote: …"even though I have an injunction against me…that bars me from asking questions about a duck and extra advisor "contingency" remuneration practices evidences that everybody in the industry knows about, BUT the general public knows nothing." According to the Court, because the defendant is referring to the plaintiff in respect of improper financial practices, he "has breached both the spirit and the intent of the order." Second, in one part of a sixteen page e-mail the defendant provides a lengthy description of what he alleges to be criminal fraud, suggesting that the plaintiff and his lawyers participated in the misconduct. In publishing these statements about the plaintiffs and his professional advisors, the defendant contravened the prohibition contained in the order. Third, a one-page e-mail from the defendant to a police officer alleging that the plaintiff and his lawyers were concealing evidence of their fraud "clearly" contravened the order. Fourth, in a three page e-mail addressed to a third party the defendant presses for an investigation because there is evidence of criminal fraud by the plaintiffs. According to the Court, "this publication is the very thing which the order was intended to prohibit" and thus, "clearly" a breach of the prohibition. And finally, two other documents entered as exhibits violate the order because they speak of the plaintiff's fraudulent conduct.

The Court was satisfied that the distribution of the e-mail publications "was effected by the defendant or by someone else with his knowledge" because the defendant "is shown as the originator or recipient of all the correspondence and the content itself accords with the mission of the defendant." Further, according to the Court, the terms of the order were "clear and unambiguous" known and understood by the defendant. In fact, in the e-mails themselves, the defendant refers to the order. Finally, the Court concludes that "the physical distribution of the

material was done deliberately and with knowledge. The e-mails could not have otherwise been placed on the internet." Thus, the publication of the documents described were breaches of the order and the defendant published these documents and was, therefore, in contravention of the order and guilty of civil contempt of court.

Patents

The Ministry of Industry has announced that s.2 of *An Act to Amend the Patent Act* (Bill C-29) will be brought into force on February 1, 2006. Section 2 seeks to provide relief to patent holders and applicants affected by certain court decisions and to protect those who risk losing patent protection for their inventions. The amendment provides patent holders and applicants who have been affected with a one-year time limit to rectify past fees that were incorrectly paid at the small entry level. In 2002, the Federal Court of Appeal, in *Dutch Industries Ltd. v. The Commissioner of Patents, Barton No-Till Disk Inc. and Flexi-Coil Ltd.*, ruled that entity size is determined once the patent application process is first engaged. The Court's decision also curtailed the practice of flexibility exercised by the Canadian Intellectual Property Office, which consisted of allowing patent holders/applicants to pay the difference in fees when they later discovered that their entity size had changed from small to large.

Privacy

In a *decision* by a Hearing Panel of the Investment Dealers Association of Canada (IDA), disciplinary penalties have been imposed on Union Securities Ltd., one of its members, for failing to provide IDA's Enforcement Department free access to all records required for the purpose of an investigation into the conduct of the company and one of its employees in contravention of the By-laws. One of the issues in dispute was whether during the course of an investigation, IDA Enforcement staff should have free access to e-mails and other electronic business data stored on the computer of a Union Securities' employee and the company's network when such data was intermingled with personal or private e-mails. The Panel rejected Union Securities' position that some of the electronic data was irrelevant because it was strictly personal to the employee. The Panel held that when an employee uses the employer's facilities for private purposes, "he had to know what he did would no longer be considered private. In those circumstances, his reasonable expectation of privacy must be considered to be reduced to nil." The Panel goes on to state that this case "will be a cautionary tale for people who use their employer's computers for private purposes."

In rendering its decision, the Panel held that a failure to co-operate "strikes at the very integrity of the Associations duty and ability to police itself" and accordingly, "the seriousness of the offence calls for a sizable penalty." Securities Union Ltd. was ordered to pay $80,000 in fines and costs.

The Ontario Information and Privacy Commissioner has issued the first Order under the *Personal Health Information Protection Act (PHIPA)* which involved medical records found scattered across a Toronto street as a backdrop for a film production. This Order, according to the Commissioner, will establish the practice to be followed by all health information custodians and their agents in Ontario, with respect to her expectations for the secure disposal of health information records under *PHIPA*. The Commissioner determined that the personal health records were collected by a paper disposal company that engaged in both shredding and recycling activities. A portion of the personal health records picked up from the clinic were mistakenly believed to be intended for recycling. The records were subcontracted to another recycling company, which later sold them, intact, to the film company for use on its set. The Commissioner found, first, the Toronto clinic failed to take all reasonable steps to secure the personal health information in its custody and control. Second, the clinic failed to ensure that the personal health information was disposed of in a secure manner. Third, the clinic failed to comply with the *Act*, which requires it to be responsible for proper handling of personal health information by itself and its agents. Fourth, the paper disposal company's action in forwarding the records to a recycling facility instead of shredding them, while caused by a mistaken belief that the records were intended for recycling, contravened the *Act*.

The Commissioner ordered the clinic to put into place a written contractual agreement with any

agents it retains to dispose of personal health information. The agreement must set out the obligation for secure disposal and requires the agent to provide written confirmation once secure disposal has been carried out. In the Order, the Commissioner stated that "secure disposal" must consist of permanently destroying paper records by irreversible shredding to make them unreadable. Further, steps must be taken to ensure that no unauthorized person will have access to the personal health information between the time the records leave the health information custodian's custody until their actual destruction. The Commissioner also ordered the paper disposal company to put procedures in place that will prevent paper designated for shredding being mixed together with paper that is intended to be disposed of via recycling. In the Commissioner's view, this Order "should be carefully reviewed by every health information custodian and paper disposal company in Ontario."

The federal Privacy Commissioner has posted the Response of the Privacy Commissioner of Canada about Possible Fusion of the Offices of the Privacy Commissioner of Canada and the Information Commissioner of Canada. This submission was made to the Honourable G. LaForest who is reviewing the issue. The object of the current response was to examine the issues flowing from a decision to retain the status quo or to move to a "twinned" system like that in place in several other Canadian and foreign jurisdictions. The paper concludes that this is not the appropriate time to consider fusing the two offices. Rather, whichever course of action the government takes, it should be based on a thorough consideration of its implications. According to this Paper, there are other more pressing issues affecting privacy rights that need to be addressed first, including an appropriate legislative framework. This Paper recommends that Government undertake a considered review of privacy and access to information legislation to ensure that these laws serve Canadians as effectively as possible. This review, according to the Paper, "should precede the discussion of organizational models."

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, Teresa Scassa and Chidi Oguamanam 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 Anne Uteck, Teresa Scassa et Chidi Oguamanam à l'adresse suivante : it.law@dal.ca