l'Association canadienne du droit
des technologies de l'information

November 11, 2004

IT.Can NEWSLETTER

Canadian IT Law Association

www.it-can.ca

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Civil Procedure

In an assessment of costs in *Culhane v. ATP Aero Training Products Inc.*, Assessment Officer Stinson considered arguments that touched on technology related issues. The litigation in question had involved a dispute over online merchandising, and in claiming the maximum amounts for trial preparation, the defendants argued that "the complexity and novel nature of the evidence and legal issues in the absence of precedents for this type of business model" (at para 7) supported an award on the high end of the scale. The assessment officer accepted that "electronic merchandising via the internet created key issues", but ruled that "the material in the court record disclosing underlying factors such as customer relations, product return policies, etc. suggests to me that some pre-internet business practices or concerns continue unchanged." (at para 8). He gave some weight to the arguments of the defendant, "but not to the extent sought."

Privacy

The Supreme Court of Canada released its decision in *R. v. Tessling* 2004 SCC 67. The case involved a claim under s. 8 of the *Charter* that the warrantless use of a thermal imaging device violated the *Charter* rights of the accused. The thermal imaging device had been used from an airplane to take a "heat" picture of the house of the accused. Based on the heat emanations and other information, the RCMP were able to obtain a search warrant for his home. They found a large quantity of marijuana and several guns.

The Court ruled that the fly-over heat imaging did not violate the accused's *Charter* rights. Binnie J. for the unanimous court noted that much of early privacy law was rooted in trespass law: "In an earlier era, privacy was associated with private property, whose possession protected against intruders." (at para 16) He went on to note that "As technology developed, the protection offered by property rights diminished…The courts were reluctant to accept the idea that, as technology developed, the sphere of protection for private life must shrink. Instead, it was recognized that the rights of private property were to some extent a proxy for the privacy that ownership of property originally conferred…" (at para 16). However, he also noted that these privacy principles face competing demands from social and economic life, including a demand by society for security, safety and the suppression of crime. (at para 17).

Binnie J. identified three main privacy interests: personal privacy, territorial privacy and informational privacy. In the case of thermal imaging of one's home, he notes that "the privacy is essentially information (i.e. about the respondent's activities) but it also implicates his territorial privacy because although the police did not enter his house, that is where the activities of interest to them took place." (at para 24) In Binnie J.'s view, the distinction between territorial and informational privacy can be used to determine where one should draw the "reasonableness" line on the facts before the Court. Binnie J. characterized the fly-over thermal imaging search as "a search for information about the home which may or may not be capable of giving rise to an inference about what was actually going on inside, depending on what other information is available." (at para 27) In characterizing it in this manner, he shifted the focus from the individual's personal privacy and the privacy of his home. What was being gathered was just some information about the home which could be combined with other information so as to draw inferences about activities in the home. Abella J. (of the Ontario Court of Appeal at the time) had characterized the thermal imaging activity differently: in her view, it amounted to a search of the accused's home.

Binnie J. concluded that there was no reasonable expectation of privacy with respect to the thermal image created through this technology. In his view, because of the nature of the current technology, the process produces information which is only useful when combined with other known information to draw inferences that might support a search warrant. It is not sufficiently sophisticated to pinpoint or identify particular activities that are giving rise to the heat signature. Binnie J. placed great emphasis in his decision on the current state of the technology. He emphasized that "External patterns of heat distribution on the external surfaces of a house is not information in which the respondent had a reasonable expectation of privacy. The heat distribution, as stated, offers no insight into his private life, and reveals nothing of his "biographical core of personal information." Its disclosure scarcely affects the "dignity, integrity and autonomy" of the person whose house is subject of the FLIR image." (para 63) As a result, he restored the conviction of the accused at trial.

Privacy Commissioner of Canada Jennifer Stoddart has released her first Annual Report tabled to Parliament. The Report identifies key achievements over the past year including efforts to rebuild and regain the confidence of Parliament and Canadians, preparing for full implementation of *PIPEDA*, responding to thousands of inquiries and requests from the business sector with respect to the application of *PIPEDA*, responding to a record number of complaints under the *Privacy Act*, and working with health care providers to address privacy concerns. The Report further identifies areas the Office of the federal Privacy Commissioner will be addressing in the future, including suggestions for a legislative reform of the *Privacy Act*, a review of the *Anti-Terrorism Act*, an audit of the cross-border flow of Canadians' personal information and monitoring new surveillance technologies with the view to proposing appropriate measures to address these issues.

British Columbia Information and Privacy Commissioner David Loukidelis has released his report, "Privacy and the USA *Patriot Act*" in response to the concerns raised about government outsourced data. The lengthy report covers a range of privacy issues relating to surveillance, electronic information flows, national security, anti-terrorism laws and the potential use of the USA *Patriot Act* in Canada. The report concludes that outsourcing of public services to the private sector is not prohibited by the *Freedom of Information and Protection of Privacy Act*, but because there is the potential for unauthorized disclosure of personal information under the USA *Patriot Act*, other measures, according to Commissioner Loukidelis, "must be put in place to mitigate against illegal and surreptitious access." Sixteen recommendations are made in the Report, directed at both the provincial and federal governments, some of which go further than the measures introduced through Bill 73, the *Freedom of Information and Protection of Privacy Amendment Act*, which received Royal Assent on October 21, 2004.

Transport Canada recently announced the launch of two enhanced security projects at strategic Canadian airports. The first will use biometrics for the new restricted area identification card. To gain access privileges to an airport's restricted area, cardholders will be required to have either their fingerprint or iris scanned by biometric readers. The second involves a pilot deployment of new screening equipment to detect explosives at pre-boarding checkpoints. The new detection equipment will test for explosives on passenger documentation.

Telecommunications Law

In *R v. D'Argy*, [2004] J.Q. no 11142 (not yet available online), Côté J. of the Quebec Superior Court ruled that s. 10(1)(*b*) of the *Radiocommunication Act* violated the guarantee of freedom of expression under s. 2(*b*) of the Charter, and could not be saved by s. 1. The case arose out of charges laid against two accused for possessing and selling cards and devices that would allow for the decoding of pay tv satellite signals. The signals in question were from a service provider located in the United States, DIRECTV. Section 9 (1)(*c*) of the *Act* prohibited the decoding of an encrypted subscription programming signal "otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed." Section 10(1)(*b*) makes it an offence to manufacture, import, distribute, lease, offer for sale, install, modify, operate or possess "any equipment or device, or any component thereof,

under circumstances that give rise to a reasonable inference that the equipment, device or component has been used, or is or was intended to be used, for the purpose of contravening section 9."

The only lawful distributors of satellite signals in Canada are Bell ExpressVu and Star Choice. The accused parties thus argued that the law prevented them from subscribing to the American DIRECTV service, and thus denied them access to content that was available from the American distributor that was not made available through the only two lawful Canadian distributors. As a consequence, they argued, the law was an unconstitutional violation of their freedom of expression.

It was argued that the accused parties were participating in the black market for television signals, and as a result, they were not entitled to raise the freedom of expression arguments. Côté J. disagreed. She noted that since they had been accused of simple possession of decoding equipment, and not just sale, they could also have been accused of participating in a grey market. She ruled that they could advance a freedom of expression argument.

The accused presented evidence that a number of programs available through DIRECTV were not available through Bell Express Vu, including some which were on the list of programming authorized by the CRTC but not actually made available. They also argued that the DIRECTV service permitted the customer to choose the language of broadcast – in most cases the choice was between Spanish and English. The Spanish language option was not available through Bell Express Vu. Further, they argued that many religious channels were available through the U.S. provider, but not through Canadian providers. Finally, because of Canadian advertising policies, the accused argued that they were being denied access to American commercials.

The Crown argued that the subscription signal of DIRECTV was aimed at an audience of individuals who had paid for their subscription to the service, and that therefore the accused, who were engaged in the black market for television signals, could not complain that their freedom of expression had been violated, as they were never part of the intended audience for the communication. Côté J. rejected this argument. She noted that there was, in fact, a grey market for the DIRECTV signal, and that some Canadians were part of the audience for DIRECTV by virtue of having represented to DIRECTV that they were residents of the U.S. While these subscriptions were fraudulently obtained, she found this to be a consequence of the nature of the Canadian radiocommunication policy. A representative of DIRECTV testified that absent the Canadian policy and legislation, DIRECTV would be in a position to make a business decision as to whether to offer its signal to Canadians. Thus Côté J. concluded that it was the Canadian policy and legislation that prevented Canadians from being part of the intended audience for the communications. As far as grey marketing was concerned, therefore, there was a violation of freedom of expression. No such right existed with respect to black marketing, as the communicating party had no intention to have their signals stolen.

Côté J. rejected the Crown's argument that there could be no violation of freedom of expression since the case involved illegal signal theft. Noting that theft of telecommunications services was already criminalized in s. 327(1) of the *Criminal Code*, she took the view that the contested provisions of the *Radiocommunication Act* went further, and prohibited not just signal theft, but any decoding of the signal without the authorization of a legitimate Canadian distributor. Thus the freedom of expression issue turned on whether limiting citizens to only those signals provided by Canadian distributors violated their freedom of expression. In other words, it would have to be established that the illicit decoding of satellite signals was done in order to receive a message. Côté J. found that that was the case here. She noted that receiving a message is as important as transmitting it from the point of view of the underlying freedom of expression values (at para 41).

Côté J. noted that the legislative provisions at issue had as their object not simply prohibiting the decoding of satellites as a means of regulating commercial activity; rather, they were an integral part of Canadian broadcasting policy, which permitted the CRTC to control the content of programming. The prohibition of grey market activity in this area amounted to a violation of freedom of expression. The violation lay not just in the prohibition of the decoding of signals but in the fact that there exist signals for which there is no authorized distributor in

Canada, and which Canadians cannot therefore access, even if they are willing to pay a subscription fee.

After an extensive review of the evidence presented on both sides, Côté J. held that the limitation on the right to freedom of expression could not be justified under s. 1 of the Charter. In her view, the purpose of the legislation was not just to protect the economic interests of private broadcasters, but rather was to help fulfill Canadian broadcast policy. In particular, the objective was to protect, enrich and reinforce the cultural, political, social and economic fabric of Canada (at para 427). She found this objective to be pressing and substantial.

The influx of U.S. programming and the effect of this programming on Canadian culture was identified as the primary concern from a policy point of view. However, Côté J. noted that in an attempt to place limits on U.S. programming (or to limit it in proportion to mandated Canadian content), the legislation also had the effect of limiting Canadian ethnic groups in their access to programming in their own language. In her view, it was never the purpose of Parliament to limit the access of ethnic communities in this way, and as a result, the effect of the legislation was not proportional to its impact on freedom of expression. The remedy imposed was a declaration of invalidity of s. 9(1)(*c*) and 10(1)(*b*) of the *Radiocommunication Act*, accompanied by a one year suspension of the effect of the declaration.

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.

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 et Teresa Scassa à l'adresse suivante : it.law@dal.ca