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Videoconference Evidence not a Bar to Assessing Witness Credibility

The British Columbia Supreme Court, sitting in Vernon, has delivered its ruling in the plaintiff's application for leave to have seven lay and four expert witnesses testify by videoconference in *Slaughter v. Sluys*. The plaintiff sustained injuries, including traumatic brain injury, fractured arm, neck injury, etc. arising from a motor vehicle accident in Vernon. The issue of liability for plaintiff's injury was heard by a different judge while the question of assessment of damages has been scheduled for trial in Vernon from April 11, 2011 for six weeks.

After the accident happened in Vernon, the plaintiff returned to Ontario his original place of residence. He had only been in Vernon for a brief period before the accident. All of the plaintiff's family, community and social support were in Pembroke, Ontario to which he returned. Consequently, many of the lay witnesses the plaintiff proposed to call in regard to quantum assessment are based in Ontario. The same is true of his treating physicians and the doctors he retained for the purpose of giving expert evidence, except for one of them who is based in Vancouver.

In his representation to the case management judge, the plaintiff argues that if his proposed witnesses were allowed to testify by videoconference, it would have a cost saving effect estimated at $50,000. In addition, it would significantly reduce the witnesses' inconvenience as well as advance the objective of promoting efficiency and proportionality in the spirit of new court *Rules* in BC. The plaintiff relied on s. 73(2) of the *Evidence Act* which gives the court discretion to allow witness testimony via videoconference unless where such means of receiving evidence would be contrary to fundamental principles of justice.

The defendant argued that any cost saving pales in comparison to the plaintiff's multi-million dollar claims. Further, it is the defendant's case that s.73 (2) of the *Evidence Act* should apply in very rare circumstances and to a limited number of witnesses. According to the defendant, the plaintiff's proposal to call 11 of his 28 witnesses via videoconference over an estimated 22 hours is outside the intention of s. 73(2) of the *Evidence Act*. The defendant argued that witness credibility is an important matter and that cannot be assessed adequately where such witnesses as proposed by the plaintiff are called by videoconference rather than being physically in the court courtroom.

In his ruling, the case management judge observed that "there is no question that *Rules* of this province enacted in 2010, have a new or at least renewed, emphasis on just and speedy and inexpensive determination of a proceeding on its merits which involves consideration of proportionality" (para. 9). The court further observed that given continued advances in videoconferencing technologies, the latter and other technologies have been employed more frequently in court proceedings, including trials. Such advances have eliminated problems associated with videoconferencing technologies in their early stages of development and have significantly improved their quality. The judge observed:

> I have, in the recent past, found videoconferencing to be acceptable and satisfactory method of receiving evidence from a witness, which has not inhibited assessment of credibility or the finding of facts. Although at first blush 22 hours worth of evidence via videoconference seems to be a significant amount of time, it must be borne in mind that this trial is scheduled to last for six weeks,

> and the proposed videoconferencing would consume but four days of the trial" (para 9).

In balancing the interest of the parties, the court ruled that "the plaintiff cannot alone determine which witnesses are "important" and therefore should attend in person ..." (para 10). It modified the plaintiff's proposal and identified specific witnesses whose evidence would be taken by videoconference and those who would be required to attend in person. It noted that proper cross-examination can occur when witnesses testify via videoconference and it does not necessarily deprive the defendant the opportunity to assess witnesses' credibility. This approach is possible particularly "where the witnesses are experts and where credibility *per se* is not in issue and it is also the case where the evidence a witness may give is not overly contentious" (para 10).

Electronic Service

The Ontario-based *Law Times* recently reported that Justice Cheryl Robertson of Kingston approved of service by way of Facebook in a family law case (link unavailable). The case involved was a paternity action where the mother could not locate a physical address for the putative father but found his Facebook profile and served court documents by way of a private message attaching them. The defendant replied in a manner that the judge felt could ground a finding that service had been effected. In another recent reported case, *McMeekin v. Northwest Territories (Dept. of Education, Culture & Employment)*, the Defendant was successful on its summary judgment application. The Court ordered that service of documents and subsequent proceedings be made on the plaintiff "electronically," on the basis that the Plaintiff had trouble hearing the bailiff at the door because of a hearing problem, and that since he checked his e-mail regularly, "this is the mode of service most likely to come to his attention on a timely basis" (para. 47).

Electronic Research in Costs Awards

In *Ayangma v. French School Board*, the Defendant school board was successful on an appeal and claimed various costs for the appeal, including a bill of $721.11 for Quicklaw research. Justice J.A. McQuaid of the Prince Edward Island Court of Appeal awarded only $250 for this portion of the bill, noting that he had reduced it "having regard to the fact that much electronic legal research can now be accessed free of charge on internet cites like CANLII" (para. 8).

Domain Name Disputes

"autocan.ca"

In *AM Ford Sales Ltd. v. Canada One Auto Group*, a 3-member CIRA panel (Brown, Cuddihy and Rogers (Chair)) heard a dispute regarding the domain name autocan.ca. The Complainant ("AM Ford") is a small auto dealership in Trail, B.C. In 1996 it registered the domain name autocanada.com and has used both the domain name (for the business website) and the mark AUTOCANADA.COM for its business since then. The Registrant ("Canada One") is owned by AutoCanada Inc., a large publicly-traded franchise auto dealership group, which operates or manages 22 dealerships across Canada. It registered the domain name on 14 February 2006, at which time it did not have a competitor company in AM Ford's region, but did subsequently begin to operate a franchise dealership that, it acknowledged, was in competition with AM Ford.

AM Ford was seeking an order that the domain name be cancelled. The Panel began by restating the requirements for a Complainant to be successful:

> Paragraph 4.1 of the Policy puts the onus on the Complainant to demonstrate this "bad faith registration" by proving on a balance of probabilities that:
>
> 1. the AUTOCANADA.COM Mark qualifies as a "Mark" as defined in paragraph 3.2 of the Policy;
> 2. the Complainant had "Rights" (as "Rights" are defined in paragraph 3.3 of the Policy) in the AUTOCANADA.COM Mark prior to the date of registration of the Domain Name and continues to have "Rights" in the AUTOCANADA.COM Mark,
> 3. the Domain Name is "Confusingly Similar" to the AUTOCANADA.COM Mark as the

concept of "Confusingly Similar" is defined in paragraph 3.4 of the Policy;

4. the Registrant has no "legitimate interest" in the Domain Name as the concept of "legitimate interest" is defined in paragraph 3.6 of the Policy; and

5. the Registrant has registered the Domain Name in "bad faith" in accordance with the definition of "bad faith" contained in paragraph 3.4 of the Policy.

If the Complainant is unable to satisfy this onus, bad faith registration is not demonstrated and the Complaint fails (page 4).

The Panel swiftly concluded that AUTOCANADA.COM was a "mark" and that AM Ford had rights to the mark, given its usage since 1996. It then turned to the issue of whether the domain name (autocan.ca) was "confusingly similar" to the AUTOCANADA.COM mark. It drew on a previous decision for authority that the starting point on confusing similarity is to examine the situation from the point of view of the unwary consumer and determine, based on similarities, whether the consumer could be misled. It then noted that 3.4 of the CIRA Policy includes "other elements which must be considered," the first of which is "the concept of resemblance in terms of appearance, sound or ideas between the domain name under consideration and the mark." Based on another earlier decision, it held that this meant that the unwary consumer "would have had to have had prior knowledge of the AUTOCANADA.COM Mark for the purpose of this comparison." Moreover, the Panel held, this also required a Complainant to present evidence of an unwary consumer being confused by the resemblance (pp. 5-6). As no such evidence was before the Panel, it held that "confusing similarity" had not been proven by AM Ford.

The Panel next turned to whether Canada One had "no legitimate interest" in the domain name. It found that AM Ford had provided some evidence that none of the criteria of legitimate interest in 3.6 of the Policy (mark used in good faith, descriptive of registrant's business/wares, etc.) applied to Canada One's use of the domain name. On the final issue of whether Canada One could be said to have registered the domain name "in bad faith," AM Ford pleaded 3.7(c) of the Policy which grounds bad faith on a competitor registering a domain name for the primary purpose of disrupting the Complainant's business. The Panel noted that 3.7(c) uses the phrase "who is a competitor of the Registrant," and found that this requirement would pertain at the time of the complaint and not at the time of registration—accordingly, Canada One was a competitor, as it had begun competing with AM Ford subsequent to registration. However, the Panel further held that there was no evidence that Canada One's primary purpose was disruption of AM Ford's business, as required by 3.7(c). Canada One had registered hundreds of domain names as part of a general marketing strategy, rather than targeting AM Ford. There was also no evidence of AM Ford's business being disrupted, and attempts by Canada One to purchase AM Ford's AUTOCANADA.COM mark did not provide any such evidence, given that the attempts were made long after the date of registration of the autocan.ca mark. Accordingly, AM Ford had not established that the primary purpose of registration was to disrupt its business.

AM Ford's complaint was dismissed. Canada One had sought an order of costs for a "bad faith complaint" pursuant to 4.6 of the Policy, but provided no substantiation of the claim of bad faith. The costs request was denied.

Privacy: Video Surveillance of Freedom of Info Requester In Accordance with Privacy Legislation

In a recent Privacy Complaint Report, the Office of the Information &Privacy Commissioner of Ontario (IPC) dealt with a complaint from an individual who had attended at a municipal government office in Mississauga (the "Civic Centre") to make a freedom of information request, and noticed that there was a video surveillance camera directly above the counter where he was making his request. He complained to IPC that the video footage could be used to identify him and others making freedom of information requests. He also complained about the presence of video cameras in the Council Chambers, which are located in the Civic Centre. The City of Mississauga conceded that the footage was "personal information" under the *Municipal Freedom of Information and Protection of Privacy Act*, but stated that the footage

was being used for law enforcement purposes and that it was necessary for the proper administration of a lawfully authorized activity.

The IPC found that the running of the Civic Centre was a lawfully authorized activity, and that video surveillance was "necessary" because of the safety and security benefits to both people and property. The City had also provided sufficient notice to comply with the *Act* and the IPC's *Guidelines for the Use of Video Surveillance Cameras in Public Places,* through a combination of posted notices and a notice on its website. The City was using the information for the purposes for which it was gathered, and would only disclose the information in appropriate circumstances, including law enforcement and under an access to information request. The footage were secured and access-controlled, and there was a policy in place that protected the security of the information, including that any request to view the footage had to be made to a senior member of security staff who alone could access the password-protected system and would produce only the requested footage.

While the City's retention period was 21-90 days, which was in excess of the 72 hours suggested by the Guidelines, the IPC accepted the City's submission that its own investigations, as well as police requests for information, often required dealing with footage well after 72 hours had passed. Finally, in response to this complaint, the City had repositioned the camera so that it could not capture the identity of persons making Freedom of Information requests. Accordingly, the IPC concluded that the City was in compliance with the *Act*.

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.

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