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Part 1

Supreme Court: No Reasonable Expectation of Privacy in Home Electricity Data

The Supreme Court of Canada recently released a heavily-divided decision in the case of *R. v. Gomboc*, which dealt with police use of a digital recording ammeter ("DRA") on the accused's power line. Calgary police, in cooperation with the RCMP, were investigating Gomboc's house in Calgary as a suspected site of a marijuana grow-op and had observed various signs that this was the case. Pursuant to the *Code of Conduct Regulation* under the Alberta *Electrical Utilities Act* a utility may disclose customer information "to a peace officer for the purpose of investigating an offence if the disclosure is not contrary to the express request of the customer." Gomboc had not made any confidentiality request and the police had the electricity provider install a DRA on his line, which provided evidence of abnormal power use supporting an inference that there was a grow-op in the house. A search warrant supported, in part, by the DRA evidence, was executed and a large amount of marijuana was found in the house. At trial, Gomboc challenged the admissibility of the evidence on the basis that his right to be secure from unreasonable search and seizure had been violated, because no warrant had been obtained for the DRA. The trial judge admitted the evidence and convicted Gomboc. However, the Alberta Court of Appeal sent the case back for a new trial on the basis that section 8 of the *Charter* was engaged, because Gomboc had a subjective expectation of privacy in the DRA data that was objectively reasonable, and thus the warrantless search had breached section 8.

Writing for a majority of four (which included Charron, Rothstein and Cromwell JJ.), Justice Deschamps allowed the appeal and restored the conviction at trial, on the basis that Gomboc did not have a reasonable expectation of privacy in the DRA data, and therefore section 8 of the *Charter* was not engaged. She noted that there was a "critical factual consideration, on which much of the disagreement in this case turns," which was the degree to which the DRA reveals private information about the targeted individual (para. 6). In its current form the DRA measures power consumption, by way of recording the power flow into the house, but does not give any indication of how the power is being used or what occupants are doing. Evidence at trial indicated that it is typically used by police to buttress an already-existing case that a marijuana grow-op is present. Justice Deschamps found that "the DRA is a technique that is more protective of personal information than most other investigation techniques. It reveals nothing about the intimate or core personal activities of the occupants. It reveals nothing but one particular piece of information: the consumption of electricity" (para. 14).

DRA data, Justice Deschamps held, engage both informational and territorial privacy interests. As to informational privacy, there was evidence that Gomboc had wanted his use of electricity to remain private, even to the point of bypassing the electricity meter on his house, and accordingly the majority found that he had a subjective expectation of privacy. As to whether the expectation was reasonable, Justice Deschamps canvassed a range of factors, including the disclosure provision in the Regulation and Gomboc's failure to invoke it, that the DRA "reveals very little about what is taking place in the

home," (para. 37) and the fact that the utility also had an interest in the information revealed by the DRA and was free to gather that information if it wished. The DRA had less informational value to police than the garbage in the Court's earlier decision of Patrick, and was comparable to the heat-signature evidence in *Tessling*. Accordingly, the expectation of informational privacy was not reasonable. As to territorial privacy, there was no actual search of the home itself which diminished the importance of the territorial privacy interest. "The fact that the home was the focus of an otherwise non-invasive and unintrusive search should be subsidiary to what the investigative technique was capable of revealing about the home and what information was actually disclosed" (para. 50). Moreover, the use of DRA in some cases might enhance territorial privacy, given that it could be used to exclude a house from investigation as well as include it. In the result, it was the informational privacy interest that drove the analysis on these facts, and the majority found that there was no reasonable expectation of privacy and therefore no breach of section 8 of the *Charter*.

Justice Abella wrote concurring reasons for herself, Justice Binnie and Justice LeBel. She found that the existence of the Regulation "makes any expectation of privacy objectively unreasonable" (para. 57). She disagreed with the majority's holding as to the innocuousness of the DRA data, noting that the DRA "is intrusive enough to yield usually reliable inferences as to the presence within the home of one particular activity: a marijuana grow operation" (para. 81). Accordingly, "[g]iven the overriding significance of protecting the privacy interests in one's home, the concerns regarding the warrantless use of DRAs seem ... to be well founded" (para. 82). However, the language of the statute was unambiguous in allowing the utility to gather and disclose the information, and though Gomboc could have requested confidentiality he did not. This was determinative of the issue, particularly in that the Regulation had not been the subject of a *Charter* challenge by the accused. Accordingly, the DRA use was not a "search" for the purposes of section 8 of the *Charter*.

Justice McLachlin wrote dissenting reasons for herself and Justice Fish. She held that, while the majority was correct that there was clearly a subjective expectation of privacy, "[t]he significance of the DRA data derives from its utility in making informed *predictions* concerning the *probable* activities taking place within a home," which made it a more intrusive technique than the majority had found and thus supported an objective expectation of privacy. This was not reduced by the Regulation, since no reasonable consumer would have been aware of the Regulation or have read it "as permitting the police to ask the utility company to take special measures, including the installation of new technology such as a DRA, to obtain information the company neither already had nor intended to obtain about what was happening inside their house" (para. 140). Accordingly the expectation of privacy was reasonable. The search was not authorized by law, because it was neither reasonably necessary to police activity nor explicitly provided for in the Regulation. Accordingly, these two judges would have dismissed the appeal.

Wikipedia: Verifying Online Material is not Court's Business

The Ontario Superior Court of Justice has delivered its ruling in *Zhurihin v. Zhurihin*. The parties were previously married but separated toward the end of 2004. Under the terms of the minutes of settlement, the husband agreed, among other things, to pay spousal support of $2,500 monthly subject to a number of conditions, one which is that the obligation ceased if the wife obtained an annual income upward of $20,000. Also, he agreed to pay the wife $40,000 in consideration of transfer of their matrimonial home to the husband. The minutes of settlement were incorporated into the divorce order following which the husband paid the $40,000 for the property and $10,000 of support arrears. Subsequently, the husband sought to have the terms of the divorce order changed. He wrote the wife and threatened he would go into bankruptcy. He subsequently transferred his trucking business of which he was a sole shareholder to a third party for nominal sum of $1 and claimed that he was hired by the new management of the company at reduced income. After making different financial restructuring of his affairs, the husband filed series of motions seeking either to amend the original divorce order or to set it aside on grounds of his inability to pay according to the terms. Arising from her frustration

for not receiving spousal support, the wife filed for bankruptcy in January 2007. Three months later, the husband did the same. After some run with the Family Responsibility Officer, the latter suspended the husband's driver's licence for failing to discharge his obligation. Further attempt by the husband to discharge the spousal support areas in 2008 which stood then at $84, 000 was rejected by the court for the husband's failure to establish any material change in his circumstance to warrant the order sought.

The husband hinged his present motion to change the divorce order on the skyrocketed price of diesel to historic high in 2005, significant truck repairs he had incurred in 2004. These developments, he claimed, necessitated the sale of his business. He argued that the radical decline in his income was linked to the decline of trucking business. In regard to rising diesel cost, the husband relied on a chart titled "US-Retail Gasoline Prices 1990-2007, Regular Unleaded, Nationwide Average, Inflation-Adjusted (2007 dollar)". According to the court, this document "shows a graph apparently printed out from some unnamed source on the internet, perhaps Wikipedia". The court noted that "[o]n cross-examination the husband admitted that he has no idea where this chart came from, although he relies on it to show that diesel prices have risen significantly over this time period" (para. 31).

The court found that in regard to the cost of truck repair and the 2005 historic high in diesel cost, those happened before the divorce order was made. Similarly, the period of his indebtedness which the husband claimed predated the divorce order, or in any case, they were extinguished by his bankruptcy. Perhaps more important, the court rejected the suggestion by husband's counsel that the court could easily confirm the accuracy or the probative value of the internet sourced graph of unnamed source by "simply making own search on the internet" (para. 320). In that regard, the court held:

> Whether it is or is not [easy to make internet search for the source], I must decide the case on the basis of evidence received during trial, and not on the basis of any independent [internet] research I might embark myself. It would be completely improper for me to do so. Without knowing the source of the information, or who obtained it, I cannot give it any weight ... while I accept the husband's evidence that diesel prices may have risen, I have no credible evidence of the extent which they did, or, more importantly, their impact on his personal income and ability to pay support (paras. 32-33)

In addition to the husband's lack of credibility in other counts, the court noted that even though the wife has since obtained a part time job, she neither makes substantial income nor has the husband satisfied the court of any significant change in his circumstances to warrant an amendment of the divorce order.

Caught on Video, Freed by Judicial Misdirection

The Ontario Superior Court of Justice has delivered its ruling in *R v. Orfanian* – hyperlink not available. The accused operated a taxi that used the service of the complainant who was a director of cooperative taxi dispatching business. The accused and the complainant have a history of disputes between them which resulted in some disciplinary actions, including fines being levied against the accused. The complainant vehicle has been vandalized a number of times. Consequently, he arranged to have a video camera installed in the window of his apartment building superintendent which overlooked the parking lot. The camera transmitted pictures to the complainant's computer. Early morning April 7, 2009, the complainant, while watching his computer, saw a man dressed in dark clothing throw an object at the window of his car. Although he could not see the face, he thought that person's physical characteristics matched those of the accused. When he checked the parking lot, he saw a vehicle driving away that resembled the accused's vehicle. He then called the police which examined the video. Another officer attended the accused's address and found him sitting in his car in the driveway, with fresh tire marks in the snow behind the vehicle. He was arrested and cautioned. The police testified that he confessed to breaking the complainant's vehicle window. Subsequently, he testified on *voir dire* and denied making the confession to the police.

The trial judge ruled that the confession was voluntary and admitted it in evidence. After the complainant's testimony, the trial judge allowed the

accused to cross-examine him. The accused started by asking questions relating to the history of the dispute between the parties in their taxi business. However, the judge intervened and advised that the question posed to the complainant should be limited to the issue before the court: the mischief the accused was alleged to have committed on the specific day, April 7.

The accused's subsequent evidence in own defence dwelt on the history of his relationship with the complaint, including their financial transactions in which he lent money to the accused. He also claimed that the complainant threatened him in his bid to obtain additional money on loan from the accused. He insisted that on the night of his arrest he was not dressed in the likeness of the person caught on the camera and maintained that he did not damage the complainant's car. In closing, the Crown, relying on the rule in Browne v. Dunn argued that the accused did not confront the complainant with important part of latter's evidence evidence in cross-examination. The accused retorted that the trial judge made him limit his questioning and that was why he did not ask more questions.

In quashing the accused's conviction, the court held that it was easy for the trial judge to find the complainant a credible witness. According to the court, "[i]ndeed after the appellant's [accused] version of events became apparent, it can fairly be said that the trial judge's direction to the appellant to confine his questions in cross-examination to the day of the offence substantially prevented the appellant from challenging Hamilton's [complainant] credibility" (para 12). The court then concluded that "based on a review of the trial record overall I can see why the trial judge chose to disbelieve the appellant's evidence. But the fact remains that the appellant did not cross-examine Mr. Hamilton on matters that could have substantially impacted his credibility because of the advice and direction from the trial judge" (para. 15).

Property Assessment: Computer-Assisted Approach Unrealistic

The Nova Scotia Court of Appeal has delivered its ruling in *Nova Scotia (Director of Assessment) v. van Driel*. The owners of a certain property in Hammonds Plain in the Halifax Regional Municipality objected to a 2005 initial assessment value of their property by the Director for $499,600. Following an adjustment of a square footage, the Director reduced the value to $459,700. Dissatisfied, the owners appealed to the Utility and Review Board. The Board's hearing of the appeal included site visits to the subject property and comparable properties in June 2007. The Board requested further information from the Director in relating to application of uniformity principle in May 2009. The Board noted that the Director's mass appraisal approach which involved the use of computer to arrive at values based on replacement costs less depreciation "was simplistic and rudimentary and had nothing to do with what a buyer might be prepared to pay a willing seller" (para 17). Preferring a market data approach to replacement cost analysis, the Board applied a minimally lower general level of assessment (GLA) in order to achieve uniformity on principle. It did this by determining applicable GLA in relation to the actual values of nearby properties at the end of the process. Consequently, the Board allowed the appeal and reduced the value of the property to $323,014. The Director appealed the Board decision on number of grounds. For the purpose of this report, he argued that the Board erred in law or jurisdiction by making findings and issuing directives outside ss. 74 and 87 of the *Assessment Act* which has the consequence of affecting the manner in which the Director fulfils statutory mandate.

In disagreeing with the Director, the court held that the URB Acts vest the Board with the power to hear assessment appeals. In the Board's reasons in regard to determining appeals, the Board is not precluded from stating principles that may have precedential consequence in later appeals. However, the court observed that:

> I do not read the Board's reasons as precluding the Director's use of mass appraisal at the initial assessment stage. The Board's reasons apply to an appealed assessment. A taxpayer who appeals has set the course of an adjudicated assessment of the tax payer's property, not the other 574,999 properties. The appeals process entitles the taxpayer to the best determination of his individual assessment that the adversary system permits, given the

constraints of reasonable costs and expedition. The Board found that, in this appeal for the van Driels' residence, an individually analyzed valuation based on sales data of comparable properties was more persuasive than a mass appraisal based on formulaic replacement costs less depreciation. That the Director may face this precedent on a future assessment appeal does not mean the Board has usurped a legislative function (para. 21).

Computer-Assisted Legal Research as Permanent Unit of Litigation Cost

The British Columbia Superior Court has delivered its ruling in regard to assessment of costs in the plaintiff's personal injury litigation in *Stapleton v. Charambidis*. The plaintiff was involved in two motor vehicle accidents. The first accident happened in November 28, 2001 and the second one occurred November 8, 2002. In regard to liability for the first accident, the court found the plaintiff 80% liable and at fault while the defendant was found liable and at fault for 20%. The court ordered that the "Costs of this trial will follow the event". Parties eventually settled for $100,000 and costs. This settlement gives rise to determining the allocation of units for the various tariff items. The court held that the units will be awarded in accordance with the Schedule attached. Before resoling the amount for several items claimed and argued, the court decided to resolve disagreement over what constitutes "documents". While the plaintiff's list of documents comprised 297 separate instruments amounting to 4305 pages, the defence list comprised 665 instruments approximating 1100 pages.

Plaintiff's counsel insisted that documents must have broader meaning to include actual pages whilst the defence counsel took a more restricted approach, arguing that a document can be distinguished from a page and that if legislature meant pages, then Schedule B would have specified so. The court held that "I am surprised that, given the paper-driven nature of modern litigation, that there are no cases reported on the subject. In my view, the term [document] must be given a flexible and reasonable interpretation" (para. 4). The court held further that, "I see nothing in the definition of "document" in the Shorter Oxford English Dictionary that restricts the meaning of "document" if comprised more than one page, to refer only to the compendium or collection of pages" (para. 4). The court then concluded that "the obvious course is to begin with the assumption that each enumerated item on a party's list of documents is a "document" and if the party presenting the bill of cost wishes to argue otherwise (as does the plaintiff in this case) then it is incumbent on him or her to explain why that presumption should be relaxed. I am satisfied that in this case that some relaxation and broadening of the interpretation is justified" (para. 4).

The court's review of selected list of items is limited only to just three for the purpose of this report: courier fees, legal research and video and computer disks. In regard to the courier fees, the plaintiff claimed $325, an amount disputed by the defence. The court noted that despite several years of litigation, given that counsel for both parties were in the same city, the charge was excessive. Nonetheless, the court noted: "I recognize that even in an age of digitization it is occasionally necessary to deliver hard copies quickly ... I will allow $100 courier fees" (para. 11). Regarding legal research, the plaintiff claimed $501.73. The court noted that charges for online research have remained contentious between the parties. It further observed that "we have reached the stage that computer-assisted legal research is so commonplace that it has probably supplanted conventional law library research, and that its cost is one more line item in a typical law firm budget" (para. 13). The court found, however, that the evidence of research adduced by the plaintiff is not attributed to a specific file and the plaintiff provided no basis for rational attribution of its cots to the defence hence it allowed no charge for legal research. Lastly, on the cost of video and computer disks, the plaintiff claimed $60 for the use of 12 disks. They were used to record and forward evidence to experts. The court upheld the claim as reasonable. Other technology-related expense included a claim of $150.00 for MediTech Visual Aids invoice submitted by a company that provides imaging technology for litigation even though that was abandoned by the plaintiff. Disposing the case, the court awarded established costs on proportionate basis in accordance with the 80-20% apportionment of liability in the earlier judgement.

US Federal Trade Commission Disciplines Company Which Sold Child Internet Usage Data

The US Federal Trade Commission recently settled complaints against New York software company Echometrix, which agreed to the entering of a court order enjoining it from activities that allegedly violated the American Federal Trade Commission Act. Echometrix was the marketer of "Sentry," a software which allowed parents to track their childrens' online activities, such as chat room discussion, instant messaging, web surfing, etc. It also sold "Pulse," a product which allegedly allowed marketers to see the content of the child internet use as part of a package of "unbiased, unfiltered, anonymous" internet content, for use in marketing. As one media story described Pulse, "[m]arketing for the program stated users could get that information, 'in their own words – at the moment they say it.'"

The FTC alleged that Echometrix did not adequately disclose that the information gathered by Sentry would be sold to 3rd-party marketers, noting that it only provided a "vague" statement some 30 paragraphs into a multi-page end user license agreement. Echometrix voluntarily submitted to an injunction which enjoined this practice and required the destruction of all data gathered from Sentry and entered into Pulse. The company was reportedly fined $100,000 by the state of New York arising out of the same circumstances.

2ième partie

Dépôt d'enregistrements audio sans transcription écrite

Le Tribunal est saisi entre autres d'une requête préliminaire dans le cadre du recours en contestation d'une décision rendue par la Régie des alcools, des courses et des jeux le 23 octobre 2009. La Régie a transmis au Tribunal et aux parties requérantes une copie sur CD de l'enregistrement audio des neuf journées d'audience devant la Régie. Le procureur des requérantes demande le dépôt d'une transcription écrite de ces enregistrements. Il est d'accord avec les règles qui permettent le dépôt des enregistrements audio, mais soulève qu'en pratique cela est insuffisant puisqu'il désire contre-interroger tous les témoins. Il mentionne aussi qu'il serait trop onéreux pour ses clients de faire transcrire par écrit les témoignages. Quant aux procureurs de la Régie, ils prétendent que le Tribunal devrait permettre le dépôt des enregistrements audio sans la transcription écrite. En effet, les règles applicables en matière de recevabilité de la preuve devant le Tribunal, la législation sur le cadre juridique des technologies de l'information, ainsi que le principe de proportionnalité de l'article 4.2 C.p.c. permettent la preuve par enregistrement audio.

Le Tribunal autorise le dépôt des enregistrements audio sans transcription écrite. Le Tribunal considère qu'il est maître de la conduite de l'audience et de la recevabilité des éléments et des moyens de preuve, les seules limitations étant celles se trouvant aux articles 11 et 139 de la *Loi sur la justice administrative* (LJA), ce qui n'est pas le cas ici. En effet, les enregistrements audio des audiences devant la Régie n'ont évidemment pas été obtenus dans des conditions qui portent atteintes aux droits et libertés fondamentaux et dont l'utilisation est susceptible de déconsidérer l'administration de la justice. Et ces enregistrements sont pertinents et de nature à servir les intérêts de la justice dans le cadre du recours en contestation. Quant aux arguments découlant de la *Loi concernant le cadre juridique des technologies de l'information* (L.R.Q., c. C-1.1), qui consacre les principes de la neutralité technologique et de l'équivalence fonctionnelle, le Tribunal est favorable à l'utilisation de technologies de l'information surtout lorsqu'elles permettent d'atteindre l'objectif de la LJA qui consiste à assurer la qualité, la célérité et l'accessibilité de la justice administrative. Enfin, bien qu'il n'existe pas nommément de règle de la proportionnalité dans la LJA, l'idée de ce principe de proportionnalité se dégage de l'objet de la justice administrative. De tous ces motifs, il ressort clairement que les enregistrements audio sont recevables en preuve devant le Tribunal.

Le Tribunal souligne que la difficulté soulevée par le dépôt des enregistrements audio est plutôt sur le plan pratique de l'utilisation de ces enregistrements et qu'il y aura évidemment lieu d'ajuster le déroulement de l'audience et d'adapter des solutions au contexte de chaque affaire. Et même s'il est possible de déposer les enregistrements audio devant le Tribunal, il ne s'agit évidemment pas d'une solution appropriée à toutes les causes. Ainsi, lorsque d'importants motifs d'un recours se fondent sur des éléments de l'audience devant la Régie, il appartient à la partie qui considère que sa cause serait mieux servie par une transcription écrite de faire effectuer une telle transcription aux fins de son recours devant le Tribunal.

- *9056-5425 Québec inc. c. Québec (Régie des alcools, des courses et des jeux),* 2010 QCTAQ 11154 (CanLII), 12 novembre 2010.

Obtention de renseignements exigibles suite à la vente d'un animal par Internet

La défenderesse a reçu une contravention pour n'avoir pas avisé par écrit la Société protectrice des animaux de la Mauricie (SPAM) de la vente de son animal et de ne pas l'avoir informé du nom, de l'adresse et du numéro de téléphone du nouveau gardien, le tout en contravention du règlement de la Ville de Trois-Rivières sur la garde des animaux. La défenderesse après avoir vendu son animal par Internet, a offert à la SPAM l'adresse internet Hotmail de la personne qui a acheté l'animal mais celle-ci l'a refusé en l'avisant que ce n'était pas conforme au règlement municipal. La défenderesse a aussi tenté d'obtenir les renseignements exigibles, mais l'acheteuse lui a refusé ses nom, adresse et numéro de téléphone. Elle n'a donc pas pu compléter le formulaire de la SPAM.

Le tribunal conclut que la défense de la défenderesse soulève un doute raisonnable et l'acquitte. Ce type d'infraction règlementaire est de responsabilité stricte et la défense est recevable en ce qu'elle a agi avec diligence raisonnable en tentant d'obtenir les renseignements demandés par la SPAM concernant une tierce personne. Devant le refus de cette tierce personne, la défenderesse a offert à la SPAM ce qu'elle pouvait offrir de mieux dans les circonstances, soit l'adresse e-mail de l'acheteuse.

- *Trois-Rivières (Ville de) c. Bergeron*, 2010 CanLII 66999 (QC C.M.), 16 novembre 2010.

La preuve électronique au Québec

Le livre de Me Mark Philips définit concrètement ce qu'est le document électronique et le situe dans le contexte juridique des technologies de l'information. L'ouvrage examine les différents aspects pratiques de l'utilisation de la preuve électronique devant les instances judiciaires. En plus de traiter du « e-discovery », l'auteur examine les exigences en matière de préservation et de destruction de documents. Il explique les étapes de la communication des documents électroniques. Un chapitre est consacré à la signature électronique. L'auteur conclut que moyennant certaines mises en garde, il est possible d'envisager l'avenir avec optimisme et il ne faut pas craindre l'introduction, dans les palais de justice, des technologies de l'information qui font partie du quotidien de chacun.

- Mark PHILLIPS, *La preuve électronique au Québec*, Montréal, LexisNexis, 2010.

Droit et photographie

Cet ouvrage porte sur le statut juridique de la photographie au Québec et au Canada. L'auteur analyse d'abord les conséquences juridiques de la saisie d'une image (photographie des choses, des événements et des personnes). Il présente ensuite la protection que la loi accorde à l'auteur d'une oeuvre photographique à partir des normes édictées par la législation nationale et la Convention de Berne. Il précise aussi le sens qu'il faut donner à l'affaire *Aubry* et aux arrêts clés qui interprètent les règles sur le droit d'auteur applicables à la photographie.

- Jean GOULET, *Grand angle sur la photographie et la loi – Un précis sur le droit de la photographie au Québec et au Canada*, Montréal, Wilson & Lafleur, 2010.

La Commission européenne met de l'avant une nouvelle stratégie en matière de protection des données personnelles

Le 4 novembre 2010, la Commission européenne a publié une communication intitulée *Une approche globale de la protection des données à caractère personnel dans l'Union européenne*. Le but est de présenter les grandes lignes d'une réforme du cadre législatif européen applicable aux données à caractère personnel afin de le moderniser et de l'adapter aux nouveaux défis technologiques. Le document entend définir l'approche qui permettra à la Commission de moderniser le cadre juridique de l'Union européenne régissant la protection des données à caractère personnel dans tous ses domaines d'action, eu égard notamment aux défis posés par la mondialisation et les nouvelles technologies, de façon à continuer à garantir un niveau élevé de protection des personnes à l'égard du traitement de ces données dans tous ces domaines.

La Commission explique que l'utilisation et le partage des données à caractère personnel est en évolution constante. Le défi ainsi posé aux législateurs est celui de la mise en place d'un cadre législatif qui résistera à l'épreuve du temps. Mais elle relève des objectifs essentiels qui doivent être assurés par delà les transformations que peuvent connaître les environnements d'information. Elle explique que les approches révisées devraient garantir aux personnes une protection adéquate en toutes circonstances, accroître la transparence pour les personnes concernées, permettre aux intéressés d'exercer un meilleur contrôle sur les données les concernant, garantir un consentement éclairé et libre, protéger les données sensibles et renforcer l'efficacité des voies de recours et des sanctions.

L'approche globale envisagée par la Commission vise à identifier les meilleures façons de remédier aux problèmes et atteindre les objectifs essentiels. Elle

servira de base aux discussions ultérieures avec les autres institutions européennes et les autres parties intéressées et sera ensuite traduite en propositions et mesures concrètes de nature à la fois législative et non législative.

- Cédric BURTON, « Protection des données: la Commission présente sa nouvelle stratégie », *Droit & Technologies,* 24 novembre 2010.
- COMMISSION EUROPÉENNE, Communication de la Commission au Parlement européen, au Conseil, au Comité économique et social européen et au Comité des régions: « Une approche globale de la protection des données à caractère personnel dans l'Union européenne », COM (2010) 609 final, 4 novembre 2010.

Preuve licite de la faute en cas d'accès aux « amis des amis » à une page Facebook – France

Le Conseil des prud'hommes de Boulogne-Billancourt a conclu que l'employeur qui a produit une page de Facebook dont le mur était accessible aux « amis des amis » n'a pas violé la vie privée des deux salariés licenciés pour faute grave. Des employés avaient créé une page Facebook critiquant leurs supérieurs au sein de l'entreprise. Les réglages avaient été configurés de façon à en ouvrir l'accès « aux amis des amis », ce qui incluait en l'espèce les actuels et les anciens employés de l'entreprise. Il en résulte, selon le Conseil des prud'hommes, que ce mode d'accès à Facebook « dépasse la sphère privée et qu'ainsi la production aux débats de la page mentionnant les propos incriminés constitue un moyen de preuve licite du caractère fondé du licenciement. » En l'espèce, le Conseil juge que les propos sont abusifs et méritent une sanction de licenciement.

- *M. B. c. Alten Sir*, Conseil de prud'hommes de Boulogne-Billancourt, Jugement de départage, 19 novembre 2010.
- *Licenciement : preuve licite de la faute en cas d'accès aux « amis des amis » à une page Facebook*, LEGALIS.NET, 25 novembre 2010.

Annulation d'une procédure de passation d'un marché public pour cause de défaillance de la plateforme – France

Dans une ordonnance de référé, le tribunal administratif de Limoges a enjoint la région Limousin de reprendre une procédure d'appel d'offres au stade de l'examen des candidatures. L'offre soumise par une entreprise possédant un certificat valide avait été rejetée pour cause de « signature altérée ». Il lui a donc été demandé de renouveler l'opération et de réinstaller le certificat « racine »; ce second dépôt fut reçu hors délai et la candidature rejetée. Le tribunal a estimé que « les documents de l'offre de cette société ne pouvaient pas être regardés comme n'étant pas signés, dès lors que l'existence d'un certificat de signature électronique adéquat n'était pas en cause et que la difficulté concernait seulement le contrôle de la validité de l'utilisation de ce certificat ; qu'ainsi, le pouvoir adjudicateur ne pouvait pas refuser d'admettre la candidature de la société requérante au motif que les documents de son offre n'étaient pas signés». Pour le tribunal, dès lors qu'une entreprise possède un certificat valide, les risques de mauvais fonctionnement de la plateforme incombent à l'entité publique. Pour cette raison, il annule la procédure.

- *Infostance c. Région Limousin et autre*, Tribunal administrative de Limoges, Jugement du 12 novembre 2010, LEGALIS.NET, 15 novembre 2010.
- *Signature électronique: les défaillances de la plateforme affectent la régularité d'un marché public*, LEGALIS.NET, 30 novembre 2010.

À signaler :

- IViR (Institute for Information Law), Leibniz Center for Law et Prof. Dr. N.A.N.M. van Eijk, Prof. Dr. T.M. van Engers, Mr. C. Wiersma, Mr. C.A. Jasserand, W. Abel LL.M., *Moving Towards Balance. A study into duties of care on the Internet*, University of Amsterdam, 2010.

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 if they relate to Part 1 or Pierre Trudel at pierre.trudel@umontreal.ca if they relate to Part 2.

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 la première partie du présent bulletin, veuillez contacter les professeurs Robert Currie, Chidi Oguamanam et Stephen Coughlan à l'adresse électronique it.law@dal.ca ou en ce qui concerne la deuxième partie, veuillez contacter Pierre Trudel à pierre.trudel@umontreal.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.