



NEWSLETTER

Canadian IT Law Association

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Jurisdiction

In *Beaulieu v. Queen's University*, the plaintiff filed suit in Alberta, alleging that a memorandum sent by email to four faculty members and one dean at Queen's University was defamatory. The plaintiff, who was situated in Alberta had instructed his secretary to get a copy of the memorandum, which she did. The plaintiff argued that the receipt by his secretary of the allegedly defamatory email amounted to a publication of the memorandum in Alberta, giving jurisdiction to the Alberta courts. The Court of Appeal disagreed, finding that any publication to Beaulieu's agents occurred with his knowledge, understanding and consent. As a result, no tort had been committed in Alberta.

Non-Competition Clauses

In *Vista Online Ltd. v. Perrault*, a Swiss investment company had loaned the company Vista Online a substantial sum of money. The loan was secured in part by a series of non-competition agreements with key employees of Vista. The issue for the court to determine was "whether covenants relating to confidentiality, non-solicitation and non-competition can be enforced where the agreements prescribing them were granted in the course of financing." (at para 3).

The Swiss investment company took over Vista Online after its collapse in the fall of 2004. The company, now acting as Vista (which was not actually continuing its operations), sought to enforce the agreements against certain key employees. Edwards J. stated: "Precisely how Vista can maintain this action was not explained by counsel. However, defendant's

counsel did not contest Vista's standing to pursue this application." (at para 8).

The suit targeted, in particular, three former "managers, officers and/or directors" of Vista, who had each signed the agreements. The three individuals had moved on from Vista, and were working in a similar line of business, developing a voice over internet protocol, for another firm.

Edwards J. noted that this was a case where "a lender has sought to prevent its borrower's employees from competing with the non-functioning borrower." (at para 23). He observed that "typically a non-competition clause is enforceable by injunction only where an employee is in direct competition with a former employer, using confidential information or client contacts obtained from the employer, that is, to protect the former employer's legitimate proprietary interest." (at para 23) He found no evidence that Vista would suffer irreparable harm if the injunction did not issue, and in any event, found the clauses "too vague and too broad to reasonably protect direct competition with Vista, which may not even be involved in the development of a VOIP product during that year." (at para 30).

Privacy Law

PROF. MICHAEL GEIST RECENTLY BROUGHT a [complaint](#) against the Ottawa Renegades after the marketing firm they hired harvested his name and email address from two separate business websites (University of Ottawa and an Ottawa law firm) in order to market season tickets to him.

The Renegades had relied upon the language of s. 2 of *PIPEDA* which expressly excludes from the definition of personal information "the name, title or business address or telephone number of an employee of an organization." The purpose of the exclusion is presumably to permit businesses to publish and distribute contact information for employees within their organization.

The Privacy Commission Investigator took the view that Prof. Geist's email address was nonetheless personal information as the language of the s. 2 definition did not expressly exclude *email addresses* from "personal information".

The Renegades next relied upon the exceptions in s. 7(1)(d) and 7(2)(c.1) which permit the collection and use of publicly available information as defined in the regulations. The regulations stipulate that the name, title, address and telephone number of a person appearing in a professional or business directory is publicly available information so long as the collection, use or disclosure of such information "where the collection, use and disclosure of the personal information relate directly to the purpose for which the information appears in the directory, listing or notice". Presumably here as well, email addresses are not expressly included in the language of the regulation. However, the Investigator relied upon the fact that the Renegades' collection and use of the email addresses was not related to the purpose for which the information appeared in the listing. According to the investigator, such information is made available so that members of the public can contact individuals within the organization for purposes which further the interests of the organization.

THE FEDERAL PRIVACY COMMISSIONER has released several case summaries arising from complaints under *PIPEDA* that have been settled during the course of the investigation. In [Case #284](#), the complainant returned her laptop for repair and was given a replacement. A few months later she received a telephone call from an individual who had purchased her original laptop which still contained her personal information. Since this incident, the Privacy Commissioner was satisfied that the store had implemented several significant changes to safeguard customers' personal information including a complete examination and clearing of all information on any computer hard drive, or electronic devices, returned to any of its stores across Canada. In [Case #290](#), an employee of a national transportation company was concerned about personal information contained in an automated crew management system allegedly accessible by unauthorized personnel, especially union representatives. Some information it was determined could not be accessed, but the

company agreed to adjust the system so that the screens would no longer display the SIN, birth date and health information.

THE OFFICE OF THE PRIVACY COMMISSIONER OF Canada (OPCC) recently posted a [Fact Sheet](#) on the application of *PIPEDA* to the activities of municipalities, universities, schools and hospitals (the "MUSH" sector). The OPCC is of the view that, as a general rule, *PIPEDA* does not apply to the core activities of these institutions, but become subject to the *Act* when it engages in a non-core commercial activity. Core activities refer to those activities that are "central to the mandate and responsibilities" of the institution whether or not a fee is charged for the service. Non-core activities or particular transactions caught by the *Act* would include selling alumni lists, operating a parking garage by a university or hospital or services or businesses operated by a third party within one of the institutions. While the core activities of hospitals or long-term care facilities are not subject to *PIPEDA*, health care providers in private practice are engaged in commercial activity and thus subject to the *Act*. In the three Territories, *PIPEDA* applies to personal information about employees within the MUSH sector, but does not apply to patient or student information in publicly funded hospitals or schools because they are not considered to be engaged in commercial activities.

Real Estate

In [Pin Services Ltd. v. Oehler](#), the plaintiff company sought to recover a fee of \$2400.00 from the defendants. The plaintiff company was an "internet advertising business", and the defendants had entered into a contract with them for them to advertise their business for sale online. At trial, the provincial court judge had ruled that the fee was not recoverable, as the plaintiff was acting as a real estate broker in contravention of the *Real Estate Act*. On appeal, Zarzeczny J. upheld this decision. He noted that while "some of the form and provisions of the Agreement and promotional material supported the argument that the service being provided by the plaintiffs was simply an advertising service, nevertheless a careful examination of the substance of the agreement, the nature of the plaintiff's business and the proper interpretation and

application of the provisions of the *Real Estate Act*... can lead to no other reasonable conclusion but that it constituted a trade in real estate..." (at para 20). Zarzeczny J. went on to note that the case turned on its specific facts, and that not all Internet advertising of real estate for sale will be considered to be trade in real estate. He noted: "It may well be that in other circumstances the simple provision of Internet advertising services to an owner seeking to sell his property through the medium of the Internet would be indistinguishable from the current practice of owners advertising their properties for sale in print or other more conventional news media." (at para 21)

Spam

In May 2004, the Industry Minister announced the formation of the Task Force on Spam. Its mandate includes a series of initiatives by government, industry, marketers and consumers to identify measures to reduce and control spam. On December 3, 2004 a [Stakeholder Roundtable](#) was held for the purpose of providing an update of actions taken by the Task Force and the progress being made in implementing the Anti-Spam Action Plan. Comments are still being sought by Industry Canada and can be posted on the [SPAM Task Force Online Forum](#).

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.

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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

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