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This newsletter is prepared by Professors Robert Currie, Chidi Oguamanam and Stephen Coughlan of the Law and Technology Institute of Dalhousie Law School.

Les auteurs du présent bulletin sont les professeurs Robert Currie, Chidi Oguamanam et Stephen Coughlan de l'Institut de droit et de technologie de la Faculté de droit de l'Université de Dalhousie.

Technical Data relating to Breath Testing

The question of disclosure of electronic data surrounding breath testing instruments continues to befuddle trial courts. The issue arose most recently in *R. v Mercey*, where the accused had been charged with driving while his blood alcohol level was over .08%. His breath had been tested with an Intoxilyzer 5000C, and he sought disclosure of a significant amount of technical data. Much of the disclosure had been satisfied, but the Crown and defence were unable to agree on five specific requests by the accused:

(a) A sample of the lot number of the Standard Alcohol Solution used;.

(b) Simulator servicing and certification records;

(c) All test records pertaining to the Intoxilyzer 5000C used in the investigation;

(d) Usage and calibration records pertaining to the Intoxilyzer 5000C used in the investigation; and

(e) Downloaded data to a central computer, bracketing the accused's set of breath tests.

In the application, both the Crown and the defence led expert evidence as to what was necessary to constitute full disclosure. Both experts were well qualified, but as the trial judge noted:

> 12 Unfortunately their views of what is necessary to understand and proof the Intoxilyzer results are diametrically opposed. Dr. Kupferschmidt effectively challenges all aspects of the operation and workings of the machine and seeks information to confirm or contradict the reports that have been produced by the machine. Mr. Palmentier says that the Intoxilyzer has a series of failsafe features that make it improbable and almost impossible for the machine to give a false reading.

The trial judge noted that the same issue had arisen in a number of previous cases, frequently with the same experts, and that no consistent response had yet been formulated by trial courts: furthermore, no appellate decision on the issue had yet been given.

At one end of the scale, courts had described the defence expert as someone who "would not be satisfied that the machine was accurate unless he was actually present when the instrument was being manufactured" (para 14). The Crown expert, on the other hand, had sometimes been described as adopting "the party line [that] nothing should go wrong, and if it did the built in safety devices would catch the error" (para 15).

The judge rejected the Crown's argument that it was up to the defence to demonstrate that there was something to be disclosed. All relevant information was to be disclosed, and relevance should be construed broadly. On that basis, the judge ordered that the Crown should disclose the first four things requested by the accused. The judge noted that these four pieces of evidence related to whether the machine operated properly and whether it was maintained correctly. These matters were obviously relevant even if it was not clear how they might lead to fruitful avenues of inquiry for the accused.

The last item, however, was not ordered disclosed. The judge took this to encompass the data concerning breath tests before and after that given to the accused, as well as that relating to the accused himself. The data on the other tests, the judge held, would not show a problem in the accused's own test, and so was not relevant. More interestingly, however,

even the data relating to the accused's own test was found not to be relevant.

That data, the judge held, would be of interest to the accused in essence to show that the Intoxilyzer 5000C was not a reliable means of determining a person's blood alcohol level. This was an argument that it was not open to the accused to make:

> Parliament has approved the use of the machine and its basic engineering, both electronic and physical. Electronic data produced by the Intoxilyzer is part of its inherent functionality. (para 26)

In that event, the data was not relevant:

> The functionality of the machine is decided by legislative fiat. What is of interest is the maintenance and operation - not the design or functionality of the machine. (para 26)

The remaining information, though it might not ultimately be relevant or admissible at trial, met the standard for disclosure.

Open Court Principle Trumps Privacy Rights

The Ontario Superior Court of Justice has delivered its ruling in some motions in *Fairview Donut Inc. v. The TDL Group Corp.* (background information in *Fairview Donut v The TDL Group Corp.* (2010), 100 O.R. (3d) 510), which arose from a proposed class action on behalf of franchisees of the Tim Hortons chain. The present report is in respect of motion by parties for an interim confidentiality order, the plaintiffs' motion for production of an affidavit of documents and request by non-party affiant franchisees to redact information from filed documents and to have pseudonyms to their affidavits and documents that identify them in the proceeding. In hearing the motions, the court stated its willingness to invoke its jurisdiction under s. 12 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 to make any orders it considers appropriate in regard to the conduct of class proceedings for the purpose of fair and expeditious disposition of the matter and to impose any such terms on the parties it considered appropriate. In regard to the motion for an interim confidentiality order, the court found that even though each party proposed a slightly different form of the order sought, they were in agreement that such an order was necessary and have requested the court to resolve areas of disagreement. Using its discretion, the court approved a slightly modified order which, among others things, expanded the number of officers, directors, employees, potential witnesses as well as included professional accountants engaged by the parties as parties to whom confidential information may be disclosed. In addition to requiring some of the parties to execute a confidentiality undertaking, the court ordered that neither the plaintiffs nor the defendants should disclose the names of proposed witnesses or experts except as required by the court. It rejected the plaintiffs' motion for the production of affidavit of documents by the defendants on several grounds including the fact that the defendants have consistently cooperated with the plaintiffs' request for documents. Also, they have turned in a large quantity of documents already, which the plaintiffs have yet to process. It also noted that the time and expense (estimated at $700, 000) required for producing an affidavit of documents, including almost 200,000 additional electronic records, would not be proportionate to the benefit that would accrue given that the documents would unlikely yield material evidence.

Finally, in regard to the request by affiant franchisees for the court to protect their privacy rights and that of other franchisees who are not parties to the proceeding, the court found that, for the most part, the information involved sensitive commercial and financial data, the disclosure of which, it is argued, would have negative consequences and embarrass the parties concerned. The court observed that "we thus have a request by non-parties, who have voluntarily and without any compulsion sworn affidavits in support of the defendants' position, which affidavits have been filed in the public record, now requesting that their names and all identifying information be redacted, not only in those documents but in any documents produced by the parties and be replaced with pseudonyms" (para 31). The court affirmed its jurisdiction to make the order sought but in declining to exercise the jurisdiction, the court held that to grant the order would, among other things, offend "the open court principle.... [and noted that] embarrassment is an unavoidable consequence of an open justice system. Persons

who testify in their own names are held to a public standard of accountability. Pseudonyms should only be permitted in exceptional circumstances where there is clear evidence that irreparable harm will ensue" (para 34). It further observed that the affiant franchisees voluntary entered the case and, as such, their credibility should be subjected to open scrutiny should the need arise. Moreover, the information is already in the public record and "no request for redaction was made before it was filed and. It should not be redacted after the fact" (para 36).

Internet Jurisdiction: Solicitation of Business By E-Mail

The Nova Scotia Small Claims Court has delivered its ruling in a motion opposing the court's jurisdiction in *Richardson v. RxHousing Inc.* The plaintiff/claimant, a resident of Halifax, Nova Scotia, entered into a leasing contract with the defendant for a property: 733 North King Road, West Hollywood, California, USA. The communications between the parties leading to the contract were done by e-mails through which the defendant made representations regarding the features of the property and attached photographs thereof. The plaintiff signed a written agreement and sent the sum of $14,076.00 (US) being three months' prepaid rent. However, when the plaintiff's agent inspected the property, it was allegedly found that the actual condition fell short of what was represented. Consequently, the plaintiff/claimant repudiated the contract, and asked that her deposit be refunded. The defendant declined, warranting the plaintiff's action in the present proceeding. In addition to filing a written defence on merit, the defendant made a submission and argued that the Nova Scotia court has no jurisdiction or territorial competence on the matter and that even it has, it should decline to exercise it on the basis of *forum non conveniens*. Also, the defendant argued that should the court assume jurisdiction, the *Nova Scotia Residential Tenancies Act* will be applicable and, as such, the Small Claims Court would not have originating jurisdiction in this matter. Finally, the defendant points to a clause in the rental agreement which provides that "Any non-paid balance due and owing on the 15th of the month will be charged to Guest's credit card. Any default of payment or litigation will be in Harris County, Texas and will automatically adhere to Texas property codes"

On the issue of territorial jurisdiction, the court ruled that the applicable Act is the *Nova Scotia Jurisdiction and Transfer Act*, S.N.S. 2003, c. 3 and that the Act applied to the small claims court. Pursuant to the Act, if there is a real and substantial connection between the Province and facts on which the proceeding is based, where the claim concerns contractual obligations and involves purchase of property, services or both for use other than in the course of the purchaser's trade or profession, and perhaps most importantly, if the contract "resulted in a solicitation of business in the Province by or on behalf of the seller", then, a Nova Scotia court can assume jurisdiction. The court had no difficulty resolving these provisions in favour of the plaintiff. In specific regard to "solicitation of business in the Province by or on behalf of the seller", the court relied on the Supreme Court decision in *SOCAN v Canadian Assn of Internet Providers* [2004]:

> [F]or the proposition that that an internet communication takes place where it is received. On my reading of the case, it is somewhat nuanced ruling than that, but I accept for present purposes that a solicitation that comes through the internet to a person situate in Nova Scotia is received in Nova Scotia [para 16). Thus, it is a solicitation of business received in Nova Scotia.

The court further found that it is not true, as the defendant argued, that it had no connection with Nova Scotia. The court held that the defendant "has a connection to Nova Scotia by virtue of doing business with an individual situate in Nova Scotia" (para 19). In regard to forum non conveniens, the court relied on the Supreme Court in *Pompey Industries v. ECU-Line N.V.* [2003] and affirmed that in the face of a foreign exclusive jurisdiction clause, a domestic plaintiff must show "strong cause" why a stay of proceedings should not be granted" (para 23). According to the court, the text of the clause relied upon by the defendant is not an "exclusive selection clause" but is at best a "non-exclusive attornment clause" and, as such, does not warrant the application of the "strong cause test" (para 30). The court found that the clause in question deals with default payment and is primarily concerned with litigation

arising from non-payment which is clearly not in issue in the present proceeding.

The court ruled that the existence of a more appropriate forum needs to be clearly established in order to displace the one chosen by the plaintiff. It observed that there is no one clear forum found to be most appropriate in this case and, consequently, the domestic forum chosen by the plaintiff wins by default. On the argument regarding *Residential Tenancies Act*, the court found, in agreement with the defendant, that the small claims court does not have originating jurisdiction in a matter to which the Act applied. However, even though the Act does not provide directly that its application is limited to a property in Nova Scotia, "as a matter of statutory interpretation, it is to be implied that the definition of the premises [under the Act] only extends to properties situate in and only in Nova Scotia" (para 40) and does not extend to a property in California. Overall, the court found that the "courts of the Province of Nova Scotia, including the Small Claims Court, has jurisdiction over the subject matter of this claim" (para 46). The Court then ordered for arrangement to be made in regard to a convenient hearing date.

Internet Defamation

The appeal in *Crookes v. Newton* was heard by the Supreme Court of Canada on December 7, 2010. The case, on appeal from the British Columbia Court of Appeal, concerns whether a person who links to a website containing defamatory material has himself published that defamation. The panel, consisting of Chief Justice McLachin and Justices Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell, reserved judgment.

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