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

December 19, 2009/19 décembre 2009

IT.Can NEWSLETTER/BULLETIN

Canadian IT Law Association

www.it-can.ca

Part 1 of this newsletter is prepared by Professors Robert Currie, Chidi Oguamanam and Stephen Coughlan of the Law and Technology Institute of Dalhousie Law School. Part 2 of this newsletter is prepared by Professors Pierre Trudel and France Abran of the L.R. Wilson Chair in Information Technology and Electronic Commerce Law, Université de Montréal.

Les auteurs de la première partie 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. Les professeurs Pierre Trudel et France Abran de le Chaire en droit des technologies de l'information et du commerce électronique L.R. Wilson de la Faculté de droit de l'Université de Montréal ont rédigé la seconde partie du présent bulletin.

Part 1

Discovery and Facebook

The Ontario Superior Court of Justice has concluded that Facebook users are not automatically required to give a defendant access to the private portion of their Facebook account in any case where a personal injury claim is made, with its decision in *Schuster v. Royal & Sun Alliance Insurance Co. of Canada*. The plaintiff had brought an action arising out of a motor vehicle accident, and claimed damages for injuries she said had compromised her ability to work and to participate in social and recreational activities. The defendant discovered that the plaintiff had a Facebook account, and that it had a private area with access restricted to 67 of her friends. The defendant brought an *ex parte* application seeking an interim order for the preservation of documents contained in the Plaintiff's Facebook webpage and production of the documents from the webpage.

The court noted some ambiguity in the defendant's claim. The motion for relief referred to preservation of the documents on the Facebook site, but the affidavit in support referred to obtaining access to the plaintiff's Facebook page. The latter order, the court noted, would require the plaintiff to provide the defendant with her username and password. If that was the order sought, the court held, it would be far too invasive of the plaintiff's privacy and would not be granted. The court proceeded as though the motion was simply for preservation of the documents, and in particular any pictures, on the private portion of the plaintiff's website. In any case, this order too was not granted.

The court noted that the test for an interim injunction was 1) whether there was a serious question to be tried; 2) whether the applicant would suffer irreparable harm if the injunction was not granted, and; 3) Which party would suffer the greater harm from granting or refusing the remedy pending a decision on the merits? There was a serious issue to be tried, but the defendant's claim failed on the latter two grounds.

The court acknowledged that pictures on Facebook could be relevant with respect to the plaintiff's damage claim. In this case, however, there was no evidence that there were photographs showing the Plaintiff's physical capabilities or whether she has engaged in activities in relation to which she claims to have been impaired. The plaintiff had filed a list of relevant documents and had not included her Facebook site among them. The court noted that "In the absence of some evidence to the contrary, I presume that the documents contained in the Plaintiff's Facebook account have not been listed in her Affidavit of Documents because they do not contain any relevant evidence" (para 30). This was not a case where some pictures of a party engaged in social activities had been posted on a public portion of the site, allowing the inference that more such pictures might be in a private section. Failing any evidence, however:

> 39 I do not regard the mere nature of Facebook as a social networking platform or the fact that the Plaintiff possesses a Facebook account as evidence that it contains information relevant to her claim or that she has omitted relevant documents from her Affidavit of Documents.

The balance of convenience claim failed for similar reasons. It had been open to the defendant to cross-examine the plaintiff on her list of documents, and

to ask about the Facebook page, had they wished to do so. They could have required the plaintiff to file an affidavit swearing that there was nothing relevant on that site. The court was still willing to allow the defendant a chance to cross-examine the plaintiff on its list of documents, since that list had not been filed until after discoveries. However, beyond that the court granted no relief.

Internet Luring

The Supreme Court of Canada, with its decision in *R. v. Legare*, has considered the internet luring provisions in the *Criminal Code*, adopting a broad interpretation of the kind of conduct captured under it. The Court has characterized the offence as an inchoate one, similar to the attempts provisions. Indeed, they characterise it as an offence "which criminalizes preparatory conduct even more remote from the infliction of harm than other incipient or inchoate crimes, such as attempt and counselling or procuring the commission of an offence."

The accused was a 32 year old man in Alberta who engaged in conversations, first over the internet and then by telephone, with a 12 year old girl in Ontario. He claimed to be 17, while she claimed to be 13. The two engaged in sexually explicit conversations in a private chat room. During the second of these conversations the accused sought to receive the complainant's picture, which she tried unsuccessfully to send. She did give him her telephone number, and her called her. In that telephone call the accused described "in coarse and explicit language" sexual actions he said he would like to perform on the complainant. The complainant hung up and the accused did not contact her again. The charges were laid against him roughly two years later. He was charged with one count of invitation to sexual touching, contrary to s. 152 of the *Criminal Code*, and one count of luring a child, contrary to s. 172.1(1)(c).

The trial judge acquitted him of both charges. The Court of Appeal overturned the acquittal on the internet luring charge and ordered a new trial. The Supreme Court upheld that order for a new trial.

Section 172.1(1)(c), at the relevant time, stated that:

> Every person commits an offence who, by means of a computer system within the meaning of subsection 342.1(2), communicates with. . .
>
> (*c*) a person who is, or who the accused believes is, under the age of fourteen years, for the purpose of facilitating the commission of an offence under section 151 [sexual interference] or 152 [invitation to touching], subsection 160(3) [bestiality] or 173(2) [exposure of genitals] or section 281 [abduction] with respect to that person.

(The section has since become section 172.1(b), and the age has been changed to sixteen.) The trial judge had concluded that the Crown was required to prove that the accused actually intended to lure a child for the purpose of one of the secondary offences. They did not, however, in the trial judge's view, have to prove that he actually intended to commit that offence. The trial judge's goal was to prevent the offence from becoming too broad. In this case, the accused had not tried to arrange a meeting and had not intended to do so, and simply "talking dirty" with the complainant was not enough to make him guilty of luring.

The Supreme Court agreed with the Court of Appeal that this had been an unduly narrow interpretation of the section. In their view, the section needed to be interpreted in light of the very specific medium for which it was designed. They noted that the provision was very narrowly targeted: it was not an offence to communicate by computer with an underage person, nor was it an offence to facilitate the commission of one of the specified secondary offences in respect of that person if the communications did not take place by computer. The provision had been drafted with the particular dangers of the internet in mind.

The internet, they noted, allowed predatory adults to adopt an assumed identity, remain anonymous, and gain access to potential victims through chat. It was, they said, a fertile breeding ground for the grooming and preparation associated with child sexual exploitation. They noted:

> For those inclined to use computers as a tool for the achievement of criminal ends, the Internet provides a vast, rapid and inexpensive way to commit, attempt to commit, counsel or facilitate the commission of unlawful acts. The Internet's one [to] many broadcast capability

> allows offenders to cast their nets widely. It also allows these nets to be cast anonymously or through misrepresentation as to the communicator's true identity. Too often, these nets ensnare, as they're designed to, the most vulnerable members of our community — children and youth.
>
> Cyberspace also provides abuse intent adults with unprecedented opportunities for interacting with children that would almost certainly be blocked in the physical world. The rapid development and convergence of new technologies will only serve to compound the problem. Children are the frontrunners in the use of new technologies and in the exploration of social life within virtual settings.

(quoting Gregory J. Fitch, Q.C., "Child Luring" (Paper presented to the National Criminal Law Program: Substantive Criminal Law, Advocacy and the Administration of Justice, Edmonton, Alberta, July 2007), Federation of Law Societies of Canada, 2007, at s. 10.1, pp. 1 & 3.)

In light of this danger, the Court held, the explicit goal of the section was to avoid the risks inherent in the internet, and to prevent harm before it could occur. Section 172.1 therefore created an offence which:

> criminalizes conduct that *precedes* the commission of the sexual offences to which it refers, and even an attempt to commit them. Nor, indeed, must the offender meet or intend to meet the victim with a view to committing any of the specified secondary offences. This is in keeping with Parliament's objective to close the cyberspace door before the predator gets in to prey.

The offence required the Crown to prove three elements, the Court held: (1) an intentional communication by computer; (2) with a person whom the accused knows or believes to be under 14 years of age; (3) for the specific purpose of facilitating the commission of a specified secondary offence with respect to the underage person.

The Court held that the purpose had to be proven on a subjective basis, and that the offence was a specific intent crime. This relatively strict standard was meant to counter-balance, to some degree, how remote the actual forbidden behaviour was from any harm. "Grooming", they held, could take place in the absence of any explicit language. It also did not matter whether the acts were objectively capable of facilitating the commission of the secondary offence. What mattered was the subjective purpose held by the accused.

Pay TV and Cable Marketing: Undue Advantage by CSRs

The Ontario Superior Court of Justice has delivered its ruling in *Allarco Entertainment 2008 Inc v. Rogers Communications Inc.* The case involved two motions. In the first, the defendants moved for an order to stay or dismiss the plaintiff claim and argued that CRTC has sole jurisdiction over the subject matter of the plaintiff's motion. In the alternative, the defendants moved for an order for the plaintiffs to post security for costs. On their part, the plaintiffs move for an interim injunction restraining the defendants' customer service representatives (CSRs) from making negative comments about Super Channel, a pay television service of the plaintiffs which is marketed by the defendant.

After approving, in 2006, the plaintiffs' application for a pay TV, (the Super Channel) the CRTC noted that the new channel would compete with other English language pay TV services distributed by broadcasting distribution undertaking (BDU). It further noted that given the incumbency situation in that market, "it would be unreasonable to expect Super Channel to meet its business plan without comparable BDU distribution requirement" (para 6). Consequently, pursuant to section 9 of the CRTC Regulations, the CRTC required that Super Channel be distributed by class 1 BDU which the defendants, Rogers Communications Inc., provided via Rogers Capable. The following year, the plaintiffs and the defendants entered into an affiliation agreement for the distribution of Super Channel. Among other technical details, the agreement provided that parties should coordinate efforts in providing support for the advertisement of Super Channel. That same year, Rogers Capable entered into a marketing support agreement with the plaintiffs in which both parties agreed on some budget for the marketing of Super Channel. The plaintiffs maintained that both parties committed to act in good faith regarding

the marketing initiative. In 2009, Super Channel subscription was quite poor. Although parties are in disagreement as the reason for this poor outcome, the plaintiffs believed "that the low rate is in large part due to negative comments about Super Channel made by Rogers' CSRs at the call centers" (para 11). Rogers insisted that its CSRs are trained to be responsive to customer questions and needs and that it has complied with its obligations under the two agreements.

In their complaint to CRTC, the plaintiffs alleged that both Rogers Cable and Rogers Communications Inc. did violate "the CRTC decision granting the license [for Super Channel] and section 9 of the CRTC Regulations by failing to distribute Super Channel in a manner comparable to competing channels and by conferring an undue preference on these competing channels" (para 13). In September 2009, the CRTC decided that Rogers Cable actually subjected the plaintiffs to an undue disadvantage in regard to the marketing of Super Channel contrary to section 9 the Regulations. The CRTC required Rogers to file before it details of steps it would take to remedy the situation by October 2009. The plaintiffs' present court action was commenced in July 2009. Among other things, they ask for specific performance of the 2007 marketing agreement with the defendant, damages and detailed injunctive reliefs, including notably prohibiting the defendants from making negative comments to the public regarding Super Channel. The defendants argue that the CRTC has exclusive jurisdiction over the subject matter of the present suit and that the court should defer to the CRTC. Also, the defendants argue that there is no serious issue to be tried and should the injunction be granted, the plaintiffs must provide security for costs. On their part, the plaintiffs insist the court has jurisdiction and that the CRTC does not have jurisdiction to award damages or to grant injunctive reliefs.

In its ruling, the court noted that even though the CRTC proceeding was not identical with the present action, the subject of the action is essentially the same with the CRTC proceeding. According to the court, "[i]n essence, the plaintiffs complain about the inferior promotion of Super Channel. Particular focus is placed on the performance of CSRs." (para 41). Since "CRTC gave Rogers Cable time to address the issue of undue preference so that CRTC may grant an additional remedy" (ibid). Consequently, in a way, the CRTC is treating the issue of injunctive relief now before the court. The court affirmed that it should not intrude but would rather defer to the jurisdiction of CRTC, especially when the matter is ongoing before the regulatory body. It further ruled, however, that "[c]onsistent with case law, the plaintiffs should not be deprived of their right to claim and pursue damages but such right should be stayed until CRTC has disposed of the substance of the plaintiffs' complaints and their requests before it for monetary relief" (para 43).

Real Estate: Breach of User Agreement by Derivative Website

The Ontario Superior Court has delivered its ruling in *Beach v. Toronto Real Estate Board*. In that case the Plaintiff applied for a declaration that the Toronto Real Estate Board (TREB)'s decision to terminate the Plaintiff and a third party (BNV Real Estate) access to TREB's Multiple Listing Service (MLS) system website in 2007 was unjustified. The MLS system is operated by the TREB. It enables TREB's members to post and search listing information for properties in the Greater Toronto Area (GTA). Members accessed the service through a TREB-issued password.
The plaintiff/applicant is a member of TREB who developed a business plan in which he sought to sell residential estates in a virtual office setting. The third party, BNV had similar plan for which it enlisted the applicant as its broker. BNV aimed at capitalizing in its hi-tech expertise to provide residential real estate brokerage services to clients at reduced price and at a high speed in its state of the art website.
In an ideal situation, while it would take about one minute to respond to client inquiry using exiting TREB services, "given the technological resources Bell Canada had committed to BNV", the latter is capable of responding to client inquiry in only a few seconds (para 39). The expectation is that those who use the website would then patronize BNV as their agent in the ensuing transaction. Using Beach's MLS access password, BNV downloaded and transferred, in bulk, residential building listings at an unparalleled speed. It then made the listings available through its BNV Real Estate Plus website for the members of the public in 2007. The BNV Real Estate Plus website

depends mainly on having access to TREB's MLS database. When TREB became aware of this practice, it terminated Beach and BNV's access to the MLS. TREB argues that the republication of MLS database of all residential listings in the GTA by one member without authorization marked a significant shift in business practice not covered by the authorized user agreement (AUA) that binds all members of the TREB. In addition to insisting that he was not in breach of the user agreement, the applicant argues that TREB's unilateral termination of his MLS access was in breach of its own rules and procedures.

In dismissing the application, the court found that BNV was in breach of section 2 of TREB's AUA. Specifically, the BNV practices did not comply with the requirement to confine access to MLS database to exclusive and internal use only. Rather, BNV extended such access externally to the members of the public. Also, the court found that BNV's activity amounted to creation of a derivative work of MLS database which infringed aspects of section 7 of the AUA. The court also found that given the magnitude of the breach, TREB was justified for not giving Beach notice before it terminated his access to MLS. The reaction of TREB was not only proper and pragmatic in the circumstances, it was also consistent with MLS Policy 508 which confers sole discretion on TREB to terminate or suspend a member's access on grounds of unauthorized or improper use of the MLS online resources. The court concluded that given that the BNV and Beach's business model depended on wholesale access to the MLS online database, and there was not much they could do to stem the breaches. Consequently, TREB was justified in maintaining an indefinite termination of Beach and BNV's access to the MLS system.

Retrospectivity of Breathalyser Amendments

The *Criminal Code* was amended in July 2008 to attach restrictions to the Carter defence, making it more difficult for an accused to rebut the presumption of the accuracy of a breathalyser reading (see the IT.Can newsletter discussion of the passage of the Bill and of the rejection of a constitutional challenge to the amendments. See the latter discussion for a more complete explanation of the way in which the provisions work). A further issue which had arisen in many cases was whether the amendments applied retrospectively: that question affected approximately 3000 cases in Ontario alone. In *R. v. Dineley*, the Ontario Court of Appeal has concluded that the amendments do apply retrospectively, and therefore that even accused charged before the amendments were proclaimed are required to meet the stricter requirements if they wish to rebut the presumption of the accuracy of a breathalyzer reading.

The Court of Appeal noted that although statutes are presumed not to apply retrospectively if they have substantive effect, that presumption does not apply to amendment which relate only to procedural or evidentiary matters. The amendments to section 258(1)(d.01) were essentially evidentiary in nature. They added additional elements to the type of evidence an accused was required to call to rebut the presumption of accuracy, but they remained evidentiary provisions. The Carter defence had not been eliminated entirely, merely changed, and so the amendments were not substantive.

Criminal Law and Sentencing: Video-Taping Own Sexual Assault

The Newfoundland and Labrador Provincial Court has delivered its ruling in *R v. J.J.H.* In that case, the accused was the stepfather of the sixteen-year old complainant since she was three years. He pleaded guilty of possession of child pornography and sexual assaults on the complainant. In regard to the latter plea, the accused filed a detailed statement of facts that outlined the extent of his sexual exploitation of the complainant over several years. The child pornography involved 71 exclusive digital photographs of the complainant taken by the accused for own sexual perversion. They were not intended for distribution. The pictures were vile, disgusting and extremely disturbing and included, among other things, images of the accused's sexual exploitations of the complainant, in a manner that violated her integrity, personhood and her privacy.

The agreed statement of facts contained accounts of how the complaint, after enduring several years of sexual abuse from her stepfather, decided to confide in third parties. First, she confided in a friend she

met on the internet. Then, she disclosed her ordeal to her two friends at school. She explained that fears, frustrations and powerlessness over her stepfather were the reasons she did not seek help earlier. One of the complainant's school friends suggested that the complainant use her digital camera which had video capabilities to obtain evidence which would assist in lodging a complaint. The complainant agreed. She hid her camera in a transparent make-up bag on a shelf in her room. The device recorded a 28 minute long episode of the accused's sexual exploitation of the complaint which paved the way for an investigation. Also, the agreed statement of facts detailed other manipulative, orchestrated and opportunistic devices through which the accused exploited the complainant over a long period. The accused's exploitation resulted in the complainant's pregnancy which was terminated in 2009. The accused perfected the sexual exploitation into an art and game. On occasions, he gave the complainant "a list of choices of sex act that she was to engage in, known as "options". The complainant was required to pick the "options" blindly like in a game of card and then the accused would perform the "elected" act. It was a scheme of planning, premeditation, and is tantamount to inviting a child to choose her own poison" (para 20).

Both the Crown and defence counsel were in agreement that the general range of sentence in this type of case is between two and ten years subject to the circumstances. The defence, however, urged the court to take into account the fact that there was a guilty plea and that the accused did not apply violence in excising his devilish sexual orgies on the complainant. The court found that "[t] he overwhelming breach of trust, the repeated and intrusive acts, the psychological duress imposed on the child, the pregnancy, the photographs, and the "options" list all impel me to the higher end of the range" (para 24). In regard to the absence of violence, the court cited *R v. C.C.S.* (1990) in which a court imposed seven year sentence for repeated sexual assault of a stepdaughter by a stepfather which involved violence. It then noted that even if the present case did not have elements of overt violence, "this child was impregnated and underwent abortion and was forced to follow a list of "options". This child was subjected to humiliation of taking pornographic pictures. This is a collateral crime".

The court observed that "[h]ad the complainant not been strong enough to seek support and had she not had the ingenuity to install the video camera in her bedroom, I believe the abuse would have continued to this day" (para 26). After reviewing the fundamental purpose of sentencing under the *Criminal Code*, the court found that the pornographic pictures constituted a serious and aggravating factor overall. The court then allowed the accused credit for 14 months pre-trial custody and sentenced him to six years and four months for sexual assault and possession of child pornography. The sentence for creation of the pictures is three years which would run concurrently. The court also made several ancillary orders, including the forfeiture, to Her Majesty, of the computer and other devices used by the accused to make child pornography.

2ième partie

Interprétation de l'infraction de leurre par Internet

L'accusé, âgé de 32 ans mais prétendant en avoir 17, a participé à des sessions de clavardage à caractère sexuel avec une enfant de 12 ans, l'a appelée et a tenu des propos sexuels lors de cette conversation. La plaignante a raccroché et il ne l'a plus rappelée. L'accusé a par la suite été arrêté et inculpé notamment d'un chef de leurre, infraction prévue à l'al. 172.1(1)c) du *Code criminel*. L'accusé a été acquitté au procès, mais la Cour d'appel de l'Alberta a annulé son acquittement et a ordonné la tenue d'un nouveau procès. L'accusé en appelle de ce jugement.

La Cour suprême du Canada rejette le pourvoi de l'accusé. L'alinéa 172.1(1)c) crée une infraction préliminaire ou « inchoative » qui comporte trois éléments : (1) une communication intentionnelle au moyen d'un ordinateur; (2) avec une personne dont l'accusé sait ou croit qu'elle est âgée de moins de 14 ans; (3) dans le dessein précis de faciliter la perpétration à son égard d'une infraction sous-jacente énumérée. Cette disposition érige en crime des actes qui précèdent la perpétration des infractions d'ordre sexuel auxquelles elle renvoie, et même la tentative de les perpétrer. Il n'est pas nécessaire que le délinquant rencontre ou ait l'intention de rencontrer la victime en vue de perpétrer une des infractions sous-jacentes énumérées. Une telle interprétation, selon la Cour, « est conforme à l'objectif du législateur de fermer la porte du cyberespace avant que le prédateur ne la franchisse pour traquer sa proie ». Dans ce contexte, le terme « faciliter « s'entend notamment du fait d'aider à provoquer la perpétration et de la rendre plus facile ou plus probable. Ce qui importe « c'est de déterminer si *la preuve dans son ensemble* établit hors de tout doute raisonnable que l'accusé a communiqué au moyen d'un ordinateur avec une victime qui n'a pas atteint l'âge fixé en vue de faciliter la perpétration à son égard d'une infraction d'ordre sexuel énumérée. »

- *R. c. Légaré*, 2009 CSC 56 (CanLII), 3 décembre 2009.

Droit de propriété et/ou droit d'usage attaché à un nom de domaine

Invoquant son droit de propriété, la Canadian Society for the Prevention of Cruelty to Animals (CSPCA) réclame une injonction interlocutoire visant à interdire à la Society for the Prevention of Cruelty to Animals International (SPCAI) d'utiliser le nom de domaine *spca.com*. La création de SPCAI et du site spca.com résulte d'une résolution du 22 mars 2006 adoptée à l'unanimité par le conseil d'administration de la CSPCA. La SPCAI était autorisée à conserver les fonds recueillis par le site *spca.com* tout en versant un pourcentage de redevances à la CSPCA.

La requête est accueillie en partie. En l'absence de preuve de l'enregistrement du nom de domaine *spca.com* en faveur de la CSPCA et en l'absence de loi spécifique encadrant les noms de domaine au Québec, la Cour est d'opinion que les règles générales du droit civil québécois s'appliquent à cet égard. La question de savoir si le droit attaché au nom de domaine relève du droit de propriété ou du droit d'usage en est une qui doit être décidée au mérite et non au stade interlocutoire. Par ailleurs, même si le droit attaché au nom de domaine en est un de propriété, une personne peut aussi en transférer l'usage à une autre. La preuve démontre que le nom de domaine *spca.com* a été utilisé pour la première fois par la CSPCA et qu'elle a clairement transféré son droit d'utiliser le nom à la SPCAI par résolution du 22 mars 2006. À ce stade, la CSPCS n'a pas de droit apparent d'utiliser le nom de domaine *spca.com*, la situation ne lui cause pas de préjudice irréparable et la prépondérance des inconvénients favorise SPCAI ; le statu quo devrait donc être maintenu. Cependant, la CSPCS a un droit aux redevances et d'être informée des donations reçues par l'intermédiaire du site *spca.com*. La cour ordonne à la SPCAI d'informer et de rendre compte des revenus d'exploitation du site et donne acte de l'offre de la SPCAI de déposer une somme d'argent pour payer les redevances.

- *Canadian Society for the Prevention of Cruelty to Animals (CSPCS) c. Barnoti*, 2009 QCCS 4565 (CanLII), 13 octobre 2009.

Opérer un site Internet constitue une activité de courtage

Dans cette affaire, l'Autorité des marchés financiers soutient, entre autres, qu'une firme a continué d'opérer ses activités de courtage pendant la suspension de ses droits, notamment en offrant ses services via son site Internet. Il convient alors de se demander si le fait d'opérer un site Internet peut constituer une activité de courtage au sens de l'article 5 de la *Loi sur les valeurs mobilières*. Parmi les activités de courtage énumérées à l'article 5 (tel qu'en vigueur au moment des faits), l'activité d'intermédiaire ainsi que le démarchage sont visées en l'espèce par la mise en place d'un site Internet.

Le Bureau de décision et de révision en valeurs mobilières considère qu'on doit interpréter la réglementation relative aux valeurs mobilières en fonction de l'évolution des divers médias utilisés par les intervenants des marchés financiers afin d'assurer la protection du public investisseur, particulièrement dans un contexte où ce sont surtout les investisseurs au détail qui sont visés par la sollicitation par le biais d'Internet. Le Bureau considère que l'acte visant à proposer à d'éventuels clients via un site Internet la participation à des opérations sur valeurs et à offrir des services de courtage électronique constitue une activité d'intermédiaire et de démarchage en vue d'exercer l'activité d'intermédiaire dans les opérations sur valeurs et donc une activité de courtage au sens de la définition de « courtier en valeurs ». En l'espèce, la firme FDDL offrait par le biais d'Internet des services de courtage électronique permettant aux investisseurs d'obtenir un accès direct aux marchés de capitaux via Internet à même leur ordinateur personnel ou ceux mis à leur disposition dans les locaux de la firme à Montréal. Ainsi, le Bureau conclut que la firme a effectué des activités de courtage non permises pendant la suspension de ses droits puisque la firme continuait d'opérer ses activités à partir de ses locaux à Montréal.

- *Autorité des marchés financiers c. F. D. De Leeuw & Associés inc.*, 2009QCBDRVM 65, 30 novembre 2009, AZ-50588902.

Protection du consommateur – Encadrement des services de téléphones cellulaires

Le 2 décembre 2009, l'Assemblée nationale adoptait le Projet de loi no 60 modifiant la Loi sur la protection du consommateur et d'autres dispositions législatives et qui vient encadrer, entre autres, les services de téléphones cellulaires. Les nouvelles dispositions législatives visent à améliorer l'équilibre des droits et des obligations entre les consommateurs et les commerçants et à proposer des solutions à des problèmes d'actualité dénoncés par les consommateurs.

Au chapitre des contrats de services fournis à distance, tels les services de téléphonie cellulaire, l'information devant apparaître au contrat a été précisée, ainsi que les éléments qui seront pris en compte en ce qui a trait à l'indemnité de résiliation qui pourra être exigée du consommateur. Dorénavant, les commerçants devront annoncer le prix total des biens et services offerts, à l'exclusion des taxes à la consommation. Une nouvelle disposition viendra limiter les frais de résiliation de contrats, souvent décriés par les consommateurs. L'indemnité de résiliation ne peut excéder le montant des bénéfices économiques déterminés par règlement et cette indemnité décroît au cours du contrat selon les modalités qui seront prévues au règlement.

L'entrée en vigueur de ces nouvelles dispositions est prévue au plus tard le 30 juin prochain.

- *Loi modifiant la Loi sur la protection du consommateur et d'autres dispositions législatives*, (Projet de loi no 60), 1ère session, 32ième législature, sanctionnée le 4 décembre 2009.

Protection de la vie privée des enfants en ligne

Le Groupe de travail sur la protection des renseignements personnels des enfants en ligne, composé de défenseurs des enfants et de la jeunesse ainsi que des commissaires à l'information et à la protection de la vie privée du Canada et des provinces, a remis son document de réflexion en cette année marquée par le 20e anniversaire de la Convention relative aux droits de l'enfant.

Le groupe a examiné « la question de la protection des renseignements personnels des enfants en ligne selon deux points de vue, soit la commercialisation de l'espace virtuel destiné aux enfants, dont la publicité qui s'adresse directement aux enfants, et l'utilisation de cet espace virtuel afin d'entreprendre l'exploration des données à des fins commerciales, et de protéger les enfants contre les dangers d'Internet, dont la pornographie juvénile, l'exploitation et la cyberprédation ». Le groupe s'est également penché sur les nouveaux risques à la vie privée des enfants par l'utilisation malveillante des sites de réseautage social, la cyberintimidation, le « sexting » et la diffamation en ligne.

Le document de réflexion présente d'abord les dangers possibles tels l'exploitation commerciale ou sexuelle des enfants en ligne et l'atteinte à la vie privée en ligne. Puis on y discute des options de réformes législatives : limiter ou interdire la collecte en ligne des renseignements identificateurs et non-identificateurs des enfants par la voie de sites web commerciaux; limiter ou interdire la publicité destinée au enfants de moins de 13 ans (modèle du Québec); interdire la publicité intégrée aux jeux et aux espaces de jeux virtuels des enfants; obliger les fournisseurs de services Internet à conserver les données sur les clients pour aider et appuyer les activités d'application de la loi; obliger les FSI à bloquer l'accès aux sites contenant des images de pornographie juvénile; rendre le signalement de la pornographie juvénile obligatoire pour tous et empêcher la divulgation du matériel d'enfants exploités sexuellement à l'avocat de la défense durant des instances criminelles. Et le Groupe de conclure : *« Compte tenu de la grande présence d'Internet dans la vie des enfants et des jeunes à la maison, les parents ne devraient pas être les seuls à contrôler la protection des renseignements personnels des enfants en ligne. Il faut des modifications législatives, conjuguées à de bonnes campagnes de sensibilisation et d'éducation du public, qui protégeront mieux leurs renseignements personnels en ligne et feront d'Internet un univers plus sécuritaire pour les enfants. »*

- Groupe de travail sur la protection des renseignements personnels des enfants en ligne, *Il devrait y avoir une loi : Les sauts périlleux de la vie privée des enfants au 21e siècle*, document de réflexion à l'intention des Canadiens du Groupe de travail des commissaires à la vie privée et des défenseurs canadiens des enfants et des jeunes sur la protection des renseignements personnels des enfants en ligne, 19 novembre 2009.

Compétence des tribunaux français sur une demande relative à la vente de produits contrefaisants sur eBay – France

Dans un arrêt du 2 décembre 2009, la cour d'appel de Paris a rejeté l'exception d'incompétence invoquée par eBay SA, eBay Europe et eBay Inc. Le tribunal a considéré que dès lors que l'on peut établir la vente en France de produits contrefaisants, le tribunal français est compétent « sans qu'il soit utile de rechercher s'il existe ou non un lien suffisant, substantiel ou significatif entre les faits allégués et le territoire français ». Pour la cour, il importe peu que les annonces soient rédigées en anglais, « la compréhension de quelques mots basiques en cette langue étant aisée pour quiconque ». Quant à l'extension en « .com », elle « n'emporte aucun rattachement à un public d'un pays déterminé ». C'est pourquoi il suffit que le site, même exploité aux États-Unis soit accessible sur le territoire français et que le préjudice allégué et subi se situe en France pour que la question relève de la juridiction du juge français.

- *eBay Europe, France et Inc / Maceo*, Cour d'appel de Paris Pôle 1, 2ème chambre, Arrêt du 2 décembre 2009.

Annulation d'un congédiement d'une salariée suite à l'envoi d'un courriel critique de l'employeur – France

Une vendeuse avait expédié un courriel sur un ton satirique et très critique sur les dépassements d'horaire non rémunérés, les rythmes tendus et stressants pendant la période de Noël et d'autres récriminations. La société l'avait licenciée, considérant que ce courrier électronique était marqué par l'intention de nuire. La Cour de

cassation, dans un arrêt rendu le 10 novembre 2009, a approuvé la cour d'appel d'Aix-en-Provence qui avait jugé le licenciement, sans cause réelle et sérieuse, d'une salarié pour son envoi d'un courriel critique à l'égard de ses conditions de travail et de rémunération. La cour d'appel avait estimé que dans la mesure où l'employée n'avait pas tenu de propos injurieux, diffamatoires ou excessifs, elle n'avait commis aucun abus dans l'exercice de sa liberté d'expression. L'article L. 2281-4 du code du travail français prévoit que « le droit des salariés à l'expression directe et collective s'exerce sur les lieux et pendant le temps de travail ». La cour d'appel avait précisé que « le lieu de travail doit s'entendre aussi de l'espace internet, dès lors qu'il fonctionne en réseau interne à l'entreprise et qu'il constitue un lieu de centralité des personnels disséminés ».

- *Maisons du Monde / Co P.*, Cour de cassation, Chambre sociale, Arrêt du 10 novembre 2009.

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.