Canadian Internet Law Update - 2016

March 30, 2017

A. Intellectual Property – Trade-marks

1. Court-ordered Domain Name Transfer

Michaels v. Michaels Stores Procurement Co., Inc., 2016 FCA 88, involved a dispute over the use of the www.michaels.ca domain name that allegedly infringed Michaels Stores' trademarks and caused consumer confusion. Michaels Stores obtained default judgment against the appellants, including an order requiring transfer of the www.michaels.ca domain name to Michaels Stores. The appellants appealed and challenged the trial court's jurisdiction to order the domain name transfer. The court of appeal dismissed the appeal. The court confirmed that the trial court had jurisdiction to order transfer of the domain name pursuant to the *Trade-marks Act* and the *Federal Courts Act*, and held that the trial judge had not erred in exercising that jurisdiction. The court reasoned that the domain name was the mechanism by which Michaels Stores' trademarks were infringed and was the instrument of confusion in the marketplace.

2. Infringing Website and Domain Name

Thoi Bao Inc. v. 1913075 Ontario Ltd. (Vo Media), 2016 FC 1339, involved a dispute between two Vietnamese language news businesses. The plaintiff used the THOI BAO trademark and the www.thoibao.com domain name in association with its news business. Two former employees of the plaintiff established the defendant company and began operating a competing online Vietnamese language news website called TBTV, which used the www.thoibaotv.com domain name, included the plaintiff's trademarks in meta tags and hidden text, and redistributed the plaintiff's television shows and newscasts without authorization. The court held that the corporate defendant had infringed the plaintiff's trademark rights and violated the plaintiff's copyright in its daily news programs. The court held that the individual defendant had hands-on, personal involvement in the corporate defendant's infringing activities and therefore was personally liable. The court awarded the plaintiff $15,000 for trademark infringement (based on a royalty approach) and $10,000 statutory damages for two incidents of copyright infringement, but refused to award punitive damages on the basis that there was no evidence of malice, prolonged infringement, or profit. The court ordered the defendants to promptly transfer all infringing domain names and social media accounts to the plaintiff and granted an injunction prohibiting future unlawful conduct by the defendants.

3. Infringing Domain Names

Boaden Catering Ltd. v. Real Food for Real Kids Inc., 2016 ONSC 4098, involved a complicated dispute between competing catering companies. The defendant used the trademarks REAL FOOD FOR REAL KIDS and RFRK and the domain name rfrk.com. The plaintiff registered the domain names realfoodforrealkidss.com, realffoodforkids.ca and rfrk.ca. The defendant successfully challenged those domain name registrations in arbitration proceedings under the *Uniform Domain-Name Dispute- Resolution Policy* and the *CIRA Domain Name Dispute Resolution Policy*, and the arbitrators ordered the domain names transferred to the defendant. The plaintiff then commenced the lawsuit for an order that the plaintiff was the lawful owner of the domain names. The court dismissed the plaintiff's claims regarding the domain names on the basis that the plaintiff had registered the domain names in bad faith for the purpose of exploiting the value of the defendant's trademarks or for illegitimate financial gain.

B. Copyright

1. Use of Photograph Posted on Instagram

Chung c. Brandy Melville Canada Ltd., 2016 QCCQ 2735, involved a dispute over the unauthorized use of a photograph, taken by the plaintiff professional photographer, of the defendant's employee modelling the defendant's clothing. The plaintiff, who was not paid for the photograph, agreed with the employee that the photograph could be posted on Instagram without the plaintiff's name but with a credit to the plaintiff by "tagging". The defendant downloaded the photograph from Instagram and used the photograph on a promotional postcard attached to the defendant's shopping bags. The defendant disputed the plaintiff's authorship of the photograph and argued (without supporting evidence) that Instagram rules provide that the authorized posting of an item to Instagram results in the loss of all intellectual property rights in the item. The court held that the plaintiff was the author of the photograph, and that the defendant's unauthorized use of the photograph constituted blatant infringement of the plaintiff's copyright and moral rights under the *Copyright Act* and an unlawful and intentional interference with the plaintiff's right to peaceful enjoinment and disposition of his property under the Quebec Charter of Human Rights and Freedoms. The court awarded the plaintiff $5,000 damages.

2. Pre-trial Injunction against Online Video

Vancouver Aquarium Marine Science Centre v. Charbonneau, 2016 BCSC 625, involved a dispute over the defendants' publication of a video entitled "Vancouver Aquarium Uncovered" that purported to expose the truth about whales and dolphins in captivity. The plaintiff aquarium claimed the video included fifteen video and image segments, comprising approximately five minutes of the 61-minute video, owned by the plaintiff and used without permission in violation of the plaintiff's copyright and in breach of a contract signed by one of the defendants. The plaintiff applied for a pre-trial injunction to stop the publishing of the video with the fifteen segments. The court held that there was a fair question to be tried regarding the plaintiff's copyright infringement claims and potential fair dealing defences. The court held that there would be irreparable harm if the injunction were not granted because it would be impossible to calculate or repair the damage to the plaintiff caused by the unauthorized, derogatory use of the fifteen segments. The court concluded that the balance of convenience would be achieved by ordering the defendants to remove the fifteen segments from the video. The court issued an injunction restraining the defendants from publishing in any manner (including online publication) the offending video (with the fifteen segments), requiring the defendants to remove the offending video from all online sources, and requiring any person to remove the offending video from any public location within seven days after receiving notice of the order. The court clarified that the injunction did not prohibit publication of a modified version of the video without the fifteen segments.

3. Fair Dealing Defence for Use of Paywall Protected Content

1395804 Ontario Ltd. (Blacklock's Reporter) v. Canada (Attorney General), 2016 FC 1255, involved a dispute over the distribution within the Department of Finance of copies of two news articles critical of the Department that were published by the plaintiff online news agency. The plaintiff used a paywall to protect its online news articles against unauthorized access, and sold paid subscriptions available through an online application. An employee of the Department purchased a subscription to access the articles, and then forwarded copies to other Department officials. Only six Department officials received copies of one or both articles. The plaintiff sued for copyright infringement. The defendant admitted that the articles were protected by copyright and used without payment or consent, but argued that the use was fair dealing for research purposes permitted under *Copyright Act*, s. 29. The court held that the use of the two articles constituted fair dealing because the articles were circulated for a proper research purpose and the scope of use was fair. The court reasoned that all six Department officials had a legitimate reason to read the articles with a view to holding the plaintiff accountable for its questionable reporting. The court acknowledged that a deliberate breach of accepted terms of access to copyrighted material was a relevant consideration in assessing fair dealing, but held that the plaintiff's Terms and Conditions were either not binding or ambiguous. The court rejected the plaintiff's argument that fair dealing with its news articles challenged the viability of its business model, reasoning that all subscription-based news agencies suffer from work-product leakage and that the plaintiff was not entitled to special treatment because its financial interests might be adversely affected by fair use of its articles. The court cautioned, however, that its reasons should not be taken as “an endorsement of arguably blameworthy conduct in the form of unlawful technological breaches of a paywall, misuse of passwords or the widespread exploitation of copyrighted material to obtain a commercial or business advantage”. The court dismissed the action.

4. Pre-trial Injunction against Sale of Pre-loaded Set-top Boxes

Bell Canada v. 1326030 Ontario Inc. (*iTVBox.net*), 2016 FC 612, involved a dispute over the sale of pre--loaded “plug-and-play” set-top boxes that contained software applications designed to access and download unauthorized copies of the plaintiffs' copyright protected works from illegal online streaming websites and illegal Internet protocol television sites. The plaintiffs sued individual and corporate resellers of the set-top boxes for copyright infringement and violation of the *Radio communication Act*. A defendant argued that the pre-loaded set-top boxes were analogous to a computer on which anyone can install freely available applications and were nothing more than a conduit with substantial non-infringing uses. The defendant also invoked the defence for Internet intermediaries provided by *Copyright Act*, s. 2.4(1)(b) on the basis that the defendant was simply providing a means of telecommunication for use by another person. The court rejected the defendant's arguments. The court held that the plaintiffs had demonstrated a serious issue to be tried as to whether the defendants were inducing or authorizing copyright infringement. The court held that the defence for Internet intermediaries was not applicable to the defendants because they deliberately encouraged and assisted customers and potential customers to access the plaintiffs' content without the need for a cable subscription. The court held that the plaintiffs would suffer irreparable harm if the injunction was not granted because the continued sale of the pre--loaded set-top boxes would allow consumers to continue to access copyrighted content, even if the plaintiffs were successful at trial, and because the defendants were unlikely to have the financial resources required to compensate the plaintiffs for their losses. The court held that the balance of convenience favoured an injunction because the defendants would not unduly suffer from being restricted to selling and advertising set-top boxes with only legal, non-copyright-infringing applications. The court granted an injunction restraining the defendants from configuring, advertising, offering for sale or selling set-top boxes adapted to provide users with unauthorized access to the plaintiffs' works, but refused the plaintiffs' request to extend the injunction to persons who were not named defendants.

5. Damages for Unjustified Takedown Notice

Whyte Potter-Mäl c. Topdawg Entertainment Inc., 2016 QCCQ 11725, involved a claim for damages after one of the plaintiff's songs was taken down from YouTube and SoundCloud for two months due to the defendants' report that the song infringed their copyright. The plaintiff sought damages in the amount of $15,000. The defendants did not contest the application. The court concluded that the plaintiff's income and reputation were negatively affected by the defendants' false copyright infringement report. The court awarded the plaintiff $5,000 in moral and material damages to be paid by the defendants jointly, and $1,000 per defendant as an additional indemnity.

C. Electronic Transactions

1. Unenforceable Online Terms and Conditions

1395804 Ontario Ltd. (Blacklock's Reporter) v. Canada (Attorney General), 2016 FC 1255, involved a dispute over the distribution within the Department of Finance of copies of two news articles critical of the Department that were published by the plaintiff online news agency. The plaintiff used a paywall to protect its online news articles against unauthorized access, and sold paid subscriptions available through an online application. The application process did not require a subscriber to acknowledge and accept any terms of use, but the foot of the subscription page referenced "Terms and Conditions". An employee of the Department purchased a subscription to access the articles, and then forwarded copies to other Department officials. The plaintiff sued for copyright infringement, and the defendant argued that the use of the articles was fair dealing for research purposes permitted under *Copyright Act*, s. 29. In assessing the fair dealing defence, the court held that the plaintiff's Terms and Conditions were not binding because the plaintiff failed to ensure that its subscribers were aware of the Terms and Conditions. The court held (at para. 40) that the plaintiff's approach was "deficient and potentially misleading" to subscribers because the Terms and Conditions were not clearly brought to subscribers' attention for acceptance. The court stated (at para. 41): "The requirement for bringing contractual conditions to the attention of a subscriber at the time of purchase is well-known in the law. It is not something that is imposed by bare inference or by falling back on the supposed sophistication of users. At a minimum the party to be bound must be shown to have been aware of the Terms and Conditions at the time of purchase". The court also held that the plaintiff was bound to the interpretation of the Terms and Conditions that was most favourable to subscribers, and that the Terms and Conditions contained a material ambiguity that could be interpreted to permit use of paid content for non-commercial uses. The court dismissed the action.

2. Contract Interpretation Principles

Sankar v. Bell Mobility Inc., 2016 ONCA 242, involved a certified class action proceeding challenging Bell Mobility's practice of keeping the unused balance of a prepaid wireless phone card account when the subscriber failed to top up the account before the end of its active period. The plaintiff claimed that Bell Mobility breached the applicable terms of service. The motion judge ruled that Bell Mobility did not breach the terms of service, and relied on certain other related contract documents in his interpretation of the terms of service. On appeal, the court of appeal affirmed the motion judge's decision and his approach to the interpretation of the terms of service. The court explained that it is not uncommon in modern contracts, including contracts made partly on paper and partly on the Internet, for the contract terms to be found in several documents, and it is well settled that where parties enter into inter-related agreements the court is required to look to all those agreements to determine their construction.

3. Electronically Signed Union Membership Cards

Working Enterprises Consulting and Benefits Services Ltd. v. United Food and Commercial Workers International Union, Local 1518, 2016 CanLII 29625 (BC LRB), involved a union's application for certification of a unit of four employees based on electronically signed and dated membership cards (instead of ordinary signed paper membership cards) as evidence of union membership. The membership cards were created using a software program that enabled the creation of an electronic signature using either a "draw" function (the signer uses a finger or stylus to physically sign as though signing on paper) or a "type" function (the signer types his name and the program generates a signature in handwriting font that is presented in quotation marks). The union provided a detailed explanation and audit trail for the electronic membership cards. The Labour Relations Board held that the membership cards signed using the "draw" function satisfied Labour Relations Regulation requirements, but the card signed with the "type" function did not because the signature was no different than a pen and paper printed block signature in quotation marks. The Board explained that it would accept electronically signed membership cards that have demonstrated reliability and authenticity regarding the date and signature and are supported with an audit trail and presentation of the device used by the union to receive the electronic cards. The Board cautioned against using an employer's email system to send or receive electronic membership cards due to statutory confidentiality obligations. The Board also stated that the union's use of the electronic signature program was "compliant" with the *Electronic Transactions Act*.

D. Privacy and Personal Information Protection

1. Civil Remedies for Revenge Porn

Doe 464533 v. D. (N.), 2016 ONSC 541, involved a claim for civil remedies for the unauthorized publication of an intimate video. The defendant, the plaintiff's ex-boyfriend, persuaded the plaintiff to record an intimate video of herself and send it to the defendant based on his assurance that no one else would see it. The defendant immediately posted the video to an Internet pornography website and shared the video with friends. The video was available online for approximately three weeks, but there was no way to know how many times it had been viewed or downloaded or whether it had been copied and re-circulated. The plaintiff was devastated, humiliated, and distraught, and suffered extensive, long-term physical and emotional harm. The defendant refused to settle or defend the action, and the plaintiff applied for default judgment. The court held that the defendant was liable for breach of confidence because the video constituted confidential information and was communicated to the defendant based on his assurance that he alone would view it, and the defendant's unauthorized disclosure of the video caused the plaintiff psychological, emotional, and physical harm. The court held that the defendant was also liable for intentional infliction of mental distress because the defendant's conduct was flagrant and outrageous, it was clearly foreseeable that the defendant's actions would cause harm to the plaintiff, and the plaintiff suffered visible and provable illness. The court held that the defendant was also liable for invasion of privacy (public disclosure of embarrassing private facts) because the defendant made public an aspect of the plaintiff's private life, a reasonable person would consider the defendant's actions to be highly offensive, and the disclosed information was not of legitimate concern to the public. The court awarded the plaintiff $50,000 as general damages, $25,000 as aggravated damages, and $25,000 as punitive damages. The court also issued injunctions to prevent a repetition of the defendant's misconduct and further violations of the plaintiff's rights. On subsequent application by the defendant, the court's default judgment was set aside: *Doe v N.D., 2016 ONSC 4920* and *Doe 464533 v N.D.*, 2017 ONSC 127.

2. Reasonable Expectation of Privacy in Private Online Messages

R. v. Craig, 2016 BCCA 154, involved a prosecution for the criminal offences of Internet luring, sexual assault, and sexual touching of a minor. The luring involved private messages sent through an online messaging service called Nexopia. The police seized the messages not from the accused's Nexopia account, but from the Nexopia accounts of the victim and her friends, each of whom did not object to the seizure and use of the messages. The accused was convicted and appealed on a number of grounds, including a *Charter* challenge to the admissibility into evidence of the seized private messages. The court held that the accused had a reasonable expectation of privacy in the messages seized from third party accounts because the messages were highly personal to the accused (they exposed intimate details of his lifestyle, personal choices, and private identifying information) and the risk that the message recipient could disseminate the messages did not destroy the expectation of privacy. The court held that, due to a number of procedural errors, the search and seizure of the messages violated the accused's *Charter* rights, but the admission of the messages into evidence would not bring the administration of justice into disrepute. The court dismissed the appeal.

3. Regulatory Proceeding regarding Data Security Practices

PIPEDA Report of Findings #2016-005 related to a joint investigation by the Privacy Commissioner of Canada and the Australian Privacy Commissioner of the 2015 data breach of a number of adult dating websites (including the Ashley Madison discreet affair website) operated by Avid Life Media ("ALM"). The data breach resulted in the unauthorized disclosure of the personal information of millions of Ashley Madison users. The investigation identified a number of contraventions of the *Personal Information Protection and Electronic Documents Act* (PIPEDA). The Privacy Commissioner held that the data security disclaimer in ALM's Terms of Service did not absolve ALM of its legal obligations under PIPEDA. The Privacy Commissioner acknowledged that a security breach does not necessarily mean there has been a contravention of PIPEDA, and that it is necessary to consider whether the safeguards in place at the time of the breach were sufficient having regard to the sensitivity of the information. The Privacy Commissioner found that ALM was required to have a high level of security given the sensitivity of the personal information, the foreseeable adverse impact on individuals (including reputational harm) should their personal information be compromised, and ALM's representations about the security of its information systems. The Privacy Commissioner concluded that ALM contravened PIPEDA because it did not have an appropriate documented information security framework and did not take reasonable steps to implement appropriate security safeguards. Although ALM had some security safeguards in place, some of those safeguards were insufficient or absent at the time of the data breach and it appeared that the safeguards were adopted without due consideration of the risks faced and absent an adequate and coherent information security governance framework to ensure that appropriate practices, systems, and procedures were consistently understood and effectively implemented. The Privacy Commissioner also concluded that ALM contravened PIPEDA by: (1) retaining personal information beyond its purpose and failing to establish maximum retention periods for information associated with inactive user accounts; (2) charging a fee for withdrawal of consent without prior notice and agreement; and (3) not taking reasonable steps to ensure that email addresses associated with new user accounts were as accurate as was necessary for the purposes for which they were to be used and failing to take into account the interests of affected individuals (including non-users). The Privacy Commissioner also concluded that ALM violated PIPEDA because the consent ALM obtained from users for the collection of their personal information was not valid due to the lack of clarity regarding ALM's retention practices and ALM's use of a fictitious trust-mark on ALM's Website. ALM entered into agreements with the Privacy Commissioner to take steps to address the issues outlined in the report.

E. Internet Defamation

1. Defamation Liability for Republication and Comments by Social Media "Friends"

Pritchard v. Van Nes, 2016 BCSC 686, involved a dispute between neighbours that resulted in the defendant making a number of completely false and unjustified Facebook postings (including allegations of pedophilia) about the plaintiff high school teacher. The defendant's Facebook friends made additional false and unjustified postings about the plaintiff on the defendant's Facebook page. The defendant deleted the postings after approximately 27 hours, but the deletion did not affect copies that had previously been shared. One of the defendant's Facebook friends forwarded copies of the postings to the principal of the school where the plaintiff taught. The plaintiff sued the defendant for nuisance and defamation. The defendant did not defend the action, and the plaintiff obtained default judgment against the defendant for damages and costs to be assessed. At the damages assessment hearing, the defendant characterized her Facebook postings as a form of "venting". The court held that the defendant was liable for her own defamatory statements about the plaintiff. The court held that the defendant was also liable for the repetitions and republications, through both Facebook reposts and by email, of the defendant's defamatory statements because an implied authorization for republication is inherent in the nature of social media and the structure of Facebook and the repetitions and republications were the natural and probable result of the defendant posting her defamatory statements on Facebook. The court held that the defendant was also liable for the defamatory statements about the plaintiff posted as comments to the defendant's Facebook page by her Facebook "friends", because the defendant knew of the defamatory comments and did not remove them within a reasonable time. The court reasoned that the defendant had a positive obligation to actively monitor and control comments posted to her Facebook page because the inflammatory content of the defendant's own postings created a reasonable expectation of further defamatory postings by the defendant's friends as part of the social media conversation. The court explained that the potential for reputations to be ruined in an instant through the use of Internet-based social media platforms ought to cause the common law to extend protection against harm in appropriate cases. For the defamation claim, the court awarded the plaintiff $50,000 general damages and $15,000 punitive damages.

2. Substantial Damages and Permanent Injunction for Fake News

Nazerali v. Mitchell, 2016 BCSC 810 and 2016 BCSC 2424, involved a dispute over defamatory articles published on the "Deep Capture" website and republished on other websites, including "Yahoo Finance". The articles falsely described the plaintiff as a market manipulator and arms dealer with ties to the Russian mafia and jihadi terrorist groups. The defendants asserted various defences – truth, fair comment, no republication, responsible communication, and protected speech under United States law – all of which were rejected by the court. The court held that the defendants engaged in a calculated and ruthless campaign to inflict as much damage on the plaintiff's reputation as they could achieve, both before and after the lawsuit was commenced, which caused the plaintiff emotional pain, disrupted the plaintiff's business relationships, and caused the plaintiff to incur considerable expense to attempt to counter the effects of the defamatory articles. The court awarded the plaintiff $400,000 general damages, $500,000 aggravated damages, $250,000 punitive damages, and $55,000 special damages (costs of search engine optimization services to attempt to mitigate the defamatory articles). The court also granted a permanent injunction restraining the defendants from making defamatory statements about the plaintiff, on the basis that the defendants intended to harm the plaintiff and would likely resist the plaintiff's enforcement of the monetary judgment. The court also ordered Google to not permit any response to an online search of the defamatory articles. The court ordered the primary defendants to pay the plaintiff's special costs. See also *Rutman v. Rabinowitz*, 2016 ONSC 5864.

3. Jurisdiction over Online Defamation Dispute

Goldhar v. Haaretz.com, 2016 ONCA 515, involved a jurisdictional dispute over an Internet libel action regarding a newspaper article uploaded in Israel. The plaintiff Canadian businessman owned an Israeli soccer team. The defendant Israeli newspaper published, in both print and on the newspaper's Hebrew and English-language websites, an article criticizing the plaintiff's management of the team in a manner that implicated the plaintiff's Canadian business practices and integrity as a Canadian businessman. The plaintiff commenced a lawsuit in Ontario claiming damages for libel. The defendant newspaper brought a motion challenging the court's jurisdiction. At the jurisdiction hearing, the plaintiff agreed to limit his damages claims to reputational harm suffered in Canada only, and to pay for the costs of Israeli witnesses to travel to Ontario for purposes of the lawsuit. The motions judge dismissed the defendant's motion, and the defendant appealed. The Court of Appeal majority dismissed the appeal on the basis that the libel action had significant connections to Ontario and was not a case of libel tourism, and an Israeli court was not a clearly more appropriate forum. The majority reasoned that the article was related to how the plaintiff conducted business in Canada, and it should not have come as a surprise to the defendant newspaper that the plaintiff would seek to vindicate his reputation in Canada. The majority also held that the plaintiff's undertaking to limit damages claims to harm suffered in Canada confirmed the significance to the plaintiff of his reputation in Ontario and the importance of vindicating his reputation in Ontario. The dissenting judge would have allowed the appeal on the basis that an Israeli court was clearly the more appropriate forum and an action in Israel was in the interests of justice. The decision is under appeal to the Supreme Court of Canada: *Haaretz.com v. Goldhar*, 2017 CanLII 12231 (SCC).

4. Defamatory GoFundMe Campaign

Zall v. Zall, 2016 BCSC 1730, involved a dispute between the plaintiff father and the defendant daughter over the defendant's defamatory statements published on the GoFundMe fundraising website. The defendant was motivated by revenge, monetary gain, and a desire to hurt the plaintiff and thwart his efforts to gain custody of the defendant's daughter. The statements by words and innuendo falsely described the plaintiff as a pedophile and sexual predator. The baseless allegations were read by the plaintiff's acquaintances, turned up in a background check by a business associate, and resulted in a demonstrable loss of business for the plaintiff. The plaintiff sued and obtained a default judgment against the defendant. With respect to the assessment of damages, the court noted that the speed at which information spreads via the Internet provides an instant and boundless audience for defamatory statements and is a significant factor to consider in defamation cases. The court found that the nature and reach of the GoFundMe website compounded the damage done more than a personal blog or website. The court awarded the plaintiff $75,000 general damages and $50,000 aggravated damages. The court also issued an injunction restraining the defendant from publishing or distributing by any means (including Internet, social media website, and email) any defamatory statement about or referring to the plaintiff, because there was a real possibility that the defendant would not pay the damages award. The court also ordered (at para. 99) "any third parties, including any internet service provider or site, who have published, posted or distributed or who have repeated defamatory comments by the defendant ... about the plaintiff, now or at any time in the future" to remove the defamatory comments from the Internet and any other form of publication or distribution, including any website, social media site, blog, news group, or chat site.

5. Liability for Defamatory Rating on Business Ratings Website

Walsh Energy Inc. v. Better Business Bureau of Ottawa-Hull Inc., 2016 ONSC 1606, involved a defamation dispute over the defendant's publication, on its business-rating website, of a D-rating of the plaintiff residential heating and air conditioning business. The rating was based on one unresolved customer complaint. The trial judge dismissed the plaintiff's claim on the basis that the rating was not defamatory and was protected by defences of fair comment and qualified privilege. The plaintiff appealed. The court held that the D-rating, which indicated the plaintiff was not trustworthy, ethical, or responsive to customer complaints, was clearly defamatory of the plaintiff, and the trial judge erred in law in concluding otherwise. The court held that the trial judge erred in failing to properly apply the test for the defence of fair comment, which requires that the comment be supported by objective facts. The court held that the trial judge erred in finding that the defence of qualified privilege applied to the defendant's ratings website, because that defence is seldom available for a communication to the public. The court reasoned that operating a ratings website does not vest a critic with qualified privilege as a defence to publishing damaging defamatory statements about other persons, and expressed the view that the contrary decision in *Upton v. Better Business Bureau of the Mainland of British Columbia*, 1980 CanLII 692 (BC SC), was wrongly decided. The appeals court granted the appeal and remitted the case back for trial before a different judge.

F. Miscellaneous

1. Employers Responsibility to Protect Employees on Social Media

Amalgamated Transit Union, Local 113 v. Toronto Transit Commission (Use of Social Media Grievance), [2016] O.L.A.A. No. 267 (QL), involved a union grievance regarding Toronto Transit Commission's (TTC) use of a Twitter account to receive customer service questions. Some of the customer tweets were complimentary while other tweets were critical of TTC and its service, and a small but significant number of tweets included vulgar, offensive, abusive, racist, homophobic, sexist, and threatening comments about TTC's unionized employees, and included personal information identifying TTC employees. The union contended that the offensive tweets constituted workplace harassment, and argued that TTC's responses to the tweets were insufficient or inappropriate. The union sought an order requiring TTC to shut down the Twitter account and other remedies. The arbitrator held that the Twitter account was part of the workplace, and that TTC had failed to take all reasonable and practical measures to protect the employees from harassment by members of the community in breach of the Human Rights Code, the collective agreement, and TTC's Workplace Harassment Policy. The arbitrator refused to order TTC to stop using Twitter, but provided detailed directions and recommendations for TTC's use of Twitter to protect TTC employees against harassment as a result of offensive tweets, including posting rules about the proper use of the Twitter account, properly responding to offensive tweets based on templated responses agreed to by TTC and the union, blocking offending tweeters, and seeking the assistance of Twitter to have offensive tweets deleted.

2. Nude Selfies and Good Morals Clause

Zigomanis v. 2156775 Ontario Inc. (D'Angelo Brands), 2016 ONSC 7053, involved a dispute over the termination of a contract for the plaintiff hockey player's paid endorsement and promotion of the defendant's energy drinks. Before the contract was signed, the athlete took photographs of his naked body (front and back, but not showing his face) and sent the photographs to his then-girlfriend. After the contract was signed, unknown individuals obtained and published the photographs on a publicly accessible Internet site. The drink company terminated the contract on the basis that the athlete had breached a contractual morals clause, which allowed the company to terminate the contract if the athlete “commits any act which shocks, insults, or offends the community, or which has the effect of ridiculing public morals and decency”. The athlete sued for wrongful termination. The court held that the morals clause was not applicable because the clause did not apply retrospectively to activities before the contract was signed. The court also held that the morals clause did not apply to the unauthorized publishing, by unknown persons, of the photographs because the morals clause was limited to actions by the athlete himself – not by other persons. The court further held that in light of historic practices, the realities of modern communication, and individuals' continuing and statutorily protected expectations of privacy, the emailing of an intimate photograph to another consenting adult was not likely to shock, insult, or offend the community or ridicule public morals and decency. For those reasons, the court held that the drink company had wrongfully terminated the promotional contract, and awarded the athlete damages and costs.

3.Order for Disclosure of Facebook Account Information

Olsen v. Facebook Inc., 2016 NSSC 155, involved a dispute over allegedly defamatory anonymous Facebook comments about the applicants' activities as chief administrative officer and councillor of an Ontario municipality. The applicants sought an order requiring Facebook to disclose information to assist identifying the three anonymous authors of the comments. Facebook did not respond to the application or participate in the proceeding. The court issued an interim preservation order requiring Facebook to secure and preserve the identifying information, and adjourned the hearing so that the applicants could give notice of the application to the comment makers by way of messages to their Facebook accounts. At the continued hearing, nobody appeared on behalf of the comment makers. The court reasoned that while Internet anonymity cannot be used to avoid liability for defamatory comments, there may be circumstances where the protection of anonymity allows critical comments on matters of public interest to expose misconduct that might not otherwise come to light. The court concluded that the nature and number of comments by two of the Facebook account holders overrode any reasonable expectation that they should be entitled to remain anonymous, and ordered Facebook to disclose information about those individuals. The court held that the individual who posted only one critical comment was entitled to remain anonymous. The court ordered that the information disclosed by Facebook was to be used only for the potential defamation action.

4. Order for Disclosure of Internet Subscriber Information

Voltage Pictures, LLC v. John Doe, 2016 FC 881, involved a proposed reverse class proceeding against unknown respondents engaged in illegal Internet sharing of the plaintiffs' copyright films. The plaintiffs brought a motion for an order that Rogers Communications, a non-party Internet service provider, disclose any and all contact and personal information of subscribers associated with identified Internet protocol addresses at various times and dates, so that the applicant could name the subscribers as defendants in the class proceeding. The plaintiff argued that it was entitled to the information under the "notice and notice" regime set out in ss. 41.25 and 41.26 of the *Copyright Act*, and was not obligated to pay any fee to Rogers for the work required to disclose the requested information. The court held (at para. 11) that while the "notice and notice" regime requires an Internet service provider to retain certain information about subscribers implicated in a copyright infringement notice, the regime "does not provide any detailed or comprehensive mechanism for copyright owners ... to enforce their rights as against alleged infringers. At best, it provides a mechanism for copyright owners to send a notice of claimed infringement via an ISP to an alleged infringer with the knowledge that there will be records available at some later date to determine the identity of such infringer if necessary". The court held that the "notice and notice" regime does not change the law and principles with respect to Norwich disclosure orders, and does not give copyright infringement claimants an independent right to access Internet subscriber information. Based on well-established principles, the court ordered Rogers to disclose the subscribers' names and addresses, but not any other information (e.g., email address or telephone number), and ordered the plaintiffs to keep the disclosed information confidential and to use the information for the sole purpose of the proposed class proceeding. The court also held that the "notice and notice" regime did not preclude Rogers from entitlement to compensation for complying with the disclosure order, and ordered the plaintiffs to pay Rogers an hourly fee of $100 plus tax for the time spent (estimated at approximately one hour) to assemble the subscriber information for disclosure under the order.

This paper provides general information only, and does not constitute legal or other professional advice. Readers are encouraged to obtain legal advice from a competent professional regarding their particular circumstances.

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