The Institute of Law Clerks of Ontario

LAW CLERKS' REVIEW

This Issue:

Message from The President

Fall has arrived! So many things that I read on social media says Fall is a favourite time of year for a lot of people. Many of us will agree with that. The weather is not stifling hot, the changing of the colours of the trees is amazing and everyone starts to get their homes and themselves ready for Winter.

At ILCO, we are in the midst of planning our Fall and Winter education programs and social events. In this edition, you will see a family event for members at Chudleigh's is happening on October 17th. It should be a lot of fun for all ages.

As always, if there is a topic you would like us to cover at a breakfast or lunch session or even one of our whole day sessions, please send your suggestion to the ILCO office.

Planning is also underway for the annual conference which is in Montreal, Quebec from Wednesday, May 11, 2016 to Saturday, May 14, 2016 at the Fairmont Queen Elizabeth Hotel. This is a lovely location and we have some great ideas for speakers and entertainment. A budget will be circulated to all members by early November to enable you to coordinate attending the conference.

The support of our members is appreciated by the board of directors and staff at ILCO. We hope you and your families get (or make in many cases) the time to enjoy Fall.

Lisa Matchim
President

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Fax. 416.359.9500 · zaheeda@cartelinc.com

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ILCO'S 26th ANNUAL CONFERENCE – MAY 11-14, 2016

We hope to see you at next year's conference in Montréal, Québec, to be held at *Fairmont The Queen Elizabeth* from May 11 to May 14, 2016.

ILCO Newsletter Articles Wanted

If you have written an interesting article or know of an article published that would be of interest to law clerks which ILCO can reprint with permission, please contact ilco@newsletter.on.ca

This event is limited to registered members and immediate family only.
For members who registered for this event with the ILCO office,
a reminder to bring your ILCO membership card and identification.

ILCO would like to thank the sponsors:
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Hope to see you there!

SUPREME COURT RECOGNIZES EMPLOYEE PRIVACY IN WORKPLACE COMPUTERS

Practice Guide by Blake, Cassels & Graydon LLP

The prevalence of computers in the workplace and employees' increased use of them gives rise to questions about the existence of privacy rights in materials stored, accessed or transmitted using employer-owned hardware and network systems. In tension with assertions of privacy, employers claim that the misuse of workplace computers to view or send inappropriate, illegal or even merely distracting material interferes with their duty to provide a safe and productive workplace, and with their right to protect the integrity of their business operations. These concerns have led to the implementation of a range of monitoring measures targeting employee email and Internet activities.

The Supreme Court of Canada (the SCC) addressed these competing interests in the context of workplace computers in its October 19, 2012 decision in R. v. Cole, holding that Canadians may reasonably expect privacy in information contained on workplace computers where personal use is permitted or reasonably expected. The court described such information as "meaningful, intimate and touching on the user's biographical core". While computer and data ownership, workplace policies and practices, and technologies in place for monitoring network activity may diminish an employee's expectation of privacy, such "operational realities" will not extinguish the expectation of privacy in its entirety.

Legal Landscape Prior to Cole

Before Cole, there was limited Canadian jurisprudence on employee privacy rights on workplace computers, particularly at the appellate level. In France (Republic) v. Tfaily (2009), Simmons J.A. recognized a reasonable expectation of privacy in personal electronic data stored by professors on university-owned computers. This aspect of the ruling was based on the terms of the collective agreement governing the employment relationship. In Poliquin v. Devon Canada Corp., the Alberta Court of Appeal allowed an employer's application for summary dismissal of a lawsuit for wrongful termination, in part on the grounds that the employee at issue had no reasonable expectation of privacy in his workplace computer. Emphasizing an employer's right to protect the professional, ethical and operational integrity of its business operations, the court held that "... an employer is entitled not only to prohibit use of its equipment and systems for pornographic or racist purposes but also to monitor an employee's use of the employer's equipment and resources to ensure compliance" (para. 49).

American court decisions and Canadian labour arbitration decisions demonstrate a similar reluctance to recognize employee privacy rights on workplace computers. Recent American cases such as Falmouth Fire Fighters' Union Local 1497 v. Town of Falmouth and People v. Kent suggest that a reasonable expectation of privacy will be found only where an employer has provided positive assurances or recognition of the confidentiality of materials accessed, transmitted or stored using an office computer. In the earlier and oft-cited decision of Smyth v. Pillsbury Co., the court reached a more extreme result in denying privacy protection for employee communications transmitted over workplace networks notwithstanding assurances from the employer that such communications would remain confidential and privileged.

In the labour context, arbitrators have regularly declined to recognize a reasonable expectation of privacy on workplace computers, emphasizing employer ownership of computer hardware and network systems. Employers instituting acceptable use or electronic monitoring policies benefit from the generous criteria for the unilateral adoption of workplace rules set out in KVP Co. v. Lumber& Sawmill Workers' Union, Local 2537 (Veronneau) (1965). Under these criteria, a rule must be clear, reasonable, and not inconsistent with the collective agreement. Further, the employer must notify employees affected by the operation of the rule, and must enforce the rule consistently from the time that it is introduced.

Even where the terms of an employer policy on computer and network use are not made clear to an employee, Briar v. Canada (Treasury Board) (Briar) and Consumers Gas v. C.E.P. suggest that a "common sense" test may be applied in assessing the employee's conduct. The arbitrator in Briar said at para. 74, "... even if it could be said that [the grievors] were unaware of the policies, they distributed material which common sense dictated was inappropriate to distribute at a workplace and, in particular, at a correctional facility where they are supposed to set an example of socially acceptable behaviour."

6 Supreme Court of Canada's Decision in Cole

Cole concerned a teacher who was criminally charged with possession of child pornography following the discovery of nude, sexually explicit photographs of a female Grade 10 student on the hard drive of his school-owned laptop. The photos were found by a computer technician employed by the school board, who was responsible for ensuring the integrity of the network system. The laptop, as well

as compact discs containing the photos, a screenshot of the laptop including the file path and thumbnail pictures, and temporary Internet files pulled from the teacher's browsing history were ultimately provided to the police, who proceeded with a warrantless search. The teacher challenged the search, and sought to exclude the evidence based on an alleged violation of his right to be free from unreasonable search and seizure under s. 8 of the Canadian Charter of Rights and Freedoms.

The SCC's decision, while set in the context of a criminal case, outlines the scope of an employee's reasonable expectation of privacy for personal information on workplace computers. The court confirmed the Ontario Court of Appeal's finding that Canadians do in fact have a reasonable expectation of privacy on workplace computers, at least where personal use is permitted or reasonably expected.

Referring to the 2010 decision in R. v. Morelli, Fish J. for the unanimous court on this issue said that any computer used for personal purposes contains "... information that is meaningful, intimate and touching on the user's biographical core" (paras. 2 and 58), including financial, medical and personal information. The court recognized that, in particular, computers used for Internet browsing reveal specific interests, likes and propensities about the user.

While workplace policies and practices can diminish an employee's reasonable expectation of privacy, the court held that these policies are not sufficient to extinguish the privacy expectation. This "diminished expectation of privacy" is equally protected by s. 8 of the Charter. The same reasoning was applied with respect to school board ownership of the teacher's laptop computer, as well as the technology in place at the school to monitor network activity.

To determine the existence and extent of the expectation of privacy, the court said one must look to the totality of the circumstances. In Cole, the nature of the information at issue and the fact that the accused was permitted to use his computer for personal use, both pursuant to policy and in practice, weighed in favour of a reasonable, although diminished, expectation of privacy.

The court found that the actions of the police in conducting a warrantless search violated the teacher's s. 8 Charter rights. However, Fish J. for the majority concluded that the admission of evidence would not bring the administration of justice into

SUPREME COURT RECOGNIZES EMPLOYEE PRIVACY IN WORKPLACE COMPUTERS - CONTINUED

Practice Guide by Blakes, Cassels & Graydon LLP

disrepute, in part because the impact of the breach was decreased by the teacher's diminished privacy interest in the laptop materials and because of the ultimate discoverability of the evidence based on the existence of reasonable and probable grounds to search.

Conclusion

The Supreme Court of Canada's decision establishes that, where the employer permits or condones personal use of workplace computers, employees will have a reasonable expectation of informational privacy. That said, it remains to be seen what impact Cole will have on the admissibility of evidence and the employer's ability to prove just cause in civil actions for wrongful dismissal.

Although Cole emphasizes that employer policies and practices will diminish rather than extinguish the expectation of privacy in workplace computers, it remains advisable for employers to implement clear and unambiguous technology and privacy policies and monitoring conventions with respect to the acceptable use of workplace computers. Employers should also ensure that monitoring policies comply with applicable privacy legislation, including employee notification of the purposes of monitoring and collection of information contained on workplace computers, and the use that will be made of information collected.

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ILCO wishes to thank Blakes, Cassels & Graydon LLP for permitting ILCO to reprint the article.

LEGAL PROFESSION CONSIDERS FINER POINTS OF ARTIFICIAL INTELLIGENCE

By Yamri Taddese

University of Toronto assistant law Prof. Anthony Niblett knows exactly how to teach students, but what about teaching computers?

Members of the ROSS team, from left: Akash Venkat, Jimoh Ovbiagele, Andrew Arruda, and Shuai Wang.

Members of the ROSS team, from left: Akash Venkat, Jimoh Ovbiagele, Andrew Arruda, and Shuai Wang. "That's quite different," said Niblett, who's part of a U of T team that's training Watson, IBM's artificial intelligence technology, to use cognitive reasoning to answer questions about tax law.

For now, Niblett and his team are teaching a Watson-based program called Blue J. Legal to determine whether a worker is an employee or an independent contractor, a question that has important implications for tax law but also in areas like labour, contract, and tort matters.

Blue J. Legal would ask a lawyer some questions about the clients' work, including their pay structure, where they work, their mobility, the tools they use, and who owns them. It then uses the facts of the case and the thousands of documents available in its system to tell lawyers the likelihood of whether they're dealing with an employee or a contract worker with evidence to support the answer.

"We're still learning how to better do it. We are still learning how to train it," said Niblett at an event organized last week by the Centre for Innovation Law and Policy on cognitive computing and the future legal research.

"Should we be focusing on cases the way we teach students or should we try a different method?" he said during a discussion that highlighted on what's perhaps a new challenge for legal education.

Former computer science students at the University of Toronto are taking another artificial intelligence application, ROSS, to the market after it won second place in a continent-wide competition for programs using IBM's Watson technology.

Users can ask ROSS a legal question in lay language and in just seconds it will turn billions of documents into

LEGAL PROFESSION CONSIDERS FINER POINTS OF ARTIFICIAL INTELLIGENCE - CONTINUED

By Yamri Taddese

snippets of answers that come with a confidence ratio. ROSS will also show users where its answers came from.

The team behind ROSS — Shuai Wang, Jimoh Ovbiagele, Akash Venkat, Pargles Dall'Oglio, and Andrew Arruda — says artificial intelligence is the future of legal research. Although the tool won't replace lawyers, they say it will help them increase efficiency and eliminate tedious tasks.

But not everyone is quick to endorse artificial intelligence in legal research. Sharon Baker, a librarian at the university's Bora Laskin Law Library, has doubts about the technology.

"I can see a role for [artificial intelligence] in terms of the facts [of a case] and finding the [applicable] law, but in terms of analysis and the communication of that, I think there still has to be human intelligence and interaction," Baker said at the event.

With technologies like Watson, which picks up users' behaviours and preferences to perfect its skills, it's easy to replicate errors, according to Baker. She noted part of her concern is also that people would start to rely on the confidence rating from artificial intelligence tools instead of doing their own analysis.

But Angus McIntyre, IBM's Watson development and delivery operations manager in Canada, downplayed the concern. "We find that people who are experts are not interested in the answer; they want to look at the evidence," he said, adding the technology simply makes professionals better at what they do by very quickly providing them with the most relevant information.

Still, there are cases where Watson simply won't have an answer to provide, especially in areas that lack case law and are more forward looking than precedent-based. Constitutional law is an example of that, according to Niblett.

Other challenges in teaching Watson include somehow getting it to understand the concept of overruling and the hierarchy of the courts. There's also the thorny issue of personal bias by the humans who are teaching Watson how to respond to questions.

ILCO wishes to thank Yamri Taddese for permitting ILCO to reprint the article published in the Law Times on April 6, 2015.

MODERNIZING ONTARIO'S BUSINESS LAW: EXPERT PANEL RELEASES ITS "WISH LIST"

By Andrew S. Cunningham and Brian Lynch

On February 15, 2015, ***Ontario's Minister of Government and Consumer Services*** asked a 13-member panel of legal practitioners and academics to survey the province's business law landscape and provide recommendations on reforming laws to modernize the province's business environment. In June, 2015, the panel **submitted a comprehensive report** with 16 recommendations for legislative reform that would promote the following key objectives:

- Making Ontario a leading jurisdiction for business; Updating legislation dealing with commercial activity, including the PPSA; and
- Creating an environment with more certainty and efficiency to support market activity and small business growth.

These objectives would be achieved by amending, and in some cases even repealing, a number of significant pieces of Ontario legislation, as detailed below. It is important to bear in mind that these are simply proposals, but the fact that such a broad range of reforms to Ontario business law is under serious discussion is a significant development in its own right.

Making Ontario a leading jurisdiction for business

OBCA changes

In the case of the ***Business Corporations Act*** (OBCA), the panel recommended removing barriers on board composition by eliminating Canadian residency requirements which currently mandate at least 25% Canadian resident representation on corporate boards, a provision that is routinely avoided by incorporating in a Canadian jurisdiction that does not impose it. In a further attempt to streamline and modernize the operation of boards of directors, the panel suggested changing the cumbersome rules regarding electronic communications so as to allow meetings to be held electronically or via conference call without the notices and consents currently required from the parties involved.

The panel also recommended that shareholders be given the ability to vote against candidates in a board election in order to more effectively control their board's composition. It also recommended the statutory recognition of beneficial shareholders which would (for example) allow those who hold shares through an electronic based book entry system to be entitled to the rights and remedies under the OBCA as registered shareholders.

In light of a similar review process underway with respect to the Canada Business Corporations Act (CBCA), another item that could perhaps be added to the "wish list" would be that the Ontario and federal jurisdictions adopt a consistent approach with respect to company law issues such as the rights of beneficial shareholders.

Limited Partnerships

With regard to partnerships and the ***Limited Partnerships*** Act, the panel made proposals aimed at encouraging the formation of more LPs in Ontario. In particular, the committee mentioned the possibility of reducing the potential for limited partner liability, noting that many LPs are formed under corresponding Manitoba legislation that permits limited partners to take a more active role in the business.

ULCs, LLPs and LLCs

The panel proposes a number of changes designed to make the use of a variety of business forms easier. For example, ULCs (unlimited liability corporations) would be permitted in Ontario – as they are currently in Alberta, B.C., and Nova Scotia – and eligibility for LLP (limited liability partnership) status would be extended beyond the legal and accounting professions. The panel also considered the adoption of U.S. style LLCs (limited liability corporations) but was of the view that the expanded LLP would serve much the same purpose.

Updating legislation dealing with commercial activity, including the PPSA

Eliminating some quirks of Ontario's PPSA

With respect to the P***ersonal Property Security Act*** (PPSA), the panel emphasised amendments to permit cash as collateral to be perfected by control as opposed to registration, and supported a provision to make cash have priority over competing security interests. Other recommendations included proclaiming into force "location of debtor" provisions which provide

for a debtor's location to be that of its registered office; repealing the provision mandating that a debtor receive copies of all registrations; defining "intangible" in the PPSA to clearly include licences, IP licences and quotas, as is currently the case in British Columbia and Saskatchewan, and waiving the requirement for chattel paper financiers to physically possess chattel paper (a requirement that has inhibited the development of electronic chattel paper in Ontario).

Repealing the Bulk Sales Act

Ontario is last Canadian jurisdiction to retain bulk sales legislation. Intended to protect unpaid trade creditors against a vendor's bulk sale of all or substantially all of its assets, the **Bulk Sales Act**'s remedies have largely been superseded by those available in other statutes. Because the Act can apply, in theory, to a broad range of business transactions, it often requires parties to obtain legal advice, exemption orders and indemnities. The panel recommended that Ontario join other Canadian jurisdictions in repealing the Act.

Repealing duplicative preference and fraudulent conveyance legislation

The panel proposed the repeal of both the ***Assignment and Preferences Act*** and the ***Fraudulent Conveyances Act***, legislation that is largely superseded by federal bankruptcy legislation and which achieves very little other than to add costs to business transactions. The committee recommended the substitution of the Uniform Law Conference of Canada's model act, the "Reviewable Transactions Act" for the two statutes.

Creating an environment with more certainty and efficiency to support market activity and small business growth

Making franchise law compliance simpler

Franchising is an important engine of business growth. Ontario's Arthur Wishart Act (Franchise Disclosure) is one of several pieces of provincial legislation in Canada that govern the franchisorfranchisee relationship. While the legislature's intention to provide substantial protections to franchisee's was warranted, the Arthur Wishart Act has created a number of difficult and costly compliance issues, particularly in comparison with franchise legislation in other provinces. For example, 14 days before a franchisee signs a franchise agreement or pays consideration relating to the agreement, the franchisor must disclose "all material facts" to the franchisee, though uncertainty surrounds what "all material facts" entails, as it remains undefined in the Act. As a result, the panel called for an update to Arthur Wishart Act, with a view to bringing about greater disclosure certainty (and lower legal costs) for both franchisees and franchisors.

Simplifying business registration requirements

Particular emphasis in this section of the report was placed on simplifying business information and business registration legislation, particularly with respect to duplication and inconsistency. For example, obstacles exist for many international organizations (e.g. LLCs) whose structures and/or designations differ from those recognized under Ontario legislation.. Legal advice must often be sought in both cases to ensure compliance with Ontario's regulations. As a result, the panel suggested modernizing Ontario legislation to allow for simpler and more predictable designations of common types of foreign corporate entities. The committee also recommended a reduction in the amount of information collected from companies to what is truly necessary from a policy perspective, as well as improved cooperation with other provinces with respect to reducing the needless duplication of corporate filings.

Conclusion

The recommendations proposed by the panel would modernize Ontario business law and align it with neighbouring jurisdictions in a manner that would help to reduce transaction costs. The Ministry of Government and Consumer Services states that it will create a reform agenda based on these recommendations, though there is no timeline for completion. If you so desire, you can email comments and ideas on the report to The Ministry of Government and Consumer Services at businesslawpolicy@ontario.ca with "Business Law Agenda Report" in the subject line. The Ministry is accepting submissions until October 16, 2015.

ILCO wishes to thank Andrew S. Cunningham and Brian Lynch for permitting ILCO to reprint the article.

CANADA: REAL ESTATE LAW UPDATE

By Sidney H. Troister, LSM, Torkin Manes LLP

FLAGS OF MORTGAGE FRAUD

Much has been written about the flags of mortgage fraud, with a description of flags often buried in articles not read very carefully. In the interests of brevity, and as a tool for you and your staff to have a ready simple guide, here are some of the most common flags of fraud. For a more detailed explanation, see my papers on real estate fraud in the 2014 and 2015 Real Estate Summit materials.

1. Things not called for in the agreement of purchase and sale including:

- deposits "paid" but not called for by the agreement of purchase and sale; even if you see cancelled cheques or receipts for the payments, uncalled for payments made are a flag of fraud.
- VTB mortgages not called for by the agreement of purchase and sale; It means all the cash to be paid on closing is not being paid and the VTB mortgage may not be good consideration.
- amending agreements reducing the purchase price because for example renovations were not made to the property as required by the agreement or to reflect additional deposits paid; it may mean the lender is lending on expected fair value without notice of the price reduction
- deposits or additional deposits paid directly to the vendor; payments to vendors as additional deposits are not usual and suspicious, even with receipts or acknowledgements of payments.

2. Payments to third parties unrelated to the transaction, even if you get a direction

Closing proceeds should be paid to the vendor or borrower or to pay off existing mortgages or other usual expenses only. A direction to pay third parties unrelated to the actual transaction is a flag of fraud and needs to be further investigated and where necessary, the lender advised. A lawyer should not be the client's banker. Never forget your duty to the lender. Note that some title insurers require funds on private mortgage transactions to be paid to discharge prior mortgages or executions or to the registered owner only. It is not sufficient to pay funds to a borrower's lawyer in trust on direction.

3. Clients willing to pay premium legal fees

Excessive legal fees for standard transactions are often seen as flags of fraud suggesting that the lawyer will prefer the interests of the personal client over that of the lender client or that flags of fraud may be ignored in the interests of realizing an advantageous fee.'

4. No real estate agents involved or real estate agents named in the offer but no invoice for the balance of commission or instructions not to pay them

Some fraudsters put the name of an agent into an agreement of purchase and sale to make it look legitimate but you are instructed as vendor's lawyer not to pay the agent; If there is no named agent or no real agent, the purchase price on the offer may not reflect a market transaction and may be inflated to induce the lender to lend more than the property is actually worth.

5. Flips

Flips are legal but the issue is disclosure; the ultimate lender must be told of the price increase.

6. Recurring parties

The same people appear in a series of transactions, sometimes as buyers, sometimes as sellers with transactions dubbed "investment deals". The parties do not appear to know much about the deals or do not otherwise appear to have the "means" to buy these properties.

OTHER THINGS TO WORRY ABOUT

1. You have a duty not participate in a fraud even if you are not acting for the lender.

2. Do not assume that the lender knows about the ultimate sale price, has seen the agreement of purchase and sale or amendments, or has been told everything relevant by the mortgage broker. Lawyers have a duty to disclose or advise of material changes in a transaction.

3. Do not rely on your client's acknowledgement or receipts that he or she received or paid any additional cash deposits.

4. Do not rely on your client's direction re funds if the money is going to nondeal related parties.

5. Always have a real forwarding address for your vendor client. Watch out for those who say "I will come in and pick up my report and my cheque" and have no verifiable address. If your vendor client sold, where are they moving? Get some proof.

6. Check client ID against the property they are selling. Get the story if the ID does not match. If there is some "story", substantiate it.

7. Be suspicious of transactions among "friends", relatives, etc. that involve no real estate agents. Some frauds occur where the client tells the lawyer some "story" which the lawyer accepts at face value such as selling to a brother, a cousin, exchange to satisfy a debt, a private transaction. These are often fraudulent mortgage transactions with inflated values and a typical flag of fraud.

8. Remember your duty to the lender and your obligations under the Rules of Professional Conduct.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

ILCO wishes to thank Sidney H. Troister of Torkin Manes LLP for permitting ILCO to reprint the article.

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ANNOUNCEMENTS

CALENDAR OF EVENTS

DATE	EVENT
October 17, 2015	Chudleigh's Farm - Fall Social
October 31, 2015	Estates Alternate Exam
November 4, 2015	Advanced Corporate Program
November 4, 2015	Sociable Event sponsored by Cox and Palmer
November 7, 2015	Corporate Alternate Exam
November 25, 2015	Advanced Family Law Program
May 11-14, 2016	ILCO 26th Annual Conference, Montreal, Quebec

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