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UAVs and the *Canadian Charter of Rights and Freedoms*

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The rise in popularity and use of unmanned aerial vehicles ("UAVs") has attracted much attention recently. In the last year, we have seen a major uptick in UAV use by private companies. Here in Canada, UAVs have been regulated for some time through federal aviation regulations, but the accessibility of relatively inexpensive UAV technology has led Transport Canada to consider revisiting the regulations to ensure they are keeping pace with current interest and use.

In many industries, both private actors and government bodies are using UAVs in new and innovative ways. Arising from this technological leap forward are a number of new legal issues, particularly in the area of privacy. Pursuant to s. 8 of Canada's *Charter of Rights and Freedoms* (the "Charter"), Canadian citizens have a right to privacy, including the right to expect that the government cannot collect information about them in certain circumstances.

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Because police forces and other investigatory agencies are clearly linked to the government, their use of UAVs is subject to the Charter. But what about private companies that provide services to public bodies ("para-public companies"). Is the Charter something they should consider when using UAVs? At the moment, Charter implications for using UAV technology remains an open legal question. To date, there are no reported court decisions that consider the issue, either for law enforcement agencies or for private contractors working for public bodies. The use of UAVs by police forces to take photographs or video, or to collect other data, can be open to challenge in the event the images, video, or data are used in a criminal investigation.

The Supreme Court of Canada case of *R. v. Tessling* [*Tessling*][1] is an example of such a challenge related to the activities of the Royal Canadian Mounted Police ("RCMP"). In *Tessling*, the RCMP used a fixed-wing aircraft equipped with forward-looking infra-red ("FLIR") cameras to fly over properties owned by an individual suspected of operating a marihuana grow-op. The police obtained images of heat radiating from the building, though the FLIR images did not show the inside of the building. Using these images, the police obtained a search warrant to search the suspect's property and found that the grow-op they suspected was there.
At trial, the suspect challenged the FLIR photographs as an invasion of his s. 8 right to privacy. The challenge did not ultimately succeed, but a key factor in the court's decision was that the images produced by the current FLIR technology were not truly invasive, because the images did not allow the police to "see" inside the suspect's home. The court emphasized, however, that improvements in the technology may lead to future challenges and the court would be open to revisit the issue at a later date. The principles in *Tessling* have been applied to other types of searches where authorities have captured images or collected data using non-traditional surveillance techniques.

With regard to para-public companies, some guidance may be taken from a line of cases where the courts consider whether a private citizen or entity is acting as an "agent" for law enforcement. A critical consideration for courts in these cases is whether the private citizen or entity has been asked or directed to assist with a search. So, for example, in the case of *R. v. Wilkinson* [*Wilkinson*],[2] a landlord took it upon himself to investigate the residence of a tenant and, after finding a marihuana grow-op, advised the police. In *Wilkinson*, the private citizen was not asked or told to investigate by police. For this reason, the court allowed the evidence found during the search to be used against the accused. However, in *R. v. Liang, Yeung, et al*.,[3] a Yukon Electric employee was asked by police to go onto the accused's property in search of an electrical bypass. The employee discovered the bypass, and that information was used by the police to make an arrest. The court concluded that because the police had specifically directed the Yukon Electric employee, the employee was an "agent" of the police and his actions were subject to the Charter.

Based on these cases, private contractors asked or hired to conduct searches or assist with investigations should be aware that the results of those searches may be subject to Charter scrutiny. Ultimately, the impact on the non-government actor may be minimal, as the common remedy for a Charter breach is to expunge the evidence from the court record. However, there are other privacy concerns beyond the Charter that may expose a company or an individual operating a UAV to civil liability, or even criminal charges. Private operators may wish to seek a legal opinion regarding the potential implications of their UAV activities.

1 [2004] S.C.J. No. 63, 2004 SCC 67.
2 [2001] B.C.J. No. 2057|2001 BCCA 589.
3 [2007] Y.J. No. 3, 2007 YKTC 18.

Video Surveillance in Schools: Balancing Safety and Privacy

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School boards everywhere are faced with the difficult task of balancing the safety of students, staff, volunteers, and community members on school property with respect to privacy and personal information. Recent decisions from Ontario emphasize the need for school boards to develop policies and procedures with respect to video surveillance that comply with applicable legislation, and then carefully follow them.

Recently, two decisions emanating from two different legal contexts were released with respect to video surveillance at schools. The first decision relates to a grievance brought by a school custodian who was terminated after being caught on camera smoking marijuana while on duty in the Ottawa-Carlton District School Board (the "Ottawa-Carlton Board"). The second decision arises from a privacy complaint brought before Ontario's Information and Privacy Commissioner (the "Commissioner") by a parent whose child attended high school St. Thomas Aquinas Catholic School (the "School") operated in the Halton Catholic District School Board (the "Halton Catholic Board").

Ottawa-Carlton District School Board Grievance

An arbitration award dated May 19, 2015, addressed video surveillance in the labour context. In *Ottawa-Carlton District School Board OSSTF, District 25 Plant Support Staff*,[1] the grievor was a custodian for a public school, who was terminated

after being caught on video surveillance smoking marijuana beside the school, during a shift. He was wearing his uniform identifying him as an employee of the Ottawa-Carlton Board. The custodian had received training about drug use and smoking, which put him on notice that the Ottawa-Carleton Board had a "zero tolerance" policy for the use of controlled or restricted drugs. The Ottawa-Carleton Board also had an extensive policy and procedure regarding video surveillance.

In reaching her decision, Arbitrator Paula Knopf examined two questions: (1) What are situations in which surveillance may be undertaken? And (2) Were the Ottawa-Carleton Board's actions in accordance with jurisprudence in the area? The arbitrator stated that an employee's right to privacy must be balanced with the employer's legitimate operational interests. Ultimately, whether video surveillance will be admitted as evidence in a labour arbitration depends on the following:

- Was it reasonable, in all the circumstances, to request surveillance?
- Was the surveillance conducted in a reasonable manner?
- Were other, less intrusive, alternatives open to the employer to obtain the evidence sought?

The arbitrator began by stating that the custodian had no reasonable expectation of privacy at the time he was recorded smoking marijuana, given, for example, his location in a public space next to the school where passers-by could observe him. The arbitrator further concluded that the Ottawa-Carleton Board had reason to request surveillance because of credible reports that employees were smoking marijuana on duty and on school premises. Specifically, the Board received a report from a supervisor in the facilities department, (the "Supervisor") stating that he had answered his cell phone's ring and then overheard a conversation between one of the Board's evening custodians at Barrhaven Public School and another unidentified man. The phone call was believed to be a "pocket dial", but the Supervisor continued to listen to the conversation and overheard the custodian saying there would not be enough drugs that night and they would be "on their own". The Supervisor assumed that they may be talking about something that might be happening during work hours that evening and reported it to his immediate supervisor.

In addition, the Board received a request from a "floater" custodian that he not be reassigned to Barrhaven Public School because he had previously been invited to participate in the use of marijuana at that site by other custodians. The "floater" custodian described the use of marijuana at the school as a "ritual" and expressed concern about his job. He also gave specifics of times and locations where marijuana was being used regularly by custodial staff, both on and adjacent to the school property.

The arbitrator stated that "even if there was an infringement on the employees' privacy, it did not do so to such an unreasonable degree that the surveillance would warrant a label of impropriety".[2] Therefore, the video surveillance was generally conducted in a reasonable manner, especially taking into account that it lasted for only three days and the video recording was taken only of the employees smoking marijuana, and no one else. Finally, the arbitrator concluded that less intrusive alternatives were sought but were ultimately unsuccessful. For example, after reporting what he had overhead on the phone, the Supervisor was instructed to go onto the roof of the high school approximately half a kilometer away from Barrhaven Public School to see whether he could get a clear view of the school or adjacent grounds. However, the Supervisor reported that he could not find a good vantage point and, as such, this matter of surveillance was insufficient.

The arbitrator also examined whether video surveillance evidence should be admissible at a hearing. In doing so, the arbitrator questioned whether the Ottawa-Carleton Board's use of video surveillance

was in accordance with its own video surveillance policy and procedures. Namely, the rationale for conducting video surveillance was not properly documented, and a third-party provider was not made aware of or required to comply with the Ottawa-Carleton Board's own rules. The arbitrator held that these were minor procedurals errors, which caused no serious prejudice to the employee, and, therefore, the evidence was not ruled inadmissible.

Halton Catholic District School Board Privacy Complaint

In a decision dated March 11, 2015, the Commissioner considered whether the Halton Catholic Board's video surveillance system accorded with the privacy protection rules set out in the *Municipal Freedom of Information and Protection of Privacy Act* (the "Act").[3] Among other things, the Act sets out rules relating to the collection, notice, use, disclosure, security, and retention of personal information. The Commissioner's findings are outlined in a *Privacy Compliance Report*,[4] which also relied on the Commissioner's *Guidelines for Using Surveillance Cameras in Schools* (the "Guidelines").[5]

The Commissioner was asked to determine whether the Halton Catholic Board's video surveillance constituted a breach of subs. 28(2) of the Act. Subsection 28(2) of the Act states:

> No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity.

First, the Commissioner determined that the recorded images of identifiable individuals collected through the video surveillance cameras located at the School constituted "personal information" as defined by the Act.

Second, the Halton Catholic Board argued that the video surveillance was "necessary to the proper administration of a lawfully authorized activity." Specifically, the Halton Catholic Board argued, and the Commissioner agreed, that the Halton Catholic Board was lawfully authorized by the *Education Act*[6] to operate the school, including responsibility for the safety and security of students and property. The Commissioner emphasized, however, that the video surveillance must be necessary and not merely helpful to the proper administration of the school. On this point, the Commissioner held that the Halton Catholic Board did not meet its obligation to ensure the video surveillance was necessary for several reasons, including

- The Halton Catholic Board did not, in practice, adhere to its own privacy policy and the Guidelines;
- The Halton Catholic Board did not have measures in place to adequately evaluate the necessity and utility of the video surveillance system on an ongoing basis; and
- The implementation of the video surveillance system was pre-emptive, as there was little indication before the Commissioner that there were demonstrative security issues at the school prior to the installation of the video cameras.

Finally, the Commissioner examined several additional issues related to the Halton Catholic Board's obligations under the Act. In doing so, it made the following recommendations:

- That the Halton Catholic Board conduct an assessment of the video surveillance system at the school in a manner consistent with the Act, the Halton Catholic Board's video surveillance policy, and the Guidelines, and then ensure ongoing compliance;
- That the Halton Catholic Board explore and, if feasible, implement measures that automatically record user activity with respect to the access and use of the video surveillance system, instead of rely on user self-reporting;
- That the Halton Catholic Board undertake to have all relevant staff and service providers sign a confidentiality agreement with regards to access to the video surveillance system; and

- That the Halton Catholic Board revise its Policies, Procedures, and Guidelines to reflect the specific timelines for retaining information from the video surveillance system that it has used.

Conclusion

Both decisions confirm the importance of effective policies and procedures on video surveillance. In addition, they emphasize the importance of ensuring that such policies and procedures are followed in practice. The Commissioner's Guidelines provide a useful tool for school boards seeking to install video surveillance or conduct a privacy impact assessment, and may be consulted when developing policies and procedures.

School boards should be aware of the privacy implications of engaging in video surveillance on school property and should always consider the reasonableness of the surveillance and whether there are alternative means of achieving a safe and secure environment for students, teachers, staff, parents, and community members.

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1 *Ottawa-Carleton District School Board v. Ontario Secondary Teachers' Federation, District 25 Plant Support Staff*, 2015 CanLII 27389 (ONLA).

2 *Ibid*., para. 40.

3 R.S.O. 1990, c. M.56.

4 *Halton Catholic District School Board (Re)*, 2015 CanLII 13372, Privacy Complaint MC13-46 (IPC).

5 A copy of the *Guidelines* can be found at <https://www.ipc.on.ca/english/Resources/Discussion-Papers/Discussion-Papers-Summary/?id=412>.

6 R.S.O. 1990, c. E.2.

It's a "Like": Facebook Class Certification Overturned by Appeal Court

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Background

In a recent ruling from the British Columbia Court of Appeal ("B.C.C.A."), a class action was decertified involving a claim by disgruntled Facebook users who allegedly had their images reproduced in Facebook advertising, without their consent.

In January 2011, Facebook began making advertising revenue from a product called Sponsored Stories. Facebook took the names and images of Facebook users and featured them in advertisements sent to the users' contacts—allegedly without the knowledge or consent of the person featured in the ad.

The representative Plaintiff claimed that Facebook acted contrary to s. 3(2) of B.C.'s *Privacy Act*,[1] which provides that it is an actionable tort for a person to use the name or portrait of another person, without their consent for advertising or promotional purposes. In considering whether to grant the class certification, the British Columbia Supreme Court ("B.C.S.C.") was first required to consider whether it should assume jurisdiction over the Plaintiff's claim in spite of a forum selection clause in Facebook's Terms of Use, agreed to by all Facebook users, which held that any claims must be made in California (the "Forum Selection Clause").

Facebook originally applied to the B.C.S.C. in 2014 to request that the court decline to hear the case, on the basis that it was not the correct venue because

of the Forum Selection Clause in favour of the California courts. Ms. Douez relied on s. 4 of the *Privacy Act*, which favoured the B.C.S.C. as having the sole jurisdiction to decide *Privacy Act* claims, to rebut Facebook's application. The B.C.S.C. rejected Facebook's assertion that it should decline jurisdiction in favour of the California courts and certified the class proceeding in B.C.[2]

Facebook launched an appeal to the B.C.C.A.

Appeal Decision[3]

Analytical Framework and Evidentiary Burden

In overturning the lower court's ruling, the B.C.C.A. noted that on an application for a stay of proceeding by a party relying on a forum selection clause, the court must consider the *Pompey*[4] test and the *Court Jurisdiction and Proceedings Transfer Act* [*CJPTA*][5] analysis to determine whether or not to decline to exercise its territorial competence over a particular dispute.

The *Pompey* test requires the party relying on the forum selection clause to show it is valid, clear, and enforceable, and that it applies to the cause of action. Once that is proven, the burden of proof shifts to the other party to show "strong cause" why the court should not enforce the forum selection clause.

Section 11 of the *CJPTA* provides that a court may decline to exercise its territorial competence if another court is the more appropriate forum to hear the proceeding, which is determined by several considerations enumerated in s. 11(2).

The B.C.C.A., bound by the decisions in *Preymann v. Ayus Technology Corporation* [*Preymann*][6] and *Viroforce Systems Inc. v. R&D Capital Inc.* [*Viroforce*],[7] concluded that the *Pompey* test is a separate inquiry conducted before the *CJPTA* analysis.

The B.C.C.A. also summarized the evidentiary burden on stays of proceedings as follows:

(a) When a defendant relies on a forum selection clause, the *Pompey* test applies. The defendant does not need to adduce expert evidence indicating that the forum chosen in the forum selection clause would have territorial competence under its own law. Rather, once the burden switches to the plaintiff to prove strong cause, the plaintiff may chose to adduce expert evidence as support for strong cause that the forum chosen in the forum selection clause would lack territorial competence under its own law; therefore, effectively operating as an exclusion of liability clause.

(b) When a defendant does not rely on a forum selection clause, it is just the analytical framework in s. 11 of the *CJPTA* that applies. In most cases, the evidentiary burden will be on the defendant to adduce evidence from an expert in the law of the defendant's preferred forum to show that forum would have territorial competence under its own law. The *CJPTA* requires a judge to "consider" not "decide" the law to be applied.[8]

Does s. 4 of the B.C. *Privacy Act* override the Forum Selection Clause?

The trial judge held that s. 4 of the B.C. *Privacy Act* trumped the Forum Selection Clause because the *Privacy Act* confers exclusive jurisdiction on the B.C.S.C. to the exclusion of all other courts worldwide. The B.C.C.A. concluded the trial judge erred in her interpretation by failing to give effect to the principle of territoriality that B.C. law only applies in B.C. and the legislature is powerless to affect the law of other jurisdictions. As such, s. 4 confers jurisdiction only to the B.C.S.C. to the exclusion of other B.C. courts.

B.C. law has effect outside of B.C. only when other jurisdictions choose, usually by a choice of law rule, to provide in their own law that B.C. law will

apply. Accordingly, it was for Ms. Douez to establish that s. 4 of the *Privacy Act* applied extraterritorially in California, which she did not. In the absence of evidence to the contrary, California courts can decide for themselves, using California law, whether they have territorial competence over any given proceeding. Moreover, the B.C.C.A. noted that the language of s. 4 provides that this section confers exclusive jurisdiction "despite anything contained in another Act", not despite anything contained in a *contract* such as the Terms of Use between Facebook and its users.

Conclusion

The B.C.C.A. concluded that the trial judge erred in her interpretation of s. 4 of the *Privacy Act*. The B.C.C.A. agreed with Facebook that the Forum Selection Clause should be enforced and Ms. Douez could bring her action in California. As a result of the B.C.C.A.'s conclusion on the Forum Selection Clause, it rendered moot Ms. Douez's application to certify the action as a class proceeding, and the claim was de-certified.

The variety and number of privacy-based class claims for online activities continues to accelerate. This welcome clarification on the enforceability of terms of use, including forum selection clauses, will be a definite "like" for those companies offering internet-based services who rely on such terms to govern their and their customers' conduct.

1 *Privacy Act*, R.S.B.C. 1996, c. 373, s. 3(2).
2 *Douez v. Facebook Inc.*, [2014] B.C.J. No. 1051, 2014 BCSC 953.
3 *Douez v. Facebook Inc.*, [2015] B.C.J. No. 1270, 2015 BCCA 279 (B.C.C.A. decision).
4 *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] S.C.J. No. 23, 2003 SCC 27.
5 *CJPTA*, S.B.C. 20003, c. 28.
6 *Preymann*, [2012] B.C.J. No. 106, 2012 BCCA 30.
7 *Viroforce*, [2011] B.C.J. No. 1101, 2011 BCCA 260.
8 B.C.C.A. decision, *supra* note 3, para. 41.

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