



Criminal Law News

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R. v. Ward - What's in a Name?

In this case, released August 8, 2008, David Ward was charged with possessing and accessing child pornography. This decision is a ruling on a Charter motion, so I can't tell you whether Mr. Ward was actually guilty of possessing child porn or not, but that wasn't the issue in the ruling in any event.

The issue in this case was the validity of a search warrant obtained for Mr. Ward's house and computer equipment by the Greater Sudbury Police Service. I suppose if you're going to be a cop in Sudbury it's preferable to work for the "Greater" Sudbury Police Service than the "Lesser" Sudbury Police Service.

The facts of this case, although international in scope, are not overly complex. Somewhere in Germany, someone hosts a website called carookee.com. This is a website that hosts over 25,000 user created forums on all sorts of topics including technology, sports, politics and (I know it's hard to believe that some would use the internet for such purposes) porn. In July 2006, the owner of the site found that some of the porn forums went beyond your garden variety porn, even for the Germans, and about 25 forums were dedicated to child pornography.

The owner gathered information about these forums and the IP

addresses of those who had accessed them and turned the information over to the German police. The German police in turn found 229 IP addresses originated in Canada and turned this information over to the National Child Exploitation Coordination Centre, which is run by the RCMP.

The RCMP found that three of these addresses belonged to Bell Sympatico in the Sudbury area. On November 22, 2006 RCMP Constable Tree wrote to Bell Sympatico requesting the subscriber information for the three IP addresses originating in Sudbury. As authority for this request, RCMP Constable Tree cited s. 7(3)(c.1) of the *Personal Information Protection Electronic Documents Act* (PIPEDA). You remember PIPEDA, don't you? I'm sure you do because the Law Society was all over it a few years ago, sending us those helpful email bulletins warning us about all our obligations. But for those few of you who may have forgotten some of its less than enthralling sections, s. 7 states amongst other things that an organization may disclose personal information without the individual's knowledge or consent if the disclosure is made to a governmental institution for the purpose of enforcing or administering any law of Canada.

Upon receipt of this "request", Bell Sympatico folded faster than Superman on laundry day and promptly sent RCMP Constable Tree

the information he wanted, namely, Mr. Ward's name and street address in Sudbury. Constable Tree then forwarded this information to the Greater Sudbury Police Service who picked up the investigation from there.

Ultimately, the Sudbury police applied for and were granted a search warrant based to a great extent on the information provided to the RCMP by Bell Sympatico. At the commencement of trial, the defence challenged the validity of the search warrant. It was the position of the defence that the Justice of the Peace should never have issued the warrant in the first place and as such the search pursuant to it should be considered warrantless and the evidence gathered as a result should be ruled inadmissible at trial.

One of the defence arguments was that the request by the RCMP of the subscriber information from Bell Sympatico constituted a warrantless search and seizure of Mr. Ward's personal information. As such this information should not have formed part of the Information to Obtain the search warrant and without it, there was insufficient material upon which a warrant could be granted.

Justice Lalonde of the Ontario Court of Justice approached the analysis of this issue by asking whether Mr. Ward had a reasonable expectation of privacy in the information that Bell Sympatico disclosed and specifically in his name. In conducting this analysis, Justice Lalonde referred to the unreported case of *R. v. Kwok*, decided by Justice Gorewich of the Ontario Court of Justice on January 25, 2008 in Newmarket. In *Kwok*, the facts were remarkably similar except that it was Rogers as opposed to Bell. In that case, Justice Gorewich found that Mr. Kwok had a reasonable

expectation of privacy in these circumstances and the police ought to have obtained a warrant in order to get the information.

In the *Kwok* decision, Justice Gauthier stated that there was no evidence of the contractual agreement before the court about keeping this type of information private. Well, the Crown didn't make that mistake twice. In the case against Mr. Ward, the Crown led evidence of the parties' contractual agreement. As part of all that fine print in the agreement between Mr. Ward and Bell Sympatico, the user agreed not to use the internet for child porn purposes. As well, in relation to disclosing personal information without consent, the agreement stated, amongst other things, the following:

The Bell Companies may disclose personal information without knowledge or consent to a lawyer representing the companies, to collect a debt, to comply with a subpoena, warrant or other court order, or as may be otherwise required by law.

Ultimately, Justice Lalande found that based on the contractual agreement between the parties, Mr. Ward could not claim a reasonable expectation of privacy in the information provided to the RCMP. He stated it thusly:

[67] Generally speaking, in modern day society, a person's name and address is used and shared frequently. A privacy issue is largely contextual in that a person may not want others to share information such as whether he or she is a subscriber to the services of an Internet

Provider. It is with regard to the context (taking into account all factors including the nature of the request, the particular information sought and the subscriber or service agreements) that the court has to assess the issue of reasonable expectation of privacy.

[68] In this case, the name and address was in the hands of a third party. The third party was entitled to measure its obligation to maintain confidentiality over personal information in accordance with its contractual arrangement with the subscriber. Although the applicant had a subjective expectation of privacy, I find in looking at the totality of the evidence that there was no objective reasonable expectation of privacy. In other words the subjective expectation was not objectively reasonable having regard to all contextual factors and the totality of the circumstances.

This is what irks me about this decision. I bet that 99% of Bell Sympatico subscribers have never read the fine print referred to in this case. I'm a Bell Sympatico subscriber and I've never read it. And of those who actually have read it, aside from obviously having way too much time on their hands, my guess is that most wouldn't understand it. As well, the reality is that none of these terms are negotiable. It's not like you can sit down with your Bell or Rogers rep and hash out these terms, it's a take it or leave it proposition.

It becomes even more important

when one thinks of all the groups, organizations businesses, charities, etc, that gather personal information from us all the time. For crying out loud, every time I go through the checkout at my local Lowe's the cashier asks me for my telephone number. I always decline and I always get a weird look that instantly lets me know that I'm part of the extreme minority who refuse to give up their number. And what does Justice Lalande expect people who do give their number to do in that situation? Negotiate on the spot with the cashier about to whom and under what circumstances Lowe's can disclose the information without consent?

In my opinion, the better approach in this case would have been to hold that Mr. Ward did have an expectation of privacy in the information. I'm as much against child pornography as the next person and it's in that context where s. 24(2) of the Charter should have been resorted to in order to decide if the evidence was admissible despite the Charter breach. My guess is that it wouldn't have taken much mental gymnastics to have it admitted under s. 24(2).

In the meantime, I guess the lesson here is we better hone up our negotiating skills for the next time we're in the checkout. Just make sure you're in the "eight items or less" line because the people behind you may not be too pleased, and that way they'll have less to throw at you. ■

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