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Supreme Court emphasizes right to internet privacy and anonymity

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The SCC's decision in *R. v. Spencer* underscores the considerable constitutional protection of individuals' privacy rights on the internet.

A recent decision of the Supreme Court of Canada recognizes that Canadians are entitled to broad protection from disclosure of their personal information, even when using publicly accessible websites.

In *R. v. Spencer* ("*Spencer*"), the Court unanimously held that

- (i) there is a reasonable expectation of privacy in a computer's unique internet address; and
- (ii) the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*") — federal legislation that regulates how organizations collect, use and disclose personal information — does not authorize violation of this reasonable expectation.

Right to privacy

In doing so, the Court emphasized individuals' rights to privacy and anonymity on the internet in the context of

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ENVIRONMENT

Appeal court finds purchaser received director's order

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The Ontario Court of Appeal has considered the requirements of s. 197 of the EPA in detail.

In *Crosslink Bridge Corp. v. Canadian National Railway Company*, the Ontario Court of Appeal upheld a decision of the Ontario Superior Court regarding notice of a Director's Order pursuant to s. 197 of the *Environmental Protection Act* (the "*EPA*").

The appeal court held that the defendant and vendor of the property in question, Canadian National Railway Company ("*CN*"), had

Justice will not be served until those who are unaffected are as outraged as those who are.

~Benjamin Franklin
(1706-1790)

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produced a copy of the Director's Order and that, therefore, the 2008 purchase of land by Crosslink Bridge Corp. ("Crosslink") was not voidable.

The EPA

The EPA regulates the discharge of contaminants into the environment. The amount of contaminant that is allowed into the environment depends on what the land is being used for and its proximity to environmentally sensitive areas.

The EPA grants the Ministry of Environment (the "MOE") broad powers to issue administrative orders (the "Director's Orders") to deal with the discharge of contaminants, such as orders to control the rate of discharge into the environment, orders to stop the discharge of contaminants, orders to clean up a contaminant and orders to take preventative actions

Section 197

Section 197(1) of the EPA grants the MOE the power to make a further order,

requiring any person with an interest in the property, before dealing with the property in any way, to give a copy of the order or decision affecting the property to every person who will acquire an interest in the property as a result of such dealing.

Under s. 197(2) of the EPA, if a Director's Order has been made by the MOE, then a certificate giving notice of the Director's Order (the "Certificate of Requirement") may be registered on title to the property in question. The Certificate of Requirement does not detail the substance of the Director's Order.

Rather, the Certificate states that a Director's Order has been made and names the person or entity required to give a copy of the Director's Order to any person dealing with the property.

The Certificate of Requirement is, . . . deemed to be directed to each person who subsequently acquires an interest in the real property.

See s. 197(3) of the EPA.

Section 197(4) of the EPA states that if a purchaser dealing with a property subject to a Director's Order is not given a copy of the Director's Order, then the purchaser's dealing with the property is voidable at its request.

This is the first reported case to consider s. 197 of the EPA in any detail. It offers a reminder that where a property is subject to a Director's Order, prospective vendors would do well to keep detailed records of dealings with prospective purchasers, including clear records of delivering a copy of the Director's Order.

Background

In December 2006, the MOE made a Director's Order under s. 18 of the EPA with respect to approximately 44 acres of vacant industrial land located in Niagara Falls, Ontario (the "Property") that had previously been used for car cleaning, an engine servicing facility and a passenger car yard.

The Director's Order required certain remedial work to be done, in certain situations, to reduce the risk of further contamination.

The Director's Order also required, pursuant to s. 197(1) of the EPA, that a copy of the Director's Order be given to every person who would deal with the Property and acquire an interest in the Property as a result of the dealing, before dealing with the Property in any way. A Certificate of Requirement was registered on title

to the Property by the MOE giving notice of the Director's Order.

Sale of property

In May 2007, Crosslink made an offer to purchase the Property. The offer originally allowed for a due diligence period ending on December 28, 2007; but, the period was extended several times to allow Crosslink to satisfy itself with respect to any environmental issues and its ability to have the Property re-zoned for its intended use.

Following further negotiations, the sale of the Property was completed in November 2008. In the final purchase agreement, Crosslink warranted and covenanted in favour of CN that it was satisfied with respect to all matters respecting the environmental condition of the Property, and that CN was assuming no liability in this respect.

Dispute

In December 2012, four years following the completion of the transaction, Crosslink advised CN, for the first time, that it was taking the position that it was never given a copy of the Director's Order pursuant to s. 197(4) of the EPA. As a result, Crosslink sought to void the transaction. The principals of Crosslink claimed that they were not aware of the Director's Order until November 23, 2012.

CN refused to void the transaction and took the position that it had delivered a copy of the Director's Order to Crosslink. Crosslink commenced an application against CN seeking to void the transaction and seeking \$5.91 million dollars from CN.

The damages figure represented all amounts paid by Crosslink for the Property, including carrying charges and expenses incurred in maintaining, rezoning and refinancing the property.

Trial Court

There was no dispute that the Certificate of Requirement, which provided notice to Crosslink that there was a

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Director's Order, was registered on title and provided to Crosslink by CN.

However, the Honourable Mr. Justice Murray acknowledged that this did not satisfy the requirement to deliver an actual copy of the Director's Order to Crosslink, pursuant to the Director's Order and s. 197 of the *EPA*.

With a view to all of the evidence on the application, Justice Murray concluded that the facts led "overwhelmingly" to the inference that Crosslink or its solicitors had been provided with a copy of the Director's Order prior to the closing of the transaction. Of particular note was an exchange of correspondence between the lawyers for CN and for Crosslink.

Legal communications

Crosslink's lawyers wrote to CN's lawyers seeking to requisition a copy of the Director's Order.

CN's lawyers replied to the requisition, stating, "[p]lease advise us if your client has not yet received a copy of his Order." CN's lawyers received no reply from Crosslink's lawyers.

CN's lawyers later asked Crosslink's lawyers whether there were, "... any concerns regarding title or the requisitions submitted in the requisition letter." Crosslink's lawyers had replied that there were none.

Estoppel

Justice Murray made an alternative finding that even if the evidence had not established that Crosslink was provided with a copy of the Director's Order, Crosslink was nevertheless *estopped* from bringing the application.

Justice Murray found that the conduct and statements made to CN's lawyers by Crosslink's lawyers prior to closing amounted to an unqualified

representation that a copy of the Director's Order had been received by Crosslink.

CN accepted these assurances and acted on them to complete the transaction. The evidence of CN's lawyers was that had they been advised that Crosslink did not receive a copy of the Director's Order, they would have given Crosslink a copy.

[E]ven if the evidence had not established that Crosslink was provided with a copy of the Director's Order, Crosslink was nevertheless estopped from bringing the application.

Ontario Court of Appeal

The Court of Appeal upheld Justice Murray's decision, finding that there was enough evidence to draw the conclusion that CN did provide a copy of the Director's Order to Crosslink. The Court of Appeal focused on the following facts:

- (1) Crosslink knew that the Director's Order had been made;
- (2) there was full disclosure of the environmental reports that led to the Director's Order;
- (3) Crosslink waived all conditions about the environmental condition of the property, acknowledged that CN had delivered all environmental reports in its possession and waived all requisitions concerning any matters; and
- (4) Crosslink failed to respond to CN's lawyers' correspondence which stated, "... [p]lease advise us if your client has not yet received a copy of the order."

Notably, the Court of Appeal stated clearly that it was not incumbent on

CN, four years after the transaction, to prove exactly when, where and how it gave a copy of the Director's Order to Crosslink. It was sufficient that Justice Murray found that at some point, CN gave Crosslink a copy of the Director's Order.

Significance

This is the first reported case to consider s. 197 of the *EPA* in any detail. It offers a reminder that where a property is subject to a Director's Order, prospective vendors would do well to keep detailed records of dealings with prospective purchasers, including clear records of delivering a copy of the Director's Order.

Constructive notice in the form of the Certificate of Requirement registered on title is not enough to meet the requirements of s. 197 of the *EPA*. Prospective purchasers should be aware that if they do not receive a copy of a Director's Order at or prior to the closing of the transaction, but know of its existence, the Court may be willing to scrutinize their actions and omissions (and motives) to discern whether they amount to an unqualified representation and promissory *estoppel*.

A purchaser's silence and failure to request a Director's Order in the face of knowledge of the Director's Order may ultimately bar a purchaser from invoking its right to void the transaction under s. 197(4) of the *EPA*. Prospective purchasers should also be aware of the effect of the passage of time in seeking to void a transaction.

REFERENCES: *Crosslink Bridge Corp. v. Canadian National Railway Company*, 2014 ONCA 247; *Crosslink v. CN Railway*, 2013 ONSC 6540; *Environmental Protection Act*, RSO 1990, c E; *Limitations Act*, 2002, S.O. 2002, C. 24 Schedule B.