

In the Matter of a Complaint between:

a Complainant

and

The Wild Coyote Club (Organization)

and

Treoscope Technologies (Third Party)

and

**Bar Watch, BC Civil Liberties Association, BC Freedom of Information and
Privacy Association, Alliance of Beverage Licenses (Intervenors)**

Inquiry under Part 11 of the PERSONAL INFORMATION PROTECTION ACT
between a Complainant and the Wild Coyote Club (Organization) and Treoscope
Technologies (Third Party) and Intervenors; OIPC File No.: P04-21866

Submission of the BC Civil Liberties Association

INTRODUCTION

1. The practice of scanning and storing the information contained on the driver's licenses of bar patrons is an unwarranted intrusion into the privacy of patrons and violates the *Personal Information Protection Act* [SBC 2003] c. 63 (the "Act"). Even if one were to assume that there exist legitimate aims of the scanning and storing practice, the practice fails to meet the legal test under the Act.

THE PRACTICE

2. According to the Portfolio Officer's Fact Report, the Organization's practice is to require patrons, in order to enter the Wild Coyote Club (the "Club"), to provide a driver's licence, which is then scanned into a computer, and to allow the Club to take a digital photograph of the patron that is also stored in the computer.

3. The information available from a person's driver's licence includes the following categories:
 - a) name;
 - b) age;
 - c) birth date;
 - d) address;
 - e) height;
 - f) weight;
 - g) eye colour;
 - h) hair colour;
 - i) gender;
 - j) a copy of the signature;
 - k) licence expiry date;
 - l) driver's licence number, and
 - m) a digital photograph of the individual.
4. The response submission of the Club states that the categories that are recorded on its computer are: age (which one must assume includes the birth date), name, gender, expiry date, driver's licence number, and photograph.
5. Given that the information is stored in a computer, it may be safely assumed that the information is placed within a database, containing similar information for all bar patrons.

THE LAW

6. The Act, in s.2, explicitly recognizes "the right of individuals to protect their personal information..."
7. None of the exceptions or exclusions in the Act applies in these circumstances.
8. There is a "reasonableness test" under the Act. The Organization must take into consideration "...what a reasonable person would consider appropriate in the circumstances..." (s. 4).
9. In fact, the Act is replete with "reasonableness tests", found throughout the Act, including the definition of "employee personal information", the definition of "investigation", and sections 2, 4, 8(1), 8(3), 9, 11, 12(1), 13, 14, 15(1), 16, 17, 18(1), 19(2), 21, and 22.
10. Further, s. 7(2) contains the following mandatory requirement:

An organization must not, as a condition of supplying a product or service, require an individual to consent to the collection, use or disclosure of

personal information beyond what is necessary to provide the product or service.

11. In order to collect the information, the Organization is required to obtain consent of the patron (s. 7(1)(b)). It is worth noting that under the Act, there can be NO implicit consent in these circumstances unless, "... at the time the consent is deemed to be given, the purpose would be considered to be obvious to a reasonable person." (s. 8(1)).
12. The Act allows information to be collected for "specified purposes" under s. 8(3), as long as proper notice is given and as long as the collection, use and disclosure of the information is reasonable in the circumstances.
13. The Act contains a further requirement under s. 11:

Subject to this Act, an organization may collect personal information only for purposes that a reasonable person would consider appropriate in the circumstances and that

(a) fulfill the purposes that the organization discloses under section 10 (1), or

(b) are otherwise permitted under this Act.

14. As a manner of applying these reasonableness tests, it may be useful or instructive to adopt the analysis of our courts with respect to protection of s.1 Charter rights, which also applies a reasonableness test. [The Charter, s. 1, states, The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law, as can be demonstrably justified in a free and democratic society". (emphasis added)]. BCCLA submits that privacy legislation should be viewed in the same light as human rights legislation, in that it seeks to protect and respect the dignity of individuals. Our courts have directed that human rights legislation be interpreted in a large and liberal manner. BCCLA submits that the Act must therefore be interpreted in a large and liberal manner, so to give as full protection to privacy rights as possible. Under s. 1 of the Charter, a "proportionality test" is applied:

There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R. v. Big M Drug Mart Ltd., supra, at p. 352. Third, there must be a proportionality between the effects of the measures which are

responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

R. v. Oakes, [1986] 1 S.C.R. 103.

15. To summarize, the Wild Coyote club has the onus under the Act:
 - a) to inform patrons, before any information is collected or used, what the specific purpose of the collection and use is [Act, s. 8(3)(a)];
 - b) to justify that purpose as reasonable;
 - c) to show that the information collected is limited to only that which is reasonably required for reasonable purposes;
 - d) to show express consent, or implied consent, in the manner and circumstances permitted under the Act;
 - e) to establish a rational connection between the stated purpose, and the methods used that infringe upon the customer's right to privacy;
 - f) to demonstrate that less intrusive methods are not available that would achieve the stated reasonable purposes.

THE STATED PURPOSES

16. The Wild Coyote submission explicitly states the intent of the system, as being "...to prevent minor's access to our age restricted premise and to deter violence within the establishment."

ARGUMENT

a) Does the Notice Provide Patrons with Adequate Notice of the Purposes?

17. The Notice (attached to the Club's Submission) simply states, with respect to the purpose, that "This is for security and identification purposes only."
18. The Wild Coyote Club must show that "Identification" is sufficient notice with respect to under-age patrons, and "security" is related to deterring violence.
19. The BC Civil Liberties Association ("BCCLA") submits that the Notice posted is far too general to constitute sufficient Notice under the Act. For example, "identification" misstates the purpose of assuring that patrons are not under-age. In theory, it could provide for a much broader collection of information than is required to ensure that patrons are not under-age. The purpose stated in the submission is verification of age, whereas the Notice given to patrons is the much broader description, "identification". Furthermore, the broader purpose of "identification" cannot be reasonably justified under the Act.

b) Rational Connection Between Purpose and Means

20. While it may be justified to examine the identification of a person who looks like they may be under-age, it makes no sense, in order to restrict access by minors, to record the information and store it in a database. A person responsible for security can just as easily look at a patron's driver's license as scan it into a database. Electronically scanning and recording the information provides no further information or analysis at the door, with respect to a person's age, than examining the identification personally. In other words, there is no need to scan and store the data in order to accomplish the objective. Indeed, the Liquor License Terms and Conditions cited by the Wild Coyote Club suggest that a licensee "assign an experienced door person to check ID." There is no rational connection between the first stated objective and the means.
21. With respect to the Club's assertion that the system is necessary in order to comply with the Liquor Control Board's ("LCB") suggestions, the LCB "suggestion" is for video cameras to be installed. Such cameras would far fall short of the personal information that is now being recorded and stored. Moreover, any suggestion by the LCB that contravenes the Act should be ignored.
22. With respect to deterring violence, the onus is on the Wild Coyote Club to establish a rational connection. There is no explanation in its submission on this point, as to why recording the information should deter violence. The Club has offered anecdotal evidence that violent acts have diminished since the system was put into place, with no attempt to determine a causal relationship. Correlation is not causation. A "placebo" scanner would arguably have the same effect of deterring violence.

c) Minimal Impairment

23. In order to restrict access by minors to age-restricted premises, there are less intrusive methods available. There is obviously no justification for recording this information from persons who are obviously over the age of 19 years. For example, a 40-year old patron should not be subject to any such procedure for the purpose of verifying his or her age, much less having such information kept in a database.
24. With respect to the second stated objective, security, it again begs the question how recording such information achieves any security objective. There is no advantage from scanning and recording a name, as opposed to looking at the name of a person, to predict whether that person may be a violent person. The same applies to the person's gender, licence expiry date, driver's licence number, and photograph. None of those pieces of information assist in

avoiding violence, and even if they did, recording them would not create any advantage over looking at them.

25. The Club may argue that the system deters violence, because patrons are less likely to engage in violent acts if they believe they could be caught. Even if this were true, the amount of information collected is over-broad. A name and photo should be sufficient. There is no need to record gender, expiry date, and driver's licence number.
26. The fact that the data is kept for two years is cogent evidence that the Club's stated purpose is not its true purpose. The true, hidden purposes, it is submitted, are to create a database to be used after a violent act has occurred, and to create evidence to be used to defend against a potential lawsuit. For example, in the event of a violent act, the police may want a list of witnesses and potential suspects. However, this is an entirely different purpose than the stated purpose. The stated purpose is to deter violence; the actual purpose appears to be to assist police after a crime has been committed. Thus the BCCLA submits that the Wild Coyote Club has violated the Act by not stating the true purpose of the system.
27. The two-year limitation period referred to in the brief filed by the Club, p. 2, can only refer to the time limit for an action for damage to property or injury to persons. It is totally irrelevant to the purpose of deterring violence, and is solely related to creating evidence to be used to defend against a potential lawsuit.
28. If the true purpose were to deter violence, metal detectors would be a much more effective, and less intrusive, method.
29. If the true purpose of the Club's data collection is as much about post-crime investigation or about defending against potential claims, than about deterring violence or "security" generally speaking, then the BCCLA submits that the collection of detailed identifying personal information included in a driver's license is not reasonable having regard to the sensitivity of the personal information in the circumstances. As such, the Club does not meet its obligations under section 8(3)(d) of the Act. Treating all patrons as potential suspects of a crime that *may* be committed in the future, to justify the collection of extremely detailed personal information from all such patrons to further a possible investigation, is a direct and deep attack on important principles fundamental to a free and democratic society including the presumption of innocence. There are many circumstances in which there is a reasonable likelihood of crimes being committed. That alone can not justify the wholesale collection of intimate details of persons who may be participants or witnesses. To permit such a collection under the Act would essentially nullify privacy protections and permit speculative collections for

the purpose of future possible criminal investigations in unlimited circumstances. Privacy would be rendered meaningless.

30. The BCCLA submits that if the true purpose of collecting and storing the information on a database is to assist in a post-incident investigation, then the following notice should be required under the law:

“In the event of a criminal or other event in the premises, a police or other investigation may be required. To assist in such an investigation, the Wild Coyote Club wishes to collect and store the personal information on your drivers license for up to two years. If an investigation is required, Wild Coyote Club may use or disclose your personal information to police or other investigators and you may be contacted as a potential suspect, witness or other relevant source of information in an investigation.”

The BCCLA submits that when such detailed, sensitive information is to be collected, used and disclosed regarding such serious matters as a crime or other legal matter, individuals should be given as specific notice as possible in order for them to make an informed choice as to whether or not to consent to the collection, use or disclosure of their personal information

31. Finally, if there have been no violent incidents at the end of an evening, upon the closing of the establishment, the database should be permanently erased. The stated objectives cannot in any way justify the maintaining of this database of personal information following the close of business each day.

All of which is respectfully submitted.

Counsel for the BC Civil Liberties Association