



NEWSLETTER

Canadian IT Law Association

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Biotechnology Law: Liability for Genetic Contamination

The Supreme Court of Canada has dismissed application for leave to appeal in *Hoffman v. Monsanto Canada Inc.* [2007] S.C.C. No. 347 ([hyperlink not available](#)). The applicants, Hoffman and others, are certified organic farmers. In the 1990s, the two respondents, Monsanto Canada Inc. and Bayer Cropscience Inc., introduced genetically modified strains of Canola, unconfined release of which was approved by the Canadian government. Hoffman, et al, claim that they have suffered, among other things, financial loss arising from the contamination of their organic farms by the respondent's GM canola strain. They blame the respondent's introduction and commercial use of GM canola strain for their loss and want the court to hold the respondents liable for negligence, nuisance, trespass, and breach of various environmental statutes. Even though the action has been maintained in the names of Larry Hoffman, L.B. Hoffman Farms Inc. and Dale Beaudoin it "was in fact driven by the Saskatchewan Organic Directorate-Organic Agricultural Protection Fund". At the court of the first instance (Saskatchewan Court of Queen's Bench, Smith J), the applicants were unsuccessful in their application for certification as class action. Further appeal to the Court of Appeal for Saskatchewan was dismissed in May 2007. Essentially, the litigation turns on the determination of potential liability of biotechnology companies for harm caused by GM crops and the modalities for certification of environmental class action. In dismissing the present application for leave to appeal, the Supreme Court of Canada did so on December 13, 2007, without costs

and without assigning any reasons for its decision

Consumer Complaints Agency for the Telecommunications Industry

On April 4, 2007, the Governor in Council issued an Order requiring the creation of an industry-established consumer agency which would be independent from the telecommunications industry and would have a mandate to resolve complaints from individual and small business retail customers. This agency was meant to be a component of the deregulated telecommunications market. The Order set out general guidelines with respect to the mandate and governance structure of the intended consumer agency, but also stated that those matters would have to be approved by the Commission.

In response a number of large telecommunications service providers (TSPs) established an agency they called the Commissioner for Complaints for Telecommunications Services Inc. (the Agency). That Agency began operating on July 23, 2007, and the founding members filed a proposal with the Commission claiming that this Agency satisfied the terms of the Governor in Council's Order. The Commission therefore held a public consultation and [invited comments](#) on the structure and mandate of the Agency. Based on that process, the Commission has recently in large measure [approved](#) the Agency, subject to some changes in structure and mandate.

One central issue which arose in the consultations was the question of whether membership in the agency should be mandatory for all or some TSPs, or whether it would be sufficient to rely on voluntary membership. In particular there was discussion of whether the Agency would be adequately funded if membership were solely voluntary, and also of whether the fees involved in mandatory membership might be unfair to smaller TSPs. Some submissions (primarily from TSPs) argued that voluntary membership would be sufficient, and that market

forces would be sufficient to encourage TSPs to join. Other submissions (primarily from consumer groups) argued that mandatory membership was necessary in order to ensure maximum participation in the Agency and thereby benefit the maximum number of consumers. They argued that market forces had not been sufficient to create the Agency in the first place, which had only been created in response to the Governor in Council's Order.

The Commission reached a kind of middle ground, requiring mandatory membership in some cases. They accepted that the fees associated with membership in the Agency could have an adverse impact on smaller TSPs. They also noted that large TSPs – those with annual Canadian telecommunications service revenues in excess of \$10 million – accounted for approximately 95 percent of total Canadian telecommunications service revenues. Finally they noted that market forces had not so far been sufficient to lead all those large TSPs to join the Agency. Accordingly they decided to make membership mandatory for large TSPs only. That would be sufficient, they decided, to make membership in the Agency sufficiently comprehensive to protect consumers, without imposing a significant administrative and financial burden on TSPs.

The other major issue considered by the Commission was the governance structure of the Agency, in order to determine that it was truly independent of industry. The Order had stated that the consumer agency should be independent from the telecommunications industry and should be directed by a governing body composed of (a) a majority of members who are not affiliated with any TSP and (b) a chief executive officer who is appointed by the governing body and is not affiliated with any TSP.

The Commission approved of the structure of the Agency, which was comprised of a majority of directors not affiliated with TSPs. The Commission also approved of the proposal to have two sets of independent directors, two consumer-group-appointed and two other independent directors. It had been suggested that persons who had been employed by a consumer advocacy group within the previous three years should be disqualified, as were people who had worked for TSPs, but the Commission found this restriction to be unnecessary.

The noted that the Agency was meant to be independent from only the telecommunications industry, not from consumer advocacy groups. The Commission also invited the consumer groups who had been involved in the consultation to establish a transparent process for nominating and appointing the two consumer-group-appointed directors.

The Commission also considered and gave decisions on a number of more specific matters, such as the scope of eligible complaints the Agency would be able to deal with, the identification of trends that might require attention, and the ability of the CEO to order monetary compensation as a remedy. The Commission did not expand the scope of eligible complaints beyond that proposed, but did require that the Agency keep track of ineligible complaints and categorize them. It also required that the list of parties who could identify trends or systemic issues for Agency reports should include any director of the Board, the CEO, and the Commission; and that the issue of ineligible complaints should be among the possible trends about which to report. Finally, the TSPs which had founded the Agency had proposed that the CEOP should be able to award compensation of up to \$1000 per complaint, but the Commission required that this figure be increased to \$5,000 per complaint.

National “Do-not-call” List

On July 30, 2007, the CRTC issued a call for proposals to create a national “do-not-call” list in accordance with their [decisions](#) to establish such a database. The competition closed on September 10, 2007, and the CRTC has now [announced](#) that Bell Canada has received a five-year contract to operate the service. As a result Bell Canada will be responsible for registering numbers, providing telemarketers with up-to-date versions of the list, and receiving consumer complaints about telemarketing calls. The national “do-not-call” list will be operated using the fees that telemarketers will pay to subscribe to the list. The list is expected to be in operation by September 30, 2008.

Privacy Commissioner's Office: Funding Opportunities for 5th Annual Privacy Research Program

The Office of the Privacy Commissioner of Canada has given notice of the proposed launch of the [5th Annual Privacy Research Program](#). According to the Commission, this year's program will include "new priorities and new opportunities". The Office is interested in supporting research proposals that focus on four identified priority areas, namely national security, identity integrity and protection, information technology and genetic privacy. The proposed package also includes funding support for public education, regional programs on privacy and "collaborative research and policy development work with provincial and territorial privacy commissioners' offices". The program is to be launched this January when detailed information on the priority areas and method of application will be unveiled.

This newsletter is intended to keep members of IT.Can informed about Canadian legal developments as well as about international developments that may have an impact on Canada. It will also be a vehicle for the Executive and Board of Directors of the Association to keep you informed of Association news such as upcoming conferences.

If you have comments or suggestions about this newsletter, please contact Professors Robert Currie, Chidi Oguamanam and Stephen Coughlan at it.law@dal.ca.

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Le présent bulletin se veut un outil d'information à l'intention des membres d'IT.Can qui souhaitent être renseignés sur les développements du droit canadien et du droit international qui pourraient avoir une incidence sur le Canada. Le comité exécutif et le conseil d'administration de l'Association s'en serviront également pour vous tenir au courant des nouvelles concernant l'Association, telles que les conférences à venir.

Pour tous commentaires ou toutes suggestions concernant le présent bulletin, veuillez communiquer avec les professeurs Robert Currie, Chidi Oguamanam et Stephen Coughlan à l'adresse suivante : it.law@dal.ca

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