



NEWSLETTER

Canadian IT Law Association

www.it-can.ca

This newsletter is prepared by Professors [Michael Deturbide](#), [Anne Mussett](#) and [Teresa Scassa](#) of the Law and Technology Institute of Dalhousie Law School.

Les auteurs du présent bulletin sont les professeurs [Michael Deturbide](#), [Anne Mussett](#) et [Teresa Scassa](#) de l'Institut de droit et de technologie de la Faculté de droit de l'Université de Dalhousie.

Civil Litigation

In the recent ruling in *Lépine c. Société canadienne des postes*, the Quebec Superior Court has permitted a class action suit against Canada Post to proceed, by ruling that the applicant Lépine was an appropriate representative for the class of persons living in Quebec who had purchased a CD-ROM from Canada Post offering them free internet service for life. The offer had been made by Canada Post in July of 2001 in conjunction with a company called Cybersurf Corp. The offer was made through an advertisement offering free internet access for life for a one-time payment of \$9.95 for a CD-ROM. Lépine had purchased the CD-ROM necessary to set up this service. Among the terms and conditions that appeared on the screen during the installation process was a statement that no recourse would lie against Canada Post, and a further proviso that Cybersurf could put an end to the free service at any time. Less than one month after Lépine signed up for the service, the service was terminated by Cybersurf, with an offer to subscribers to permit them to continue to receive service for a monthly fee. Similar class action suits are proceeding in Ontario and British Columbia.

Consumer Protection

Federal, provincial and territorial ministers responsible for consumer affairs have agreed to promote consumer protection in electronic commerce by endorsing [The Canadian Code of Practice for Consumer Protection in Electronic Commerce](#). The Code outlines several principles of good business practice for merchants conducting commercial activities with consumers online. These

principles include: providing adequate information to allow consumers to make informed choices, providing a meaningful opportunity to correct or cancel an order before it is accepted and processed, ensuring privacy of personal information, maintaining effective controls to protect the integrity and confidentiality of payment and other personal information consumers provide, and not sending marketing e-mail to consumers without their consent, except when vendors have an existing relationship with them. Vendors must also take all reasonable steps to prevent monetary transactions with children.

The ministers also called for credit card chargeback rights for consumers, which are reflected in the [Internet Sales Contract Harmonization Template](#), to be extended to all forms of distance sales (a rather ironic statement, as many of these jurisdictions have not yet adopted legislation that reflects the Template provisions).

The ministers praised the model legislation developed by a working group of federal, provincial and territorial representatives, and the Uniform Law Conference of Canada on consumer protection in cross-border transactions. A [press release](#) indicates that each jurisdiction is reviewing the model to determine its applicability to their particular situation.

Copyright

In a [January 19 decision](#), the Copyright Board of Canada refused an application by the Canadian Private Copying Collective that the Board issue orders against certain importers of blank audio recording media that were allegedly not complying with the terms of the Private Copying Tariff, 2001-2002 and the interim tariff for 2003. The Board concluded that it was not analogous to bodies such as the Competition Tribunal or the CRTC, and that the *Copyright Act* did not confer upon it the power of enforcement.

Criminal Law

In *R. v. Cassidy*, the Ontario Court of Appeal considered the status of charges originally stayed following a dispute over the extent of the Crown's obligation of disclosure. The respondent had been charged with five counts of possession of child pornography. The charges related to files found on his computer hard drives. To retrieve the files the police had used two software programs. One program is available commercially, but at a very high cost both for the software and the necessary training. The other program is only available for use in law enforcement, and cannot be purchased by members of the public. Although the Crown had disclosed the files that were the subject of the charges to the respondent, they had refused to provide access to the full hard drives, or copies of the hard drives. They also refused to provide copies of the software programs. After refusing to comply with a court order to provide the hard drives, the software and the necessary training to the respondent, the Crown consented to an application by the respondent to stay the charges. The Crown later appealed the disclosure order, and sought to have the stay set aside. At the Court of Appeal, the Crown proposed that the respondent be given access to the hard drives by "allowing counsel or his expert to attend at the police premises and, in privacy apply the two software programs to the respondent's copies of the hard drives." (at para 9). This arrangement was acceptable to the respondent. The Court of Appeal took the view that this would be sufficient to meet the Crown's disclosure obligation. However, the Court declined to reinstate the charges, noting: "There was nothing to prevent the Crown from taking this position two years ago before the trial judge. Instead, it maintained what it now concedes was an erroneous position and launched an appeal which resulted in a two year delay in the proceedings." (at para 18).

Defamation

In the recent decision in *Consumers' Assn of Canada v. Hillard*, Morin J. of the Ontario Superior Court dealt with a claim of defamation that arose with respect to two emails sent by the defendant by one former Board member of the Consumers' Association of Canada to other Board members and

committee chairs. The defendant did not defend the action and was noted in default. The e-mails contained statements that the Court found to be defamatory, and damages were awarded to the plaintiffs.

Privacy

IN A RULING ON VOIR DIRE IN *R. v. RUGG*, Higinbotham J of the B.C. Provincial Court considered the privacy implications of the use of "Forward Looking Infra Red" (FLIR) technology.

The FLIR technology produces a "heat picture" of an object at which it is aimed. The picture is produced based on the surface temperature of the object, and does not penetrate the object to measure the heat of other objects within. Thus, if aimed at a house, it would produce an image of the heat of the various surfaces of the house, but would not measure objects inside the house.

Higinbotham J ruled that the use of the device did not amount to a search, as the FLIR "does not reveal any core biographical information about the residents of the house" (at para 19). The judge noted it revealed less information than records of electrical consumption, or surveillance of the comings and goings of residents in the house. Noting that Canadian case law was divided as to the intrusiveness of the FLIR technology, Higinbotham J took the view that "residents do not have a reasonable expectation of privacy as to the amount of heat emanating from their homes." (para 23).

IN *SAVIK ENTERPRISES V. NUNAVUT (COMMISSIONER)*, a dispute over the awarding of a government contract, Kilpatrick J of the Nunavut Court of Justice took notice of certain common law privacy rights. The plaintiff had expected to receive a lucrative fuel delivery contract that was instead awarded to a number of small local companies. The plaintiff brought a motion to compel disclosure of the proposals submitted by the competing bidders. The defendant denied access, claiming privilege. A third party, Arctic Cooperatives Ltd. sought leave to intervene in the motion to represent the privacy interests of the competing bidders. Kilpatrick J. noted that a growing body of case law in Canada recognized common law privacy interests. He

noted that the companies had common law privacy interests in their proposals, and took the view that these interests would be affected by the order for disclosure being sought by the plaintiffs. As a result, he granted intervenor status to ACL.

Recent Publication

Eloïse Gratton, *Internet and Wireless Privacy: A Legal Guide to Global Business Practices* (Toronto: CCH Canadian, 2003).

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 Michael Deturbide, Anne Mussett and Teresa Scassa at it.law@dal.ca.

Disclaimer: The IT.Can Newsletter is intended to provide readers with notice of certain new developments and issues of legal significance. It is not intended to be a complete statement of the law, nor is it intended to provide legal advice. No person should act or rely upon the information in the IT.Can Newsletter without seeking specific legal advice.

Copyright 2003 by Michael Deturbide, Anne Mussett and Teresa Scassa. Members of IT.Can may circulate this newsletter within their organizations. All other copying, reposting or republishing of this newsletter, in whole or in part, electronically or in print, is prohibited without express written permission.

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 Michael Deturbide, Anne Mussett et Teresa Scassa à l'adresse suivante : it.law@dal.ca

Avertissement : Le Bulletin IT.Can vise à informer les lecteurs au sujet de récents développements et de certaines questions à portée juridique. Il ne se veut pas un exposé complet de la loi et n'est pas destiné à donner des conseils juridiques. Nul ne devrait donner suite ou se fier aux renseignements figurant dans le Bulletin IT.Can sans avoir consulté au préalable un conseiller juridique.

© Michael Deturbide, Anne Mussett et Teresa Scassa, 2003. Les membres d'IT.Can ont l'autorisation de distribuer ce bulletin au sein de leur organisation. Il est autrement interdit de le copier ou de l'afficher ou de le publier de nouveau, en tout ou en partie, en format électronique ou papier, sans en avoir obtenu par écrit l'autorisation expresse.