

IT.CAN NEWSLETTER/BULLETIN

Canadian IT Law Association

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Part 1 of this newsletter is prepared by Professors [Michael Deturbide](#), [Anne Mussett](#) and [Teresa Scassa](#) of the Law and Technology Institute of [Dalhousie Law School](#). Part 2 of this newsletter is prepared by Professor [Pierre Trudel](#) and [France Abran](#) of the L.R. Wilson Chair in Information Technology and Electronic Commerce Law, Université de Montréal.

Les auteurs de la première partie 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](#). Les professeurs [Pierre Trudel](#) et [France Abran](#) de la Chaire en droit des technologies de l'information et du commerce électronique L.R. Wilson de la Faculté de droit de l'Université de Montréal ont rédigé la seconde partie du présent bulletin.

Part 1

Consumer Protection

British Columbia is the most recent province to introduce new consumer protection legislation to address online sales. [Bill 2](#), *The Business Practice and Consumer Protection Act* resembles the Internet Sales Harmonization Template. Alberta, Manitoba, Nova Scotia have implemented the Template to varying degrees in their new consumer protection legislation. In Ontario, its statute has passed and draft regulations have been published. Essentially, the provincial *Acts* are the same with respect to the substantive rules although there are some differences in terminology. The *Acts* cover internet sales contracts with particular focus on issues relating to contract formation, cancellation, reimbursement rights on credit cards and disclosure of information

Copyright Law

THE SUPREME COURT OF CANADA has handed down its much-anticipated decision in [Law Society of Upper Canada v. CCH Canadian](#) (*CCH Canadian*). Writing for a unanimous Court, McLachlin C.J. has reversed the decision of the Federal Court of Appeal. In doing so, she has made a number of very important statements regarding copyright law in Canada.

One of the issues in *CCH Canadian* was that of the appropriate standard of originality in Canadian

copyright law. The debate in Canadian case law and academic commentary has been between a low threshold of originality amounting to “sweat of the brow” or a higher threshold where a work must evince some level of creativity. McLachlin C.J. ruled that “the correct position falls between these extremes.” (at para 16). Rejecting “creativity” as a requirement, she states:

What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one’s knowledge, developed aptitude or practiced ability in producing the work. By judgment, I mean the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. (at para 16).

McLachlin C.J. also went on to address the particular issues relating to compilations of fact. In rejecting “sweat of the brow” as a basis for originality, she indicated that one of the most glaring flaws in that approach was that it “extended copyright protection in a compilation beyond selection and arrangement – the compiler’s original contributions – to the facts themselves”. (at para 22). She reaffirmed the proposition that in Canada, as in the United States, copyright protection is limited to the expression of ideas, and not to the underlying facts or ideas expressed.

In reaching her conclusions with respect to the standard of originality, McLachlin C.J. emphasized the importance of the purpose of copyright legislation. Referring back to the Court’s earlier decision in *Theberge v. Galerie d’Art du Petit Champlain*, she noted that an unduly low threshold for originality in copyright would “tip the scale in favour of the author’s or creator’s rights, at the loss of society’s interest in maintaining a robust public domain that could help foster future creative innovation.” (at para 23).

McLachlin C.J. proceeded to apply this standard of originality to the works at issue in the case. She ruled that headnotes, case summaries and topical indices reflected an exercise of skill and judgment on the part of their authors, and were thus “original” works. (at paras 30-32). Reported judicial decisions “when properly understood as a compilation of the headnote and the accompanying edited judicial reasons” (at para 33) are “original” works. However, the publishers could claim no copyright in the underlying judicial reasons “in and of themselves”. (at para 35) Any editorial changes or corrections made to the decisions “are more properly characterized as a mere mechanical exercise.” (at para 35)

It is not entirely clear whether McLachlin C.J. intended only to find that the publishers did not have copyright in the judicial reasons, or whether she intended to declare judicial reasons to be entirely in the public domain. She states: “...the reported reasons, when disentangled from the rest of the compilation – namely the headnote – are not covered by copyright. It would not be copyright infringement for someone to reproduce only the judicial reasons.” (at para 35) This statement would appear to fly against the general expectation that judicial opinions are covered by Crown copyright. (See, for example, the *Reproduction of Federal Law Order*, which seems premised upon Crown copyright existing in reasons for judgment).

McLachlin C.J. also reversed the decision of the Court of Appeal with respect to the finding that the provision of free-standing photocopiers in the Great Library amounted to the authorization by the Law Society of any infringing copying by the users of the machines. The Federal Court of Appeal had followed the approach of the Australian High Court in *Moorhouse v. University of New South Wales*, [1976] R.P.C. 151. In rejecting this approach, McLachlin C.J. noted that the Moorhouse decision is “inconsistent with previous Canadian and British approaches to this issue” (at para 41), and that it “shifts the balance in copyright too far in favour of the owner’s rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole.” (at para 41). In her analysis, McLachlin C.J. pointed out that there was no evidence that the machines had been used to infringe copyright, and that it is “plausible that the patrons using the

machines were doing so in a lawful manner.” (at para 43). Further, the posting of a notice by the Law Society above the machines did not constitute “an express acknowledgment that the photocopier will be used in an illegal manner” (at para 44). Finally, she concluded that in any event, “the Law Society lacks sufficient control over the patrons who might commit infringement. Nor does the Law Society exercise control over which works the patrons choose to copy, the patrons’s purposes for copying or the photocopiers themselves.” (at para 45).

McLachlin C.J. also considered whether the Great Library’s custom photocopy service fell within the scope of the fair dealing defense. Her analysis begins with a significant statement of the proper approach to interpreting the defense. She notes that fair dealing should not be interpreted restrictively, in order to “maintain the proper balance between the rights of a copyright owner and users’ interests.” (at para 48). She takes the position that the fair dealing defense is always available. As a result, a library only needs to rely upon the specific library exemption in s. 30.2 of the *Copyright Act* if they are unable to make out the fair dealing defense. McLachlin C.J. accepted the view of the Federal Court of Appeal that “research” is not limited to private or non-commercial research, and as such, can encompass the research done by lawyers in carrying out the business of law. She then embraced the set of factors outlined by Linden J.A. at the Federal Court of Appeal as being part of a fair dealing analysis. The factors include: the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, and the effect of the dealing on the work.

In applying these considerations to the facts, McLachlin C.J. ruled that it was not incumbent on the Law Society to establish that every use of the materials provided by the Great Library falls within the fair dealing exception. Rather, the Law Society can rely on its “general practice” to establish fair dealing. (at para 63). In her view “‘Dealing’ connotes not individual acts, but a practice or system. This comports with the purpose of the fair dealing exception, which is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works.” (at para 63). Thus, institutions relying on the fair dealing exception can establish fair dealing “either by showing that their

own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair.” (at para 63). In the case of the Law Society’s custom photocopy service, McLachlin C.J. found that it qualifies as dealing with works for the purpose of research as it is “an integral part of the legal research process” (at para 64). The dealings with works through this service were also found to be fair in the circumstances.

The Court also considered an argument on cross-appeal relating to the Law Society’s fax transmissions of works. The publishers had argued that such transmissions were “communications to the public by telecommunications” in violation of s. 3(1)(f) of the *Copyright Act*. McLachlin C.J. upheld the decisions below that the transmission of a single copy of a work to a single individual is not a communication to the public within the meaning of the *Act*.

IN A RECENT DECISION of the Federal Court Trial Division, Tremblay-Lamer J. ruled on a number of issues raised in a copyright dispute. In *EROS - Equipe de recherche opérationnelle en santé inc v. Conseillers en gestion et informatique (C.G.I.) Inc.*, the dispute centred on a piece of software designed to aid in the management of patients in long term care. The software, commissioned by the Régie Regionale de la Santé, had been designed to automate a system of information gathering and management that was manual, and relied upon a series of forms. The plaintiff EROS claimed copyright in the forms, and argued that this copyright had been infringed by the incorporation of the forms into the software program, the translation of the forms into a computer language, and the reproduction of the work that constituted the forms whenever the software program was run. EROS argued that the Régie was liable for authorizing these acts of infringement.

In its defence, the Régie asserted Crown immunity. Tremblay-Lamer J. rejected this argument on the basis that the Régie, by earlier entering into a licence agreement with EROS regarding the forms, had voluntarily submitted to the copyright regime. In any event, by deciding to incorporate the protected forms into the software, the defendant had acted outside of its mandate conferred on it by the government, and therefore could not claim the benefit of Crown immunity.

Tremblay-Lamer J. had no difficulty finding that there had been a reproduction of the plaintiff’s forms in the defendant’s software, as large parts of the forms were incorporated into the programme. The more interesting issue in this case was whether the particular agencies that used the software violated copyright each time they used the programmes. Tremblay-Lamer J. ruled that the right of reproduction in “any material form” meant a reproduction in a form that is “palpable, tangible, perceptible” (at para 113). When the software is used, large parts of the plaintiff’s forms appear on the screen. The user then enters the information into the screen. The appearance of the form on the screen is thus not ephemeral, and is interactive. As a result, in the view of Tremblay-Lamer J., it would amount to a reproduction within the meaning of the *Copyright Act*. A further violation would occur each time a printed report would be generated.

Domain Names

A recent decision under the CIRA *Dispute Resolution Policy* (CDRP) in *Diners Club International Ltd. v. Planet Explorer Inc.* raises questions about the manner in which the policy is applied to the particular set of facts. The complainant objected to the respondent’s registration of the domain names *diners-club.ca* and *dinerscard.ca*. The domain names resolved to a web site created by the respondent which was critical of the complainant’s business practices, and which attempted to gather support for a class action law suit against the complainant. The complainant sought to use the CDRP process to have the domain names transferred. A three-person panel consisting of Edward Chiasson, Q.C., Roger Kerans and David Haigh ruled in favour of the complainant and ordered the transfer of the names.

The decision is interesting because of the manner in which the panel applies the CDRP. Paragraph 4.1 of the CDRP provides as follows:

4.1 Onus. To succeed in the Proceeding, the Complainant must prove, on a balance of probabilities, that:

- (a) the Registrant’s dot-ca domain name is Confusingly Similar to a Mark in which the Complainant had Rights prior to the date of

registration of the domain name and continues to have such Rights; and

(b) the Registrant has registered the domain name in bad faith as described in paragraph 3.7;

and the Complainant must provide some evidence that:

(c) the Registrant has no legitimate interest in the domain name as described in paragraph 3.6.

Even if the Complainant proves (a) and (b) and provides some evidence of (c), the Registrant will succeed in the Proceeding if the Registrant proves, on a balance of probabilities, that the Registrant has a legitimate interest in the domain name as described in paragraph 3.6.

The Panel found that the domain names were confusing similar to the complainant's Diners Club trademarks. It also found that the respondent had no legitimate interest in the domain names. The panel appeared to take the view that the creators of a criticism site could only use the trademark of another in the site's domain name if the domain name uses language that identifies the site as a criticism site. They may have been contemplating, for example, something such as *dinersclubsucks.com*. Otherwise, in the view of the panel, "The owner of a mark is entitled to decide who and how its mark will be used insofar as the mark is being used without qualification in relation to the Respondent or its commercial activities." (at para 47).

In spite of the fact that para 4.1(b) of the CDRP requires that the complainant establish, on a balance of probabilities, that the domain name has been registered in bad faith, the panel stated: "Having determined that the Respondent does not have a legitimate interest in the subject domain names, the Administrative panel makes no finding concerning the allegation of bad faith." Given the definition of "bad faith" in paragraph 3.7 of the CDRP, it is questionable whether the complainant would have been able to establish this element of the test.

Privacy

Federal Privacy Commissioner, Jennifer Stoddart has delivered three speeches in the past two weeks. Speaking to the International Association of Privacy Professionals in Washington DC, Commissioner

Stoddart addressed [Privacy and Data Security](#) from the Canadian perspective. Commissioner Stoddart appeared before the [Standing Committee on Government Operations and Estimates](#) at which time she outlined a series of priorities for the Office of the Privacy Commissioner. Ms. Stoddart identifies "institutional renewal and the necessary corrective measures" as the most immediate priorities. And finally, on March 3, 2004, Ms. Stoddart was invited to address the [Senate Standing Committee on Social Affairs, Science and Technology: Bill C-6, the Assisted Human Reproduction Act](#). Commissioner Stoddart concludes the privacy-related principles in the proposed legislation are, "on their face," adequate.

In response to the confusion surrounding the application of *PIPEDA* to charities and in the employment context, the Privacy Commissioner of Canada has also released three "fact sheets," two on the application of the *Personal Information Protection and Electronic Documents Act (PIPEDA)* and a third on workplace privacy generally. The first deals with the [application of PIPEDA to charitable and non-profit organizations](#). The Privacy Commissioner clarifies the position of both types of organizations indicating that generally the *Act* will not apply to charities, associations or other similar organizations, but non-profit status does not automatically exempt an organization from the application of the *Act*. Further, even where an organization is not subject to *PIPEDA*, it should practice fair information principles and provide "members, donors or supporters with an opportunity to decline to receive further communications." With respect to the [private sector employment context](#), the Privacy Commissioner has also issued a clarification on the application of *PIPEDA* to employee records. It confirms that the *Act* applies to employee information only in organizations that are engaged in federal works, undertakings or businesses. The extension of the *Act's* scope in January 2004 does not change that. Finally, a "fact sheet" entitled "[Privacy in the Workplace](#)" deals briefly and generally with employee rights in the workplace.

2^{ème} partie

Ouverture du site Gouvernement en ligne – Québec

Le Conseil du trésor du gouvernement du Québec a désormais sur son site une nouvelle section consacrée au Gouvernement en ligne. Il s'agit d'un bulletin mensuel qui vise à faire connaître les nouveaux services en ligne offerts par le gouvernement du Québec et à en présenter d'autres qui gagnent à être mieux connus, qu'ils soient l'œuvre de ministères, d'organismes ou de partenaires non gouvernementaux.

Voir : <http://www.bulletin.gouvernement.tresor.gouv.qc.ca>

Gouvernement en ligne et authentification – Protection de la vie privée – Québec

Le projet Service québécois d'authentification gouvernementale (SQAG), proposé par le Secrétariat du Conseil du trésor du Québec, consiste à délivrer aux citoyens et aux entreprises utilisant des services gouvernementaux par Internet un certificat numérique qui leur permettra de s'identifier en ligne. À la demande du Secrétariat du Conseil du trésor, la Commission d'accès à l'information (CAI) a rendu un avis sur le fonctionnement et la conformité du SQAG aux exigences de la législation québécoise sur la protection des renseignements personnels en regard de l'identité, la délivrance d'un certificat, l'inscription à un programme et corroboration d'identité, l'authentification des citoyens et des entreprises et la récupération, l'annulation et le renouvellement d'un certificat.

La CAI souligne les efforts du Secrétariat du Conseil du trésor afin de trouver une solution répondant aux exigences de la protection de la vie privée et des renseignements personnels et aux préoccupations qu'elle avait déjà émises antérieurement. Elle donne son accord pour la réalisation du SQAG tout en se réservant la possibilité de faire une vérification et une analyse plus approfondies du projet implanté.

Avis de la Commission d'accès à l'information sur le projet d'authentification des citoyens et des entreprises dans le cadre du gouvernement électronique pour le Secrétariat du Conseil du trésor, 23 février 2004.

Justice et technologies de l'information – Protection de la vie privée – Québec

Le Système intégré d'information de justice (SIJ), projet impliquant trois ministères (justice, sécurité publique et santé et services sociaux), vise à doter les intervenants québécois de l'administration de la justice, des technologies de l'information nécessaires pour échanger électroniquement les informations de justice entre eux. Dans cet avis, la Commission d'accès à l'information (CAI) examine la conformité du projet SIJ aux principes de protection des renseignements personnels.

Avis de la Commission d'accès à l'information concernant le système intégré d'information de justice (SIJ) présenté par le ministère de la Justice, 11 février 2004.

Expectative raisonnable de vie privée et Internet – Canada

L'expectative raisonnable de vie privée d'un individu varie selon les contextes. La Cour suprême du Canada en a déjà identifié certains dans le monde « réel », entraînant des degrés ou niveaux différents d'expectative de vie privée. On traite ici de l'expectative de vie privée dans le contexte des enquêtes criminelles et pénales. L'émergence d'Internet et des nouvelles technologies a cependant apporté de nouveaux contextes de communication. Dans son mémoire, l'auteur examine ainsi, en regard des critères établis par la Cour suprême du Canada, le niveau ou le degré d'expectative raisonnable de vie privée d'un individu placé dans ces nouveaux contextes.

François BLANCHETTE, *Mémoire-L'expectative raisonnable de vie privée et les principaux contextes de communications dans Internet*, Juriscom.net, 3 février 2004.

Preuve et signature électronique

Le droit vise à traiter de façon identique les moyens classiques et électroniques de signer, étant donné leurs fonctions communes. Pour ajuster l'institution de la signature aux phénomènes électroniques, le droit s'est tourné vers le standard de fiabilité de la signature électronique. L'auteur examine les applications et les composantes du standard de fiabilité.

Ivan MOKANOV, *La teneur du standard de fiabilité des moyens électroniques de signature*, Lex Electronica, hiver 2004.

Preuve et conservation de l'écrit – Québec et France

Dans ce mémoire, l'auteur traite d'une part des enjeux liés à l'évolution et au rôle de l'écrit face à l'avènement des technologies de l'information et d'autre part du cadre juridique de la preuve et de la conservation de l'écrit dans la société de l'information, et ce en droit français et québécois.

Stéphane CAÏDI, *La preuve et la conservation de l'écrit dans la société de l'information*, Lex Electronica, hiver 2004.

Protection des données à caractère personnel

Le développement exponentiel des réseaux informatiques affecte la protection des données à caractère personnel. Les entreprises et gouvernements qui désirent garder la confiance des individus doivent avoir une infrastructure de sécurité efficace, et cela devient une authentique obligation légale. Ce mémoire aborde l'étude du développement d'une obligation légale de sécurité ainsi que l'encadrement juridique de la mise en place d'un programme de sécurisation des données personnelles par des mesures de sécurité qui respectent les standards minimaux imposés par les textes législatifs nationaux et internationaux.

Ana I. VICENTE, *La convergence de la sécurité informatique et la protection des données à caractère personnel : vers une nouvelle approche juridique*, Lex Electronica, hiver 2004.

Protection des mineurs sur Internet – Forum des droits sur l'Internet

Le Forum des droits sur l'Internet a rendu public, le 11 février 2004, ses recommandations sur les moyens juridiques, techniques et pédagogiques de prévenir l'exposition des mineurs à des contenus préjudiciables sur le web (messages violents, pornographiques ou portant atteinte à la dignité humaine) et sur les espaces interactifs (clavardage, P2P...).

Constatant que les jeunes abordent Internet comme des acteurs et non pas comme des récepteurs, le Forum croit qu'il faut dépasser une approche strictement fondée sur l'interdit et préconise un partage des responsabilités entre les acteurs en proposant un plan d'action en ce sens. Les recommandations du Forum s'adressent à une diversité d'acteurs et favorisent une combinaison des leviers juridiques, techniques et pédagogiques.

Forum des droits sur l'Internet, *Recommandation- Les enfants du net : (I) L'exposition des mineurs aux contenus préjudiciables sur Internet*, Rendue publique le 11 février 2004.

Sur ce sujet voir :

Étienne WERY, *Le forum des droits de l'Internet adopte un rapport concernant la protection des mineurs sur l'internet*, Droit et Nouvelles technologies, 17 février 2004.

Communications commerciales non sollicitées transmises par courrier électronique (spam) – Europe

La directive « vie privée et communications électroniques » interdit l'envoi de communications commerciales non sollicitées par courrier électronique dans toute l'Union européenne, sauf dans le cadre de relations client-fournisseur existantes.

La Belgique a déjà transposé le régime de l'opt-in dans sa loi du 11 mars 2003 sur le commerce électronique qui interdit explicitement à quiconque d'envoyer un courrier électronique sans autorisation

préalable à son destinataire. Thibault VERBIEST examine les questions juridiques épineuses soulevées par ce nouveau régime (*Courriers électroniques non sollicités : le débat juridique n'est pas clos*, Droit et Nouvelles technologies, 5 février 2004.)

La Commission des communautés européennes a présenté une communication qui répertorie une série d'actions nécessaires pour compléter la réglementation de l'Union européenne et faire en sorte que l'interdiction de spam soit une réalité.

Tiré de Étienne WERY, *La Commission européenne déclare la guerre totale au spam : elle dévoile un plan d'attaque pluri-annuel*, Droit et Nouvelles technologies, 30 janvier 2004.

À signaler :

Marc BARIBEAU, *Principes généraux de la loi sur le droit d'auteur*, édition 2003, Québec, Publications du Québec, 2003, 116 p.

Nicolas VERMEYS, *Computer « Insecurity » and Viral Attacks : Liability Issues Regarding Unsafe Computer Systems Under Quebec Law*, Lex Electronica, hiver 2004.

Bertel De GROOTE avec la participation de Jean-François DERROITTE, *L'Internet et le droit international privé : un mariage boiteux?* Lex Electronica, hiver 2004.

Émile Lambert OWENGA ODINGA, *Lois traditionnelles sur la presse : au vu du phénomène « presse électronique », faut-il penser aménagements ou refonte?*, Lex Electronica, hiver 2004.

Fabienne CANDÉAGO, *Analyse de la politique et des règles de procédure d'I.C.A.N.N relatives au règlement des conflits entre les titulaires de marques de commerce et les détenteurs de noms de domaine-Conciliation entre les droits et intérêts des détenteurs de marques de commerce et ceux des internautes*, Lex Electronica, hiver 2004.

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 if they relate to Part 1 or Pierre Trudel at pierre.trudel@umontreal.ca if they relate to Part 2.

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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 la première partie du présent bulletin, veuillez contacter les professeurs Michael Deturbide, Anne Mussett et Teresa Scassa à l'adresse électronique it.law@dal.ca ou en ce qui concerne la deuxième partie, veuillez contacter Pierre Trudel à pierre.trudel@umontreal.ca.

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