

# IT.CAN NEWSLETTER

Canadian IT Law Association

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## Defamation: Disclosing Identity of Online Commenters

In a widely [reported](#)-upon but brief oral chambers [decision](#), Justice Heather Robertson of the Nova Scotia Supreme Court ordered the disclosure of information relating to the identity of two anonymous posters to an online newspaper. In *Mosher v. Coast Publishing Ltd.*, a motion was brought on behalf of the Chief and Deputy Chief of Halifax Regional Fire Services, who alleged that they had been defamed by remarks made by anonymous persons on the website of local newspaper *The Coast*. The individuals had posted responses to an article about racism in the fire department on the site, one using a Google gmail account. The motion requested that both the paper and Google be required to disclose whatever information each possessed that would lead to the identity of the individuals. The motion was not contested by either *The Coast* or Google, both of whom indicated they would comply with whatever the court ordered.

Justice Robertson first noted that the motion had been brought under Nova Scotia Civil Procedure Rule 18.12(2), which allows for discovery in advance of the commencement of proceedings. In her *Ladyship's* view, the appropriate rule was 14.12(1), which provided for orders of production "to a party." Robertson J. then commented:

I have no problem in principle with your application and prepared to grant the order. Because the court does not condone the conduct of anonymous internet users who make defamatory comments and they like other people have to be accountable for their

actions. So, this is an appropriate circumstance where your clients should have the right to seek the identity of those persons so you can take the appropriate action with respect to the alleged defamatory acts. I reviewed all of the authorities that you presented to me and obviously the most compelling is the *York University v. Bell Canada Enterprises*, [2009] O.J. No. 3689, Justice Strathy's handling of anonymous internet users (at para. 8).

## Defamation: Crown Employee Not Relieved by Crown Concession of Vicarious Liability

The Ontario Superior Court has delivered its ruling in a motion by the defendants in [2037839 Ontario Ltd. v. Canada \(Attorney General\)](#). In the substantive suit, the plaintiff sues the defendants and several others in the publishing and health regulation establishments claiming, among others, defamation and breach of the *Charter*. The plaintiff alleges that the defamation arose out of a notice which Health Canada posted on its website in 2005 whereof it warned Canadians not to use GHR-15, a dietary food supplement promoted by the plaintiff under a holistic medicinal regimen. Health Canada's warning associates the product with risks arising from "unsubstantiated claims, hypothyroidism, possible interactions and allergic reactions" (para 6). It advised the general public that the plaintiff's products had not been approved for sale in Canada. This notice was also published by several news organizations; some of them are defendants to the suit. In addition to its claims against Health Canada, the plaintiff also claims against a named employee of that organization for misfeasance of public office, defamation and breach of the *Charter*, claims which the court noted mirror the *Charter* claims against the Attorney General of Canada (AGC). Part of the plaintiff's *Charter* claims is that many Canadians needlessly

suffer and even die as a result of the actions of the AGC and the named employee of Health Canada. Among other things, the defendants (AGC and the named employee) seek through this motion an order for the deletion of the employee's name from the style of cause as party to the action.

In rejecting majority of the plaintiff's claims relating to breach of the *Charter*, the court however, held that to the extent that the plaintiff properly pleads a cause of action against the crown employee, the plaintiff is entitled to maintain the claim of defamation against that employee, "notwithstanding a concession of vicarious liability by the Crown. An admission of vicarious liability does not negate a cause of action against a Crown employee" (para 61).

## Federal Court Criticizes Use of Wikipedia

The *Globe & Mail* recently [reported](#) that judges of the Federal Court have, in a number of judgments, criticized the use of Wikipedia as a basis for factual submissions by both Crown counsel and immigration agents responsible for screening immigration and refugee claims. The article quotes Toronto immigration lawyer Lorne Waldman as stating his firm has "rebutted government citations of Wikipedia articles on at least three occasions." A named "federal spokeswoman" is also quoted as stating that, "Wikipedia is specifically discouraged as a reference in decision making, unless it is supported by information from a credible, reliable source," and that "federal screening agents...get training 'on assessing Internet sources.'" The author of the article remarks: "Maybe more training is needed."

The article provides hyperlinks to three federal court cases and an Ontario Consent and Capacity Board decision in which the use of Wikipedia has been denied or criticized. In the most recent, the decision of de Montigny J. of the Federal Court in *Jabazi v. Canada (Citizenship and Immigration)*, the court was engaged in a judicial review of an immigration officer's decision to deny permanent resident status to the applicant, a distinguished Iranian nuclear scientist who had been working for Canada's National Research Council. The officer had utilized information from several websites, including Wikipedia, in making her decision. Justice

de Montigny remarked: "This Court has more than once questioned the reliability of Wikipedia. It is an open source reference with no editorial control over the accuracy of the information that can be inputted by anyone" (at para. 60). He ultimately ruled, with regard to the officer's fact-finding, "Instead of discussing [the Applicant's] explanations, she prefers to rely on dubious information found on the internet and on inconclusive reports from other government agencies to make grave accusations against the Applicant. These errors make the officer's decision unreasonable" (at para. 77). In the 2008 decision of *Khanna v. Canada (Citizenship and Immigration)*, the Immigration Appeal Board had refused to receive in evidence a Wikipedia entry about a particular Hindu marriage custom. Justice Hughes affirmed this finding, remarking: "I find that the rejection of this evidence was reasonable. Wikipedia is an 'open source' reference that can be modified by anyone. There is minimal control over the accuracy of its content. [...] It was reasonable to exclude [it] from evidence" (at para. 11).

## Search of Laptop Bag is Incidental to Execution of a Warrant for the Search a Computer

The Ontario Superior Court of Justice has delivered its ruling in *R v. Bourdon* ([hyperlink not available](#)). In that case, the defendant was required by the National Parole Board to, among other things, not have access to the internet, possess any computer with internet capabilities, possess pornography. Pursuant to the terms set by the Parole Board, the defendant lived in a community correctional centre in the City of Hamilton which is a minimum security institution. Immediately his Parole Officer became aware that the defendant had been accessing the internet and that he owned a laptop, the officer asked the defendant to bring the computer to her office, a request that could be complied with in ten minutes. When the defendant failed to return in a timely way, the Parole Officer caused a suspension warrant to be issued, which stopped the release of the defendant and resulted in his being taken into custody.

In executing a warrant of apprehension and suspension of long term supervision on the

defendant, two police detectives took the laptop computer from the defendant when he confirmed that it was the same computer subject of the parole officer's request to produce. Even though the warrant related only to the computer, the officers took the laptop computer with the computer bag. The computer which was warm at the time of seizure was properly sequestered and subsequent criminal code search warrant was obtained which enabled the police to search the Dell laptop computer seized from the defendant and all files, folders and other magnetic information stored therein. This warrant did not provide authorization to search the computer bag.

A search of the computer hard drive with the use of police software showed the computer was not in working order as there were previous attempts at partial reinstallation of Windows. The police noted that the purpose of reinstalling Windows was to hide evidence. When the police finished the installation to make the computer fully functional, it then used "encase" software that allowed for recovery of deleted files from the hard drive and the examination of the latter for content. The police found evidence of cookies on the computer which had been deleted as a result of the partial re-installation of Windows. Aside from incriminating information from the hard drive, the police found inside the computer bag a DVD which, when played, showed photographic images of young women some of which depicted some form of sexual touching or kissing.

Among several claims, the defendant seeks the exclusion of the evidence obtained from the seizure and search of his computer bag as a breach of s. 8 of his *Charter* right. In rejecting this claim, the court noted:

The seizure of the laptop bag was incidental to [the] primary seizure of the computer ... it was simply an oversight not to have included the computer bag in the Information to Obtain (ITO). I have no doubt that if the computer bag was included in the ITO, it would have been included in the search warrant authorization. As the court heard in evidence, computer bags often contain equipment and other peripheral devices such as thumb drives which are incidental to the search of the computer ... the privacy interest of the defendant was not

violated ... unlike the situation in the recently released case of *R. Morelli*, I find there was no intentional misconduct on the part of Detective to wilfully violate the *Charter* rights of the defendant or to intentionally mislead the Justice of the Peace (paras. 68-69).

## Domain Name Decisions

In *Market Force Information Inc. v. Joe Smith*, sole CIRA panellist Teresa Scassa heard a dispute regarding the domain name shopnchek.ca. The Complainant ("Market") is a Delaware Corporation with head offices in Louisville, Colorado. It is the parent company of Shop N' Chek Inc., a wholly-owned subsidiary of Market, which is in the business of providing consulting and business research services. The Registrant ("Smith") is an individual whose contact address was in Calgary, Alberta. The domain name was registered on 15 October 2008. Smith did not respond to the complaint.

Panellist Scassa turned first to the "Canadian Presence Requirement" under 1.4 of the CIRA Policy, namely that a person is only eligible to have a complaint heard by CIRA if they have a Canadian presence or own a CIPO-registered trademark. The mark in question, SHOP 'N CHEK, was owned by Shop 'N Chek Inc., and not by Market. Market was also not a licensee of the trademark, which also would have satisfied the presence requirement. The Panellist noted: "A literal reading of ... the *Canadian Presence Requirements* results in a finding that these requirements are not met in this case. The proper complainant should be Shop 'N Chek, Inc." (para. 7). Noting her reluctance "to defeat the purpose of the CDRP through an overly technical interpretation of the *Policy*," the Panellist proceeded to consider the remainder of the complaint. On the Complainant's burden to prove that the domain name was "confusingly similar" to a mark in which the Complainant had pre-existing rights, Panellist Scassa noted that Market had not conclusively established that it had any rights in the mark for the same reason it had not truly satisfied the Canadian presence requirements, but held ("for the sake of argument") that the domain name was essentially identical to the mark and thus was "confusingly similar" (at para. 19).

With regard to whether Market had provided "some evidence" that Smith had "no legitimate

interest” in the domain name, Market had asserted that Smith could not meet any of the indicia of legitimate interest in 3.6 of the Policy. Panellist Scassa noted that “providing ‘some evidence’ of a lack of legitimate interest in a case where there is no response by the Registrant may be a challenge” (para. 22), but observed that in previous cases with similar circumstances the Complainant had managed to provide evidence of some use of the domain name from which the Panel could infer lack of legitimate interest. In this case, no such evidence had been provided, nor had Market actually made any argument on the point beyond bare assertions. Accordingly, she ruled that Market had not reached the “relatively low threshold” for proving lack of legitimate interest (para. 22). Market also failed on the third requirement, that it show on a balance of probabilities that the registration was made “in bad faith,” again because it failed to provide any evidence as to what the use of domain name was. Accordingly, the complaint was dismissed.

## Myriad Genetics: Death of Diagnostic Patents for Breast Cancer Genes?

A US District Court Judge, in New York, Robert Sweet, has invalidated the famous Myriad Genetics Inc. patents for the widely used but expensive diagnostic method for the detection of the genes associated with inherited breast cancer. [In a Bloomberg BusinessWeek report](#), Judge Sweet was quoted as ruling that the patents “were improperly granted”. In agreeing with the American Civil Liberties Union (ACLU) who sued for the invalidation of the Myriad patents on behalf of several stakeholders, including the Association for Molecular Pathology and American College of Medical Genetics, the court acknowledged that “[t]he identification of BRCA1 and BRCA2 gene sequences is unquestionably a valuable scientific achievement for which Myriad deserved recognition, but that is not the same as concluding that it is something they are entitled to patent”. The court ruled that Myriad’s test involves identifying something that occurs in the body and equated the comparisons of DNA sequences to abstract mental processes. According to the court those could not be entitled to patent protection. It is expected that this decision will be appealed.

## i4i Patent Infringement: No Respite Still for Microsoft

[A US Federal Appeals Court in Washington D.C.](#) recently denied Microsoft Corporation’s request to rehear arguments in its long-running patent battle with a small Canadian hi-tech company, the Toronto-based i4i Ltd. (*i4i Limited Partnership and Infrastructures for Information Inc. v. Microsoft Corporation*). In rejecting the Microsoft’s requested for a re-hearing of the arguments in the case by all 11 judges of the United States Court of Appeals of the Federal Circuit, the court affirmed the August 2009 decision in which a federal jury awarded the Toronto company \$290m dollars pursuant to a finding that Microsoft infringed i4i’s patent relating to a text manipulation soft ware in the 2003/7 editions of the Microsoft Corporation’s word processing application.

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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](mailto: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](mailto:it.law@dal.ca)

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