



NEWSLETTER

Canadian IT Law Association

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Defamation

Another decision from a Canadian court has highlighted that defamation on the Internet is distinguishable for the purposes of damages from defamation via other media. Earlier Canadian decisions have inferred that the world-wide distribution of defamatory statements over the Internet justified significant damage awards (see, for example, the Ontario Superior Court 2002 decision *Reichman v. Berlin*, and the 2004 decision of the Alberta Court of Queen's Bench in *Vaquero Energy v. Weir*). The recent Ontario Court of Appeal decision in *Barrick Gold Corporation v. Lopehandia* explicitly states that “the mode and extent of publication is therefore a particularly significant consideration in assessing damages in Internet defamation cases.”

The lower court awarded Barrick \$15,000 in general damages in a default judgment for a significant number of libelous statements made maliciously by the defendant over Internet bulletin boards and web sites. There was evidence that the postings were read, as they resulted in enquiries from financial analysts and even regulatory authorities. However, the motions judge held that the comments were unlikely to be taken seriously, and rejected Barrick's claims for punitive damages and injunctive relief.

The Ontario Court of Appeal relied on the Australian High Court's decision in *Dow Jones & Company Inc. v. Gutnick* to differentiate publication of material over the Internet from publication in more traditional media. According to the Court, “Internet defamation is distinguished from its less pervasive cousins, in terms of its potential to damage the reputation of

individuals and corporations... its potential for being taken at face value, and its absolute and immediate worldwide ubiquity and accessibility.” The Court concluded that the motions judge's determination that the defamatory comments would not be taken seriously (which the Court of Appeal held was contrary to the evidence) led to a failure to consider “the distinctive capacity of the Internet to cause instantaneous, and irreparable, damage to the business reputation of an individual or corporation by reason of its interactive and globally all-pervasive nature.”

With respect to punitive damages, the Court concluded that although vulnerability was a factor that required consideration, the Internet neutralized any power that Barrick may have had in its communications war with the defendant. In fact, the Court found that Barrick was the vulnerable party because of the power of the Internet to spread defamatory comments. The Court awarded Barrick \$50,000 in punitive damages, and increased the general damage award to \$75,000.

The issue of the presence of the defendant within the jurisdiction presented a problem for the court in deciding whether to award injunctive relief. The Court concluded that Barrick had a real and substantial connection with Ontario, but there was no way to determine where the defendant's postings originated. The Court again referred to the *Dow Jones & Company Inc. v. Gutnick* decision for support that the Internet should not be used to circumvent defamation law, and granted a permanent injunction against the defendant. The Court reasoned that even if the injunction could only be enforced in Ontario, it could be enforced against the operator of one of the bulletin boards used by the defendant, Yahoo Canada Inc. of Toronto. Also, the Court felt that the injunction might be enforceable in British Columbia, where the defendant resided, under *Morguard* principles.

Domain Names

In the most recent [decision](#) under the Canadian Internet Registration Authority (CIRA) Domain Name Dispute Resolution Policy, The Independent Order of Foresters brought a complaint against the Registrant, Noredu Enterprises Canada Inc. for its use of the domain name FORESTERCOLLEGE.CA. The Independent Order of Foresters (Complainant) has operated as an insurance business for over 125 years. Its head office is located in the Don Mills area of Toronto in a 24 story building bearing an illuminated sign at the top, "Foresters." According to the Complainant, the building is "a landmark... commonly referred to as the FORESTERS Building." The Registrant became a tenant at the Foresters building in June 2002. In February 2003 the Registrant adopted the business name Forester College of Technology and the domain name FORESTERCOLLEGE.CA was registered in June 2003. Alleging that the Registrant was using the Foresters marks, trade name and photographs of the Foresters building in promotional materials for the college, including on its website, several written requests were made by the Complainant to the Registrant to stop using the Foresters name in connection with its college. Although the Registrant agreed to cease using the name Forester College, the web page located at www.forestercollege.ca/index.html continued to use "FORESTER COLLEGE" and show images of the Foresters building. The sole panelist found that the Complainant had not satisfied the requirements under paragraph 4.1 of the CIRA Domain Name Dispute Resolution Policy (Policy). Specifically, the Complainant had not established that the domain name was confusingly similar to the Complainant's marks and even if it was, the Registrant had not registered the domain name in bad faith. With respect to the issue of "confusingly similar" under CIRA Policy 4.1(a), the panel applies an interpretation of the definition of "confusingly similar" consistent with s.9(1) of the *Trademarks Act*, concluding that the Registrant's domain name is not confusingly similar to any of the Complainant's marks featuring the words FORESTERS. However, if the "classic trademark and trade name law confusion standard" is applied, the panel finds that the Registrant's domain name is confusingly similar to the Complainant's marks featuring the word FORESTERS. Thus, the question of whether

the Registrant acted in bad faith in registering the domain name is triggered. The panel concludes that there is no bad faith on the part of the Registrant because the registration of the domain name was not "primarily for the purpose of disrupting the Complainant's business," but rather to "advance its own business interests, regardless of any effects on the business of the Complainant." Therefore, even if the domain name is confusingly similar, the bad faith requirement under the Policy, paragraph 3.7 was not, according to the panel, established. Although unnecessary, with respect to the third requirement the Complainant must prove to succeed, the panel goes on to indicate that it would have found that the Registrant did not have a legitimate interest in the domain name because it "cannot demonstrate any legitimate interest" under paragraph 3.6 of the Policy.

Privacy

IN RESPONSE TO THE PROVINCIAL GOVERNMENT's plans to outsource the management of medical data to an American Company, British Columbia's Privacy Commissioner, David Loukidelis, announced in a May 28th [News Release](#) that his office will examine the implications of the United States *Patriot Act*. The *Act* requires companies to supply documents to the FBI on request without obtaining prior consent from those whose personal information is being disclosed. Commissioner Loukidelis has called for [Submissions, Assessing USA Patriot Act Implications for Privacy Compliance under British Columbia's Freedom of Information and Protection of Privacy Act](#) inviting input from "all quarters." The deadline for submissions is July 23, 2004 and Commissioner Loukidelis anticipates the Report to be completed by August 13, 2004.

FEDERAL PRIVACY COMMISSIONER Jennifer Stoddart delivered a speech recently, [Enabled Government: Our Changing World Event](#) to the Association of Public Sector Information Professionals. Commissioner Stoddart broadly canvasses the goals, challenges and benefits of e-government.

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.

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

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