

# IT.CAN NEWSLETTER/BULLETIN

Canadian IT Law Association

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## Contract and Civil Procedure

The Ontario Court of Appeal has delivered its ruling in the case of [TSP-Intl. Ltd. v. Mills](#). In this case, Brown (the Principal of TSP) was introduced to Mills by a mutual friend. Brown entered into an informal relationship with Mills under which Mills provided software applications and related services to TSP's clients, including Scepter, TSP's largest client. While Mills worked primarily for Scepter, under arrangement with TSP, he also provided software services for other clients as an independent contractor. Mills informed Brown of how he turned down overtures from other clients desirous of hiring him. In the meantime, Mills also informed Brown about a software application he developed outside his work schedule with TSP in which Scepter was interested. Brown permitted Mills to bill Scepter independently for such services. Subsequently, however, Mills worked on a certain data imaging system program which he developed outside his working hours and offered to TSP on an independent billing basis without Brown's knowledge and consent. Meanwhile, the overall quality of TSP's relationship with its clients and independent contractors deteriorated. Mills then accepted an offer to work for Scepter. He left TSP and entered into a written agreement to provide same services to Scepter as he did during his contract/relationship with TSP. Upon learning about this, TSP sued Mill seeking damages for breach of fiduciary duty or, in the alternative, for breach of confidence.

The court below dismissed the claims for breach of fiduciary duty and confidence as the applicable elements of those claims were lacking, especially as

Mills did not obtain or use any information that was confidential in relation to TSP. The court held, however, that parties operated "under a mutual obligation and duty of good faith in the performance of their contractual duties and that the obligation was breached by the defendants" (¶ 7). The court also held that in the event that the finding of breach of duty of good faith was wrong, Mill's pact with Scepter was unconscionable and that despite the absence of a written or oral contract, "there was an implied term, based on past conduct that Mills would not 'secretly' negotiate a deal for himself with TSP clients" (¶ 9). The parties' pleadings rested solely on breach of fiduciary duty or breach of confidence. They did not raise the issues of breach of duty of good faith, unconscionability, or implied contractual term. These issues were raised *suo moto* by the court which sought to have counsel's additional submissions on them on a date in which the trial judge was scheduled to deliver oral reasons for judgment. The defendant's counsel declined to make submission on the additional issues. The major issue on appeal was the procedural legality of a trial judge raising (*suo moto*) issues not pleaded by the parties and making determinations on the basis of those issues.

The court of appeal upheld the trial judge's dismissal of claims for breach of fiduciary duty and breach of confidence. It also dismissed the respondent's cross-appeal against the trial judge's findings on those two grounds. On the substantive issue, the appeal court held that the trial judge stepped outside the pleadings and that she raised additional issues and theories after the evidence had been completed. As such, those issues were not adequately exposed to the rigors of our adversarial system and it was not clear "what evidence the plaintiffs might have led at trial in support of those alternative theories [i.e. additional issues] anymore than we can say what evidence the defendants might have led in response" (¶38). The court observes that "[n]ot knowing the case they had to meet and having been denied their right to fair opportunity to meet that case, the defendants have been seriously prejudiced and

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treated unfairly. In finding liability on the bases she did, the trial judge committed reversible error” (¶ 39) and the judgment could not stand.

## **Internet Service Providers – Access to Customer Records**

The Canadian Bar Association has written a [public letter](#) to the Minister of Justice, Minister of Public Safety and Minister of Industry, expressing its concern over recent decisions by ISPs to amend their service agreements. The amendments state that the ISPs will monitor or investigate the use of services by customers, and will disclose information not only in accordance with legal requirements, but in response to governmental requests from applicable jurisdictions. This intention, the CBA points out, goes beyond the measures which had been proposed in the previous “Lawful Access” proposals, which were themselves criticized for their potential to have a profound impact on individual privacy. The amended customer service agreements would seemingly remove the need for prior judicial authorization, which would not be in accordance with *Charter* standards.

The CBA noted its particular concern over the possible threat to solicitor-client privilege which was posed by these amended service agreements and requested an opportunity to discuss the matter with the Ministers.

## **Patents – Patenting of Higher Life Forms**

The Canadian Intellectual Property Office has issued a [policy statement](#) concerning its “Office Practice Regarding Fertilized Eggs, Stem Cells, Organs and Tissues”. The policy states that any animal life form at any stage of development, from fertilized eggs onward, are not patentable under the *Patent Act* on the basis that they are higher life forms. The policy also states that totipotent stem cells are higher life forms not subject to patent, on the basis that they are equivalent to fertilized eggs. A totipotent stem cell is defined as one which “can give rise to all the cell types that make up the body plus all of the cell types that make up the extraembryonic tissues such as the placenta”.

The policy also states that organs and tissues are not compositions of matter which would be patentable as inventions under the Act: “Organs and tissues are created by complex processes, elements of which require no human intervention, and do not consist of ingredients or substances that have been combined or mixed together by a person”.

On the other hand the policy acknowledges that artificial organ- or tissue-like structures might be patentable as inventions, if they were substantially made through human intervention. In addition, stem cells which cannot develop into an entire animal (specifically embryonic, multipotent and pluripotent stem cells,) are patentable.

## **PRIVACY – Commissioner Peeps at Transborder Financial Transactions**

Privacy International has petitioned data protection authorities in Canada and globally accusing US authorities of improperly accessing private information, including those of Canadians through a European-based financial cooperative called SWIFT. Consequently, the Office of the Privacy Commissioner of Canada is [currently examining](#) whether Canadians’ financial records are being improperly accessed by foreign authorities. This development comes on the heels of the Commissioner’s recent Parliamentary [submissions](#) on the issue of money laundering legislation in Canada in which she noted that the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (now under review) was intrusive in nature in a way that, among other things, everyone is considered a potential suspect. Moreover, unlike its US counterpart, the Act requires reporting of international e-funds transfers. The Commissioner has consistently called for proper accountability and oversight structures to match legislative responses to terrorism in such a way as to preserve, strengthen and not compromise the privacy interest of Canadians. The Commissioner’s fact-finding mission following Privacy International’s petition aims at determining the veracity of the allegation that SWIFT and other “foreign authorities are improperly accessing information about Canadians’ financial transactions and to determine the extent to which her office can get involved in the matter”. It is anticipated that the

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Commissioner will make the result of her findings public in the not too distant future.

## Satellite Licensing Initiative

Industry Canada has announced its intention to invite applications for the largest satellite [licensing initiative](#) in Canadian history, in which up to 29 satellite licenses could be issued. As part of the process the public, including those who will use the new satellites to deliver services, will be invited to participate by commenting on the plans submitted. The additional satellite capacity will help address the development of Canadian high-definition television services, satellite broadband and other telecommunications services in the North.

It is expected that the results of the competition will be announced in the Spring of 2007, and that some of the satellites will be providing services by 2009 or 2010.

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This newsletter is intended to keep members of IT.Can informed about Canadian legal 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 Teresa Scassa, 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 Teresa Scassa, Chidi Oguamanam et Stephen Coughlan à l'adresse suivante : [it.law@dal.ca](mailto: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.

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