



NEWSLETTER

Canadian IT Law Association

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Civil Procedure

In the May 27, 2004 newsletter, we reported on the Nova Scotia Barristers' Society's successful attempt to attain intervenor status in a case that involved issues of confidentiality and solicitor-client privilege relating to email communications stored on a hard drive that had come into the possession of the plaintiff's in a major stock fraud case. A hearing is scheduled for October to resolve a number of preliminary issues. The plaintiff's applied to the Nova Scotia Supreme Court to have a further issue dealt with at the hearing: whether and how alleged illegal purpose on the part of lawyers named as defendants in the case would affect the issue of solicitor-client privilege in relation to the email communications. In a brief decision (not yet available online), Scanlan J. ruled that this issue was too factually complex to be dealt with by way of chambers application. (*National Bank Financial Ltd. v. Potter*, 2004 NSSC 143).

Copyright

The Canadian Recording Industry Association has filed an [appeal](#) of the decision of Von Finckenstein J. in *BMG v. John Doe*. In that case, the judge declined to order the defendant Internet service providers to disclose the names of certain Internet users believed to be responsible for a significant volume of file-sharing. The judge ruled, *inter alia*, that the file-sharing activity did not infringe copyright. In the appeal document, CRIA argues that von Finckenstein J. failed to apply the proper test for motions under the Federal Court Rules, failed to properly construe key provisions of the *Copyright Act*, overlooked key aspects of the evidentiary record, and misapplied rule 81 of the Federal Court Rules.

On the copyright issues, CRIA argues that von Finckenstein J. misapplied the analysis of "authorization" in *CCH Canadian Ltd. v. Law Society of Upper Canada*: "The motions judge failed to appreciate that the CCH case evaluated the position of the supplier of equipment having both infringing and non-infringing uses (the photocopier), whereas the present case involves the actions of the Defendants who themselves made and transmitted infringing reproductions of the copyright works (the Songs)." (at para 60). CRIA also takes issue with the finding that a "positive act" is required in order to find distribution under s. 27(2) of the *Copyright Act*. Further, it is argued that the uploading of music onto servers is not covered by the private copying exception because it fails to meet a number of the requirements of that exception. CRIA argues that the motions judge considered whether the music was uploaded for "personal use", whereas the legislation refers to "private use", and that uploading music into shared directories could not be considered "private use". Further, CRIA argues that the server on which the music was stored was not an "audio recording medium" within the meaning of the private copying exception. CRIA also argues that the songs fell outside the private copying exception because they were copied for the purpose of distribution, and for the purpose of communicating them to the public by telecommunication within the meaning of s. 80(2)(c) of the *Copyright Act*.

Meanwhile, Evans J.A. of the Federal Court of Appeal has denied an application for intervenor status by associations representing the software and movie industries

Employment

Ontario Public Service Employees Union v. Ontario (Ministry of Natural Resources) (Hastie Grievance) [2003] O.G.S.B.A. No. 4 (QL), involved six employees who were discharged for contravening the Workplace Discrimination and Harassment Prevention Policy and the Operating Procedure on Usage of I.T. Resources

by sending, receiving and storing inappropriate material which was sexually explicit on workplace Outlook e-mail accounts. On January 23, 2003, Arbitrator Petryshen concluded that discharge may be an appropriate response for the six discharged employees given the seriousness of their conduct. Recently, in *Ontario Public Service Employees Union v. Ontario (Ministry of Natural Resources) (Wickett Grievance)* [2004] O.G.S.B.A. No. 97 (QL), Arbitrator Petryshen provided his “bottom line” decision in which he finds that the Employer did not have just cause to discharge the grievors for inappropriate use of e-mail and further, he directs the Employer to reinstate the grievors. The decision with reasons will be released at a later date.

Privacy

The B.C. Privacy Commissioner is [seeking comments](#) on its [Draft Employment Privacy Guidelines](#). These guidelines are aimed at clarifying the application of Alberta’s new [Personal Information Protection Act](#), which applies to the employment relationship. Comments must be submitted by August 31, 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 Anne Uteck 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 Anne Uteck 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.

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