



NEWSLETTER

Canadian IT Law Association

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Copyright

The Australian High Court has rendered a decision which interprets the technical protection measures provision of its legislation. [Stevens v. Kabushiki Kaisha Sony Computer Entertainment](#) involved a suit brought against an individual (Stevens) sold unauthorized copies of various Sony PlayStation games. The PlayStation software contained access restrictions that would prevent the playing of unauthorized copies of games. Stevens thus also sold modified chips, or “mod chips” that could be installed into PlayStations. Once installed, these chips allowed the PlayStations to play the unauthorized games. Sony sought an injunction to stop Stevens from selling the chips under the new anti-circumvention provisions of the *Australian Copyright Act*. They also sought damages. Although the trial judge rejected Sony’s claims, the Full Court granted the injunction and sent the matter back for consideration of damages. Stevens appealed to the High Court.

The High Court overturned the Full Court’s decision and reinstated the decision of the trial judge. The Act prohibited the selling of “circumvention devices”, which were defined as devices that could be used to circumvent or facilitate the circumvention of a “technological protection measure”. The *Act* defined a technological protection measure as a “device or product, or a component incorporated into process, that is designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work or other subject-matter by either or both of the following means...”. The means set out were the use of an access code or a copy control mechanism. The Court accepted the trial judge’s finding that a TPM must therefore be

something which “prevents or inhibits the person from undertaking acts which, if carried out, would or might infringe copyright in the work” (at para 38). The Court took the view that the use of the “mod chip” was not for the purpose of copying the copyright protected game, but merely for the purpose of accessing it. In interpreting the legislation, the Court noted that the *Act* provided for, *inter alia*, a penalty of up to five years imprisonment for making or selling a circumvention device, and stated that this militated in favour of a more restrictive interpretation. Further, the Court stated: “the true construction of “technological protection measure” must be one which catches devices which prevent infringement. The Sony device does not prevent infringement...The Sony device and devices like it prevent access only after any infringement has taken place.” (at para 46). Finally, the Court noted that “in construing a definition which focuses on a device designed to prevent or inhibit the infringement of copyright, it is important to avoid an overbroad construction which would extend the copyright monopoly rather than match it.” (at para 47) The Court declined to accept an interpretation that would prohibit conduct which did not infringe copyright, and which was otherwise lawful.

Sony argued that by allowing the game to be played on the machine, illicit reproduction occurred in the RAM of the PlayStation. The Court considered the interpretation of “reproduction in any material form”. The Court found that a work might be reproduced in material form in RAM in some circumstances. However, for this to be the case, the Court reasoned, it would have to be possible to extract the work from RAM and reproduce it. Since this could not be done in the case of the PlayStation games, the RAM storage did not amount to reproduction in any material form.

In a separate concurring opinion, McHugh J. noted that the technical protection measures provisions was a result of a legislative compromise “that is the product of intensive lobbying, directly or indirectly,

of Ministers and parliamentarians by groups in the industry seeking to achieve the maximum protection or advancement of their respective interests. The only purpose of the legislation or its particular provisions is to give effect to the compromise. To attempt to construe the meaning of particular provisions of such legislation not solely by reference to its text but by reference to some supposed purpose of the legislation invites error.” (at para 126)

Note: The definition of a technical protection measure in Canada’s Bill C-60 is:

“technological measure” means any technology, device or component that, in the ordinary course of its operation, restricts the doing — in respect of a material form of a work, a performer’s performance fixed in a sound recording or a sound recording — of any act that is mentioned in section 3, 15 or 18 or that could constitute an infringement of any applicable moral rights”

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Criminal Law

R. v. Moraj—Ontario Court of Justice Brampton, Ontario [2005] O.J. No. 4036, K.L. McLeod J. (oral judgment—no link available)

The defence applied to exclude breathalyzer test results from being used in evidence in a charge of driving with over .80 milligrams in 100 millilitres of blood. The accused was speeding at the time he was stopped by a constable. The constable did not note the time of his suspicion that the accused had alcohol in his system. However, upon forming that suspicion, he made a call asking for an approved screening device (ASD). The constable delayed for some six minutes in providing the demand pending the time he could have the ASD in attempt to comply with s.254 of the *Criminal Code* which provides that demand should be followed “forthwith” by the administration of the screening device test. The Court found that the main question “is whether the informational aspect of and the implementational aspect of the s. 10(b) [of the *Charter*] right [to counsel] could have been provided upon the detention of Mr. Moraj” (para 10) and whether a six

minute interval provided a realistic opportunity for Mr. Moraj to exercise his right to counsel (para. 19).

The Court upheld as binding the decision in *R v. Murphy* and endorsed Justice Howden’s observation to the effect that “we are in the age of portable technology. It is part of the officer’s duty to facilitate detainee’s right to counsel ... to ascertain if the accused has a cell phone with which to activate his Charter right to counsel where the ASD is not available immediately after the demand” (para 15). In the present case, Mr. Moraj was under detention awaiting demand, “[t]here was evidence that Mr. Moraj had he been asked, had a cell phone with him [since] [h]e worked for Bell Cellular” (para 16) The Court held the result of the Breathalyzer test amounted to conscripted evidence pursuant to *R. v. Stillman* and upheld the defence’s application with respect to the section 10(b) that the evidence be excluded (para. 22).

Defamation

In *Ager v. Canjex Publishing Ltd.* the B.C. Court of Appeal considered an appeal from a lower court ruling which found the appellants liable for defamation, and fixing an award of damages at \$300,000. This amount included general and aggravated damages. The alleged defamation involved articles written and published by the defendants that alleged that the plaintiff, a geophysicist, had misrepresented the value of certain mining claims and had engaged in fraudulent activity. The Court of Appeal upheld the finding that there was defamation, but set aside the order for aggravated damages.

In awarding aggravated damages, the trial judge had taken into account the fact that the defendant company had published the offending newspaper articles on its website. In reviewing this portion of the decision, the Saunders J.A. for the Court of Appeal noted that “The Internet is a growing new medium of communication. The trial judge correctly identified the articles’ continued presence on the website as a matter of serious concern.” (at para 82). While the presence of the articles on the website justified the granting of an injunction, Saunders J.A. was of the view that it did not warrant an award of aggravated damages. He noted “retention of the articles on the website is not synonymous with actual malice.

Absent a finding of express malice, as is here the case, it follows from my earlier discussion that this factor does not support the award of aggravated damages.” (at para 82.)

Privacy And Administrative Law

ONTARIO (MINISTRY OF TRANSPORTATION) v. ONTARIO (Information and Privacy Commissioner) (Ont. C.A.)

In order to select winning bids for consulting engineering services, the Ministry adopts a two-stage process. Stage one involves a review by the Ministry staff of technical and management proposal submitted by bidding firms. Scores are then allocated on the basis of 18 components. The scores are then averaged for each bidding firm. The second stage involves opening of the bidding price envelopes. The contract is then awarded to the bidding firm with the lowest price/score ratio.

In 2000, a request was made to the Ministry to disclose “all RFP [requests for proposal] summary charts and construction scores” (para. 3) (re stage one) in respect of six highway construction involving Highway 401. Relying on sections 18 and 13 (1) of the FOIPP, the Ministry declined to supply the information. It argued that the information could be reasonably expected to prejudice its economic interest and be injurious to the government’s financial interest and that the scores constituted “advice” or “recommendations” of public servants which are exempted under section 13(1).

Disagreeing with the ministry, the adjudicator (Laurel Cropley) via Order OP-1993 of 2002 found that the scores assigned to the bids were not exempt. She also found that there were evidentiary gaps in the Ministry’s argument with respect to the existence of reasonable expectation of harm. She ordered disclosure of the records. By judicial review proceedings, the commissioner’s decision was challenged by the Ministry and Consulting Engineers of Ontario, first at [Divisional Court](#) which dismissed the application for judicial review. The Ministry appealed to Ontario Court of Appeal.

Dismissing the application, the Court found the adjudicator’s interpretation of relevant statutory

provisions was reasonable. The Court upheld again the adjudicator’s interpretation of “advice” under section 13(1) and affirmed that “[t]o qualify as “advice” or “recommendations”, the information contained in the records must relate to a suggested course of action, which will be ultimately accepted or rejected by its recipient during the deliberative process” (para. 20). The Court further affirmed that the adjudicator’s interpretation was consistent with the overall purpose of the *Act* under section 1 which is to foster and not stifle the public’s right to information. According to the Court of Appeal, “[a] “recommendation” may be understood to “relate to a suggested course of action” more explicitly and pointedly than “advice”. Advice may be construed more broadly than recommendation to encompass material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation” (para. 29).

ONTARIO (MINISTRY OF NORTHERN DEVELOPMENT AND Mines) v. Ontario (Assistant Information and Privacy Commissioner) (Ont. C.A.)

Responding to requests for access to records prepared by Ministry staff regarding applications for funding of projects made to Northern Ontario Heritage Fund Corporation, the Assistant Information and Privacy Commissioner (Tom Mitchinson) ordered the records to be produced. The Ministry declined and argued that the pieces of information in issue were exempt pursuant section 13(1) of FOIPP because they were “advice” or “recommendation” of public servants. The Ministry staff’s role is one of provision of evaluations to the Corporation. This was to assist the latter’s Board to decide which projects should be funded and the terms of such funding.

The first of two orders (PO-2028) approved a request for records in relation to a \$1.5 million contribution by the Corporation to the Northern Ontario Tourism Marketing Corporation for 2000, specifically an evaluation report by the Ministry of 23 February 2000. The portion of the report in issue dealt with “Potential Issues” and “Funding Options” which listed “pros” and “cons” of such options. The second order (PO-2084) approved a request for records regarding the proposal to create Canada Ecology Centre (CEC), specifically the CEC’s latest application to

the Corporation for additional funding. Only those records the Minister claimed were exempt were in issue.

The Commissioner's orders issued 28 January and 11 December 2002 in respect of the two requests were upheld by the [Divisional Court](#). The Court adopted the Commissioner's interpretation of section 13(1) as reasonable while upholding his decision to order the Ministry to disclose the records. Dismissing the Ministry's appeal, the Court of Appeal affirmed its earlier decisions and those of the Commissioner on the interpretations of section 13(1) of the FOIPP. According to the Court, under section 13(1) "advice" must contain more than mere information (para. 10). In the present case, issues dealt with under the heading of "potential issues" only draw matters of potential relevance to the attention of the Board (para. 14). As to whether matters outlined under "options" and "pros" and "cons" amounted to advice or recommendation as to be exempt, "depends on the circumstance of each case" (para. 16). The Court concluded that "the Commissioner's conclusions were carefully examined and were reached after careful analysis" and that "[t]he Divisional Court was correct in holding that the decisions of the Commissioner were reasonable" (para. 17).

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, Teresa Scassa and Chidi Oguamanam 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, Teresa Scassa et Chidi Oguamanam à l'adresse suivante : it.law@dal.ca

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