Internet and E-Commerce Law in Canada

Editor-in-Chief: Professor Michael A. Geist, Canada Research Chair in Internet and E-Commerce Law
University of Ottawa, Faculty of Law

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• CONSULTATION ON CANADA'S DIGITAL ECONOMY •

Faskens Communications Group
Fasken Martineau DuMoulin LLP

On May 10, 2010, the Government of Canada released a consultation paper titled Improving Canada's Digital Advantage — Strategies for Sustainable Prosperity — Consultation Paper on a Digital Economy Strategy for Canada (the "Consultation Paper") which requests comments from the public on developing a digital economy strategy for Canada. The Consultation Paper was announced jointly by the Ministers of Industry, Human Resources and Skills Development, and Canadian Heritage. This article summarizes the Consultation Paper and identifies the key issues raised by the Government.

In the March 3, 2010 Speech from the Throne, the Canadian Government indicated it would launch a digital economy strategy to drive the adoption of new technology across the economy, and to protect the rights of Canadians whose research, development and artistic creativity contribute to Canada's prosperity by strengthening laws governing intellectual property and copyright. Also, in the 2010 Budget, the Government of Canada committed to develop a Digital Economy Strategy that will enable the Information and Communications Technology ("ICT") sector to create new products and services, accelerate the adoption of digital technologies, and contribute to improved cyber security practices by industry and consumers.

The Consultation Paper discusses five key challenges in developing a digital economy strategy: Canada's capacity to innovate using digital technologies, building a world-class digital infrastructure, growing the Information and Communications Technology industry, creating a digital content advantage through a strong and competitive digital media industry, and building digital skills for all Canadians.

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Please address all editorial inquiries to:

Boris Roginsky, Journals Editor
LexisNexis Canada Inc.
Tel. (905) 479-2665; Toll-Free Tel. 1-800-668-6481
Fax (905) 479-2826; Toll-Free Fax 1-800-461-3275
Internet e-mail: ieclc@lexisnexis.ca.

The Government has invited the views of all interested parties on these challenges. The deadline for filing comments was July 9, 2010.

CANADA'S CAPACITY TO INNOVATE USING DIGITAL TECHNOLOGIES

The Consultation Paper emphasizes that Canada's industry sectors need to increase their investment in digital technologies in order to remain competitive. Canadian firms have been slower to invest in digital technologies than firms in other countries. In 2007, Canada ranked 11th among 21 Organisation for Economic Co-operation and Development ("OECD") countries in total economic investment in ICT. Many OECD countries have strategies to encourage business investment in ICT, including tax incentives, ICT grants and subsidies, technology vouchers and special ICT-boosting infrastructure programs.

The following issues/questions are identified for discussion:

- Should Canada focus on increasing innovation in some key sectors or focus on providing the foundation for innovation across the economy?
- Which conditions best incent and promote adoption of ICT by Canadian businesses and public sectors?
- What would a successful digital strategy look like for your firm or sector? What are the barriers to implementation?
- Once anti-spam legislation, and privacy and copyright amendments are in place, are there new legislative or policy changes needed to deal with emerging technologies and new threats to the online marketplace?
- How can Canada use its regulatory and policy regime to promote Canada as a favourable environment for e-commerce?

BUILDING A WORLD-CLASS DIGITAL INFRASTRUCTURE

A key concern identified by the Consultation Paper is that, while competition between telephone and cable providers has driven continued investment in network infrastructure, Canada appears to be falling behind its peers.

The following issues/questions are identifed for discussion:

- What speeds and other service characteristics are needed by users (*e.g.*, consumers, businesses, public sector bodies and communities) and how should Canada set goals for next generation networks?
- What steps must be taken to meet these goals? Are the current regulatory and legislative frameworks conducive to incenting investment and competition? What are the appropriate roles of stakeholders in the public and private sectors?
- What steps should be taken to ensure there is sufficient radio spectrum available to support advanced infrastructure development?
- How best can we ensure that rural and remote communities are not left behind in terms of access to advanced networks and what are the priority areas for attention in these regions?

GROWING THE INFORMATION AND COMMUNICATIONS TECHNOLOGY INDUSTRY

The Government notes that the ICT sector in Canada represents 5 per cent of gross domestic product ("GDP") and accounted for 11.5 per cent of all real GDP growth since 2002. Competition from emerging economies is increasing, and Indian and Chinese firms have now become world leaders and innovators. The size of the Canadian industry sector now falls below the OECD average, ranking 14th out of 23 countries measured as a share of total business sector GDP.

The following issues/questions are identified for discussion:

- Do our current investments in R&D effectively lead to innovation, and the creation of new businesses, products and services? Would changes to existing programs better expand our innovation capacity?
- What is needed to innovate and grow the size of the ICT industry including the number of large ICT firms headquartered in Canada?
- What would best position Canada as a destination of choice for venture capital and investments in global R&D and product mandates?
- What efforts are needed to address the talent needs in the coming years?

CREATING A DIGITAL CONTENT ADVANTAGE THROUGH A STRONG AND COMPETITIVE DIGITAL MEDIA INDUSTRY

The Consultation Paper discusses the need for a strong and competitive digital media industry in Canada to take a leading role in shaping the global digital economy. The extensive amounts of foreign content available online produces challenges, though, and content producers continue to struggle to attract audiences. The challenges are particularly acute for legacy players that are accustomed to an orderly marketplace, which must meet consumer demand for their established products while at the same time creating the business opportunities of tomorrow.

The following issues/questions are identified for discussion:

- What does creating Canada's digital content advantage mean to you?
- What are the core elements in Canada's marketplace framework for digital media and content? What elements do you believe are necessary to encourage the creation of digital media and content in both official languages and to reflect our Aboriginal and ethnocultural communities?
- How do you see digital content contributing to Canada's prosperity in the digital economy?
- What kinds of "hard" and/or "soft" infrastructure investments do you foresee in the future? What kinds of infrastructure will you need in the future to be successful at home and abroad?
- How can stakeholders encourage investment, particularly early stage investment, in the development of innovative digital media and content?
- How can we ensure that all Canadians, including those with disabilities

(learning, visual, auditory), will benefit from and participate in the Canadian digital economy?

BUILDING DIGITAL SKILLS FOR ALL CANADIANS

The Consultation Paper expresses concerns that a digital skills divide is emerging, where some groups have less access to new technology and are falling behind in their adoption of digital skills. This is of particular concern because effective participation in the labour market is increasingly linked to digital competence.

The following issues/questions are identified for discussion:

- What do you see as the most critical challenges in skills development for a digital economy?
- What is the best way to address these challenges?
- What can we do to ensure that labour market entrants have digital skills?
- What is the best way to ensure the current workforce gets the continuous up-skilling required to remain competitive in the digital economy? Are different tactics required for SMEs versus large enterprises?
- How will the digital economy impact the learning system in Canada? How we teach? How we learn?
- What strategies could be employed to address the digital divide?

CONCLUSION

The Government acknowledges that, in recent years, Canada has built an international reputation in emerging areas such as e-gaming, animation and special effects software. However, growth rates have declined in the Canadian ICT sector in the face of increasing international competition, and Canada is behind other countries in the adoption and use of digital technologies.

Other countries have set clear targets and timelines. The Consultation Paper asks whether Canada should set targets for its own digital strategy, and if so, what those targets should be and what timelines are appropriate to reach the targets. The Government of Canada is requesting input on how to shape the development of a digital economy strategy that positions Canada to compete globally and succeed.

• FOREIGN COMPANIES AND .CA DOMAIN NAMES — OBSTACLES TO REGISTERING A .CA DOMAIN NAME (PART ONE) •

Jonathan G. Colombo, Partner, and Catherine Lovrics, Associate
Bereskin & Parr LLP

Canadians will often type in a .ca domain name when looking for the Canadian version of a website. As this practice becomes more common, .ca domain names become more attractive to foreign companies. However, foreign companies are often surprised by the obstacles they will face when trying to register .ca domain names in Canada.

The Canadian Internet Registration Authority ("CIRA") is the registry for the .ca domain. It sets and enforces the requirements for .ca domain names, including the Canadian Presence Requirements ("CPRs") and Registrant Agreement ("CRA").

Under the CPRs, a foreign company is entitled to register .ca domain names that consist of, or include, the exact word components of its registered Canadian trade marks. Put differently, without a registered trade mark, a foreign company may not be able to register .ca domain names that correspond to its unregistered trade marks. A trade mark application will not meet the CPRs either.

Unfortunately, foreign companies without a Canadian trade mark registration will face three additional obstacles when trying to protect their mark in the .ca space. First, there are typically no "local contact" service providers that register .ca domain names on behalf of foreign companies. Second, the CRA prohibits a registrant from allowing any third party to use or operate a .ca domain name. Third, the CRA also prohibits the registration of a .ca domain name by an agent for, or on behalf of, any third party.

It appears that CIRA is auditing for compliance with the CPRs, so non-compliance is increasingly risky. If a registrant is found to have failed to meet the CPRs, CIRA does not give the registrant the op-

portunity to correct the registration or transfer it so that the requirements can be met. In fact, CIRA may simply cancel the registration.

However, a foreign company can reach an agreement with a Canadian subsidiary or incorporate a Canadian company to register and operate a .ca domain name. A written agreement is advisable to specify the terms of the trade mark or domain name licence and address what will happen if and when (i) the licence is terminated, or (ii) the licensor meets the CPRs. The agreement should also be carefully worded to avoid violating the above CRA prohibition against granting rights in a .ca domain name. Technically the registrant cannot register or use the domain name "on behalf of" the licensor. Rather, the registrant should be a licensee of the trade mark, but actually own and use the domain name. Agreements should be worded, for example, to make clear that the licensor controls the use of the trade mark, but not the domain name *per se*.

In Part Two of this series, the limitations of the Canadian Domain Name Dispute Resolution Policy will be discussed.

[*Editor's note*: Jonathan G. Colombo, B.A., M.A., LL.B., is the Managing Partner of Bereskin & Parr LLP, and a member of the Trade Mark Practice group. Jonathan can be reached in Toronto at 416.957.1613 or jcolombo@bereskinparr.com.

Catherine Lovrics, B.A., LL.B., is an associate lawyer with Bereskin & Parr LLP's Trade Mark Practice group. Catherine can be reached in Toronto at 416.957.1163 or clovrics@bereskinparr.com.]

• THE ANONYMOUS BLOGGER EXPOSED — EXTRAORDINARY INJUNCTIONS IN INTERNET DEFAMATION ACTIONS •

Maanit Zemel, Associate
Miller Thomson LLP

While Google is grappling with privacy concerns raised by the Canadian Privacy Commissioner, Canadian courts have been issuing orders requiring Google and internet service providers ("ISP") to reveal personal information of individuals who are alleged to have posted defamatory statements online. These extraordinary orders pose new challenges to privacy laws and freedom of expression.

THE CASE OF THE ANONYMOUS BLOGGER

The internet is a unique mode of communication. It enables individuals to anonymously say whatever they want with little or no fear of repercussion. The Ontario Court of Appeal has described communication via the internet as "instantaneous, seamless, interactive, blunt, borderless, and far-reaching. It is also impersonal, and the anonymous nature of such communications creates a greater risk that any defamatory remarks are believed by their readers".[1]

Assume that someone posts defamatory statements on a blog about you, anonymously or by using a pseudonym. Within a few hours, other websites pick up the postings and, by the end of the day, the defamatory statements have spread all over the internet. You do not know the identity of the blogger. All that is known is the identity of the ISP that controls the website on which the defamatory statements were posted. In such a case, you have access to extraordinary injunctive measures, which might assist you in curtailing the defamation and bringing the anonymous blogger to Court.

NORWICH ORDERS

A Norwich Order is a pre-action discovery tool granted to a plaintiff before a lawsuit is commenced. It is directed at third-parties that hold information that the plaintiff needs in order to commence the lawsuit.

In a seminal case involving York University, York alleged that its professors were being defamed by anonymous bloggers online. The postings were made by someone with a "Gmail" account. A Norwich Order was issued against Google, requiring it to disclose the internet protocol addresses associated with the Gmail account. Google complied with the order, and it was revealed that the anonymous bloggers were customers of Bell Canada and Rogers Communications.[2] The Ontario Court issued another Norwich Order against Bell and Rogers, ordering them to reveal the identity of the anonymous bloggers.

When considering the implications such an order might have on privacy laws and freedom of expression, the Court stated (quoting from an American decision):

> In that the Internet provides a virtually unlimited, inexpensive, and almost immediate means of communication with tens, if not hundreds, of millions of people, the dangers of its misuse cannot be ignored. The protection of the right to communicate anonymously must be balanced against the need to assure that those persons who choose to abuse the opportunities presented by this medium can be made to answer for such transgressions. Those who suffer damages as a result of tortuous or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights.[3]

In a decision released in May 2010, the Ontario Divisional Court considered the effect such an order might have on rights guaranteed by the Canadian *Charter of Rights and Freedoms*. The Court found that the *Charter* applied and that a balance must be struck between the *Charter* guaranteed privacy rights of the Plaintiff and the privacy rights and freedom of expression of the anonymous defamers. The Court held that in order to obtain an order for disclosure, the Plaintiff must demonstrate a *prima facie* case of defamation. This would ensure that the *Charter* rights of all are sufficiently protected.[4]

Other provinces have followed suit. Norwich-type orders have recently been issued by the Nova Scotia and New Brunswick courts.[5] For example, in a highly publicised case in Nova Scotia, a teenage girl brought an application for a Norwich Order and a publication ban arising out of a fake Facebook page. The page was set-up by anonymous individuals alleged to have cyber-bullied and defamed the applicant. The Nova Scotia Supreme Court issued the Norwich Order but refused to grant the publication ban requested by the applicant.[6]

Thus, the anonymity enjoyed by individuals may no longer be protected, if those individuals go as far as to defame others online.

It is significant that, at an application for a Norwich Order, the person posting the statements would likely not be present in Court to respond to the allegations of defamation. For plaintiffs, this means that they must ensure that the allegations of defamation have some evidentiary basis. The plaintiff might face significant consequences down the road, if the identified defendant can later demonstrate that there had not been a sufficient evidentiary basis for the allegation of defamation and, thus, for the granting of the Norwich Order.

[*Editor's note*: Maanit Zemel practises in the field of civil and commercial litigation. She acts for individual and corporate clients in a variety of litigation and administrative matters and has represented clients at all court levels, including the Supreme Court of Canada and before administrative tribunals.

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1 *Barrick Gold Corporation v. Lopehandia*, [2004] O.J. No. 2329, 71 O.R. (3d) 416 at para. 31 (C.A.)

2 *York University v. Bell Canada Enterprises et al.*, [2009] O.J. No. 3689 (O.S.C.J.).

3 *Ibid.* at para. 23, quoting from *Cohen v. Google Inc.* (N.Y.S.C. Index No. 100012/09).

4 *Warman v. Wilkins-Fournier,* [2010] O.J. No. 1846, 2010 ONSC 2126 (Div. Ct.).

5 *William Mosher v. Coast Publishing Limited*, [2010] N.S.J. No. 211, 2010 NSSC 153; *B.(A.) v. Bragg Communications Inc*., [2010] N.S.J. No. 360 (N.S.S.C.); *Doucette v. Brunswick News*, [2010] N.B.J. No. 235 (N.B.Q.B.).

6 *B.(A.) v. Bragg Communications Inc*., [2010] N.S.J. No. 360 (N.S.S.C.). The decision regarding the publication ban is currently under appeal.

• DISCLOSURE OBLIGATIONS EXTEND TO SOCIAL NETWORKING SITES •

Mark Davis, Partner
Heenan Blaikie LLP

Social networking has improved our ability to share information. It has also given rise to many attendant legal challenges. The legal press is replete with examples of such challenges: admonitions against judges becoming "Facebook friends" with lawyers who appear before them and prohibitions on litigants "friending" supposedly independent experts. Facebook, MySpace and LinkedIn are just some of the social networking sites through which litigants can make potentially relevant information available. The information posted to these sites creates fodder for discoveries and cross-examination.

Litigants must be aware the information posted to social networking sites, if relevant to any matters in issue, will need to be produced in a civil action.

In 2009 the Ontario Superior Court of Justice was faced with three applications seeking to compel production of information contained within a litigant's Facebook profile. The February 20, 2009 decision of Justice D.M. Brown in *Leduc v. Roman*, [2009] O.J. No. 681 (O.S.C.J.) found that it was "beyond controversy" that a litigant's Facebook profile may contain documents relevant to the issues in an action. In *Luduc*, the plaintiff claimed damages for injuries sustained in a motor vehicle accident. The defendant brought a motion to compel production of all pages on the plaintiff's Facebook profile, which were otherwise unavailable because the plaintiff had limited access to the information to his "Facebook friends". Justice Brown had no problem concluding that a posting to a Facebook or MySpace profile constituted data and information in an electronic form which was a producible document under the *Rules of Civil Procedure*. The obligation to produce relevant documents is critical to the functioning of our civil litigation system and if a posting "relates to any matter in issue in an action" the party must identify such information in its affidavit of documents. Justice Brown found that it was incumbent upon counsel to explain to a client that in appropriate cases, documents posted on the party's Facebook profile may be relevant to allegations made in the pleadings and therefore must be produced. Justice Brown found that where, as in the present case, a party maintains only a private Facebook profile with a public page containing nothing other than information about the user's identity, the Court can infer from the social networking purposes of Facebook (and the applications it offers to users such as postings of photographs) that users intend to share personal information about themselves with others. Justice Brown found that a party who maintains a private or limited-access Facebook profile stands in no different position than one who sets up a publicly available profile: both are obliged to identify and produce any postings that relate to any matters in issues in the action. Justice Brown found that where a party discovers the existence of a Facebook profile, fairness dictates that it be given an opportunity to ascertain and test whether the Facebook profile contains relevant information. Justice Brown found that:

> One way to ensure this opportunity is to require the Facebook user to preserve and print-out the posted material, swear a supplementary affidavit of documents identifying any relevant Facebook documents and, where few or no documents are disclosed, permit the opposite party to cross-examine on the affidavit of documents in order to ascertain what content is posted on the site.

While recognizing that it would be premature to simply order the wholesale production of all documents in a Facebook profile, it would be unfair to allow a person claiming substantial damages for loss of enjoyment of life to hide behind self-set privacy controls. The Court can infer, from the nature of the Facebook service, the likely existence of relevant documents on a limited-access Facebook profile.

On July 6, 2009, Mr. Justice C. Boswel rendered his decision in *Wice v. Dominion of Canada General Insurance Company* [*Wice*], [2009] O.J. No. 2946 (O.S.C.J.). *Wice* also related to an action claiming damages as a result of a motor vehicle accident. The defendant had produced evidence demonstrating that there were relevant photographs of the plaintiff participating in social activities posted on the plaintiff's Facebook profile. Again, the Court was prepared to infer from the nature of the Facebook service that other relevant documents were likely included in the plaintiff's profile. The Court ordered that the plaintiff produce a further and better affidavit of documents within 30 days which was to include relevant documents from the plaintiff's Facebook profile. The plaintiff was ordered to preserve any and all information and documents in his Facebook account or similar accounts for the duration of the litigation and to produce a further and better affidavit of documents. The defendant was granted leave to cross-examine on the further affidavit of documents.

In *Schuster v. Royal & Sun Alliance Insurance Company of Canada*, [2009] O.J. No. 4518 (O.S.C.J.), Justice Price was confronted with another automobile accident case. In this case the defendant did not offer any evidence upon which the Court could conclude that the plaintiff's Facebook profile contained relevant information or that the plaintiff failed to perform her duty to disclose all relevant documents in her affidavit of documents. In coming to this conclusion, Price J. found that where a person's public profile includes photographs it may be reasonable to conclude that the private site would as well.

> What is determinative in my opinion, in drawing an inference to whether there is relevant information in the private pages of a litigant's Facebook account is whether there is relevant information in their public profile.

In the result, the Court found that the proper balance between the plaintiff's privacy interests and the defendant's disclosure interests is struck by presuming from the plaintiff's failure to list Facebook documents in her affidavit of documents that these documents do not contain relevant information. However, the defendant was provided with a reasonable opportunity to rebut this presumption by cross-examining the plaintiff on her affidavit of documents to ensure that she has complied with her discovery obligations.

Although it is not every case in which information posted on a social networking site will be relevant, where that potential exists, a litigant who neglects to produce such information will likely be required to submit to cross-examination in order to explain his or her failure to do so. Counsel and litigants need to be aware of the obligation to produce all relevant documents, even those that are posted to a litigant's private social networking site.

[*Editor's note*: Mark Davis is a litigator who focuses on intellectual property matters. He has significant experience in patent litigation as well as trade-mark and copyright disputes, particularly those relating to the Internet.]

INVITATION TO OUR READERS

Do you have an article that you think would be appropriate for *Internet and E-Commerce Law in Canada* and that you would like to submit?

AND/OR

Do you have any suggestions for topics you would like to see featured in future issues of *Internet and E-Commerce Law in Canada*?

If so, please feel free to contact Michael A. Geist
@mgeist@uottawa.ca
OR
ieclc@lexisnexis.ca