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**THE SUPREME COURT OF CANADA AND EMERGING  
TECHNOLOGIES**

*The Honourable Justice Thomas A Cromwell\**

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## 1. Introduction

The purpose of this paper is to provide an overview of the work of the Supreme Court of Canada in the law relating to emerging technologies. I will begin with a brief account of the constitutional and jurisdictional context in which the Court functions and then review some recent judgments in the fields of intellectual property, criminal law, tort law and constitutional law. As we will see, a wide variety of legal issues in relation to several emerging technologies have come before the Court in recent years. This has required the Court to examine fundamental legal principles in order to allow the law to be applied in ways that are both consistent with our legal tradition and appropriate to the new technologies.

## 2. The Supreme Court of Canada in its Constitutional and Legal Context

Canada is a federation in which legislative power is divided between the federal government and the governments of the provinces. For example, criminal law and procedure is within the legislative competence of the federal government while property and civil rights and the administration of justice are matters for the provinces.<sup>1</sup> The judicature provisions of the constitution, however, assume the continuation of the provincial superior courts as they existed before Confederation with the result that there is an essentially unitary court system for each province. The courts in the provinces thus deal with matters arising under both provincial and federal law.<sup>2</sup> The Supreme Court of Canada is a general court of appeal for Canada and hears appeals in all areas of law, whether they relate to matters of federal or provincial legislative competence.<sup>3</sup> The Court also deals with constitutional and other important legal questions referred to it by the Governor General in Council under the so-called “reference” procedure.<sup>4</sup> Other than reference cases and a few other fairly rare exceptions, all of the appeals before the court are by leave of the Court; the appellant must first obtain the Court’s permission (leave) to hear the case on the merits.<sup>5</sup> Leave may be granted when the Court is of the opinion that any question raised by the case is one that it ought to hear by reason of its public importance.<sup>6</sup>

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<sup>1</sup> *Constitution Act 1867* (UK) c 3.

<sup>2</sup> See T A Cromwell, “Aspects of Constitutional Judicial Review in Canada” (1995) 46 *South Carolina Law Review* 1027 - 1042, at 1028 - 1032.

<sup>3</sup> *Supreme Court Act RSC 1985*, c S-26 as amended.

<sup>4</sup> *Ibid*, s 53.

<sup>5</sup> *Ibid*, s 40(1); appeals that may be brought “as of right” (that is, without the necessity of first obtaining leave) include: reference cases (ss 53 and 54); appeals from references to the provincial courts of appeal (s 36); appeals from the Federal Court of Appeal involving controversies between Canada and a province or between two or more provinces (s 35.1); and certain criminal appeals such as those in which a judge of the Court of Appeal dissents on a question of law or the Court of Appeal sets aside an acquittal and enters a verdict of guilty: *Criminal Code RSC 1985*, c C-46 as amended, ss 691, 692 and 693. Although the provincial courts of appeal and the Federal Court of Appeal have the statutory authority to grant leave to appeal to the Supreme Court of Canada (*Supreme Court Act* ss 37 and 37.1), they generally defer that authority and require parties to seek leave from the Supreme Court.

<sup>6</sup> *Supreme Court Act 1985*, s 40(1).

Since 1982, Canada has had a *Charter of Rights and Freedoms*<sup>7</sup> which provides constitutional protection for a number of human rights, including equality, freedom of expression, religion and association as well as protections in the criminal law sphere and for language rights. These guarantees are binding only on government actors and are subject to such limitations as are demonstrably justified in a free and democratic society. Cases raising issues under the Charter constitute a significant proportion of the Court's work.

The Court is composed of the Chief Justice of Canada and eight judges all of whom are appointed to serve until age 75 by the Governor General in Council. Three judges must be appointed from the superior courts or the bar of Quebec.<sup>8</sup> By tradition, three judges come from Ontario, two from western Canada and one from Atlantic Canada. The Court is bilingual and bijural, operating in both of Canada's official languages (French and English) and in both of Canada's legal systems (the common law and the civil law of Quebec).

### **3. The Court and Emerging Technologies**

In this section, I will review cases relating to emerging technologies in several doctrinal areas of law.

#### ***3.1 Intellectual Property Law***

Two cases raise the issue of the limits of what may be patented. In *Harvard College v Canada (Commissioner of Patents)*<sup>9</sup> the issue was whether a higher life form, in this case a mouse that had been genetically altered to increase its susceptibility to cancer, was patentable under the *Patent Act*.<sup>10</sup> The Act provides for patent protection for "... any new and useful art, process, machine, manufacture or composition of matter" or any new and useful improvement to the same.<sup>11</sup> The issue was thus whether higher life forms fall within the definition of an invention and specifically whether they could be considered to be a "manufacture" or "composition of matter." A bare majority of the Court found that they could not, reasoning that the Act failed to address many of the unique concerns that are raised by the patenting of higher life forms. The Act could not, therefore, have been intended to deal with inventions of this type. In *Monsanto Canada Inc v Schmeiser*,<sup>12</sup> one of the issues concerned the validity of a patent for the genes and modified cells that make up a type of canola. The Court held that the patent was valid. While acknowledging that in *Harvard College*, the Court had held that plants and seeds were unpatentable higher life forms, the Court

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<sup>7</sup> *Constitution Act 1982*, Part 1 being Sch B to the *Canada Act 1982* (UK) c11.

<sup>8</sup> *Ibid*, s 6.

<sup>9</sup> 2002 SCC 76; [2002] 4 SCR 45.

<sup>10</sup> *RSC 1985*, c P-4 as amended.

<sup>11</sup> *Ibid*, s 2 "invention".

<sup>12</sup> 2004 SCC 34; [2004] 1 SCR 902.

reasoned that patent protection was available for a gene and a cell and that was what had been claimed by Monsanto.

### **3.2 Criminal Law**

I will touch on three cases in the criminal law area, all relating to the law of search and seizure.

In *R v Tessling*,<sup>13</sup> the issue was whether the use by police of forward-looking infrared (FLIR) technology to assess a home's heat emissions engaged the constitutional protection against unreasonable search and seizure. In short, did flying over the accused's house in an airplane equipped with a FLIR camera and using it to record images of thermal energy or heat radiating from the house constitute a "unreasonable search"? The Court concluded that it did not. The FLIR image was not equivalent to an entry to the house and is more accurately characterised as a type of external surveillance. Emphasising that its judgment depended on the present capacity of FLIR technology as revealed in the record before the Court, the judgment noted that FLIR records only information that exists on the external surfaces of the building and therefore records only information that is exposed to the public. It did not expose any intimate details of the accused's lifestyle or any part of his core biographical data. It showed only that some activities in the house generated heat. The Court concluded that patterns of heat distribution on the external surfaces of a house are not a type of information in which, from an objective perspective, a person has any reasonable expectation of privacy.

In the second case, *R v Gomboc*<sup>14</sup> the police requested a electrical power utility to monitor the electricity usage of a suspected marijuana grow operation by means of a digital recording ammeter (DRA). The DRA was installed on a power line leading to the house but without entering onto the accused's property. The question was whether the DRA readings constituted an unreasonable search of the premises. A majority of the Court found that they did not. The DRA, as the technology was described in the record, yielded merely information about electricity consumption which was not confidential or private information entrusted to the supplier. Given the risk that the consumer had bypassed the electricity meter to avoid detection and having to pay for electricity consumed, the supplier was entitled to cooperate with the police as a potential victim of crime. The DRA was not capable of providing any useful information about household activities of a private nature. Three members of the Court noted that under the relevant legislation, a consumer of electricity was entitled to request that his or her customer information remain confidential but that the accused had made no such request.

In *R v Morelli*<sup>15</sup> the question concerned the validity of a search warrant authorising the search of the accused's computer. This turned on whether the information put before the justice who authorised the issuance of the warrant set out reasonable and probable grounds to believe that the accused was in possession of child pornography. The most relevant evidence placed before the issuing justice was that a computer

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<sup>13</sup> 2004 SCC 67; [2004] 3 SCR 432.

<sup>14</sup> 2010 SCC 55; [2010] 3 SCR 211.

<sup>15</sup> 2010 SCC 8; [2010] 1 SCR 253.

technician installing a high-speed Internet connection for the accused noticed several links to both adult and child pornography sites in the task-bar's "favourites" list. A majority of the Court held that this did not provide reasonable and probable grounds to believe that the accused was in possession of child pornography. The Court was of the view that merely viewing in a web browser an image stored in a remote location on the Internet does not establish the level of control necessary to find possession; possession of the illegal images requires possession of the underlying data files in some way. While viewing images online constitutes the separate crime of accessing child pornography, it does not constitute the offence of possession of child pornography. The search warrant was thus improperly issued and the search conducted on the strength of it had been unlawful.

### ***3.3 Division of Powers***

The federal Parliament enacted the *Assisted Human Reproduction Act* in 2004.<sup>16</sup> It prohibited human cloning, the commercialisation of human reproductive material and the reproductive functions of women and men and the use of *in vitro* embryos without consent. It also created a detailed system of regulation under which a range of "controlled activities" could only be carried out with a licence, in licensed premises and in accordance with regulations to be created under the Act. These activities included the manipulation of human reproductive material or *in vitro* embryos, transgenic engineering and reimbursement of the expenditures of donors and surrogate mothers. The Act also set up a comprehensive information collection and management scheme and established a federal agency to administer and enforce the legislation. The question that came before the Supreme Court was whether the Act was valid federal legislation pursuant to Parliament's power to enact criminal law. A majority of the Court held that large portions of the Act were not supportable under the federal criminal law power but in fact related to health services in health care institutions by health care professionals, a matter within provincial legislative competence. However, the Court upheld the Act's prohibitions of human cloning, commercialisation of human reproductive material and the use of *in vitro* embryos without consent as well as certain provisions relating to consent and the age of consent and related administrative provisions as a valid exercise of the federal criminal law power.

### ***3.4 Tort Law – Defamation***

In *Crookes v Newton*<sup>17</sup> the Court was asked to decide if the creator of a hyperlink to defamatory material is liable for publication of defamatory statements made in the linked material. The Court, in three sets of concurring reasons, held that the answer to the question was "no". The majority view was that hyperlinks are in essence references which simply communicate that something exists but do not by themselves communicate its content. Inserting a hyperlink gives the author inserting the link no control over the content of the linked material. Only when the person creating the link presents content from the linked source in a way that actually repeats the defamatory

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<sup>16</sup> SC 2004, c 2.

<sup>17</sup> 2011 SCC 47.

content should that content be considered to be published by the person inserting the link.

#### **4. Conclusion**

This brief review shows that technological innovation raises issues in a wide variety of legal contexts including intellectual property, federalism, criminal law and tort law. The cases in which these issues arise typically provide only a narrow “snap shot” of the technology in issue rather than giving a comprehensive or even expansive view. The constraints of the adversary system make the courts dependent on the evidence which the parties have decided to place before them. Both of these factors limit the courts’ capacity to engage with the full implications of the particular technology. However, in the Supreme Court, interested groups capable of offering a broader or different perspective from that of the parties to the litigation are permitted to intervene quite liberally. So, for example, in the *Crookes* Internet defamation case, a number of organisations, including the Canadian Civil Liberties Association, the Canadian Newspaper Association, the Writers’ Union of Canada and the Canadian Publishers’ Council, intervened and provided the Court with extensive written submissions and scholarly material.

The challenge of these cases is, of course, to develop the law – whether the common law, constitutional law or the interpretation of statutes – in a way that is both consistent with its underlying basic principles and purposes and suitably adapted to the new technology. The hyperlink case, for example, forced a careful re-examination of the functions of publication in the law of defamation and basic principles underlying the vast case-law on the subject.

One of the themes that emerges from the decisions under review is the need to take a gradual, incremental approach which recognises how rapidly technology can develop. In each of the decisions in *Tessling*, *Gomboc*, *Morelli* and *Crookes*, the Court was careful to emphasise that its holding was premised on a particular understanding of the nature of the technology in issue and to note that advances in the technology might well require reassessment of the legal implications of its use. The advice often given to appellate judges to think broadly but to write narrowly is perhaps particularly sage counsel in this context.