

Information Technologies and Globalization

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Thank you, Justice Hesler, for those kind words of introduction.

Chief Justice Lutfy, Associate Chief Justices Oliphant and Smith, fellow judges and friends: I would like to express the warmest of welcomes to everyone here this morning. I hope that during the course of this conference you will have an opportunity to enjoy the pleasures of our beautiful city and time permitting that you also take the opportunity to visit our architectural gem, Osgoode Hall, located just two blocks from here.

I would like to salute the Canadian Institute for the Administration of Justice (CIAJ) for its many years as a leader in providing valuable resources to judges, lawyers and others interested in advancing the quality of the administration of justice in our nation. I should like to begin by congratulating the CIAJ and, in particular, co-chairs Justice Kiteley, Commissioner Stoddard, Professor Austin and Mr. MacKenzie for organizing this conference on “Technology, Privacy and Justice”. As one has come to expect from the Institute, the sessions all promise to be informative, provocative and timely with perhaps the exception of this opening address.

I am pleased to take a few minutes to speak to you about the subject matter of this conference — information technology, globalization and the rule of law. While I hope it may be said that I know something about the rule of law, I have to concede at the outset that I am not an expert on globalization, and that when it comes to information technology I am not on the leading edge. Fortunately, you have many illustrious and thoughtful speakers who will enlighten us as to the many issues that confront us with the intersecting of these three concepts.

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Nevertheless, I am pleased to be afforded the opportunity to make what might be described as some “global” comments as to how the rule of law can assist in resolving competing interests that arise as a result of what are often seen as unprecedented and unanticipated effects of globalization and information technology.

The theme of this conference and the discussion sessions suggest that there are new, leading edge and revolutionary issues which may require urgent responses. In this context, we must however, remember that novel and very challenging issues in the areas of globalization and technology have been confronted throughout history. The responses have led to political, socio-economic, and legal developments that have changed the character of our world. Indeed, globalization is not new when we think of the transformation of the European economy, culture and society occasioned by the opening of new business opportunities 500 years ago. The efforts of Vasco da Gama, Christopher Columbus, and Jacques Cartier opened economic and trade routes to the East and West, thereby changing the face of Europe forever. Indeed, more than 200 years ago the philosopher Immanuel Kant wrote that the peoples of the world were already “unavoidably side-by-side” in the sense that a major change in one place would have consequences for many other places.

While these words were prophetic and are even more relevant today, I doubt that Kant ever imagined how pervasive globalization would become two centuries later. Throughout most of our history, major changes have occurred in incremental steps. However, these changes and challenges were usually adequately addressed in efforts to control and rationalize the uncertainties created by the new realities in economics and technology. By the early 1600’s, Hugo Grotius had published his two important treatises, *Freedom of the Seas* and *On the Law of War and Peace*, in response to international challenges arising out of burgeoning international trade. Indeed, the political, business, academic and legal communities have been required to respond to globalization and technology for centuries.

Technological advances such as the steamship, locomotive and telegraph of course provided great opportunities, and the rate of globalization dramatically increased. By 1964, with the dramatic advances in telecommunications infrastructure in the form of telephone, radio and television, Marshall McLuhan was able to write in his seminal work, “Understanding Media: the Extensions of Man”, that “the globe has

contracted, spatially, into a single large village” — the so-called global Village.

In my view, the first really significant political/legal response to 20th century globalization came in the form of the General Agreement on Tariffs and Trade (GATT), which came into force in 1947. GATT eased barriers to trade and provided a legal framework for resolution of disputes arising in international trade. The rule of law was embedded into international economic activities. While the movement of goods and services grew between nations, international agreements attempted to reduce or eliminate unfair competition and unfair trade practices.

In a very real sense, the world has been dealing with major issues and challenges arising out of the globalization of the world's socio-economic infrastructure and the impact of information technology, as these terms are used today, for many years.

Today, we live with the nearly universal reach of globalization as information technology permits instantaneous communication and rapid movement of goods, capital, and labour. The resulting impacts on global, national and individual economic well-being cannot be minimized. The Asian economic and monetary crisis of the late 1990s has now been attributed, not so much to underlying economic infrastructure problems, but to the near instantaneous outflow of capital spurred by relatively local investor panic. Similarly, computer-generated “sell offs” have caused significant “market corrections” in North America resulting in unnecessary economic recessions.

The rule of law has provided, or has attempted to provide, responses to these changes for a very long time and will continue to do so. However, this is not to suggest that the law of Grotius or well-established common law will necessarily provide us all with the answers to the challenges of globalization. Common law and statutory regimes will have to continue to evolve to meet these challenges. At the same time, we cannot allow ourselves to conclude that although so much has changed, traditional legal analysis has become irrelevant. Disputes that relate to globalization or information technology do not require us to throw out the baby with the bath water.

For example, in 2004 Justice Blair for the Ontario Court of Appeal in the case of *Barrick Gold Corp. v. Jorge Lopehandia and Chile Mineral*

Fields Canada,¹ dealt with the subject of Internet libel and defamation. In that case he wrote that:

Communication via the Internet is instantaneous, seamless, inter-active, blunt, borderless and far-reaching. It is also impersonal, and the anonymous nature of such communications may itself create a greater risk that the defamatory remarks are believed...

Justice Blair went on to point out that:

These characteristics create challenges in the libel context. Traditional approaches attuned to “the real world” may not respond adequately to the realities of the Internet world. How does the law protect reputation without unduly overriding such free wheeling public discourse?

Finally, in comparing Internet defamation with other forms of defamation he pointed out that:

...Internet defamation is distinguished from its less pervasive cousins, in terms of its potential damage to the reputation of individuals and corporations, by the features described above, especially its interactive nature, its potential for being taken at face value, and its absolute and immediate worldwide ubiquity and accessibility. The mode and extent of publication is therefore a particularly significant consideration in assessing damages in Internet defamation cases.

The court then went on consider the question of general and punitive damages in the context of these new realities and increased both. In this case, the court found that the explosion of information technology had created a new situation not adequately addressed by the common law, as it previously existed, but required extension to deal with the modern circumstances. However, the analysis did not require a break from traditional common law but rather involved an evolution, not a revolution, to meet a new reality.

¹ *Barrick Gold Corp. v. Jorge Lopehandia and Chile Mineral Fields Canada*, (2004) 71 O.R. (3d) 416.

Similarly, last week our court released its decision in *Bangoura v. the Washington Post et al.*,² in which I was a member of the panel. In this case, the plaintiff alleged defamation by the Washington Post through the vehicle of its Internet service and electronic archives. In January 1997, the newspaper published two articles in its newspaper and on its web site that alleged that the plaintiff, a United Nations (UN) official in Africa, had been accused by his UN colleagues of sexual harassment, financial improprieties and nepotism. The Plaintiff was not resident in Ontario, or even Canada, at the time of publication of the material. On the facts before the court, only seven copies of the newspaper were delivered to Ontario at that time. The two articles in issue were available on the Washington Post web site free of charge for 14 days following publication. Thereafter, the articles could be accessed through a paid archive. The evidence before the court was that only one person, counsel for Mr. Bangoura, had accessed the articles in the paid archive.

Mr. Bangoura moved to Ontario in 2000, some three years after the publication of the challenged articles and commenced the action in 2003. The defendants challenged the jurisdiction of the Ontario court but the motions court judge found in favour of Ontario and assumed jurisdiction. The Washington Post and other defendants appealed. The court permitted the intervention of a “Media Coalition” as a friend of the court. The members of this media coalition, among other things, publish Internet web sites that have been accessed by millions of viewers in more than 200 countries. The intervention was focused on attempting to establish the proper criteria for the assumption of jurisdiction in multinational Internet defamation and libel cases. Notwithstanding their helpful submissions, however, the court found it unnecessary to break new ground; in our view, the issue in this particular case could be dealt with appropriately under existing law without attempting to create a new rule for Internet defamation.

Justice Armstrong, writing for the court, held that the decision of this court in *Muscutt v. Courcelles*³ provided an appropriate set of criteria against which to test whether an Ontario court should assume jurisdiction over the alleged tort. Additionally, the court did consider the relevance of

² *Bangoura v. the Washington Post et al.*, (2004) 235 D.L.R. (4th) 564.

³ *Muscutt v. Courcelles*, (2002) 60 O.R. (3d) 20.

the judgment of the High Court of Australia in *Dow Jones & Co. Inc. v. Gutnick*⁴, a case with which many of you are no doubt familiar. In that case, an Australian court assumed jurisdiction in a case of Internet libel, much to the chagrin of the members of the media coalition. Our court, however, found that the underlying facts in the *Gutnick* case provided a substantially greater nexus with the Australian jurisdiction than existed in this case. In the end, our court found, not surprisingly, that there was no substantial connection linking the plaintiff, the defendants and the alleged misconduct to Ontario, sufficient to justify the assumption of jurisdiction.

I should note in passing that a few days ago Justice Burnyeat of the Supreme Court of British Columbia released a decision in the matter of the *Burke v. NYP Holdings, Inc.*⁵ In that decision, he held that Brian Burke, general manager of the Vancouver Canucks hockey team, could sue the New York Post in British Columbia in relation to a report published on the Internet. Without commenting on the decision in any detail, it would appear that Justice Burnyeat found that the particular facts of that case, which appear to be markedly different from those in *Bangoura*, demonstrated a real and substantial connection with British Columbia.

In the *Bangoura* matter, counsel for the Media Coalition proposed several alternative approaches to the issue of jurisdiction which he argued should be incorporated into the so-called *Muscutt* factors in the case of Internet libel and defamation. Although it was unnecessary, in the circumstances, for the court to adopt any particular alternative, the court also did not reject them, leaving them for consideration another day when the facts justified the exercise.

You may well wish to consider the alternative approaches suggested by the Media Coalition in your discussions during this conference. As summarized by Justice Armstrong at paragraph 48 of the judgment, the suggested approaches include:

- The Targeting Approach — under this approach, a court would take jurisdiction where the publication is targeted at the particular forum of the court.

⁴ *Dow Jones & Co. Inc. v. Gutnick*, (2002) 210 C.L.R. 575.

⁵ *Burke v. NYP Holdings, Inc.*, (2005) BCSC 1287.

- The Active/Passive Approach — under this approach, a foreign defendant who actively sends electronic publications to a particular forum would be subject to the jurisdiction of that forum's courts. A defendant who simply posts to a passive website would not be subject to such jurisdiction.
- The Country of Origin Approach — under this approach, jurisdiction is taken where the publication originated. The theory of this approach is that it is in the country of origin where the publisher has the last opportunity to control the content of the publication.
- Foreseeability and Totality of Circumstances — this approach is similar to the approach taken by the court in *Muscutt* and its companion cases.

I would suggest that in examining legal issues raised by globalization and information technology, it would be appropriate to firstly examine whether the common law as it stands can adequately deal with the issue.

If the circumstances do involve a paradigm shift in legal approaches, a court will of course have to look for new legal solutions. The approaches suggested by the Media Coalition may well be responses that should be examined in the context of multinational defamation and libel. Other approaches may be developed as well, to protect both individuals and a reasonable level of freedom of speech.

In one of your sessions, you will be discussing information-technology and "e-commerce". The law of contract was originally developed in an age of face-to-face negotiations and paper contracts, when a time lag between agreement and fulfillment were expected. The law that developed in a simpler time cannot necessarily accommodate the new reality. Although the common-law will continue to evolve, the existing law may simply have become irrelevant in the face of new realities. In these circumstances, we should not torture or twist existing jurisprudence to make it applicable to situations for which it is not equipped.

One of the new realities is that technology permits an unprecedented intrusion by employers into the activities of employees. Is electronic monitoring merely an extension of workplace monitoring by a manager or is it unacceptably and unfairly intrusive? Is the downloading of material from the Internet using a company's computer different than

using a telephone to make a personal call? What are an employee's rights to privacy and employment security in the new technological reality?

In another session, you will be discussing electronic access to court documents. Public access to court proceedings is a fundamental principle of an open and accountable administration of justice. The law relating to access to court proceedings and documents was developed in an earlier time as a response to secret or closed trials where justice was not done or at least not seen to be done. However, for most of our history, the right of access to court documents was generally exercised rather sparingly. Perhaps it was the right to access as much as actual access that safeguarded the public. Today, when much of the material used by the courts may be filed in an electronic format, existing technology can make the information available, not just to a few self appointed "guardians of the public interest", but rather to the world at large. You will no doubt be discussing whether this universal availability of court documents is what was intended by our predecessors when they jealously protected an open court system. Is this greater technological accessibility merely a logical extension of our open system or is this a paradigm shift that needs to be reconsidered from first principles based on a balancing of public interest and individual rights? In other words, should public access to court documents be the norm or should there be a change in the form and content of court documents, in order to recognize legitimate privacy interests?

I note that you will also be discussing the privacy rights of litigants and witnesses during a trial. This will no doubt engage some of the same issues raised with respect to access to court documents. Should we maintain a fully open justice system or should we consider the level of legitimate privacy that should be afforded to litigants and witnesses in light of the new reality that information about these persons can be disseminated to the world instantaneously? Perhaps the questions to be determined are "how open is open?" and "how private is private?"

The Court of Appeal for Ontario has considered this issue as it relates to the publication of its decisions on its web site. The court publishes all of its decisions. Like many other courts, however, the court has utilized technology to provide a level of privacy to litigants.

Search engines such as Google, Netscape and Yahoo enable the public to search the Internet by scanning it on a daily or weekly basis and

then creating indices of the contents of web pages they have scanned. The court has installed a small program attached to its judgment pages that sends a message to the search engines requesting that those pages not be included in their indices. All of the major search engines honour the request. As a result, as the indices are refreshed from time to time, Internet links to the judgment pages of the court's web site are not created. Judgments are effectively "invisible" to users of these popular search engines.

The result is that a researcher or member of the public, who makes the extra effort, may navigate to the court's web site and, using its internal search engine, find a decision using keywords or the litigant's name. In contrast, the technology ensures that anyone using popular search engines such as Google or Netscape to conduct an Internet search for the same name will not locate the Court of Appeal decision. The result is that information is available for legitimate use but it's not readily available to casual or accidental disclosure to the world at large.

Our court has also adopted some non-technological responses. Care is taken to use only initials for the names of persons in appropriate cases and to write judgments without the inclusion of personal or embarrassing, but non-essential, details.

In considering the impact of information technology in relation to national security and criminal law, we must always, of course, keep in mind constitutional rights including the right to be presumed innocent, to be free from unreasonable search, and generally to the due process of the law. I also expect that there will be an important discussion as to the appropriate extent of privacy in an age of terrorism and highly sophisticated crime, and the need for police and security agencies to be able to access and decrypt new forms of communication including e-mail, voice over Internet and so on. The fine balance in the continuum between privacy, constitutional rights and the protection of the public will be the continuing subject of debate, I expect for many years to come.

For example, Internet fraud seems to have become almost a pandemic. Certainly anyone who has e-mail has received at least one letter from abroad offering to share a fortune in hidden funds. More insidiously, some seek to fraudulently obtain funds through even an e-mail requesting personal information ostensibly from your own bank, eBay or some other legitimate enterprise. The resulting identity theft can cause

damage that goes far beyond that caused to a victim by a burglary. I recently discovered that I had become somewhat of a victim of identity theft when I discovered that I had apparently become a consultant endorsing the work of a particular international immigration law firm soliciting funds from potential immigrants. These forms of Internet crime raise important issues of jurisdiction and issues related to detection, investigation, evidence gathering and prosecution.

As so many of the challenges arising from globalization and the pervasiveness of information technology extend beyond national borders, we must question whether appropriate remedies under domestic law are available or whether such remedies must be developed in the international arena. At the same time, however, in my view our common law is flexible and robust enough to expand into new areas and provide remedies notwithstanding the multinational dimension of a dispute. It is essential that our courts be able to protect the rights of our citizens without forcing them to seek remedies in foreign jurisdictions, as it would be quite impractical except perhaps for wealthy corporations.

Obviously, much of the law dealing with the impact of globalization is developing, therefore we have a responsibility to assist in the development of the law with both an eye to the past and a telescope into the future. In developing our responses to legal issues arising out of globalization and information technology, we must not steer the law into cul-de-sacs but ensure that it develops with the foresight and flexibility to deal with the challenges and developments as they arise. As Marshall McLuhan wrote in "Understanding Media", "control over change would seem to consist in moving not with it but ahead of it. Anticipation gives the power to deflect and control force".

We will need to use the tools provided by our common law while demonstrating a willingness to shed the straitjackets of the past where necessary so that we can stay "ahead of the wave". As lawyers and judges, we have a collective responsibility to assist our society to regulate the combined forces of information technology and socio-economic globalization to the benefit of all.

Thank you very much and have a good conference.