

CANADIAN CRIMINAL PROVISIONS DEALING WITH TELECOMMUNICATIONS

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The Canadian Criminal Code (R.S.C. 1985, c. C-46) establishes a number of specific offences dealing with telecommunications, notably theft of a telecommunication service (s. 326) and possession of device to obtain telecommunication facility or service (s.327). Other criminal provisions dealing with the unauthorized use of a computer and invasion of privacy are beyond the scope of the present article.

For the purposes of these two sections, «telecommunication» is defined as any transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, or other electro-magnetic system, which encompasses in exhaustive manner any form of communication at a distance (s. 326(2)).

Theft of telecommunication service will occur when any person, in a fraudulent or malicious manner, or without colour of right, (1) uses, consumes or abstracts electricity or gas, or causes it to be wasted or diverted; or (2) uses any telecommunication facility or obtains any telecommunication service. Accordingly, the application of this section will be triggered by the mere fact of falling within one of the circumstances stated above. The state of mind of the accused is unimportant, but the act must be fraudulent, malicious or without colour of right. The section imposes a reversal of the burden of proof, so that it is up to the defendant to prove that he or she has «colour of right» to the use of the telecommunication service, or that the use is not fraudulent or malicious. It is important to note that the conditions with respect to the taking or conversion are not cumulative, but rather are in the alternative, so that the act does not have to be fraudulent, malicious and without colour of right; only *one* of these is necessary.

An example of the definition of fraudulently can be found in the case of *R. v. Miller* (1984), 12 C.C.C. (3d) 466 (Alberta Court of Appeal). The accused were

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subscribers to a cable television service but had difficulties with the reception. The husband modified their television set to improve the reception with a «tunable stub», with the result that the reception improved. However, the «tunable stub» had the additional effect of perfecting the reception of a pay-TV channel, which is otherwise scrambled and can be obtained by payment of an extra fee for an appropriate decoder. The alleged offence was the use of the pay-TV channel without payment for the service. The Court of Appeal held that the Criminal Code does not seek to criminalize the retention of an unpaid signal. On the contrary, the Code condemns the fraudulent or malicious obtention of a signal without colour of right. It is the acquisition or original receipt of the signal which must be touched with the intention to steal. Accordingly, the Court held that if the service is procured without a fraudulent act on the part of the user, then no offence is established. In another case, *R. v. Renz* (1974), 18 C.C.C (2d) 492 (British Columbia Court of Appeals), it was held that the criteria of «fraud» requires an intentional and deliberate act, with the knowledge that the person was *not* permitted to obtain the service in the way that it was obtained.

Although the expression «telecommunication facility» portends to be broad in its application, in *R. v. McLaughlin* (1980), 18 C.R. (3d) 339 (Supreme Court of Canada), it was held that a computer terminal was *not* a telecommunication facility, since telecommunication connotes some type of external transmission or reception and the existence of a sender and a receiver. In this case, it was held that the purpose of this section (then s. 287) was the theft of information from a facility from which the information is channelled. The function of a computer, according to the Court, is not the channelling of information to outside recipients so as to be susceptible to unauthorized use, but rather permit the making of complex calculations and to process, correlate, store and retrieve information. One might wonder if this decision is still valid, particularly with the advent of the Internet, and computer networks in general, since the Internet does include some sort of external transmission or reception through a common carrier (such as an Internet Provider), and does include the existence of a sender and a receiver. It is submitted that, although the Criminal Code does include an offence dealing with the unauthorized use of a computer (s. 342.1), the offence described in s. 326 might be a complement to it.

Possession of a device to obtain a telecommunication facility or service is defined in section 327, and is a complement to the offence of theft of a telecommunication device. The offence consists of the manufacture, possession, sale or offer for sale or distribution of any instrument or device or any component thereof, the design of which renders it *primarily* useful for obtaining the use of any telecommunication facility or service, under circumstances that give rise to a reasonable inference that the device has been used or is or was intended to be used to obtain the use of any telecommunication facility or service without payment for a lawful charge therefor. The preamble of the section also contains the added element that

the person must be in possession of the device without lawful excuse. Again, the burden of proof lies on the defendant to show lawful excuse. The section further provides that any instrument of device in relation to which the offence was committed will be forfeited to the Crown. However, the forfeiture does not extend in respect of property of telecommunication common carriers who are not parties to the offence.

The fact that a device could be modified to achieve some other purpose does not meet the requirements of this section without adequate proof that such modifications have been made, where the device had in fact been modified in a manner which achieved the unlawful purpose (see *R. v. Ross* (1988), 32 O.A.C. 47 (Ontario Court of Appeal)). Furthermore, the offence will be met where a person possesses the device for storage purposes under circumstances giving rise to a reasonable inference that the person knows that the intended use of the devices by other persons is to unlawfully obtain television signals. However, the intended use does not have to be by the person storing the devices (see *R. v. Fulop* (1988), 46 C.C.C. (3d) 427 (Ontario Court of Appeal)).

It should be noted that there is very little jurisprudence on these sections, and more to the point, very little recent jurisprudence of note. The original purpose of these sections was to deal with the theft of telecommunication services, such as the illegal connection of a telephone to a cable. However, the explosion of the Internet, or computer networks in general, as well as wireless communications through cellular telephones or PCS may serve to broaden the application of these sections.



