

The Top Five - 2005

Each year Justice Stephen Goudge of the Ontario Court of Appeal identifies five cases that are of significance in the educational setting. This summary, based on his comments and observations, is appropriate for discussion and debate in the classroom setting.



R v. Hamilton, 2005 (S.C.C.)

http://www.lexum.umontreal.ca/csc-cc/en/pub/2005/vol2/html/2005scr2_0432.html

Counseling someone to commit a criminal offence in the context of Internet communications

The accused sent out emails to more than 300 people advertising the sale of “Top Secret Files” which he himself had purchased off of a website. This email advertised that inside the files was software that would allow the buyer to generate valid credit card numbers. The accused sold at least 20 copies of the “Top Secret Files”, which in addition to the credit card software also included instructions on how to make bombs and how to break into houses. The accused did not advertise anywhere in his email the fact that these other “how to” instructions were part of the file package.

When the police searched the accused’s computer, they found a document describing a credit card number generator which was different from the files in the package he was selling. They also found that he had a handwritten list of Visa numbers. The accused admitted that he had seen a computer list of all of the things that were included in the package of files that he was selling, but that he had never read the materials on bomb making or how to break into houses.

There was no evidence that either he or his customers had used the fraudulently generated credit card numbers, or that any of his clients had used the instructions to make bombs or break into houses in order to commit crimes.

The accused was charged with four counts of counseling the commission of an indictable offence, including fraud, under s.464 of the Criminal Code.

s. 464(a) of the Criminal Code states that:

... every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable.

At the trial level, the judge acquitted the accused of all charges. The trial judge accepted the accused testimony that he had not read the files about bomb making or how to

break into houses. The trial judge also accepted evidence that the accused had not used the credit card numbers that he had generated. The trial judge found that the accused was aware that the use of generated credit card numbers was illegal.

The trial judge found that the *actus rea* (the action part of the offence) had been present, namely that the accused had encouraged buyers to commit crimes through his communications, but that the accused was not guilty because the *mens rea* (mental intention) of the crime was not present. The trial judge found that the accused was not intending that people would actually carry out any crimes as a result of buying the files. On the issue of the charge related to counseling credit card fraud specifically, the trial judge concluded that the accused was selling the credit card software to make money, and therefore his intent was not to get people to actually commit credit card fraud.

The Court of Appeal upheld the findings of the trial judge and then the Crown appealed to the Supreme Court of Canada.

The Supreme Court of Canada allowed the appeal on the count for counseling fraud, finding that the trial judge had made in error in law about the *mens rea* required for this offence and ordered a new trial on this issue. It upheld the trial judge's and Court of Appeal's decision with respect to the counts related to bomb making and breaking into

houses. The fact that the accused had never read the files about bomb making or breaking into houses, meant he lacked the mental intent to counsel people to commit these other crimes.

The Supreme Court clarified that in order to establish the presence of *mens rea* in this type of case, the Crown must show that the accused either intended that others commit a crime, or that the accused knowingly counseled others to commit an offence, and was aware that there was an unjustified risk that they would actually commit a crime as a result of his encouragement. Plainly said, even if no crimes happen as a result of the accused encouraging actions, he/she may still be found to have the mental intent for this crime, if the Crown can show that the accused knew that it was quite likely that someone might commit a crime because of his actions of encouragement.

The Supreme Court, also found that the trial judge had mixed together the idea of "motive" and "intent". Although the accused's motive was to make money out of this venture this did not change the fact that he was intending to induce people to commit fraud through use of the bought files.

In its judgment, the Supreme Court expressed concern about the fact that the Internet is a fertile ground for encouraging illegal conduct. However it noted that criminalization of communications over the Internet is a complex issue because it touches on issues of freedom of speech. It encouraged the legislature to respond to this issue directly and in the near future.