Information, Privacy and Data Security Post

Hicks Morley Information & Privacy Post – Summer 2008

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ENJOY YOUR SUMMER!

We hope you enjoy this mid-summer edition of the Hicks Morley Information & Privacy Post – our quarterly newsletter about case law developments in privacy, access to information, the protection of confidential business information and the law of production.

We've had a busy summer for client relations here, having recently launched a re-branded website and ran a series of successful client conferences attended by over two thousand individuals. As a result, we have developed a number of bulletins with other content that you may find of interest, including the following:

- Protect your domain name from rogue departing employees – a client bulletin on how to manage the risk of domain name hijacking by departing employees
- Supreme Court speaks on school searches – a client bulletin on the Supreme Court's "sniffer dog" cases – *A.M.* and *Kang-Brown*
- The Kajouji Case: A recent tragedy focuses renewed attention on students at risk – a client bulletin on information flows and managing the risk of on-campus violence
- Playing the Application Game: Why employee privacy matters – a client conference paper on the subject of statutory privacy rights and employment

In addition, we've also noted a number of recent cases below, including a notable case from the Ontario Divisional Court which addresses the procedural aspect of seeking an individual's medical information for assessment purposes (*Cotton*), a British Columbia Office of the Information & Privacy Commissioner decision on breach notification (*Investigation Report F08-02*) and a case out of the British Columbia Supreme Court which demonstrates that the production of documents in electronic form does not alter the general presumption that a producing party will produce records in good faith (*Chadwick*).

We hope you enjoy, and as always, encourage you to share this with your colleagues.

Paul Broad

CONFIDENTIALITY DUTIES – PROFESSIONALS

ABCA addresses the duty of confidentiality of an expert witness

The Alberta Court of Appeal issued a split judgement that touches on the scope of confidentiality that is waived by the act of filing an expert report in court. The majority held that the filing of a report only waives confidentiality as between a litigant and its expert in the content of the report itself.

This was a case about an expert report written by an accounting firm for a woman engaged in a child support and custody dispute (the "complainant"). The firm traced her husband's assets and drafted a preliminary report, which the complainant filed in court in support of her position in two proceedings. This action, which the firm claimed she did not have authorization to take, led to a series of events that culminated in a complaint by the woman to the Institute of Chartered Accountants of Alberta.

After viewing the report, the husband (also an accountant and familiar to the firm) called the author of the report to complain about its quality. The author wrote an e-mail to the managing partner which stated, "If Danny feels we have slighted his reputation, we have not." Soon after, the firm decided to withdraw the report. It took the position that withdrawal was justified because the report was filed without its authorization and the complainant's account was unpaid. It told the husband about the withdrawal at around the same time it sent a letter to the wife, who heard about the withdrawal through the husband's counsel before she received the letter. Later, in response to a summons issued by the husband, an accountant from the firm swore an affidavit to confirm the withdrawal.

Based on these facts, the Institute made findings of professional misconduct, which the majority of the Court of Appeal (in an award written by Picard J.A.) upheld on a "reasonableness" standard. She first affirmed a finding that the author's e-mail, despite being sent internally, was "false and misleading" and constituted a breach of the professional rule against making such statements. Picard J.A. read the rule broadly; since it didn't exclude internal communications, she held that it applied to them.

Picard J.A. also affirmed breach of confidence findings that were based on the firm's direct communications with the husband, and its affidavit. She rejected the firm's reliance on the rule governing litigation privilege that deems privilege to be waived for all information relevant and material to an expert report filed in court. She held that this was a rule about litigation privilege and was not incorporated into the Institute's confidentiality standard, and so upheld the Institute's finding that the firm acted improperly by disclosing information about the terms and reasons for the report's withdrawal, the state of the complainant's account and its relationship with the complainant.

Slatter J.A. wrote a very strong dissent that took issue with the internal e-mail finding and the majority's confidentiality findings.

Deloitte & Touche LLP v. Institute of Chartered Accountants of Alberta (Complaints Inquiry Committee), 2008 ABCA 162 (CanLII).

Federal Court says ministerial offices beyond the scope of ATIA

The Federal Court held that the Prime Minister's Office and other ministerial offices are not "institutions" whose records are subject to the federal *Access to Information Act*.

Canada (Information Commissioner) v. Canada (Minister of National Defence), 2008 FC 766 (CanLII).

OCA interprets MFIPPA application provision broadly

The Ontario Court of Appeal interpreted the subsection 2(3) application provision of the *Municipal Freedom of Information and Protection of Privacy Act*, and held that the City of Toronto Economic Development Corporation ("TEDCO") is deemed to be part of the City of Toronto for the purposes of the *Act*.

TEDCO is an OBCA corporation that is wholly owned by the City. The City appoints all TEDCO directors, who in turn elect or appoint all TEDCO officers pursuant to a by-law. The Court held that all of TEDCO's officers are "appointed or chosen by or under the authority" of the City as contemplated by subsection 2(3). It based its decision on the ordinary meaning of the word "authority," the purpose of access to information legislation and the non-technical character of the language used in subsection 2(3) – marked by the phrase "appointed or chosen."

City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario, 2008 ONCA 366 (CanLII).

FREEDOM OF INFORMATION – EXEMPTIONS

IPC says personal information in OSR shall not be released

The IPC/Ontario denied a parent's appeal for access to information about an incident that led to the suspension of two students, and in doing so made a significant statement on a student's privacy interest in information contained in the Ontario Student Record.

The records at issue were about two students other than the parent's child, so the Board claimed they were exempt based on the exemption in section 14 – i.e. it claimed that disclosure would constitute an "unjustified invasion of privacy." The Board also argued that disclosure should be presumed to constitute an unjustified invasion of privacy based on section 14(3)(d) of MFIPPA (the "educational history" presumption) because the records had been included in the OSR pursuant to the Ministry's Violence-Free School Policy. The IPC acknowledged that the OSR is "the core of a student's educational history" and held that the presumption applied.

It also rejected the requester's claim that the "public interest override" applied. Although it recognized that a parent's interest in ensuring a safe environment for his or her own children and other children was a "compelling public interest," it did not find that this interest outweighed the special privacy interest of youth at risk.

Order MO-2291 (11 April 2008, I.P.C./Ont.).

Arbitrator Brent's teaching evaluation data award upheld

The Divisional Court dismissed a judicial review of a February 2007 decision of Arbitrator Gail Brent in which she held that the University of Windsor did not violate its faculty collective agreement or the Ontario *Freedom of Information and Protection of Privacy Act* by publishing teaching evaluation scores on a secure network for access by students and other members of the university community.

It held that Ms. Brent was reasonable in construing the term "personal information" in the relevant collective agreement provision narrowly such that it excluded teaching evaluation scores. It also held, without deciding on the applicable standard of review, that Ms. Brent was correct in deciding that teaching evaluation records were excluded from FIPPA based on the employment-related records exclusion.

University of Windsor v. University of Windsor Faculty Association, 2008 CanLII 23711 (ON S.C.).

FREEDOM OF INFORMATION – OPEN COURTS

OCA outlines procedure on an application to quash a sealing order

In a recent decision, the Ontario Court of Appeal declined to quash sealing orders issued in respect of search warrant materials, in part because the court record was not suitable for appellate review. The outcome is largely fact-driven, but the

Court did explain in general terms how the procedure on an application to quash a sealing order should be managed to ensure a full and fair hearing and a court record that supports appellate review.

The Court said this process, and in particular, a requirement on the Crown to produce an index with its grounds, "reflects the presumption that once a search warrant has been executed, the warrant and the information upon which it is based must be available to the public unless it is demonstrated that the ends of justice would be subverted by the disclosure of the information."

R. v. Canadian Broadcasting Corporation, 2008 ONCA 397 (CanLII).

FREEDOM OF INFORMATION – PROCEDURE

US Supreme Court revives FOI request precluded as *res judicata*

The Supreme Court of the United States unanimously held that an FOI claim filed by an acquaintance of a person who was unsuccessful in previously filing the same claim should not be barred.

The first requester asked the Federal Aviation Administration for technical documents related to a model of vintage airplane he owned and was seeking to restore. The FAA denied the request based on the FOIA's third-party trade secrets exemption. The first requester eventually filed a lawsuit that was heard by the Tenth Circuit Court of Appeals. The Tenth Circuit upheld the lower court's finding that the third-party restored its right to protect the records (despite an earlier waiver) by objecting after the FOI request had been filed. It did, however, significantly qualify its decision by noting that the first requester had not challenged whether it was possible to "restore" trade-secret status once waived and, if so, whether the timing of the third-party's objection enabled such restoration.

The second requester then filed the same request and eventually filed suit, but was barred in the first instance and on appeal based on a finding that he was "virtually represented" by the first requester. The virtual representation doctrine expands the traditional exceptions (in American federal law) to the rule that one must be a party to be barred by a prior judgement. It had not previously been considered by the Supreme Court.

The Supreme Court rejected the virtual representation doctrine but remanded the matter for a determination as to whether the second requester filed suit as the first requester's agent. This may have seemed a possibility to the Court because the first requester had a greater interest in the records (he owned the aircraft; the second requester did not) and had asked the second requester to help him restore the aircraft and because both requesters used the same legal counsel. There was no determination of the question of agency on the record, however, so the Court let the agency issue live with a note that "courts should be cautious about finding preclusion on this basis."

Taylor v. Sturgell, 553 U.S. _____2008.

PRIVACY – COLLECTION, USE AND DISCLOSURE

Drug and alcohol testing condition does not give CHRT grounds to assess merits of discrimination complaint

This Canadian Human Rights Tribunal decision illustrates the limits to advancing drug testing claims under human rights legislation.

The Tribunal dismissed a discrimination and harassment complaint brought by an employee who was terminated and then reinstated on the condition he abstain from using drugs and alcohol and engage in unannounced testing. The employee did not claim that he suffered from an addiction; rather, he claimed that the reinstatement contract created the perception that he

suffered from alcoholism and was disabled. The Tribunal disagreed, finding that the contract was imposed because of objective behaviour and not perceived disability.

Witwicky v. Canadian National Railway, 2007 CHRT 25.

PRIVACY – COLLECTION, USE AND DISCLOSURE

Arbitrator says what PI is necessary to assess a job competition

British Columbia arbitrator James Dorsey recently considered what personal information needs to be disclosed to fulfil the purpose of a collective agreement clause that gives a union access to information to assess the propriety of a job competition.

This award follows a 2005 judgement by the British Columbia Court of Appeal in which it held that the purpose for disclosing bargaining unit members' personal information to the union as contemplated by the clause was consistent with the purpose for which it was collected and therefore permitted under the British Columbia *Freedom of Information and Protection of Privacy Act*. The Court of Appeal also held that only what is necessary to the purpose should be disclosed to the union, and perhaps unfortunately, said that "personal identifiers" should be redacted from the disclosure.

Following the Court of Appeal's judgement, the employer applied a very literal and narrow view of the union's right to "applications" and a very literal and broad view of the Court's comment on redacting personal identifiers. Arbitrator Dorsey held that the employer's position was improper given the purpose of the access to information clause.

He held that the union's right to "applications" gave it an entitlement to resumes, interview questions and responses, score sheets, and essentially all other records collected and used in the application process except reference information. He also held that the Court of Appeal's suggestion to redact personal identifiers did not allow the employer to redact all information that would tend to identify individuals.

Ontario employers have generally been unsuccessful in resisting disclosures required by labour law on the basis of employee privacy rights.

Canadian Office and Professional Employees Union and Coast Mountain Bus Co. (Re) (7 September 2007, Dorsey).

Divisional Court says reasons for ordering medical exam required

The Divisional Court quashed a medical assessment order issued by the Ontario College of Nurses because the College did not provide the affected nurse with reasons for its order.

In accordance with the *Health Professions Procedural Code*, the College's Executive Committee appointed a board of inquiry to assess the nurse's capacity. The board of inquiry gave notice to the nurse of its intention to order her to submit to a medical examination (on the threat of suspension) because it had reasonable and probable grounds to believe she was incapacitated. The power to make this order is specified in the Code, as is the requirement to give notice.

The nurse made submissions through counsel, and included two medical opinions and statements from her colleagues that supported her capacity. Regardless, the board ordered an assessment and did not provide reasons for its order. The Court award also says the College "refused" to provide the nurse with a record of its proceedings or file the record with the Court, though it did file an Affidavit in its response which attached all the material before it at the time it made its decision.

The Court quashed the order because the College breached the nurse's right to procedural fairness. It considered that the privacy interest at stake weighed in favour of a high standard.

Although the substantive basis for ordering a medical assessment is often litigated, judicial comment on the process of ordering an assessment is rare. The outcome in this decision is certainly driven by its specific factual context, but it nonetheless has some broader significance.

Cotton v. College of Nurses of Ontario, 2008 CanLII 26674 (ON S.C.).

Leak of information side-tracks STD adjudication claim

Arbitrator Devlin upheld a grievance which claimed an improper denial of short-term disability benefits and awarded $5,000 for the manner in which the employer (together with its third-party adjudicator) denied the benefit.

The main problem with the decision to deny benefits was that it relied on a finding that the grievor was not eligible because her condition (an episode of situational depression) was caused by her husband's terminal illness. The grievor gave this information to the employer in an informal telephone conversation at the start of her absence, and the employer forwarded it to the benefits adjudicator in an "employee profile" form. Ms. Devlin found the underlying reason for the grievor's absence was not a relevant factor in the claim, which was otherwise justified. She held that there was evidence that the improper denial caused the grievor additional stress and awarded $5,000 in damages.

Hamilton Health Sciences and Ontario Nurses Association (Re), [2008] O.L.A.A. No. 103 (Devlin) (QL).

Alberta OIPC issues helpful medical information management decision

The Alberta Office of the Information and Privacy Commissioner issued an investigation report that analyzed various information flows that employers typically use in managing employee medical issues.

The first information flow involved information transferred from a third-party Employee Assistance Program provider (EAP) to the employer's occupational health services (OHS) department. The OIPC held the EAP improperly disclosed information to the OHS about whether the employee was complying with his treatment program. The disclosure itself was not objectionable because the employee was on leave and in receipt of short term disability benefits on the condition he obtain appropriate medical care. However, the employer and the EAP drew a distinction between voluntary entrance into the EAP and a formal referral into the EAP; voluntary care was treated as absolutely confidential, while care pursuant to a referral involved a limited disclosure of information back to the OHS. The EAP argued that it had obtained oral consent for this disclosure, but the OIPC held that the employee was rightly confused about the EAP's role, partly because he had received EAP services voluntarily in the past. Hence, The OIPC held that the EAP violated its obligation to give reasonable notice of its purposes as required by the Alberta PIPA.

The second information flow involved information transferred from the employer's OHS to a member of the employer's human resources department (and also to the local union president). The OIPC held that it was okay for the employer's OHS to know about the nature of the employee's condition so it could ensure it was being properly managed, but all human resources needed to know was whether the employee had successfully completed treatment and would comply with return to work conditions.

The third information flow involved a communication sent by human resources, which indicated that the employee was not complying with the employer's policies, that the OHS had given the employee notice of his requirements and the reason why the employee was not in compliance. The information was contained in a letter copied to the local union president, the employee's immediate supervisor, the employer's director of disability management, the employer's director of operations, the nurse who ran the employer's OHS, the employer's site production manager and the manager of the employee's department.

The OIPC held that the employee's direct supervisor and the individuals responsible for administering the employer's short term disability program had a need to know information about the ongoing employment-related dispute, but that the other

members of management copied on the letter only needed to know that the employee was not yet eligible to return to work and should not be on-site.

Investigation Report P2008-IR-003 (10 April 2008, Alberta OIPC).

PRIVACY – PERSONAL INFORMATION

Alberta OIPC prescriber detailing order quashed

The Alberta Court of Queen's Bench quashed an order by the Alberta OIPC that prohibited disclosure of prescriber data to IMS Health.

The Court made two substantive findings. First, it held that the OIPC did not err in limiting the scope of its investigation to disclosures to IMS only, even though a determination on the issue it was investigating could affect other related programs and other parties. Second, and more significantly, it held that the OIPC erred in finding that the Act required consent to disclose data that could be used to profile or detail a prescriber – namely, information about how a prescriber chose to diagnose and treat a patient of a particular age, with a particular condition, and specifically what medication was used, in what dosage, and for how long.

The Court declined to make the order on the basis of IMS's broader arguments about the nature of "work product information" and health information custodians' right of expression, so its judgement is technical and confined in its significance.

IMS Health Canada, Limited v. Alberta (Information and Privacy Commissioner), 2008 ABQB 213 (CanLII).

LSAC allowed to substitute submission of photos for fingerprints

This is a federal Privacy Commissioner report on the Law School Admission Council's practice of collecting fingerprints from LSAT test takers. Her office recommended that LSAC cease the practice, but allowed it to substitute a practice of collecting test takers' photographs.

There are some notable findings in the report. Namely:

1. the OPC rejected LSAC's argument that it was engaged in educational rather than commercial activity, finding that its core activities provided a service to its member law schools;
2. the OPC held that fingerprints are more sensitive than voice prints and less sensitive than one's photographic image; and
3. the OPC made another comment de-emphasizing the significance of cross-border transfers of personal information.

The report also highlights the difficulty of sustaining a collection practice based on deterrence alone. The case for deterrence is often logically compelling, but proving that collecting information effectively deters misconduct is hard. LSAC had not once used a fingerprint to identify whether a fraudulent test had been submitted since it started collecting fingerprints in the mid-1970s, so it was difficult for the LSAC to justify its practice on any ground other than deterrence. It also claimed that it simply wanted to assure its members that it was doing all it could to ensure the security of the test. The OPC seemed to accept this purpose as legitimate, but not compelling enough to justify the collection of fingerprints. The LSAC proposed collecting photographs as a step-down solution mid-way through the investigation, and the OPC held that this alternative would achieve the appropriate balance because images are "marginally" less sensitive.

Report of Findings: Law School Admission Council Investigation (29 May 2008, OPC).

PRIVACY – SAFEGUARDS

BC OIPC says 41 days too long for breach notification

The British Columbia OPIC issued an investigation report in which it held that the Ministry of Health breached the security measures provision of the British Columbia *Freedom of Information and Protection of Privacy Act* in circumstances involving the loss of an unencrypted magnetic tape that contained the personal information of British Columbia residents who received health care in New Brunswick.

The OPIC held that the Ministry breached the Act in light of the following actions:

1. sending data on unencrypted magnetic tapes (even though the data on the tapes would not be highly accessible given the near-obsolescence of the medium)
2. not requiring the sender to give notification of when the package would be received and not requiring the sender to use a courier with a tracking service (which contributed to the delay in discovering that the package had been lost)
3. not instructing the sender to refrain from sending another unencrypted tape while the incident was still under investigation
4. taking 41 days to notify individuals of the breach

The OIPC also held that the Ministry did not follow best practice by only notifying the OIPC shortly before it gave notice to the affected individuals. It expressed a desire to help public bodies develop effective strategies to mitigate the risk of harm flowing from data breaches.

Investigation Report F08-02, 2008 CanLII 21699 (BC I.P.C.).

PRIVACY – SEARCH AND SEIZURE

NB judge grants motion to exclude evidence on seized hard drive

A New Brunswick Provincial Court judge excluded evidence on a hard drive obtained by the Canada Revenue Agency pursuant to a search warrant.

The dispute related to files that were stored on a hard drive but were also beyond the temporal scope of the search warrant and over which the accused consistently asserted an expectation of privacy. The motions judge found that the CRA did not act improperly by seizing the hard drive, but breached section 8 of the *Charter* because it did not immediately file an amended return before the issuing judge and undertake not to use the out-of-scope records. He found a second breach because the CRA, instead, used the out-of-scope records to file a second search warrant in another unrelated investigation.

The section 24(2) analysis turned on the seriousness of the breach, which the judge characterized as a “clear pattern of a continuous obtrusive breach.”

R. v. Daley, 2008 NBPC 29 (CanLII).

Propriety of border crossing laptop search affirmed on appeal

The United States Ninth Circuit Court of Appeals overturned a much-discussed order to suppress evidence obtained in a border crossing laptop search.

The case involves a traveller named Michael Arnold, who was routinely selected for secondary questioning after returning from a three week vacation in the Philippines. A border agent turned on Arnold’s computer and discovered photos of two

nude women in folders on his desktop. She called in other officials, who then questioned Arnold and examined his computer some more, and ultimately seized the computer after finding what they believed was child pornography. Based on these facts, in 2006 a district court judge granted Arnold's motion to suppress on a finding that there was no reasonable suspicion for the search.

The appeal from the lower court's order centered on whether the Fourth Amendment requires the United States government to meet a "reasonable suspicion" standard in conducting border crossing laptop searches because laptops are different than other closed containers. The Court's description of Arnold's argument nicely highlights its significance:

Arnold argues that "laptop computers are fundamentally different from traditional closed containers," and analogizes them to "homes" and the "human mind." Arnold's analogy of a laptop to a home is based on his conclusion that a laptop's capacity allows for the storage of personal documents in an amount equivalent to that stored in one's home. He argues that a laptop is like the "human mind" because of its ability to record ideas, e-mail, internet chats and web-surfing habits.

The Court rejected the laptop argument as contrary to United States Supreme Court jurisprudence, which it read as weighing against any analysis that would differentiate between the types of property searched at border crossings. In short, it held that property is property.

United States v. Arnold, 08 C.D.O.S. 4533.

PRODUCTION – ANTON PILLER ORDERS

Plaintiffs can't (yet) capitalize on loss of evidence seized on an *Anton Piller* Order

The Ontario Superior Court of Justice dismissed a motion brought by defendants after their documents and things seized under an *Anton Piller* order were lost by the supervising solicitor.

The Court held that the defendants had not established any basis for modifying or setting aside the *Anton Piller*order. It also held that the claims for damages and a dismissal of the action were premature and best resolved after a trial, except that the defendants could bring a summary judgement motion to forward their argument that the loss of evidence prejudiced their defence.

*Bell Ex*pressVu Limited Partnership v. Echostar Satellite LLC, 2008 CanLII 12837 (ON S.C.).

Court sets aside *Anton Piller* order for material non-disclosure

The Ontario Superior Court of Justice issued an order setting aside an *Anton Piller* order. The judgement is another example that stresses the extreme burden on parties who seek such orders.

The *Anton Piller* order was initially granted in 2006 in support of a departing employee claim that included allegations of fraud and breach of confidence. The Court set it aside because the plaintiff failed to fully and frankly disclose material facts and failed to make reasonable inquiries into material facts. More specifically, it held that the plaintiff:

1. failed to ask customers whose business it claimed was lost or threatened due to the individual defendant's actions whether they had been approached by the individual defendant;
2. failed to disclose that a customer relationship on which it relied was responsible for only a 2% portion of its gross profit; and
3. despite raising the difficulty in seeking production of the individual defendant's MSN Hotmail (which resided in the United States), failed to disclose that it had launched an action in Texas against the individual defendant's new employer concurrently with its Ontario action, that it had sent a preservation letter to the new employer in conjunction

with the action and that it had an agreement from Microsoft to retain the individual defendant's MSN Hotmail e-mails indefinitely.

The Court also criticized the execution of the order and, in particular, a search conducted of the purse of the individual defendant's wife.

Factor Gas Liquids Inc. v. Jean, 2008 CanLII 15900 (ON S.C.).

PRODUCTION – DEEMED/IMPLIED UNDERTAKING

Federal Court says relief from implied undertaking unnecessary and unfair

The Federal Court denied a motion for relief from the implied undertaking rule to allow documents produced in one action to be used in another related action. The Court held that the defendant (and plaintiff by counterclaim) did not meet the strict standard of "necessity" established by the Supreme Court of Canada in *Lac d'Amiante du Québec Ltée* and recently endorsed in *Juman v. Doucette*.

Sanofi-Aventis Canada Inc. v. Apotex Inc., 2008 FC 320 (CanLII).

PRODUCTION – E-DISCOVERY

Forensic inspection ordered but party trusted to deal with results

Mr. Justice Elliot Myers of the BCSC ordered the forensic examination of a computer hard drive, declined to order the appointment of independent counsel and suggested that the forensic expert was precluded from communicating the results of his analysis to the parties to whom records were produced.

The hard drive was in the custody of the plaintiffs and contained records relating to a fatal helicopter crash. The parties agreed that it contained relevant records, some of which were deleted prior to litigation and needed to be recovered. This caused the plaintiffs to hire a forensic computer specialist to retrieve and produce records to the defendants, but when the defendants asked for information about the methodology used by the specialist the plaintiffs refused. They claimed that providing the requested explanation would involve a substantial expense and, for whatever the reason, neither the defendants nor the plaintiffs invited the Court to assess or order the obvious mid-ground solution – simply ordering the plaintiffs to provide the information originally requested by the defendants.

In making his order (which entailed having the defendants' forensic computer specialist administer agreed-upon search terms), Myers J. distinguished between the need for an order to give assurance that a search is done effectively and the need for an order to protect against bad faith conduct. He also held that it was implicit in the order granted that the defendant's forensic expert would not communicate the results of his search to the defendants and suggested he would deal with any questions about the validity of the expert's process, if necessary, post-disclosure.

Chadwick v. Canada (Attorney-General), [2008] B.C.J. No. 1225 (S.C.) (QL).

PRODUCTION – PRESERVATION

No basis for questioning preservation steps

Master MacLeod had the opportunity to consider whether a party should be compelled to answer, in the ordinary course of oral discovery, questions about its efforts to preserve evidence. He decided not to compel a party to answer questions about the efforts it made to preserve records because there was no reason to believe the party was breaching its discovery

obligations.

Andersen v. St. Jude Medical Inc., [2008] O.J. 2452 (S.C.J.) (QL).

PRODUCTION – PRIVILEGE

No solicitor-client relationship formed in casual law office conversations

The Nova Scotia Court of Appeal affirmed a 2007 decision in which a judge held that two casual conversations between a lawyer, another lawyer and the other lawyer's wife did not give rise to a solicitor-client relationship.

The facts involve a partner and his associate whose wife was contemplating leaving her employment as a real estate broker.

The associate first had a conversation with the partner that was held to be "brief," and likely lasted for less than 20 minutes. The associate admitted that he sought "off the cuff" advice on the partner's "two cents worth" and at the same time sought an opinion about the qualities of his wife's potential new business partner. The conversation did touch upon legal matters, however, including the wife's obligation to give notice.

The second conversation happened when the wife attended the office and she and her husband intercepted the partner when he was on his way out to lunch. The wife testified that she attended the office to seek legal advice from the partner, but also admitted that she had no intention of retaining him as counsel on her impending departure. The subject matter of the second conversation was the same as the first, and the partner testified that he was just lending support to his associate.

The wife left her employment and her former employer sued. In the course of pursuing its claim, the employer contacted the partner, who spoke openly about his meeting with the wife and his now estranged associate. The partner said, "If they had listened to me there would likely have not been a lawsuit." The wife (with others) sued for breach of solicitor-client privilege.

Mr. Justice Boudreau of the Nova Scotia Supreme Court dismissed the claim in April 2007. The Nova Scotia Court of Appeal upheld Boudreau J.'s decision in a brief award.

Cushing v. Hood, 2007 NSSC 97, affirmed 2008 NSCA 47 (CanLII).

Records ordered to be produced despite arguments made about youth privacy

The Ontario Superior Court of Justice ordered parts of a student's Ontario Student Record and various records in the custody of the police to be disclosed to a plaintiff in a civil action.

The lawsuit related to a violent incident by one grade seven student against another who later sued the offending student's guardian and others for an alleged lack of supervision.

In ordering the offending student's OSR to be disclosed, the Court explained how the statutory privilege in section 266 of the *Education Act* has not been interpreted as a barrier to production, in particular when the student or his or her guardian is a party.

Regarding the police records, the offending student was never prosecuted, so the police did not oppose the motion and took the position that the *Wagg* screening process need not be engaged. The Children's Lawyer argued, however, that records should not be produced because the police had no right to obtain any statement from the offending student because they were not investigating any offence and because the child was not afforded a right to counsel and to have a guardian present. The Court rejected this argument, though it also held that, in any event, the admissibility of evidence should be determined at trial and potential inadmissibility is not a barrier to production.

Lee v. McNeil, 2008 CanLII 20984 (ON S.C.).

PRODUCTION – REGULATORY POWERS

Case Report – SCC says Privacy Commissioner can't decide privilege claims

The Supreme Court of Canada issued its much-anticipated decision in Blood Tribe in July. In a judgement written by Mr. Justice Binnie, it unanimously held that the Privacy Commissioner of Canada does not have the power to compel production of records over which an organization claims solicitor-client privilege. In doing so, the Court affirmed the well-established principle that solicitor-client privilege cannot be abrogated by inference and made its first comments yet on the mandate granted to the PCC by the Personal Information and Protection of Documents Act.

The dispute arose when the respondent to an access to personal information complaint refused to produce records of communications that it claimed to be subject to solicitor-client privilege. In demanding the records be produced, the Commissioner relied on investigatory powers granted by section 12 which allow her to order production "in the same manner and to the same extent as a superior court of record."

The Supreme Court held that section 12 does not give the PCC the power to compel production of records over which solicitor-client is claimed by mere inference or by necessary implication in light of the PCC's mandate.

While the principle that solicitor-client privilege can only be abrogated by express statutory language is not new, the Court's application of the principle in this case demonstrates its strength because (as pointed out by the Information Commissioner in support of the PCC's appeal), "verification of the privilege is the very object of the Privacy Commissioner's statutory ombudsperson function and not merely a preliminary step to determine the record's use for another purpose."

The Court was not convinced by this argument, especially given the PCC's mandate, which it characterized as adversarial rather than independent. Though the Court acknowledged that the validity of a solicitor-client privilege claim which is raised in response to a PIPEDA right of access request is of concern to the PCC given her mandate, it said her only valid means of seeking a determination of such a claim is to engage the Federal Court as she is empowered to do under the Act.

Canada (Privacy Commissioner) v. Blood Tribe Department of Health, 2008 SCC 44.

eBay's request for stay of PowerSeller production order rejected by FCA

The Federal Court of Appeal rejected an application for a stay of an order that requires eBay to provide the Minister of National Revenue with the names, basic account information and gross annual sales of eBay's Canadian resident "PowerSellers" for 2004 and 2005. The information was ordered to be produced under the authority of section 231.2 of the *Income Tax Act*, which authorizes third-party production orders that allow the MNR to seek information about persons or ascertainable groups of persons where the order is made to verify compliance with the *Income Tax Act*.

eBay Canada Limited v. Canada (National Revenue), 2008 FCA 141 (CanLII).

Hicks Morley's Information and Privacy Practice Group

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