Information, Privacy and Data Security Post

Hicks Morley Information & Privacy Post – Fall 2008

Date: November 21, 2008

We're nearing the end of 2008 and are happy to present another edition of the Post. There's been no shortage of significant developments in the law of information and privacy of late, including a rather welcome clarifying judgement from the Alberta Court of Appeal on the law of spoliation. The case, called *McDougall*, certainly does not grant a licence for litigants to be careless in document preservation, but it signals a markedly more forgiving approach to lost evidence than that prevalent in the United States. We've also included a significant PIPEDA judgement from the Federal Court called *Johnson* that touches on some fundamental issues relating to the scope of the application of that statute.

We hope you enjoy!

Paul Broad

FREEDOM OF INFORMATION – APPLICATION

Doctors' Association a "trade union" for the purposes of FIPPA

The Divisional Court dismissed an application for judicial review of an Information and Privacy Commissioner/Ontario order in which parts of a memorandum of agreement between the Ontario Medical Association, the Canadian Medical Protective Association and the Ministry of Health and Long Term Care were ordered to be disclosed.

Canadian Medical Protective Association v. Loukedelis, 2008 CanLII 45005 (ON S.C.D.C.).

FREEDOM OF INFORMATION – OPEN COURTS

Manitoba CA denies access to child and family services records

The Manitoba Court of Appeal held that the media ought not to be allowed to publish information in records protected under child and family services legislation that were tendered in a public inquest into the death of a 14-year-old child. The Court held that the Manitoba *Child and Family Services Act* does not strip a judge holding an inquest of his or her discretion to permit publication of the protected records but also held that section 31(1) of the *Manitoba Fatality Inquiries Act* does not mean that protected records that are filed as exhibits in an open inquest are automatically "public" in the sense they are open to all use.

Canadian Broadcasting Corp. v. Manitoba (Attorney General), 2008 MBCA 94 (CanLII).

Manitoba QB quashes orders for production of media tapes

The Manitoba Court of Queen's Bench quashed two *Criminal Code* production orders issued against the CBC and CTV. It held that the deficiency of the information as it related to the media's privacy interest led to a flawed exercise of judicial discretion. The decision stresses that the police ought to do their best to help issuing judges conduct the public interest balancing exercise required by the media search jurisprudence, an exercise made difficult given that the media does not participate. The Court also suggested that issuing judges should provide reasons to facilitate effective review.

Canadian Broadcasting Corporation v. Manitoba (Attorney-General), 2008 MBQB 229 (CanLII).

ABQB says media has no right of access to exhibits at trial

The Alberta Court of Queen's Bench denied a mid-trial application made by the CBC for access to an audiotape played in open court. Madam Justice Moen engaged in considerable analysis of the applicable jurisprudence and held as follows:

1. The open courts principle gives the public and the media a right to attend in open court and to report and publish widely what they heard and saw. Any limits on this right must be subject to the *Dagenais/Mentuck* test.
2. The open courts principle does not, however, give the public and the media a right to receive copies of evidence – the *Dagenais/Mentuck* test does not apply.
3. Mid-trial applications in criminal jury trials will generally work an unfairness on the parties and interfere with the trial process; hence, they should only be entertained in "special circumstances."
4. The onus in applications for access to exhibits should be on the media, which should be required to give notice to all persons that may be directly affected by the broadcast of the recording, and to show that "extraordinary circumstances" weigh in favour of access.
5. In considering applications for access to exhibits, the Court should consider the property and privacy interests of third parties.

This decision comes shortly after the Court launched a new Audio Recording Policy, which allows accredited members of the media to record proceedings if they provide a signed undertaking to use the recording for verification purposes only.

R. v. Cairn-Duff, 2008 ABQB 576 (CanLII).

PRIVACY – ACCESS TO PERSONAL INFORMATION

Fed Ct. minimizes the consequences of the dreaded "all e-mails" access request

The Federal Court held that PIPEDA does not give employees of federally-regulated employers a right of access to e-mails concerning them that are sent between co-workers in their personal capacity.

The applicant, a former employee, filed a request for all e-mails "concerning" him. At the Federal Court, the primary issue in dispute was whether "personal" (i.e. non-work related) e-mails about the applicant were subject to the right of access in PIPEDA.

Mr. Justice Zinn held that the personal e-mails sought were not collected in connection with the operation of a federal work or undertaking and were also excluded as e-mails collected, used and disclosed for personal or domestic purposes. Zinn J. appears to have been influenced by the rights of the co-workers who sent and received the impugned e-mails and their interest in what has otherwise been called "mixed personal information." He suggests that these individuals would be deprived of the personal and domestic purposes exclusion if PIPEDA was held to apply to their e-mails, hence framing the

exclusion as a form of right. Notably, Zinn J. did not expressly consider whether the employer reserved a right to monitor "personal" e-mails under its computer use policy.

There are other very significant aspects of the judgement that relate to the nature of an organization's duty to clarify the scope of a request and its duty to conduct a reasonable search for responsive information.

Johnson v. Bell Canada, 2008 FC 1086 (CanLII).

PRIVACY – COLLECTION, USE AND DISCLOSURE

Workplace surveillance system survives arbitral scrutiny

Arbitrator Craven partially upheld a policy grievance which challenged the expansion of an employer's in-plant video surveillance system but nonetheless gave a strong endorsement to the employer's purpose for using video surveillance.

Arbitrator Craven focussed on the use of the cameras rather than their mere presence. Though the system gave the employer the capacity to monitor employees, he was satisfied the employer was only using the system for investigatory purposes. Arbitrator Craven's distinction between using cameras to support an investigation and using cameras to monitor is strong. He suggests that an investigatory purpose is more likely to be upheld as a legitimate exercise of management rights and less likely to be objectionable because of its intrusiveness.

Based on a separate finding that the employer had breached a technological change provision in its collective agreement by not engaging in discussions with the union when it expanded the system, he ordered the employer to meet with the union to engage in discussions.

Re Cargill Foods, a Division of Cargill Ltd. v. United Food and Commercial Workers International Union, Local 633 (Privacy Grievance), [2008] O.L.A.A. No. 393 (QL) (Craven).

Arbitrator orders call centre to stop recording calls

Arbitrator Veniot ordered the Halifax Regional Municipality to cease and desist from recording calls to its municipal call centre for quality monitoring, coaching and dispute resolution purposes.

The union grieved the implementation of a system whereby the Municipality recorded all calls to its call centre. It claimed a breach of the privacy protection provisions of the Nova Scotia *Municipal Government Act* and the collective agreement. The system was implemented after the Municipality had engaged in a successful program of customer service improvement. The evidence showed its call centre was "functioning well" at the time of the implementation, so the Municipality argued that the call centre attendants had little expectation of privacy, that it was simply supervising work product and that it was being diligent in its attempt to improve service.

Mr. Veniot rejected this argument and ordered the Municipality to cease and desist, and in doing so made the following findings:

1. He found that the characteristics of a person's voice are personal information, but he did not consider the sensitivity of this information in the balance. He did not engage in an explicit analysis of whether the content of call centre employees' communications are their "work product" or their personal information.
2. He interpreted the "necessity" standard for collection in the legislation strictly, distinguishing the text of the Nova Scotia statute from text of PIPEDA (which speaks of "reasonableness") and implying that a necessity standard does not entail a balancing of legitimate interests.
3. Although finding there is no "free-standing" right of privacy for unionized employees, he also stated that employees

> come into the collective bargaining relationship with a right to “some” privacy, and therefore, “the question is never whether that right is in the agreement – something [he has] never seen – but how and on what basis the employer can argue that employee [sic] have surrendered any portion of that right.”

Re Halifax (Regional Municipality) and Nova Scotia Union of Public and Private Employees, Local 2 (Policy Grievance), [2008] N.S.L.A.A. No. 13 (QL) (Veniot).

Encrypted form in which information stored weighs in favour of biometric security system

The Alberta OIPC upheld the use of biometrics after conducting a contextual analysis that de-emphasized the invasiveness of standard biometric timekeeping systems.

The investigation report was issued in response to a complaint brought under Alberta’s public sector privacy legislation. The complainant objected to a biometric timekeeping system which relied on a numeric template produced from hand measurements. The rationale for the system – time fraud protection and administrative efficiency – was not particularly unique, though the institution did provide evidence that it had dismissed one employee for “buddy punching” in the past. The adjudicator nonetheless held that the institution met the FIPPA necessity requirement, in part because the information was stored in a form in which it was not likely to be misused.

Investigation Report F2008-IR-001 (Alberta OIPC).

Use of biometrics okay, but notice especially important for employers

As in *Investigation Report F2008-IR-001*, the Alberta OIPC upheld the use of biometrics under the Alberta PIPA.

The complaint involved the use of a numeric template produced from employee thumbprints. The employer’s rationale for use was fairly general, but the OIPC nonetheless held that the employer’s use was permissible in light of the secure form in which thumbprints were stored.

Although endorsing the employer’s use of biometrics for timekeeping purposes, the OIPC held that the employer did not meet the reasonable notification requirement embedded in the Alberta PIPA employee personal information provisions because it did not explain to employees that it would only collect a numerical representation of thumbprints and not thumbprints themselves. It stressed that identifying personal information to be collected with specificity is important, particularly when information is to be collected through new and misunderstood technologies and particularly for employers, who are relieved from the ordinary consent requirement under PIPA.

Investigation Report P2008-IR005 (Alberta OIPC).

PRIVACY – DRUG TESTING

Arbitration board upholds challenge to post-incident testing provision

An arbitration board chaired by David Elliot held that a post-incident drug and alcohol testing provision was unreasonable because it required for an automatic test of any employee “involved” unless there were reasonable grounds to find that alcohol or drugs did not cause the incident.

The board felt that this reverse onus was improper. It did not, however, find that an employer must have reasonable grounds in order to test, and endorsed an approach whereby a test could also be ordered where there is “no credible explanation for the accident, near miss or other potentially dangerous incident.” This finding may have been influenced by evidence that supervisors were applying the reverse onus improperly by asking, “Can the use of drugs or alcohol be ruled out?”

Re Communications, Energy and Paperworkers Union, Local 707 and Suncor Energy Inc. (3 September 2008, Elliot).

PRIVACY – OUTSOURCING

Federal OPC dismisses complaint about cross-border personal information transfer

The federal OPC has issued another report dismissing a PIPEDA cross-border outsourcing complaint. The report echoes the position the OPC established in *Case Summary 313* and *Case Summary 333* – that is, that the transfer of personal information into the United States does not necessarily breach the safeguarding requirement in PIPEDA because it exposes the information to the dictates of United States law, but that notification is required given the principle of openness.

PIPEDA Case Summary #394 (19 September 2008).

PRIVACY – SEARCH AND SEIZURE

Crown violates section 8 of the *Charter* by obtaining employment records via subpoena

The Ontario Superior Court of Justice held that the Crown conducted an unlawful search and seizure by obtaining an accused person's employment records via subpoena rather than a search warrant.

While noting that subpoenas are issued within a judicial process, Trotter J. accepted the defence argument that proceeding by way of subpoena to seek records belonging to an accused person deprives the accused person of the procedural safeguards embedded in the *Criminal Code* search warrant provisions. He also engaged in a significant discussion of an employee's interest in his or her employment records, records which Trotter J. notes are deemed to be "private records" for certain purposes under the *Criminal Code*. While finding that an accused person's interest in his or her employment records is of such a character to demand the Crown retrieve them via a search warrant, he also notes that employment files are kept by employers subject to a broad right of use (and therefore, in the circumstances, the Crown's breach was less serious).

R. v. Incognito-Juachon, 2008 CanLII 36164 (ON S.C.).

Identifying web user through ISP does not invalidate subsequent police search

The Ontario Court of Justice dismissed a *Charter* application that was based, in part, on a challenge to an RCMP letter request to Bell Canada.

Bell answered the request and identified the accused as being associated with several internet protocol addresses at specific points in time. The local police later obtained a search warrant for the accused's home, seized computers containing child pornography and laid charges.

Mr. Justice Lalande distinguished *R. v. Kwok* – in which the Court found a *Charter* breach and excluded evidence in similar circumstances earlier this year – by noting that the judge hearing *Kwok* did not receive any evidence about the ISP's terms of service. Though noting that the Bell Sympatico terms of service that governed the accused referred to disclosures "required by statute or a court order," Mr. Justice Lalande nonetheless relied heavily on them in finding that the accused's reasonable expectation of privacy was low. He was also strongly driven by his characterization of the information revealed by Bell as being non-sensitive in nature.

R. v. Ward, 2008 ONCJ 355 (CanLII).

PRODUCTION – E-DISCOVERY

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 held that questions about preservation were not justified in the circumstances because there was no evidence of malfeasance.

Andersen v. St. Jude Medical Inc., [2008] O.J. No. 2452 (S.C.J.) (QL).

FC orders party to generate and produce an accounting record

The Federal Court rejected a party's argument that it should not be compelled to create a record that does not exist and ordered it to generate and produce monthly financial statements from its accounting software program. Though the party did not retain copies of the specific reports requested, the Court held it was possible to generate them with minimal burden.

Shields Fuels Inc. v. More Marine Ltd., 2008 FC 947 (CanLII).

BCCA dismisses leave to appeal forensic inspection order

The British Columbia Court of Appeal dismissed an application for leave to appeal of an order for forensic inspection of a home computer. The applicants argued that the propriety of such orders is of broad significance to the practice, but Bauman J. responded, "In my respectful view, the plaintiff overstates the significance of the case and the scope of the order at bar."

Honour v. Canada, 2008 BCCA 346 (CanLII).

PRODUCTION – PRESERVATION

ABCA speaks clearly on spoliation remedies

The Alberta Court of Appeal reinstated an action that had been dismissed because the plaintiff had destroyed evidence. In doing so, it made some very clear and principled statements on the remedies for spoliation.

First, the Court confirmed that the spoliation presumption first recognized by the Supreme Court of Canada in the 1896 *St. Louis* case is simply a rebuttable presumption of fact that requires a finding of intentional destruction of evidence.

Next, the Court distinguished this specific remedy from the broader range of remedies that might flow from the Court's rules-based or inherent jurisdiction to control its process. It suggested the maintenance of trial fairness should be the primary guide to the exercise of discretion and warned that the striking of an action is extraordinary: "While the court always has the inherent jurisdiction to strike an action to prevent an abuse of process, it should not do so where a plaintiff has lost or destroyed evidence, unless it is beyond doubt that this was a deliberate act done with the clear intention of gaining an advantage in litigation, and the prejudice is so obviously profound that it prevents the innocent party from mounting a defence."

And finally, the Court noted that there is no recognized civil duty to preserve evidence in Canadian law: "The issues of whether a party may be guilty of negligence where it destroys documents it had a duty to keep, or whether spoliation exists as an intentional tort, are not engaged in this case and any comment about whether the law should be developed in these areas should be left to a case where these issues arise from the facts."

McDougall v. Black & Decker Canada Inc., 2008 ABCA 353 (CanLII).

Ontario SCJ dismisses spoliation claim on its merits

The Ontario Superior Court of Justice considered and dismissed a tort claim for spoliation.

The plaintiff established that the defendant arranged to have the testator's computer wiped after the plaintiff threatened litigation and after he had received correspondence from the plaintiff's counsel. The plaintiff also established that there was at least one e-mail destroyed (which was later produced from a third-party) which supported his claim that the defendant asserted undue influence over the testator.

The Court's very brief treatment of the spoliation issue leaves its significance doubtful. It is unclear whether the Court finds that a claim for tort damages for spoliation can be made out on mere proof of bad faith destruction of evidence or whether such a claim also requires proof of prejudice. The Court also did not consider whether the defendant had a positive duty to take reasonable steps to preserve the testator's computer or the nature and extent of such a duty.

Tarling v. Tarling, 2008 CanLII 38264 (ON S.C.).

Court considers nature of spoliation claim in allowing leave to amend Statement of Claim

Master McLeod granted a plaintiff leave to amend its statement of claim to add an allegation of spoliation first brought on the eve of trial.

The action was brought by a doctor whose hospital privileges were revoked in 1991. He sought to add a claim that original notes of the board meeting at which his privileges were revoked were suppressed in a purposeful attempt to obscure relevant details of how the meeting unfolded. The spoliation allegation was made, in part, based on actions taken by the hospital's former executive director and a member of the medical staff who the plaintiff alleged instigated the case against him because of a personal vendetta. The executive director was alive and denied the spoliation allegation, but the allegedly vindictive doctor had died sometime after 1991.

Master MacLeod held that the executive director had ultimate responsibility for preparation of the corporate minutes and could answer the spoliation claim. He also dismissed an argument that amendment should be denied because of the expiration of a limitation period, but noted that the defendant could plead the *Limitations Act* in its defence.

Zahab v. Salvation Army, [2008] O.J. No. 3250 (S.C.J.) (QL).

PRODUCTION – PRIVACY

Party too quick to protect non-party privacy – *Anton Piller* vacated

This case is about an employee who e-mailed himself a great number Alberta Treasury Branch records before departing from employment from a company that provided IT services to the ATB, and the service provider's very aggressive reaction. The service provider applied for an *Anton Piller* order based on its concern about ATB client privacy and the risk of identity theft (though there was no evidence the defendant had any motive to perpetrate identity theft or sell the information). It turned out the records taken did not contain any client information. The Court criticized the service provider for its lack of diligence and vacated the *Anton Piller* order.

Design Group Staffing v. Fierlbeck, 2008 ABQB 35 (CanLII).

Balance favours disclosure of photographs on Facebook given number of plaintiff's friends

The Ontario Superior Court of Justice ordered a plaintiff in a motor vehicle suit to produce copies of her Facebook pages. The defendant successfully argued that the pages were likely to contain photographs relevant to the plaintiff's damages claim, and was buttressed by the fact that the plaintiff had served photographs showing herself participating in various forms of

activities pre-accident.

Murphy v. Perger, [2007] O.J. No. 5511 (S.C.J.) (QL).

Court says case-by-case privilege does not protect identity of expert's client

The Supreme Court of Nova Scotia granted a motion for the production of information relating to a "private client" of an expert because the expert said that she used the information to support the reasonableness of an assumption. Though the expert attempted to discount the significance of the private client's information to her opinion, the Court held that it must be produced as an essential fact upon which her opinion was based. It also rejected an argument that a case-by-case ("Wigmore") privilege applied.

South West Shore Development Authority v. Ocean Produce International Ltd., 2008 NSSC 240 (CanLII).

PRODUCTION – PRIVILEGE

E-mail leak does not result in waiver of privilege

The Ontario Superior Court allowed a motion to suppress e-mails containing privileged communications that were filed by a former spouse after she received them from her former husband's girlfriend.

After rejecting an argument that the e-mail communications were subject to the criminal intent exception to solicitor-client privilege, the Court went into detail on the waiver argument. Although there was a sharp factual dispute about how the e-mails were leaked, the Court held that the respondent's best case – that the applicant had his girlfriend type e-mails to his lawyer and left such e-mails around the home – would not be grounds for waiver in the circumstances.

The Court stressed that waiver is a question of intent, and held that the applicant had a reasonable expectation of confidence that was breached by his girlfriend (i.e. he was not reckless to ask a friend for administrative help nor was he reckless to leave documents around a private home). The Court also stressed that the test for waiver requires a balancing of interests and that a court must assess all factors, including the "threshold relevance" of the impugned evidence, before allowing it to be admitted despite a valid privilege claim. In the circumstances, therefore, the Court's finding that the leaked e-mails had little probative value weighed in favour of its decision that they ought to be suppressed.

Though the decision is fact-specific, the Court goes on to make a rather principled statement about electronic documents and how they are hard to control, suggesting that protecting solicitor-client privilege requires a more forgiving application of the waiver doctrine.

Eizenshtein v. Eizenshtein, 2008 CanLII 31808 (ON S.C.).

NBCA says counsel can continue to act given nature of privileged records

The New Brunswick Court of Appeal affirmed an order that allowed counsel who received and read privileged communications to continue to act and affirmed the part of the order that stated that counsel was not precluded from establishing the facts underlying the privileged communications.

The defendants claimed that various written statements from a witness for an adjusting firm retained by legal counsel were subject to solicitor-client privilege after they were inadvertently disclosed to the plaintiff along with a draft affidavit of documents several days before examinations for discovery. The plaintiff had thoroughly reviewed and made notes of the written communications in question by the time its counsel showed up at the discovery and was told what he had read was privileged. The plaintiff eventually destroyed the written communications, though it kept its notes and made the point that its

actions were taken without prejudice to its right use information contained in the communications now destroyed.

The defendants filed a motion to disqualify the plaintiff's counsel, but only succeeded in obtaining a protective order that required the destruction of documents and notes and prohibited use of documents. The order also specifically stated that the plaintiff was not precluded from establishing the facts underlying the privileged communications. The defendants appealed, and the third-party defendants who had not participated in the motion for fear of gaining knowledge of privileged communications filed a cross-appeal, arguing that they were now at a relative disadvantage and deserved access to the facts underpinning the privileged communications.

In dismissing the appeal and cross-appeal, the Court of Appeal stressed that solicitor-client privilege only protects communications and not underlying facts. The judgement seems swayed by the Court's scepticism about the privilege claim. It did not review the impugned communications (nor did the motions judge), but said the Court's assumption that the communications were privileged was "questionable" and that, in any event, the documents were likely "fact-focussed."

Euclide Cormier Plumbing and Heating Inc. v. Canada Post Corporation, 2008 NBCA 54 (CanLII).

PEI Court of Appeal says civil rules trump litigation privilege

The Prince Edward Island Court of Appeal issued a principled judgement on the scope of litigation privilege as it stands against the production and discovery requirements in the PEI civil rules.

Rule 31.06 in the Prince Edward Island Rules of Court governs oral discovery and requires a person who is examined to answer "any proper question relating to any matter in issue in the action." The identical provision exists in the Ontario Rules, where it has been interpreted to override litigation privilege subject to provision's own express limitations. The PEI Court of Appeal endorsed the Ontario approach and rejected the contrary position taken by the Manitoba Court of Appeal.

Llewellyn v. Carter, 2008 PESCAD 12 (CanLII).

OCA grants leave in case about whistle-blower who leaked privileged report to Crown

The Ontario Court of Appeal granted leave to appeal in a noteworthy case about breach of privilege by the Crown.

The case involves an investigation report prepared at the request of external legal counsel after a critical injury for which *Occupational Health and Safety Act* charges were ultimately laid. An employee who was given a draft of the report on the undertaking he destroy it gave a copy to the Crown. This was after the company had asserted privilege to the Ministry inspector, who had agreed not to order the report's production.

When the Crown disclosed the report to the company it immediately objected, and at trial moved for a declaration that the report was privileged and for a stay. It succeeded in obtaining a declaration, a stay and an order for $38,000 in legal costs. On appeal, the stay and the costs order were overturned.

In its judgement on leave, the Ontario Court of Appeal explained that the Justice of the Peace and the appeal judge differed on their views of the prejudicial impact of the breach of privilege. In granting leave, it commented that the civil law cases on inadvertent disclosure of privileged records are not "particularly on point" and that this was likely an issue that would often arise in the context of corporate accused who face "disgruntled" employees.

R. v. Bruce Power Inc. (7 July 2008, Ontario Court of Appeal).

BCCA holds defence counsel may attend informer privilege hearing

The British Columbia Court of Appeal dismissed an appeal from an order which allowed defence counsel to be present at an *in camera* hearing to determine whether informer privilege was validly claimed. It did so by issuing three separate judgements and, in the end, is less authoritative than it is revealing of sharp divide on a key point of criminal procedure and the law of privilege.

R. v. Virk, Basi and Basi, 2008 BCCA 297 (CanLII).

PRODUCTION – REGULATORY POWERS

Ontario Div. Ct. interprets doctors' college investigatory powers broadly

The Divisional Court held that investigators appointed under the *Ontario Health Professions Procedural Code* have the power to compel observation of surgery conducted by an investigated physician and the power to compel an individual physician under investigation to submit to an interview.

The Court held that the College of Physicians and Surgeons of Ontario's power to "inquire into and examine," interpreted purposively, allows it to compel the observation of surgeries. It stressed that the College's evidence showed observation is an effective, customary and even necessary process for assessing a health care practitioner's competence. It held that the grant of power in the *Code* was unambiguous, so there was no scope for interpreting it narrowly to conform with *Charter* values that weigh against self-incrimination and unreasonable search.

The Court also dealt with the privilege against self-incrimination in finding that an investigator can compel a physician to submit to an interview. The Court held that neither the privilege against self-incrimination nor (implicitly) the right to silence were engaged given the purpose of a College investigation. It said that the aim of an investigation is not to gather evidence for use in a subsequent prosecution; rather, it was "to ensure appropriate regulation of the medical profession in the public interest." In this regard, it suggested that the use immunity provision in section 9 of the *Public Inquiries Act* was also incorporated into the *Code*.

Gore v. College of Physicians and Surgeons of Ontario, 2008 CanLII 48643 (ON S.C.).

Saskatchewan CA affirms law society's right to demand access to privileged communications

The Saskatchewan Court of Appeal held that the Saskatchewan *Legal Profession Act* authorizes the Law Society of Saskatchewan to demand production of records required for an investigation despite a claim to solicitor-client privilege.

The Court distinguished the Supreme Court of Canada's recent *Blood Tribe* decision and held that section 63 of the Saskatchewan statute clearly contemplates that privilege will be abrogated by a proper demand. Since the respondent law firm conceded that the Law Society's production demand was sufficiently tailored, the Court held that it could lawfully seize the disputed records.

Notably, the Court also rejected a broader argument by the Law Society that the common law "extends the envelope of solicitor-client privilege" to include law societies.

Law Society of Saskatchewan v. E.F.A. Merchant Q.C., [2008] S.J. No. 623 (C.A.) (QL).

SCC says CRA may audit one taxpayer through another

A 4-3 majority of the Supreme Court of Canada held that the Canada Revenue Agency need not seek judicial authorization to examine information about one taxpayer's compliance by auditing another.

The case involved an audit of a university's charitable foundation and the powers granted to the CRA under the *Income Tax Act*. The CRA sought to examine the Foundation's records to determine whether it was receiving valid charitable donations. There was no dispute that, at the same time, it intended to pursue individual donors who may have made donations it expected to be invalid.

The question, given the CRA's dual purpose, was whether it could seek Foundation records that would identify individual donors under its section 231.1 audit power (which allows it to look at a taxpayer's records without judicial authorization) or whether it needed to rely on its section 231.2 production power (which allows it to look at a person's records which relate to one or more "unnamed persons," but only with judicial authorization).

The majority held that the CRA does not need judicial authorization in conducting audits that are aimed at both parties to a tax-related transaction: "The s. 231.2(2) [judicial authorization] requirement should not apply to situations in which the requested information is required in order to verify the compliance of the taxpayer being audited." It held that section 321.2 still has a meaningful role in the enforcement scheme because the CRA may need to seek information outside of a formal audit.

Redeemer Foundation v. Canada (National Revenue), 2008 SCC 46 (CanLII).

The articles in this Client Update provide general information and should not be relied on as legal advice or opinion. This publication is copyrighted by Hicks Morley Hamilton Stewart Storie LLP and may not be photocopied or reproduced in any form, in whole or in part, without the express permission of Hicks Morley Hamilton Stewart Storie LLP. ©