Information, Privacy and Data Security Post

Information & Privacy Post – 2008 Year In Review

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Dear Friends

Another year of interesting and significant developments in the law of information and privacy!

In 2008 we brought you three editions of the Information and Privacy Post, and have consolidated our case law digests in this Year in Review. It's written for our management-side client base, but available to all. We hope you are able to use it as a reference tool or, alternatively, as a document you can peruse and use to reflect upon the trends that are most relevant to your day-in and day-out challenges.

What were the highlights of 2008? Though this is a matter of perspective, we've picked five.

Ontario Court of Appeal says journalists can't shield wrongdoers…appeal pending

The Ontario Court of Appeal's March decision in *R. v. National Post* is not the most practically relevant case for those in management, but its implications for society earn it a top note here. The media is an agent with a very special status under our Constitution, and is responsible for information flows that are central to public and private sector governance. This case will define the media's powers to receive information from whistleblowers and other confidential informants. It is scheduled to be heard by the Supreme Court of Canada at the end of May.

Three civil privacy claim cases out of Ontario… the dawning of a new era?

All of a sudden the tort of privacy and other civil claims based on privacy rights are starting to seem real, making nonchalance about disclosure of accurate but "private" information risky despite patchy privacy statute application and the lack of order-making powers in PIPEDA. We've reported on two Ontario Superior Court of Justice cases of privacy tort cases: *Nitsopoulos v. Wong* from September and *Warman v. Grosvenor* from November. *Colwell v. Cornerstone Properties Inc*. is the first case we are aware of in which an employer has been held liable for constructively dismissing an employee based on a privacy violation. It was issued by the Ontario Superior Court of Justice in mid-December.

SCC says Privacy Commissioner can't adjudicate on privilege claims

The well-known July decision in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health* is the strongest

endorsement of solicitor-client privilege yet by the Supreme Court of Canada. And judging by the attendance at a recent Ontario Bar Association panel discussion, it has caused administrative tribunals and regulators some concern. They may take some comfort that litigants have already tried to push *Blood Tribe* too far. For more on this, see our reports on the Saskatchewan Court of Appeal's decision in *Law Society of Saskatchewan v. E.F.A. Merchant Q.C* and the Ontario Labour Relations Board decision in *Proplus Construction & Renovation Inc.*

Alberta Court of Appeal decision lends some clarity to pleas for a spoliation remedy

Judging by the number of reported cases on spoliation this year, alleging spoliation is certainly *en vogue*. But does it hinge on bad faith? If there is a positive duty to preserve, what exactly is required of the reasonable in-house counsel?

At the end of 2008 we still don't have clear answers to either of these questions, but some of the observable confusion in the case law might be cleared up by the Alberta Court of Appeal's late October judgement in *McDougall v. Black & Decker*. The Court laid out six principles on the law of spoliation that have already been treated as authoritative in a December case from Manitoba called *Commonwealth Marketing Group Ltd. v. Manitoba Securities* Commission. The Court also reminds us that there is no clearly recognized positive duty to preserve producible records… yet. As for the standard of care, given we don't yet have a recognized duty we'll be looking to guidelines like the *Sedona Canada Principles* for a while before the courts tell us how to make tough calls on preservation.

SCC says what's disclosed in the discovery room stays in the discovery room

Juman v. Doucette, from March, is a nice, principled and unanimous judgement from the Supreme Court of Canada on a relatively new yet central rule to our system of civil discovery.

It's been our pleasure to examine and share these with you this year, and we look forward to doing the same in 2009!

Paul Broad

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