Information, Privacy and Data Security Post

Information & Privacy Post 2009 and Spring 2010

Date: June 2, 2010

Dear Friends

After a short hiatus, and the introduction of a new editor, we are pleased to once again bring you the Hicks Morley Information and Privacy Post! As the first edition in over a year, we''ve combined our traditional Year in Review with our first Quarterly Edition for the year and are excited to present you with case summaries from 2009 and Spring 2010.

The last year and a quarter has brought us a variety of cases on a range of information and privacy issues. While some cases serve to reinforce previously established principles, we also saw significant developments in a number of highly relevant and topical areas.

Here are the top 4 information and privacy highlights of 2009 and Spring 2010:

1. SCC broadens scope of Crown''s “first party” disclosure duty and more

The Supreme Court of Canada''s unanimous judgement in *R. v. McNeil* broadened the scope of the Crown''s duty of disclosure to an accused person, holding that the Crown is not a single entity for the purposes of its obligation to disclose information in its possession and control. The decision further facilitates an accused person''s right to third-party production by requiring a judge to order the disclosure of records that are truly relevant, despite any subject''s competing privacy interest. The implication of this decision is that accused individuals will no longer face the prospect of fishing for records of police misconduct or other similar information by bringing third-party motions.

2. Information about lifestyle abandoned when trashed

In *R. v. Patrick*, the Supreme Court of Canada held that the police did not violate an accused person''s right to be free from unreasonable search and seizure by seizing information discarded in residential garbage. The Court reasoned that the issue to be determined is the reasonableness of asserting an expectation of privacy after disposing of household waste in a manner that leaves it identifiable. The outcome may have differed if the accused individual had shredded his bills and other identifying information. It is now the leading case on “abandonment” – that is, how one must treat information protected by section 8 in order to maintain *Charter* protection.

3. Ont. C.A. articulates soft necessity requirement for pre-action discovery

In *CEA Group AG v. Ventra Group Co.*, the Ontario Court of Appeal clarified the requirements for pre-action discovery and affirmed that an applicant for pre-action discovery must establish that the discovery sought is “necessary” to the process of obtaining justice for some wrongdoing. The Court dismissed the appellant’’s argument that the discovery sought must be “necessary to plead” on the basis that it set too strict a standard. Though it is not a landmark case, it is nevertheless significant and highly relevant given that pre-action discovery is a means of investigating and pursuing claims based on anonymous internet use.

4. Court says Privacy Commissioner can’’t access documents subject to Solicitor-Client Privilege

In *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, the Newfoundland Supreme Court held that the Newfoundland Information and Privacy Commissioner cannot require a pubic body to produce records claimed to be exempt from public access as subject to solicitor-client privilege. The Court also held that the Commissioner’’s power to review access decisions does not include a power to adjudicate solicitor-client privilege claims because such claims involve rights that exist independently of the Act.

As always, we hope that you enjoy our review of the most timely and relevant privacy law cases. Our aim is to provide you with material to consider as you evaluate the most recent trends and their potential impact on your organization. We encourage also you to share the Post with your colleagues.

We hope you’’ll enjoy reviewing these case digests as much as we enjoyed putting them together. Look forward to our Summer Quarterly Edition, which is due out in the summer.

Mireille Khoraych
Editor

Read the full PDF Privacy_Post_2009_Year_in_Review_June_2010.