**Information, Privacy and Data Security Post**

# Hicks Morley Information and Privacy Post – Summer 2010

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Welcome to the Summer 2010 Quarterly Edition of the Hicks Morley Information and Privacy Post! This edition is packed with the most up-to-date case law developments in privacy, freedom of information, confidentiality and the law of production.

Of note is the Supreme Court of Canada's recent pronouncement on access to information under Ontario's *Freedom of Information and Protection of Privacy Act* and whether the lack of a public interest override favouring disclosure violates section 2(b) of the *Charter*. In concluding that it does not, the Court found that section 2(b) provides an independent right of access to information. The implications of this finding are yet to be seen, but the Court's unanimous judgment indicates that a door may now be open for a new means of accessing government information.

As always, we hope you will enjoy reading the enclosed case law digests and keeping abreast of the most recent developments in this continually evolving area of law.

Mireille Khoraych, Editor

## FREEDOM OF INFORMATION – REASONABLE SEARCH

### STRONG DEFERENCE TO SEARCH PROCESS DEMONSTRATED IN "E-FOI" CASE

The Information and Privacy Commissioner/Ontario upheld the reasonableness of an institution's search for responsive e-mails, finding that searching for e-mails held by a key custodian alone was reasonable and sufficient. It stated "…it is not unreasonable that the University's search for records, both in electronic and hardcopy format, would begin and end in the Office of the Dean, for which responsive records were either sent and received." Despite a request to "retrieve and search for any e-mails which may have been deleted", it found that pursuant to the institution's e-mail retention policy, these records "would in all likelihood no longer exist".

As with a recent Alberta Court of Queen's Bench decision, this order demonstrates a significant degree of deference to the process chosen by an institution to search for electronic records. These two decisions, and others, could be evidence of the development of a general approach with respect to electronic documents and e-mails. Canadian freedom of information jurisprudence has yet to address expressly the need to maintain balance, in light of the inflationary potential associated with the search and retrieval of electronic records.

*University of Ottawa (Re)*, 2010 CanLII 15935 (ON I.P.C.)

### ANOTHER E-FOI CASE OUT OF ALBERTA

The Alberta Court of Queen's Bench quashed part of an OIPC order regarding the reasonableness of a search for electronically stored records.

The Court quashed that part of the order which required the University of Alberta to restore and search e-mail server backup tapes. The Court held that the OIPC erred by making this order without considering the restriction on the obligation to create records that require an institution to use more than its normal "computer hardware and software and technical expertise" or cause "unreasonable interference" with its operation. As in *Edmonton Police Services*, the Court seemed to assume that restoring compressed e-mails from a backup tape involves "creating" a record.

The Court upheld that part of the order requiring the University to search again. In doing so, it affirmed the OIPC finding that it was unreasonable to search for "complaints" related to the requester by only searching e-mails of the two administrators who invited feedback, and not the department members from whom feedback was solicited. The Court commented that a search of only the recipients' e-mails was insufficient given the University's evidence that the two administrators had no standard practice regarding retention and deletion of records. Moreover, the University gave no evidence as to whether the administrators had deleted any e-mails and whether they recalled receiving any written complaints.

The Court also affirmed an order requiring the University to apply broader search terms in re-doing its search on the basis that a keyword search based only on the requester's first or last name was unreasonable.

*University of Alberta v. Alberta (Information and Privacy Commissioner)* , 2010 ABQB 89 (CanLII)

## FREEDOM OF INFORMATION – OPEN COURTS

### BCCA ORDERS MEDIA ACCESS TO "CRIME BOSS" VIDEO POST-TRIAL

A majority of the British Columbia Court of Appeal held that a trial judge erred by denying the media post-trial access to a videotape exhibit adduced in a criminal trial. It ordered the tape to be released with measures to be taken to protect the identities of undercover RCMP officers and others who were shown on the tape.

The video showed a confession that the RCMP obtained by having the accused confess past crimes to a "crime boss." It showed three undercover officers and identified them by their real first names. The video was shown in open court subject to a publication ban that restricted identifying the officers. Shortly after the accused was convicted, the applicants requested access to the videotape and a transcript of the same, but the trial judge denied access on the strength of an affidavit that established a likelihood of harm to the undercover officers.

Madam Justice Newbury held that the trial judge erred by balancing the benefit to be gained by releasing the video in a substantially modified form (to protect the officers' identities) against the safety and privacy interests at stake, in effect reading out the "necessity" requirement for restrictive orders endorsed by the Supreme Court of Canada in *Dagenais/Mentuck*.

Note that Madam Justice Newbury justified a permanent restriction on the publication of the officers' identities by reference to the "perpetual availability of information on the internet."

*Global BC, A Division of Canwest Media Inc. v. British Columbia*, 2010 BCCA 169 (CanLII)

## FREEDOM OF INFORMATION – PUBLIC INTEREST OVERRIDE

### LACK OF PUBLIC INTEREST OVERRIDE IN FAVOUR OF DISCLOSURE IS CONSTITUTIONAL

On June 17th, 2010, the Supreme Court of Canada issued a significant judgment on access to government information. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* (the "CLA" case), it held that the *Canadian Charter of Rights and Freedoms* (the "*Charter*") gives the public a limited right of access to government information – a right existing separate and apart from the rights currently granted by access to information legislation.

The matter before the Court was whether the Ontario *Freedom of Information and Protection of Privacy Act* ("*FIPPA*") violates section 2(b) of the *Charter* (the guarantee of freedom of expression) because *FIPPA* does not extend the section 23 "public interest override" to documents which claim the law enforcement and solicitor-client privilege exemptions.

*FIPPA* gives the public a presumptive right of access to most information in the custody or control of an Ontario government institution. This right is then subject to three mandatory exemptions and 12 discretionary exemptions. Seven of the exemptions are then subject to an override that applies if "a compelling public interest in the disclosure of the [requested] record clearly outweighs the purpose of the exemption." The override does not apply to the law enforcement and solicitor-client privilege exemptions. The Criminal Lawyers' Association claimed this limit was an unjustifiable breach of section 2(b) of the *Charter*.

The Supreme Court of Canada unanimously held that the limited override in *FIPPA* is constitutional. The Court stressed that both the law enforcement and solicitor-client privilege exemptions in *FIPPA* are based on recognized public interests and, furthermore, that *FIPPA* institutions must consider the public interest in favour of disclosure in deciding to apply these exemptions. This structure-based balancing precluded finding a section 2(b) violation, according to the Court, because an additional override based on a consideration of the public interest would "add little" to meaningful public discussion.

The Court's second significant finding concerned the proper exercise of discretion. It held that an institution must consider the public interest favouring disclosure in making a discretionary access decision. With reference to *FIPPA*'s discretionary law enforcement exemption, it stated:

…a proper interpretation of s. 14(1) requires that the head consider whether a compelling public interest in disclosure outweighs the purpose of the exemption, to prevent interference with law enforcement. If the head, acting judicially, were to find that such an interest exists the head would exercise the discretion conferred by the word "may" and order disclosure of the document.

The third significant aspect of the Court's judgment is that it seemingly limited this finding to the law enforcement exemption. The law enforcement and solicitor-client privilege exemptions are both discretionary and require a consideration of all relevant factors, including the public interest favouring disclosure. Yet at the same time the Court stressed the proper application of discretion in applying the law enforcement exemption, it suggested solicitor-client privilege will always prevail over the public interest in disclosure.

Though this finding seems to blur the substantive (privilege) with the procedural (discretion), it is another indication of the Court's commitment to maintaining a strong solicitor-client privilege doctrine. There is no question that, once established, solicitor-client privilege is almost absolute (subject to two recognized exceptions – in the words of the Court, "the narrowly guarded public safety and right to make full answer and defence exceptions").

The fourth, and broadest, finding of significance, is that section 2(b) of the *Charter* supports a right of access to government information. According to the Court, this right derives from the section 2(b) guarantee of freedom of expression and is akin to the long-recognized open-court principle:

In sum, there is a *prima facie* case that s. 2(b) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded…

If this necessity is established, a *prima facie* case for production is made out. However, the claimant must go on to show that

the protection is not removed by countervailing considerations inconsistent with production.

Though the judgment was about the legality of *FIPPA* and not a direct-to-court request for access, this statement appears to recognize a right of access that could be asserted by way of a court application.

We do not expect the CLA case to radically change how the public seeks access to government information. The existing statutory access regimes grant a very broad right of access. There is no reason to believe that the *Charter* right now recognized by the Supreme Court of Canada is significantly broader than the statutory rights already granted in a relatively uniform manner across Canada. In fact, CLA suggests the opposite. Moreover, Canadian access to information statutes typically place an onus of justifying non-disclosure squarely on government, whereas the burden of establishing a *Charter*-based right of access, according to CLA, is squarely on an applicant.

The CLA right, however, is something to be aware of and monitor. It may be a means by which well-funded requesters can attempt to seek faster access to government information. It also is a means by which requesters may challenge limitations in specific access statutes in much the same manner as did the Criminal Lawyers' Association.

*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII)

# FREEDOM OF INFORMATION – APPLICATION, EXCLUSIONS AND JURISDICTION

## FEDERAL COURT UPHOLDS RESTRICTIONS ON THE APPLICATION OF *PIPEDA* TO AGENTS

In *State Farm Mutual Automobile Insurance Company v. Privacy Commissioner of Canada et al.*, the Federal Court held that *PIPEDA* does not apply to a collection, use or disclosure of personal information merely because it is collected, used or disclosed by a third party on behalf of a principal with whom it is in a commercial relationship.

*PIPEDA* applies to personal information that is "collected, used or disclosed in the course of commercial activity" and to personal information of employees in connection with federally-regulated operations. However, *PIPEDA* explicitly excludes personal information if it is used by an individual for "personal or domestic purposes", and personal information of employees in relation to provincially-regulated operations.

In *State Farm*, an individual defendant had been involved in a motor vehicle accident and was sued by the plaintiff. The defendant had an insurance policy with State Farm. State Farm retained a private investigator on behalf of the insured defendant. The private investigator conducted video surveillance on the plaintiff, who sought access to the surveillance footage under *PIPEDA*. State Farm refused access to the footage.

The Privacy Commissioner of Canada assumed jurisdiction over the plaintiff's complaint, implying that *PIPEDA* applied to the surveillance footage in issue. State Farm applied to the Federal Court for judicial review of the Privacy Commissioner's jurisdiction.

The Court found that the primary activity or conduct at hand must be examined in order to determine whether it is a commercial activity as contemplated by *PIPEDA*. Where the primary activity is not a commercial activity, it remains exempt from *PIPEDA*, even where third parties are retained by an individual to carry out that activity or conduct on his or her behalf. The incidental relationship between the person who seeks to carry out the activity or conduct and the third party retained to do so will not alter the non-commercial character of the primary activity or conduct, which remains the dominant factor in determining whether an activity is "commercial" in nature.

This is a broad and principled finding on the scope of *PIPEDA*'s application and is not limited to any particular kind of agency relationship. It remains to be seen whether provincially-regulated employers will be successful in relying on the principle articulated above to avoid the application of *PIPEDA* to their operations where they have retained third parties to conduct private investigations, payroll processing and benefit administration, among other things.

*State Farm Mutual Automobile Insurance Company v. Privacy Commissioner of Canada*, 2010 FC 736 (CanLII)

### ONTARIO LABOUR RELATIONS BOARD FINDS *FIPPA* DOES NOT APPLY TO AN EMPLOYER'S NOTICE OF DECISION UNDER ITS HARASSMENT POLICY

In *Laurentian University Faculty Association*, complaints between two union members were made pursuant to the employer's harassment policy. The union sought disclosure of a Notice of Decision, which set out the results of the employer's investigation into the complaints. The issue the Board had to decide was whether the mandatory limitation on the disclosure of personal information under *FIPPA* prevented the Board from issuing an order requiring the employer to disclose the record to the union.

The Board found that *FIPPA* did not apply to the record in issue, as it fell within the labour relations exception in section 65(6). Therefore, *FIPPA* did not prevent disclosure of the Notice of Decision. The Board also commented that if *FIPPA* did apply, it would have ordered disclosure, as it did not deem disclosure to the union to be an unjustified invasion of privacy.

This case confirms that *FIPPA* cannot be used to resist a union's request for documents relating to its members, though it remains open to employers to raise labour relations principles to attempt to maintain confidentiality of certain documents.

*Laurentian University Faculty Association v. Laurentian University*, 2010 CanLII 32256 (ON L.R.B.)

## FREEDOM OF INFORMATION – SOLICITOR-CLIENT PRIVILEGE

### COURT OPINES ON AUTHORITY TO WAIVE PRIVILEGE

The Nova Scotia Supreme Court held that the province's Department of Transportation and Infrastructure Renewal waived privilege by providing a summary of a legal opinion to a citizen, who later requested a copy of the full opinion in a freedom of information request.

The Court had little trouble finding an intention to waive privilege, noting that the only remaining concern of the Department was over releasing a letter that embodied the opinion and not the opinion itself. More interesting is the Court's rejection of the Department's argument that waiver of privilege held by the provincial Crown must be waived by the Executive Branch. It held that the authority to waive privilege in an opinion prepared for the Crown is at least coextensive with the authority to acquire such an opinion.

The requester's counsel has since made the following comment in Canadian Lawyer magazine: "I think this decision is the first time that a court has stated that a civil servant can waive privilege over legal advice received within his authority."

*Peach v. Nova Scotia (Transportation and Infrastructure Renewal)*, 2010 NSSC 91 (CanLII)

## PRIVACY – EMPLOYEE MEDICAL INFORMATION

### PURPOSE-BASED RESTRICTION ON USE AND DISCLOSURE OF EMPLOYEE MEDICAL INFORMATION

Labour arbitrator David Starkman admitted video surveillance evidence and a medical assessment report over the privacy-related objections of the grievor.

The employer initiated video surveillance after receiving a report that the grievor was golfing while claiming to be off work with a back problem. It then disclosed the surveillance footage, a physical demands analysis form and a position description form to a medical expert, who rendered an assessment report that led to the grievor's discharge.

The union argued against the admissibility of the surveillance evidence and the assessment report based on an alleged breach of privacy. In arguing against the admissibility of the assessment report, it raised the *Personal Information Protection and Electronic Documents Act*, the *Personal Health Information Protection Act* and the *Municipal Freedom of Information and Protection of Privacy Act*.

In finding the surveillance footage admissible, Arbitrator Starkman suggested it was justified and conducted reasonably. In finding the assessment report admissible, he held that none of *PIPEDA*, *PHIPA* nor *MFIPPA* regulated the disclosure of the physical demands information to the employer's medical expert.

Arbitrator Starkman confirmed that the primary restriction on the use and disclosure of employee medical information collected for an employment-related purpose is a purpose-based restriction, premised upon the purpose for which the medical information is collected and used.

*Kingston (City) v. Canadian Union of Public Employees, Local 109*, [2010] O.L.A.A. 146 (QL) (Starkman)

# PRIVACY – WORKPLACE MONITORING AND EMPLOYEE SURVEILLANCE

## NARROW RULING IN AMERICAN EMPLOYER TEXT MESSAGE AUDIT CASE

The Supreme Court of the United States has allowed an appeal of a much discussed workplace privacy case *City of Ontario et al. v. Arch Wireless et al.* (lower court decision).

The Court's decision is of limited authority because it assumed that the employee had a reasonable expectation of privacy in text messages sent and received from his employer-issued device. Having made this assumption, the Court nonetheless held that the employer's search was lawful, because it was motivated by a legitimate work-related purpose and was not excessive in scope.

Despite its limited authority, this case serves as a warning to employers about relying too heavily on the "no expectation of privacy" view.

*Ontario v. Quon, 130 S.Ct. 2619 (2010)*

# PRIVACY – COLLECTION, USE AND DISCLOSURE

## RECEIPT OF UNSOLICITED E-MAIL NOT A "COLLECTION" UNDER PRIVACY STATUTE

The Information and Privacy Commissioner/Ontario dismissed a privacy complaint by a university professor who alleged that his University had improperly collected and used his personal e-mails for disciplinary purposes.

The complainant had sent e-mails from his personal account about a weekly event series to a list of over 1000 individuals. The e-mails apparently contained statements that encouraged recipients to "send to friends." The e-mails were received by one or more University administrators, who forwarded them to other administrators for "operational purposes." The University ultimately imposed discipline on the complainant based on the content of the e-mails.

The investigator held that the University did not collect the unsolicited e-mails. He reasoned that the use of the terms "obtained and compiled" elsewhere in the *FIPPA* indicate that the legislature contemplated means of coming into custody or control of personal information other than through collection. He also reasoned that the requirement to give notice of collection suggests that collection requires something more active than the passive and unsolicited receipt of emails demonstrated by the University.

Regarding the allegation of improper use, the investigator held that the e-mails were used by the University for a purpose consistent with the purpose for which they were obtained or compiled, that is, to address issues related to the operation of the University. The investigator was satisfied that the University obtained or compiled the e-mails for the purpose of the effective administration of the University.

The finding about unsolicited receipt of personal information is based on an interpretation of *FIPPA*, but is of relatively broad significance given that the parts of *FIPPA* relied upon by the investigator are neither technical nor unique. The decision also raises a notable jurisdictional issue about records that are obtained for a non-employment related purpose and subsequently used for an employment-related purpose, and *FIPPA*'s employment-related records exclusion.

*University of Ottawa (Re)*, 2010 CanLII 30187 (ON I.P.C.)

## PRIVACY – SEARCH AND SEIZURE

### BCCA SAYS RESIDENTIAL SAFETY INSPECTIONS REQUIRE A WARRANT

A five-judge panel of the British Columbia Court of Appeal held that provisions of the British Columbia *Safety Standards Act* violate section 8 of the *Charter*, to the extent they authorize the warrantless entry and inspection of residential premises for the purpose of inspecting safety risks that may be related to marijuana grow-operations.

The *SSA* gives safety officers the power to enter premises, including residences, to conduct an inspection provided "there are reasonable grounds to do so." To facilitate inspection, it also enables local governments to obtain information about hydro accounts that average over 93 kwH per day in a billing cycle. The background facts involved an inspection of a 6,800 square foot home with a indoor pool, a sauna/steam room, a hot tub, a greenhouse and central air conditioning. One of the residents testified the house had never been used as a grow-op.

The Court held that an inspection for grow-op related safety hazards is not a typical regulatory inspection. It found that the legislation invites a particularly intrusive and stigmatizing search of a private residence, because the potential violations under inspection are not easy to find, and that obtaining an administrative warrant would not frustrate the objectives of the inspection regime.

*Arkinstall v. City of Surrey*, 2010 BCCA 250 (CanLII)

### SCC SAYS CONFIDENTIALITY PROMISES MADE IN NEWS GATHERING ONLY SUBJECT TO CASE-BY-CASE PRIVILEGE

The Supreme Court of Canada affirmed the validity of a search warrant and assistance order that was served on the National Post in 2002, which required it to provide the RCMP with a document and envelope received from a confidential informant. Though the panel wrote three separate judgments, all nine judges held that privilege claims made by news gatherers to protect information received in confidence should be justified on a case-by-case basis and that no class or general privilege applied.

The National Post resisted the warrant and assistance order because the journalist had promised anonymity to his informant (who said he was simply passing the documents on) and because he questioned whether the disclosure would actually help the RCMP's pursuit of the wrongdoer. The National Post relied on the common law of privilege, section 2(b) of the *Charter*, and at the Supreme Court of Canada, section 8 of the *Charter*.

The seven judge majority dismissed the National Post's appeal from the Ontario Court of Appeal.

Though the majority recognized a public interest in news gathering through confidential sources, it rejected arguments for

special protected status in the form of *Charter*-based immunity and a common law class privilege. It held that such status would be too big a blow to the administration of justice and, notably, personal privacy. It was particularly concerned that the scope of the requested privilege would be hard to define in a manner that reflected the true public interest at stake, given both the variety of means used to gather news, the range of persons who now engage in news gathering, and the lack of regulation of news gathering as an industry.

These arguments may have been undermined by the National Post itself, which accepted that a confidential source could be protected by a case-by-case privilege analysis that is informed by the *Charter* guarantee of freedom of expression and the role of the media. The majority accepted this position, and did so while recognizing that, "[t]he role of investigative journalism has expanded over the years to help fill what has been described as a democratic deficit in the transparency and accountability of our public institutions."

The majority also held that the onus to satisfy all four criteria for a case-by-case privilege rests with the media. It articulated various factors relevant to the balancing of interests called for by the fourth criterion and, on the facts, held that the balance weighed in favour of production. The majority gave particular weight to the fact that the search was for physical evidence of a serious alleged crime.

In addition to the privilege finding, the majority also held that the search warrant and assistance order were not unreasonable within the meaning of section 8 of the *Charter*.

Le Bel J. concurred with the majority, except for one aspect of its section 8 finding, where he held that the media ought to have been given notice of the application for a search warrant, but that the lack of notice did not render the search unreasonable.

Abella J. dissented. She applied the balancing test to reach a different outcome than the majority. Her approach did not differ from the majority's in principle, but does suggest a degree of willingness to allow the media's investigative process to pre-empt a law enforcement investigation. Abella J. also held that the media ought to have been given notice of the application for a search warrant as required by section 8 of the *Charter*.

Media claims now seem somewhat undermined by the rise of "citizen journalism", for which no special skills are required. In *Grant v. Torstar*, for example, the Supreme Court of Canada recognized the impact of blogging, and now Twitter, which lead to greater difficulty in making claims to special rights based on the bare status as a "journalist".

*R. v. National Post*, 2010 SCC 16 (CanLII)

# PRIVACY – DRUG TESTING

## ARBITRATOR ALLOWS CHALLENGE TO RANDOM ALCOHOL TESTING

Arbitrator Veniot upheld a grievance that challenged the use of random alcohol testing for safety sensitive positions at a New Brunswick pulp mill. He found neither the Ontario Court of Appeal's upholding of random alcohol testing in *Entrop* nor Arbitrator Picher's broad denouncement of random alcohol testing in his 2006 *Imperial Oil* decision to be determinative. Rather, he stressed that each case must be decided in its own context, with Picher's "Canadian Model" in view, except where the evidence indicates otherwise.

On the facts, Arbitrator Veniot held that the employer had only proven gains likely to "run from uncertain to exist at all to minimal at best." He therefore upheld the grievance, declared the random testing provision of the employer's drug and alcohol policy to be unreasonable and ordered it to be set aside.

*Irving Pulp and Paper, Ltd. and Communications, Energy and Paperworkers Union, Local 30 (Day) (Re)*, [2009] N.B.L.A.A. No. 28 (QL) (Veniot)

# PRIVACY – APPLICATION, EXCLUSIONS AND JURISDICTION

## PRIVACY BREACH AS A BASIS FOR ENJOINING CUSTOMER SOLICITATION?

The Ontario Superior Court of Justice dismissed a motion for an injunction to restrain a departing investment advisor from soliciting his former clients. This case is notable as the plaintiff argued that it would suffer irreparable harm to its reputation because the defendant's use of its customer list would place it in breach of *PIPEDA*.

The plaintiff did not rely solely upon the number of clients and the value of the assets it administered to demonstrate the harm it would suffer. The plaintiff also stated that it committed to hold all personal information "in strict confidence" and promised "in no event" to release the information "to any third party without" the client's written permission or an order of a court requiring its release.

The Court did not give this argument much, if any, weight given that there was no evidence that any of the plaintiff's clients had filed a *PIPEDA* complaint. It dismissed the motion on a full application of the *RJR MacDonald* test.

Departing investment advisor cases are not rare, and given the unique relationship between investment advisor, investment firm and client, at least one court (the BCCA in 2007) has recognized a special public interest in allowing departing advisors to contact former clients so they can choose whether to move their business. *PIPEDA*'s strict consent rule does not account for this interest. Though there may be some very good factual disputes about whether a group of clients implicitly consented to allow a departing advisor to take and use its contact information, there is likely not much to stop an investment firm from strengthening its promises to keep contact information confidential as a means of guarding against an implicit consent argument and better restricting its departing advisors.

*Timothy William Campbell v. BMO Nesbitt Burns Inc.*, 2010 ONSC 2315 (CanLII)

# PRIVACY – WRONGFUL DISCLOSURE

## BCCA DISMISSES BACKGROUND CHECK ACTION

The British Columbia Court of Appeal dismissed a $520 million action against the province and an employee of the Ministry of Children and Family Development for alleged improprieties in answering a background check made by a funded agency.

The Court found that the lower court should have disposed of the action under British Columbia's summary trial rule. It held that the Ministry employee was not in sufficient proximity to the plaintiff, given her conflicting statutory duty to children and family members. It also held there was no evidence of malice to support a misfeasance in public office claim and to negate a qualified privilege defence to a defamation claim.

The Court had previously ordered a British Columbia *FIPPA* complaint arising out of the same facts back to the Information and Privacy Commissioner of British Columbia to address whether the Ministry breached the accuracy provision of *FIPPA*. It appears that the OPIC has not yet issued a decision.

*Harrison v. British Columbia (Children and Family Development)*, 2010 BCCA 220 (CanLII)

# PRODUCTION – SOLICITOR-CLIENT PRIVILEGE

## FEDERAL COURT SAYS OPC CAN'T DEMAND EVIDENCE SUPPORTING A PRIVILEGE CLAIM

The Federal Court addressed a *PIPEDA* application involving an access request and a solicitor-client privilege claim made by the custodian, Air Canada. For the most part, the Court held that Air Canada's privilege claim was justified. In doing so, it

held that the Privacy Commissioner did not have the power to compel Air Canada to justify its claim by filing an affidavit.

The Court found that, although the burden rests with Air Canada to justify its privilege claim, it is the Court, and not the Privacy Commissioner, which is the decision maker. Air Canada could have refused without giving any particulars whatsoever. The Privacy Commissioner would then have had to seek one of the many avenues of redress to the Court which are available to her. In such a case though, even if it turned out that Air Canada's refusal was not capricious, and that the documents were privileged, Air Canada might face serious cost consequences for unnecessarily taking up the Court's time.

The Court also found that the Privacy Commissioner had the right to inform Air Canada that if it did not persuade her that its assertion was well founded, she could come to this Court, as was the case here. However, since she could not make a decision, it followed that she could not stipulate the steps Air Canada had to take to satisfy her that the documents were truly privileged.

Notably, the Court stated that an incident report – prepared by employees and forwarded to the company's legal department as a matter of procedure – was subject to both solicitor-client and litigation privilege. The Court also declined to award damages for the one part of Air Canada's privilege claim that it did not uphold.

*Privacy Commissioner of Canada v. Air Canada*, 2010 FC 429 (CanLII)

### LAW ENFORCEMENT BENEFITS FROM INADVERTENTLY HEARING LAWYER'S TELEPHONE CALL

The New Brunswick Court of Appeal declined to exclude from evidence a recorded telephone conversation in which a lawyer charged with obstruction of justice allegedly counselled a client's wife to destroy evidence.

The RCMP civilian agent who listened to the call, pursuant to an authorization to intercept, missed the first part of the call in which the accused identified himself as a lawyer. She listened, heard the caller make statements she considered to be obstructive in nature and conveyed what she had heard to her supervisor. When she played the recording back to the supervisor, they both heard the first part of the call and realized the caller was a lawyer. In breach of the terms of the authorization, they nonetheless continued to listen and only then sealed the communication.

The Court of Appeal held that the RCMP breached section 8 of the *Charter* by failing to stop and seal the recording as soon as it was clear the call was from a lawyer. It declined, however, to exclude the recording from evidence. In doing so, the Court was influenced by the fact that the communication was heard through inadvertence and that it was not, in fact, subject to solicitor-client privilege.

*R. v. Martin*, 2010 NBCA 41 (CanLII)

## PRODUCTION – PRIVACY PROTECTION

### NSCA MAKES PRIVACY-PROTECTIVE ORDERS IN YOUTH'S FACEBOOK CASE

In *A.B. v. Bragg Communications Inc.*, Oland J.A. of the Nova Scotia Court of Appeal overturned the decision of the lower court regarding two privacy-protective orders. The application was brought by a 15 year-old girl who took issue with an unknown individual who created a fake and allegedly defamatory Facebook profile in her name.

Before LeBlanc J. of the Nova Scotia Supreme Court, the applicant succeeded in arguing for production of the identity of the individual associated with the fake profile.

LeBlanc J. also denied the applicant an order permitting the use of a pseudonym (initials) and denied her a publication ban.

This aspect of the decision was overturned. The Court of Appeal granted orders allowing the use of these two privacy-protective measures, with the publication ban limited to restricting publication of the words of the Facebook profile. Oland J.A. held: (1) that the orders were necessary to protect the applicant's mental and emotional health; (2) that the orders would be effective in protecting the applicant; (3) that the orders would have a relatively limited impact; and (4) that a failure to make the orders would render the appeal moot.

*A.B. v. Bragg Communications Inc.*, 2010 NSCA 57 (CanLII)

## COURT SAYS SUING MESSAGE BOARD OPERATOR NOT AN EASY MEANS TO IDENTIFY ANONYMOUS INTERNET USERS

The Divisional Court held that a motions judge erred in requiring the owner/operator of a right-wing internet message board to disclose the identities of eight John Doe defendants who had posted commentary about lawyer Richard Warman.

The issue on this case was whether, and when, civil procedural rules could be used to obtain the identities of anonymous internet users without restrictions that are based on countervailing *Charter*-protected interests, such as privacy and freedom of expression. The need to balance interests has been recognized in the test for production of identifying information from non-parties. In this case, the party in custody of the identifying records was a named defendant and subject to a routine duty to produce "all documents relevant to any matter in issue in the action."

The Court held that the routine production duty did not preclude a balancing of interests and that the motions judge ought to have considered the following four issues before ordering production:

1. whether the unknown alleged wrongdoers had a reasonable expectation of anonymity in the particular circumstances;
2. whether the plaintiff had established a *prima facie* case and was acting in good faith;
3. whether the plaintiff had taken reasonable steps to identify the unknown alleged wrongdoers and attempted to do so; and
4. whether the public interests favouring disclosure outweighed the legitimate interests of freedom of expression and right to privacy of the unknown alleged wrongdoers.

The Court held that the *prima facie* standard of proof is appropriate when the order threatens an individual's ability to speak anonymously. It also held that notice to unnamed alleged wrongdoers may be required, but that generally little would be added by such a step in defamation proceedings, given what is required to prove a *prima facie* case of defamation.

This case addresses the rules for asking a court to unmask anonymous speakers. It also raises questions about the circumstances in which interests such as privacy may be raised as a basis for restricting the production of relevant records.

*Warman v. Fournier et al.*, 2010 ONSC 2126 (CanLII).

## MAJORITY OF ONTARIO COURT HOLDS FIRM ON RULE FOR TAPING DEFENCE MEDICALS

In a 3-2 split, the majority of the Ontario Court of Appeal held that it was not ready to change an established rule which provides that orders for the audio recording of defence medical examinations must be based on reasons particular to the facts of the case.

In a claim arising out of an automobile accident, the plaintiff sought an order imposing a condition that a defence medical be recorded. The request was supported by an affidavit from counsel that alleged systemic bias amongst defence medical experts and a systemic concern about inaccurate reporting of plaintiff statements. The affidavit included evidence of four cases of alleged inappropriate conduct. The plaintiff also raised concerns acknowledged in Justice Osborne's report on civil justice reform and Justice Goudge's report on paediatric forensic pathology, but did not raise any concern about the expert

proposed by the defence.

Justice Armstrong wrote for the majority. He held that the Court of Appeal's 1992 judgment in *Bellamy v. Johnson* established that orders to record medical examinations must be based on the facts of a specific case. Though acknowledging concerns about systemic unfairness, Justice Armstrong held that the evidentiary record before the Court was insufficient to establish a new rule.

Justice Lang, writing for the minority, questioned the majority's interpretation of *Bellamy*, but nonetheless held that a requirement to prove a case-specific basis was overly restrictive. Justice Lang said that orders for a defence medical should include a condition permitting the plaintiff to record the examination unless a motion judge is persuaded (by the defence) that the recording would compromise the examiner's ability to learn the plaintiff's case or to learn about his or her condition.

*Adams v. Cook*, 2010 ONCA 293 (CanLII)

### COURT WON'T ORDER PRODUCTION OF BANK RECORDS TO ASSIST JUDGMENT CREDITOR

The Ontario Superior Court of Justice declined to order the production of bank records so that the applicant, a judgment creditor, could initiate a Sheriff's sale.

The applicant held a first mortgage on the debtor's home, which was owned and mortgaged jointly with an estranged wife who continued to live in the home. The respondent bank held a second mortgage.

The applicant filed a writ of execution after receiving a judgment and later sought to initiate a sale of the home. The Sheriff would not do so without documentation showing the debtor's equity in the home, which the applicant then requested from the respondent bank. When the bank refused, the applicant applied for production of the bank statements. It argued that an order was necessary because it could not locate the debtor to serve him with a judgment debtor notice of examination and even if it could find the debtor, that it was more efficient to simply order production of the bank statements.

The Court held that the applicant was not entitled to the documentation under the *Mortgages Act* and declined to order production based on its equitable jurisdiction. It found that the bank was not implicated in any wrongdoing, in the manner that banks often are when individuals flow monies obtained by fraud through bank accounts. Moreover, it held that the order was not necessary given that the applicant could examine the debtor's wife, who had a privacy interest in her (joint) bank records and an important interest in the property at risk of sale. Instead, the Court granted leave to add the debtor's wife as a respondent, so that it could seek an order, to be made on notice, for her examination.

*Citi Cards Canada v. Pleasance*, 2010 ONSC 1124 (CanLII)

## PRODUCTION – *ANTON PILLER* ORDERS

### COSTS AWARD FOR "SCANDALOUS" PURSUIT OF *ANTON PILLER*

The Saskatchewan Court of Queen's Bench made a significant costs order against a group of plaintiffs for bringing an application for an *Anton Piller* order and resisting an order to set it aside, both in a manner it deemed to be "scandalous". The order fully indemnified two separately represented groups of defendants for costs from the date of execution of the *Anton Piller* to the date of the hearing of the defendants' motion to set aside. The Court discounted the costs it awarded to a third group of jointly-represented defendants because it held that the costs actually incurred were excessive.

*Agracity v. Skinner*, 2010 SKQB 123 (CanLII)

## PRODUCTION – PRESERVATION

### COURT SAYS DUTY TO PRESERVE DOESN'T SPRING FROM GRAVITY OF POTENTIAL DISPUTE

The British Columbia Supreme Court held that a gaming company had no duty to preserve betting slips redeemed by an individual to whom it denied a prize claim for over $6.5 million.

The plaintiff claimed that he submitted 20 to 25 betting slips into the gaming company's redemption machine, and that the machine retained five to 10 tickets as winning slips. The machine then produced a voucher for $6.5 million, which the gaming company would not pay as it took the position that the voucher was produced in error. It based this position on an examination of a winning slip that was stamped by the machine as associated with the $6.5 million win, but that in fact did not reveal a winning wager at all. At the time it denied the payout, the gaming company also denied the plaintiff's request to see his other slips that were retained by the machine. The gaming company destroyed these slips in the ordinary course of its business a week or two later, well before the plaintiff threatened or commenced an action.

The Court held that the gaming company had no duty to preserve the slips at the time it destroyed the records, as the plaintiff did not follow up his request to see the betting slips further. More importantly, if the plaintiff was not satisfied with the explanation he had been given, he should have advised the defendants, putting the defendants on notice that the matter had not been put to rest.

The slips were destroyed in the ordinary course of business before the defendants were aware that the plaintiff was considering litigation or even challenging their explanation for the error. The defendants did not intentionally destroy the winning betting slips in an effort to suppress the truth. Accordingly, the Court found that there was no basis to apply the doctrine of spoliation.

*Patzer v. Hastings Entertainment Inc.*, 2010 BCSC 426 (CanLII)

## PRODUCTION – MISCONDUCT AND SANCTIONS

### SPOLIATION REMEDY GRANTED IN FAVOUR OF BEREAVED DOG OWNER

In *Arnold v. Bekkers Pet Care Inc.*, the Ontario Superior Court of Justice held that a kennel failed to meet its standard of care based on an inference it drew as a result of a missing record.

The plaintiff brought an action against the kennel after her dog had to be euthanized shortly after its stay. Her theory was that the kennel should have been more attentive to her dog's physical deterioration and intervened. The kennel argued that the deterioration occurred rapidly. However, it was hampered in making this argument because it had lost its record of the dog's care.

The deputy judge did not make an express finding of bad faith, but did note that the kennel owner's evidence on the loss of the record was "vague." The record's probative value being apparent, he drew an adverse inference and held that its loss "tipped the balance" in favour of the plaintiff on the issue of care.

This case is not revolutionary but presents a good scenario for raising the issue about whether negligent or reckless loss of a record is enough to support a spoliation remedy. In light of the decision of the Alberta Court of Appeal in *Black & Decker*, the vague evidence finding was likely essential to the remedial award in this case.

*Arnold v. Bekkers Pet Care Inc.*, [2010] O.J. No. 2153 (Ont. S.C.J.) (QL)

## PRODUCTION – E-DISCOVERY

### COURT DISMISSES REQUEST TO LIMIT PRODUCTION OF E-MAILS

The Newfoundland and Labrador Supreme Court – Trial Division dismissed an application to limit production of e-mails.

The defendant (and plaintiff by counterclaim) brought an application in a departing employee dispute. It sought relief from a consent order requiring it to search, review and produce e-mails of 13 custodians based on a list of stipulated terms, including e-mails in active storage and e-mails in archive or backup systems. Having produced some e-mails under the order, the defendant asked for any further production obligations under the order to be terminated and, alternatively, for an order that further production be based on proven need and/or cost shifting.

The Court was not satisfied that limiting production was warranted based on the defendant's evidence, which it said "boiled down" to evidence of current efforts, costs and technical difficulties in meeting the order. Its reasoning suggests that the defendant's evidence of bare cost alone (some of which it questioned) did not impugn the process embodied in the consent order, which it presumed was proportionate and of reasonable quality. The Court received evidence that an element of the process was flawed in that a search for the words "Newfoundland" generated a large number of responsive records for one custodian. In response, the Court held this search term was "too broad to be useful" and directed the parties to discuss the matter.

*GRI Simulations Inc. v. Oceaneering International Inc.*, 2010 NLTD 85 (CanLII)

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