Information, Privacy and Data Security Post

Hicks Morley Information and Privacy Post – Fall 2010

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Welcome to the Fall 2010 Quarterly Edition of the Hicks Morley Information and Privacy Post! As always, we bring you this quarter's case law updates in privacy, freedom of information, confidentiality and the law of production.

Highlights in this quarter include *State Farm v. Privacy Commissioner of Canada*, [2010] FC 736, where the Federal Court found that *PIPEDA* does not apply to provincially regulated employers through the use of commercial agents and *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681(CanLII), where the Ontario Court of Appeal found that records protected by settlement privilege fall within the solicitor-client exemption in s.19 of *FIPPA* and are exempt from the right of public access in Ontario.

We hope you will enjoy reading these case law summaries and find them informative as you navigate through the complex world of privacy law and regulation.

Mireille Khoraych, Editor

FREEDOM OF INFORMATION – OPEN COURTS

SEARCH WARRANT INDEXING CHALLENGE TO PROCEED WITHOUT ATTORNEY GENERAL AS RESPONDENT

Moir J. of the Nova Scotia Supreme Court issued a preliminary ruling in a novel Canadian Broadcasting Corporation application in which it was seeking an order requiring the Nova Scotia Provincial Court to index its search warrants based on the open courts principle and the *Charter*.

In his preliminary ruling, Moir J. held that the Attorney General, as a representative of the executive branch of government, was not a proper respondent because the executive cannot control the judiciary's records. Though acknowledging that the application "seems to concern a clerical, or mechanical, function", he held that the matter, in its essence, concerned the sufficiency of access to records in order to satisfy the open courts principle. Moir J. held that the application could continue with the Chief Judge of the Provincial Court as a respondent and the Attorney General, as financial supporter of the judiciary, as an affected party.

Canadian Broadcasting Corporation v. Nova Scotia (Attorney General) , 2010 NSSC 295 (CanLII)

FREEDOM OF INFORMATION – REASONABLE SEARCH

FIELD SEARCH APPROVED BY ADJUDICATOR WITHOUT HEARING FROM E-MAIL CUSTODIANS

The IPC/Ontario upheld an email search FOI case. The adjudicator rejected an argument from the requester that the institution should adduce evidence from the e-mail custodians who were asked to search for responsive records (and not just the individuals who coordinated the search). She did note that the requester, having declined to participate in the hearing, had not given the IPC any reason to doubt the *bona fides* of the institution's search.

York University (Re) , 2010 CanLII 44189 (ON I.P.C.)

FREEDOM OF INFORMATION – APPLICATION, EXCLUSIONS AND MATTERS OF JURISDICTION

FEDERAL COURT ADDRESSES EFFECT OF REQUESTER'S DEATH ON A DENIED ACCESS REQUEST

The Federal Court ordered Correctional Services Canada to provide a requester's personal information to the Elizabeth Fry Society on the basis of a consent she signed before she committed suicide.

The requester alleged mistreatment by CSC and sought the help of the Society. The Society made a request for access to personal information on her behalf pursuant to a consent that authorized disclosure to the Society. In the consent, the requester stated the disclosure was "for the purpose of assisting me." The CSC failed to answer the request in time and was deemed to have refused it on August 17, 2009, about two months before the requester committed suicide. The CSC later denied the request to the Society and, in response to the Society's application, claimed the Society had no standing as a result of the requester's death.

The Court held that the Society continued to be authorized to act on the requester's behalf after her death. It mentioned briefly that the purpose of the consent continued after her death, but its reasoning does not rest heavily on the language of the consent. The Court found "that the Act intended that an individual's right to grant access to their personal information survives their death." This finding allowed the Court to conclude that the Society had standing to file an application to the Federal Court as an "individual who has been refused access to personal information." It is questionable whether this fact limits the judgment, but the Court did stress that the requester was alive and being represented by the Society on the date of the deemed refusal.

Canadian Association of Elizabeth Fry Societies v. Canada (Public Safety and Emergency Preparedness), 2010 FC 470 (CanLII)

OLRB HOLDS THAT FACULTY UNION HAS RIGHT TO HARASSMENT INVESTIGATION DECISIONS

The Ontario Labour Relations Board issued a decision in which it held that a faculty union, as a certified bargaining agent, has a right of routine access to harassment investigation decisions, where either the complainant or respondent is a member of the union. Vice-Chair Patrick Kenny held that the provision of this information was necessary to the union's representational role and stated:

Without providing an exhaustive list of the circumstances in which the trade union bargaining agent will reasonably require confidential information, the facts in this case give one circumstance in which the trade union is entitled to receive the information. It has a responsibility, with the University, to provide a harassment-free and to ensure a discrimination-free

working environment. It is involved in responding to employees in its bargaining unit who have been subjected to harassment or discrimination such as would be described in the Notices of Decision. This is why it has a legal interest in receiving, and is entitled to, copies of the Notices of Decision.

Vice-Chair Kenny found that the request of the Laurentian University Faculty Association (LUFA) for copies of each Notice of Decision was clearly grounded in section 70 of the *Labour Relations Act*. Moreover, LUFA needed that information, which is disclosed as of right to the complainant, the respondent and the individual responsible for taking corrective action, for the purpose of deciding whether or not it ought to file grievances to protect the interests of individual bargaining unit members, the bargaining unit as a whole, and/or the trade union as an institutional party. LUFA had filed grievances in the past with respect to issues arising from the results of investigations and conclusions reached in Notices of Decision under the Policy. Vice-Chair Kenny concluded that apart from any application of the *Freedom of Information and Privacy Act* (*FIPPA*), LUFA was entitled under section 70 to a copy of each Notice of Decision.

Vice-Chair Kenny also held that individual consent was not necessary, that records of harassment investigations involving faculty are excluded from *FIPPA* as employment-related and that, in any event, their disclosure to the union would be authorized as “required by law.”

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

RECORDS PROTECTED BY SETTLEMENT PRIVILEGE EXEMPT FROM THE RIGHT OF PUBLIC ACCESS IN ONTARIO

The Ontario Court of Appeal issued a significant decision in which it held that documents protected by settlement privilege are exempt from public access under the Ontario *Freedom of Information and Protection of Privacy Act.*

The LCBO denied access to various records related to a mediated settlement of a number of civil proceedings between itself and a winery. It relied on the “solicitor-client privilege” exemption in section 19 of *FIPPA*. This exemption has two branches. Branch 1 exempts records that are subject to solicitor-client privilege and litigation privilege as these privileges are recognized at common law. Branch 2 exempts records that are “prepared by or for Crown counsel for use in giving legal advice or in contemplation or for use in litigation.”

The Court of Appeal affirmed the Divisional Court’s Decision that the records were exempt because they fit within the Branch 2 exemption. In doing so, it made the following significant findings:

- the term “litigation” in the Branch 2 exemption encompasses mandatory and consensual mediation of an Ontario civil dispute;
- the phrase “prepared for Crown counsel” should not be narrowly read to mean “prepared at the behest of Crown counsel”; and
- the “for use in litigation” requirement imports a requirement that the records be communicated to Crown counsel within a reasonably expected “zone of privacy.”

Though this is a very significant decision on the *FIPPA* Branch 2 exemption, the Court declined to opine an even more significant issue – an issue it framed as “Whether the common law settlement privilege is a free-standing exemption under *FIPPA* or whether *FIPPA* is a complete code.” The Divisional Court judgment strongly suggests that privileges recognized at common law and rooted in the public interest (such as settlement privilege) can trump the *FIPPA* right of access.

Liquor Control Board of Ontario v. Magnotta Winery Corporation, 2010 ONCA 681(CanLII)

PRIVACY – SEARCH AND SEIZURE

ONT. C.A. SAYS COMMUNICATION DEFENCE TO MISCHIEF OFFENCE SHOULD BE BROADLY CONSTRUED

In *R. v. Tremblay*, the Ontario Court of Appeal acquitted an individual accused of mischief for parking an old van on his front lawn while his neighbours attempted to sell their house. The Court held that the defence in section 430(7) of the *Criminal Code* applied, notwithstanding that the accused admitted that he employed the prop as a tactic to force his neighbours to withdraw an unrelated lawsuit.

Section 430(7) reads:

No person commits mischief within the meaning of this section by reason only that he attends at or near or approaches a dwelling-house or place for the purpose only of obtaining or communicating information

The Court of Appeal stated that this provision "protects acts done for the purpose of communicating information that would otherwise constitute mischief regardless of whether the intended results of that communication were to interfere with or interrupt the use or enjoyment of another person's property." It also held that the defence, as ambiguous in meaning, must be interpreted and applied consistently with the values embodied in section 2(b) of the *Charter*. Recognizing that the line between lawful and unlawful communication "will not always be easily drawn," it suggested that *the degree* to which the communication obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property will differentiate lawful from unlawful communication.

R. v. Tremblay, 2010 ONCA 469 (CanLII)

PRIVACY – BREACH RESPONSE

FEDERAL COURT COMMENTS ON REMEDIAL POWER TO REDRESS *PIPEDA* VIOLATION THROUGH CORRECTIVE ORDER

The Federal Court made the following comment in dismissing an application under the *Personal Information Protection and Electronic Documents Act* (*PIPEDA*) that sought, among other things, an order requesting correction of a record of personal information:

Section 16 of the Act limits the Court's remedies of ordering corrective action or notice thereof to an organization's practices. The type of corrective remedy the Applicant requests is not related to the Respondent organization's practices. Practices generally mean the organization's usual business methods or procedures. As a result, the Applicant's request falls outside the scope of the Court's remedial power under s. 16 of the Act.

Soup v. Blood Tribe Board of Health, 2010 FC 955 (CanLII)

COURT ESPOUSES PREFERENCE FOR CONSERVATIVE APPROACH TO *PIPEDA* REMEDIES

Mosely J. of the Federal Court dismissed a *PIPEDA* application because the applicant failed to establish a need for a compliance order (with or without notice to the public) and failed to prove his damages. The OPC had issued a report in May 2009 in which it concluded that the respondent – a fitness club – breached the consent rule in *PIPEDA* by disclosing information about the applicant's membership usage to his employer as part of a corporate membership program. It recommended a change in practice, and the respondent complied. In dismissing the application, Mosely J. made the following conservative statement about the *PIPEDA*'s remedial provision:

Pursuant to section 16 of *PIPEDA*, an award of damages is not be made lightly. Such an award should only be made in the most egregious situations. I do not find the instant case to be an egregious situation.

Mosely J. held that the applicant had established a breach of the consent rule, but had not established justification for a remedy. He rejected the applicant's argument that he suffered employment-related consequences because of the breach, due to the lack of evidence of any loss. His reasoning suggests that individuals who apply for a *PIPEDA* remedy must prove not only a breach, but actual damages, and based on the statement quoted above, perhaps also something more.

Randall v. Nubodys Fitness Centres, 2010 FC 681 (CanLII)

PRIVACY-COLLECTION, USE AND DISCLOSURE

ARBITRATOR UPHOLDS POLICE RECORD CHECK GRIEVANCE

Arbitrator Wayne Moore endorsed the general reasonableness of a City of Vancouver policy that requires current employees in designated positions to submit police record checks every five years, but also held that the policy ought not apply based on fire suppression duties.

Arbitrator Moore assessed whether the policy was reasonable in light of the necessity standard in section 26(c) of the *British Columbia Freedom of Information and Privacy Protection Act*. He started by rejecting the union's argument that the City needed to demonstrate an "existing problem" to justify checks on current employees and stated:

The Union argues that in order to implement the Policy, the Employer must show evidence of an existing problem in the workplace. I find that it is not inherently unreasonable to enact a policy in anticipation of a problem so that the organization can be in a position to identify the problem and to address it. To the extent that the Union argues that actual evidence of a problem in the workplace is a pre-requisite for the establishment of a reasonable policy, I disagree. In my view, the Employer is entitled to act proactively, so long as it does so reasonably. That said, the absence of evidence of a problem can impact on both the reasonableness of a policy and the reasonableness of its application.

Arbitrator Moore then held that the City ought to narrow its criteria for designation under the policy to conform with the reasonableness requirement, in essence requiring a relatively strong correspondence between position duties and risk. In the result, he held that it was reasonable to designate members of the City's fire unit as subject to the police check requirement based on one or more of the following criteria:

- they have ongoing or significant unsupervised access to vulnerable people in the ordinary course of employment (where "unsupervised" means unsupervised by management or other employees)
- they are responsible for the security of people and/or material assets in "some significant way"
- they exercise significant discretion and have independent power to make decisions, such that they may be susceptible to corruption

Based on these narrowed criteria, Arbitrator Moore held that the City had improperly designated a number of positions. He held that fire suppression and the provision of emergency medical services involves insignificant contact with vulnerable persons (as distinct from the role of a paramedic who responds to a fire call) and insignificant responsibility for the security of people and material assets (as distinct from the role of a site security guard). By this finding, he held that the policy ought not apply to firefighters and other positions that the City designated on the basis of fire suppression duties. Conversely, he held that the City properly designated a number of positions based on an assigned responsibility for fire safety enforcement.

Arbitrator Moore also held that the City must compensate employees for time spent, including travel time, at overtime rates and must reimburse employees for the expenses incurred in obtaining their records.

Vancouver (City) v. Vancouver Firefighters' Union, Local 18 (Police Records Checks Grievance), [2010] B.C.C.A.A.A. No. 81 (QL) (Moore)

PRIVACY – APPLICATION, EXCLUSIONS AND MATTERS OF JURISDICTION

COURT SAYS *PIPEDA* DOESN'T APPLY THROUGH COMMERCIAL AGENTS

The Federal Court issued a very significant judgment on the scope of *PIPEDA*'s application. Mainville J. held that *PIPEDA* does not apply to a collection, use or disclosure of personal information merely because it is collected, used or disclosed by an agent 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." Since *PIPEDA* came into force in the provinces, people have questioned whether it applies merely because personal information is processed by an agent involved in a commercial relationship with a principal that is engaged in provincially-regulated non-commercial activity. For example, provincially-regulated employers retain a range of agents who collect, use and disclose employee personal information on behalf of the employers for the purpose of employment administration – e.g. private investigators, payroll processing agents, benefits administrators and others.

In the matter addressed in this decision, State Farm retained a private investigator on behalf of an insured person who was sued by a motor vehicle accident plaintiff. The private investigator conducted video surveillance on the plaintiff, and the plaintiff sought access to the surveillance footage under *PIPEDA*. Mainville J. held that *PIPEDA* did not apply and stated:

I conclude that, on a proper construction of *PIPEDA*, if the primary activity or conduct at hand, in this case the collection of evidence on a plaintiff by an individual defendant in order to mount a defence to a civil tort action, is not a commercial activity contemplated by *PIPEDA*, then that activity or conduct remains exempt from *PIPEDA*, even if third parties are retained by an individual to carry out that activity or conduct on his or her behalf. The primary characterization of the activity or conduct under *PIPEDA* is thus the dominant factor in assessing the commercial character of that activity or conduct under *PIPEDA*, not the incidental relationship between the one who seeks to carry out the activity or conduct and third parties. In this case, the insurer-insured and attorney-client relationships are simply incidental to the primary non-commercial activity or conduct at issue, namely the collection of evidence by the defendant Ms. Vetter in order to defend herself in the civil tort action brought against her by Mr. Gaudet.

This is a broad and principled finding on the scope of *PIPEDA* application. It is not limited to any particular kind of agency relationship and will no doubt cause lawyers, insurers and provincially-regulated employers to be pleased.

Note that State Farm backed its successful interpretation ground with a ground that rested on a very broad challenge to *PIPEDA*'s constitutional validity. Mainville J. did not decide on this second ground.

State Farm v. Privacy Commissioner of Canada, [2010] FC 736 (CanLII)

PRIVACY – ADMISSIBILITY OF EVIDENCE

ANOTHER ONTARIO ARBITRATOR HOLDS THAT RELEVANT EVIDENCE IS ADMISSIBLE, PERIOD

Arbitrator Joseph Rose dismissed a preliminary objection that sought the exclusion of video surveillance evidence based on an allegation of insufficient grounds to warrant its use. He adopted the views expressed by Arbitrator Bendel and Arbitrator Raymond and held (in slightly more qualified terms than the aforementioned arbitrators) that relevant evidence is admissible, despite any alleged privacy breach.

Thames Emergency Medical Services v. CAW, Local 302 (Wilson Grievance), [2010] O.L.A.A. No. 315 (QL) (Rose)

PRIVACY – MEANING OF PERSONAL INFORMATION

FEDERAL COURT DEALS WITH WHAT'S ACCESSIBLE AS "RELATING TO" A PUBLIC SERVICE POSITION OR FUNCTION

The Federal Court held that the employment history of federal public servants prior to their entry into the pubic service is not accessible as information that "relates to the position or functions of the individual."

Section 19 of the *Access to Information Act* is a mandatory exemption **from access** for records containing "personal information" as defined in section 3 of the *Privacy Act*. Section 3 of the *Privacy Act* defines personal information as "information about an identifiable individual," including information related to an individual's "employment history." Certain kinds of information are deemed to be **excluded** from the definition of personal information, including:

3(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

(i) the fact that the individual is or was an officer or employee of the government institution;

(ii) the title, business address and telephone number of the individual;

(iii) the classification, salary range and responsibilities of the position held by the individual;

(iv) the name of the individual on a document prepared by the individual in the course of employment, and

(v) the personal opinions or views of the individual given in the course of employment.

The applicant relied on this deeming provision in seeking access to information about job competition candidates' employment history *prior to their entry into the pubic service*. He argued that this information, though not about a position or function in the public service, nonetheless "relates to" a position or function because each candidate's employment history prior to entry into the public services was essential to obtaining a public service position and therefore is not included in the definition of personal information.

The Court rejected this argument, stating:

…the Court cannot conclude that the information to which this application pertains is information *relating to the position or functions of the candidates* hired under these four competitions. This information concerns their education, experience and skills prior to obtaining a position in a government institution. It also primarily concerns the persons themselves, even if these skills and personal suitability were assessed to ensure that these candidates had the skills otherwise required for these positions in the federal administration. As mentioned, the information regarding the general characteristics directly associated with these positions, including the qualifications required to obtain them, – as opposed to information on the candidates themselves – was disclosed to the applicant. (Emphasis in original.)

The Court noted that its finding was on an issue of first impression.

Nault v. Canada (Public Works and Government Services), 2010 FC 623 (CanLII)

PRIVACY – WORKPLACE MONITORING

ARBITRATOR SAYS VEHICLE TELEMATICS DATA IS NOT PERSONAL INFORMATION

Arbitrator Steeves of British Columbia dismissed a privacy grievance that challenged the implementation of a fleet telematics program. The decision is significant because Arbitrator Steeves dismissed the grievance before balancing interests, based on

a finding that the telematics data collected by the employer was not personal information in the circumstances of this case.

The Telematics program consisted of electronic devices that were installed in the employer-owned vehicles driven by its elevator mechanics in the course of their employment and for driving to and from home. Using satellite technology, the devises collected information about the vehicles when they were operated by the mechanics.

Arbitrator Steeves recognized that the data contained information about the stop times of a vehicle and that this may also be information about the activities of the driver/employee. However, he agreed with the analysis in *Nav Canada*, that this type of information does not engage the right to privacy of individual employees. He also recognized that the Telematics data may lead to decisions by the employer to discipline employees. He had two responses to this concern. First of all, the data does not provide a complete or reliable picture of the activities of an individual and other information would be required to sustain just cause for discipline (actual cases of discipline will have to be judged on their individual circumstances).

Second, he relied on *Nav Canada*, for the proposition that the possible use of the data to evaluate the performance of employees does not transform the information into personal information under the *Personal Information Protection Act* (*PIPA*). The information may have the effect of permitting or leading to the identification of a person and it may assist in a determination as to how he or she has performed his or her task in a given situation. Arbitrator Steeves referred to the following quote from *Nav Canada*: “[b]ut the information does not thereby qualify as personal information. It is not **about** an individual, considering that it does not match the concept of “privacy” and the values that concept is meant to protect. It is **non**-personal information transmitted **by** an individual in job-related circumstances” (paragraph 54, emphasis in original).

Arbitrator Steeves found that “in the circumstances of this case, the collection of information about the operation of a company vehicle, that also includes the name of the driver of the vehicle, does not transform that data into “personal information” under *PIPA*. The Employer in this arbitration is entitled to know what its employees are doing when they are working and when they are using company vehicles. This information assists management by providing reliable and objective information to improve the efficiency of the vehicle fleet. The same information is not “about” an individual employee”.

Whether information is “about an individual” is a very contextual question. In this case, the outcome was driven by the nature of the data collected (which could only support general inferences about individuals), the employer’s restriction on personal vehicle use and a conclusion that the employer’s primary purpose for collecting the data related to vehicles and not to individuals. Though the case is therefore fact driven, Arbitrator Steeves’ analysis is strong and further develops the arbitral privacy jurisprudence.

Otis Canada v. International Union of Elevator Constructors, Local 1 (Telematics Device Grievance), [2010] B.C.C.A.A.A. No. 121 (Steeves) (QL)

PRODUCTION – SUBPOENA POWERS

MORE ON PROPORTIONALITY FROM THE NEWFOUNDLAND AND LABRADOR COURT OF APPEAL

Chief Justice Green and Justice White, on behalf of the Newfoundland and Labrador Court of Appeal, issued a principled judgment on quashing subpoenas in civil proceedings. On applying the relevance standard, the justices stated:

Additionally, even if the material sought can be said to be relevant in this sense, there may be, as *Re General Hospital Corporation* indicates, other grounds on which a person subpoenaed may be able to quash the subpoena or at least postpone its execution. Aside from issues involving irregularity in issuance, and other grounds of inadmissibility, such as privilege and specific statutory exceptions, most other grounds are a manifestation of the jurisdiction of the court to control an abuse of its process. This involves taking into consideration the interests of the subpoenaed witness as well as the interests of the litigants by looking at the actions, motivations and purposes of the party issuing the subpoena, as well as the impact on

the person subpoenaed. This is essentially a balancing exercise, involving the application of the proportionality principle recognized by this Court in *Szeto et al v. Field*, 2010 NLCA 36 (CanLII), 2010 NLCA 36.

The matter at issue involved a subpoena *duces tecum* issued to the live-in partner of an individual from whom the applicant was seeking child and spousal support. The applicant sought specific information about the new partner's financial affairs. The Court held that such information is not necessarily relevant, when the quantum of support is in issue. Rather, a more "nuanced" analysis is required, one which considers how and to what extent any of that information may be necessary to resolve the specific support issues as they present themselves in the context of the specific case. Because of the potential impact on the partner's privacy interests the Court stated that, if that information should be provided, the timing becomes a relevant consideration as well as whether the information could be obtained in a less intrusive way from another source.

In a way, this judgment is an add-on to the Chief Justice's exposition on proportionality in the May decision *Szeto v. Dwyer*, noted in the quote above. Both judgments seem to recognize that personal privacy should be considered as part of the proportionality analysis.

Carroll (Re); Kent v. Kent, 2010 NLCA 53 (CanLII)

PRODUCTION – PRESERVATION

ALBERTA CA CORRECTS A "HYBRID" PRESERVATION ORDER

The Alberta Court of Appeal varied an *ex parte* order that required defendants in a departing employee case to list and compile information and produce it to the plaintiff as a means of preservation. The Court characterized the order as a "hybrid" preservation order – featuring more than a bare direction to preserve and less than authorization to seize. It held that the order was flawed because it required delivery of records directly to the plaintiff without regard for their relevance and potentially privileged status.

KOS Oilfield Transportation Ltd. v. Mitchell, 2010 ABCA 270 (CanLII)

PRODUCTION – SCOPE OF PRODUCTION

MASTER SHORT DEALS WITH DEFICIENT PRODUCTION ALLEGATIONS

Master Short of the Ontario Superior Court of Justice addressed motions by two parties each alleging that the other provided deficient electronic production.

Motion A – Form of producing electronic documents deficient

Apotex sought a further and better affidavit of documents from Ercos, who initially produced approximately 1700 PDF files on a DVD. The PDF's were named in a coded form, but the codes did not correspond with the codes Ercos had provided in its Schedule A index. Instead, it provided a table of concordance to allow the two different codes to be matched. One day after Apotex served its notice of motion for a further and better affidavit of documents, Ercos produced a CT Summation load file to Apotex, but argued this was done as courtesy and that its original production was proper. Master Short disagreed, stating:

While I am not being critical of counsel in this specific case, I do however take this opportunity to express my view in general that in cases of this nature the new rules put an onus on counsel, in situations such as this, to not use electronic production to gain tactical advantage. The requirement, in part arising from the "equality of arms" component of proportionality, does not mean that a party need provide a computer system to their opponents, but they do need to work together to facilitate the exchange of information and a practical production and exchange of the "bibliographic data" attached to their productions.

Master Short did not make an order in the circumstances.

Motion B – Paltry production justifies further and better affidavit

Ercos sought leave to cross-examine Apotex's affiant and sought a further and better affidavit of documents from Apotex, who was claiming $100 million in damages as a result of delayed market entry related to supply problems. Despite the nature of its claim, Apotex delivered a sworn and certified Affidavit of Documents that listed only 56 documents in Schedule A, all of which related to issues of liability and none that related to damages claimed. When pressed, it eventually produced an additional 14 documents related to damages claimed.

In ordering Apotex to provide a further and better affidavit of documents, Master Short did not expressly infer deficiency from the number of documents Apotex had produced, but he did note the "totality of the circumstances" and the "entirety of the matters discussed." He also found Apotex's own evidence and position flawed. Apotex adduced evidence on the motion that "counsel requested that Apotex forward all documents related to the issues of liability" and argued that a motion for production of documents related to damages claimed was premature in advance of oral discovery. Master Short said:

I regard this position as approaching a total disregard for the expectation of the Rules. A party cannot unilaterally bifurcate its case, fail to disclose documents relating to remedy, and then, assert that the disclosure of the existence and content of any additional documents can wait until discovery.

Perhaps more significant to those engaged in e-discovery, Master Short suggested (subtly) that the "field filtering" document collection process followed by Apotex was not sufficient. He said counsel should have been "more proactive" and that he was not satisfied documents were "effectively requested from the client."

Master Short did not order cross-examination on the deficient affidavit on the assumption that full production would be provided "in accordance with the directions and spirit of [his] reasons."

Apotex Inc. v Richter Gedeon Vegyeszeti Gyar RT, [2010] O.J. No. 2718 (QL) (S.C.J.)

COURT REBUFFS ARGUMENT FOR DELAYED PRODUCTION OF PIERRINGER AGREEMENT

The Ontario Superior Court of Justice ordered production of a proportionate liability (Pierringer) settlement agreement to a group of non-settling defendants, despite an argument that production was unnecessary until after trial.

The matter was about a young boy who died from injuries he suffered after a folding cafeteria table he was moving across his school gymnasium collapsed. His family brought an action against the school board and a separate action against the designer, manufacturer and distributors of the table. The school board settled before the hearing of a motion to consolidate the two actions. It entered a "Pierringer"-like agreement with the plaintiffs – that is, the plaintiffs released the school board from the action on an agreement to reduce their claim against the non-settling defendants by the school board's share of the total liability.

Master McLeod rejected the plaintiffs' argument that the agreement should only be disclosed after the trial, when damages have been assessed. In doing so, he stressed the importance of full production to litigation planning and strategy:

Calculation is a central issue at trial but knowing the amount actually in dispute is also critical to litigation planning and strategy. In general a defendant is entitled to know what the actual amounts in dispute are, so that informed decisions may be made about whether to defend or offer to settle, and what procedures may or may not be justified.

The principle of proportionality makes the actual damages as opposed to the pleaded damages additionally relevant. Proportionality is supposed to inform not only the decisions of the court concerning the application of the rules but also to inform the discovery planning that is now a mandatory step. … .

Master McLeod stated that other aspects of a partial settlement may also be relevant:

For example, it would be relevant if the former defendant has obligated itself to give access to all of its documents, to make witnesses available for interviewing or conversely if the plaintiff has restricted its ability to access such documents or information. It would be relevant if the former defendant has contractually bound itself not to co-operate with the other defendants or has agreed that it will extend such co-operation. One reason these kinds of agreements are relevant is because they may bring the documents or witnesses into the possession, power or control of the plaintiffs. This will be important for production and discovery planning. All of this will be important for the non settling defendants to know so that they may bring appropriate motions or factor this into the discovery plan.

Master McLeod did, however, decline the non-settling defendants' request for an order allowing non-party discovery of the school board. Although it was apparent the school board was in custody of relevant records and employed a number of witnesses, Master McLeod held that the motion for non-party discovery was nonetheless premature until the continuing defendants completed discovery of the plaintiffs. Instead, he issued a generally-worded preservation order directed at the school board.

Noonan v. Alpha-Vico, 2010 ONSC 2720 (CanLII)

JUDGE REJECTS PRIVACY ARGUMENT, ORDERS PHOTOS AND CLINICAL NOTES PRODUCED

The Ontario Superior Court of Justice ordered some family photographs taken before and after the plaintiff's automobile accident to be produced.

Gordon J. did not attempt to reconcile the Court's approach to dealing with the privacy interest in personal photographs in *Leduc v. Roman* (pro-production) with that espoused in *Schuster v. Royal & Sun Alliance Insurance Company* (pro-privacy). He did note, "*Schuster*, however, involved an ex parte motion to prevent the plaintiff from deleting her facebook webpage."

Gordon J. also held that the plaintiff should obtain and produce clinical records and other records held by a womens' shelter given her emotional distress claim: "The obvious issue is whether the plaintiff's purported emotional trauma results from the accident or [her] abusive relationship or both."

Parsniak v. Pendanathu, 2010 ONSC 4111 (CanLII)

MASTER SHORT ARGUES FOR PROPORTIONALITY IN DISCOVERY

Master Short of the Ontario Superior Court of Justice issued a lengthy and impassioned argument for a new, scaled-down, approach to documentary production.

The matter was about production of a hard drive used by a defamation plaintiff and the basis for its production, given the defendant's justification defence. Master Short summarized the dispute as follows:

Mr. Warman asserts that someone adverse to his interests set about to make a hateful Internet posting and to take appropriate steps to make it appear that the posting had been generated from an Internet Protocol ("IP") address belonging to Mr. Warman. Mr. Levant asserts that Mr. Warman, in fact, generated the subject posting and that if a full analysis of the hard drive of Mr. Warman's computer is undertaken, it may well be that proof of Mr. Levant's theory will be found.

Master Short ordered that the hard drive be examined by a neutral expert for specific relevant evidence that was central to both the claim and the defence – e.g. information that would tend to show whether the plaintiff posted the hateful communication himself.

The outcome of the case is fact-specific, and not particularly surprising. Master Short, however, also stressed the importance of proportionality in discovery and stated:

The time has come to recognize that the “broad and liberal” default rule of discovery, has outlived its useful life. It has increasingly led to unacceptable delay and abuse. Proportionality by virtue of the recent revisions has become the governing rule. To the extent that there remains any doubt of the intention of the present rules, I see no alternative but to be explicit. …

If embraced by the courts, parties and their counsel, such proportionality guidelines offer hope that the system can actually live up to the goal of securing for the average citizen, “a just, speedy and inexpensive determination” of his or her case.

Warman v. National Post Company, 2010 ONSC 3670 (CanLII)

PRODUCTION – STATUTORY PRIVILEGE

ALBERTA COURT SAYS STATUTORY PRIVILEGE DOES NOT PRECLUDE AN ACTION

The Alberta Court of Appeal held that the privilege embodied in section 241 of the *Income Tax Act* was not a basis for striking a claim against the federal government based on the manner in which it administers the *ITA*.

The Court held that it was not clear section 241 would preclude the plaintiff from obtaining evidence from the government. More broadly, it held that a party’s ability to obtain evidence is not a proper consideration on a motion to strike. In so finding, the Court stated that the section does not preclude the plaintiff from deriving the evidence it needs from sources other than the defendant Canada. It stated:

It is reasonably common for a defendant to be in the possession of relevant and material information which need not be disclosed because it is privileged, but that does not prevent the lawsuit from proceeding. The plaintiff can try to prove its case without that evidence. Further, whether a pleading discloses a cause of action is a distinct issue from whether the plaintiff will be successful in marshalling the evidence needed to prove that cause of action. Section 241 is not determinative of this appeal.

The Court ultimately struck the claim as disclosing no reasonable cause of action based on a finding that the government did not owe the plaintiff a private law duty of care.

783783 Alberta Ltd. v. Canada (Attorney General) , 2010 ABCA 226 (CanLII)

PRODUCTION – *ANTON PILLER* ORDERS

DIVISIONAL COURT WRITES A CHAPTER ON *ANTON PILLER* ORDERS

The Ontario Superior Court of Justice – Divisional Court made some significant comments in affirming an order to set aside an *Anton Piller* order.

The order was initially granted in 2006 in support of a departing employee claim that included allegations of fraud and breach of confidence. Hambly J. set it aside based on a failure to demonstrate a threat of very serious damage and failure to make full, frank and fair disclosure. He later imposed a costs award on the plaintiff in respect of the *Anton Piller* proceedings that totaled over $550,000. This motivated the plaintiff’s appeal, which was made on leave and over an objection that the matter was moot.

The Divisional Court, in reasons written by Wilton-Siegel J., dismissed the appeal. Its key legal findings are as follows:

- The second factor outlined in *Celanese* requires a plaintiff to demonstrate a strong *prima facie* case for "very serious damage." This is not necessarily satisfied by proof of a substantial risk of an inability to prosecute due to the destruction of evidence. Wilton-Siegel J. suggests that a court should also examine whether very serious damage will flow from the misconduct itself.
- Since an *Anton Piller* order is discretionary, a plaintiff is not automatically entitled to an order if it meets the four criteria outlined in *Celanese*. A court should also consider whether an order is necessary, including "whether the evidence is available to the plaintiff by other means that are not as intrusive as an *Anton Piller* order."
- Evidence of belief or suspicion of wrongdoing and damage must be based on a solid foundation of "documentary or other evidence." If a plaintiff adduces evidence of belief or suspicion without "very strong reasons to believe", it must disclose its weakness.

The Court's reasons flesh out the requirements for an *Anton Piller* order and invite a conservative application of discretion in a manner that should give plaintiffs considering this remedy reason to pause before seeking such an order. The reasons make very clear that surviving a motion to set aside is no small feat. Moreover, the Court's treatment of the second – "very serious damage" – factor in *Celanese* addresses what Wilton-Siegel J. characterizes as an ambiguity in the case law.

Factor Gas v. Jean, 2010 ONSC 2454 (CanLII)

PRODUCTION – QUALIFIED PRIVILEGE

EMPLOYER LIABLE TO FORMER EMPLOYEE IN DEFAMATION

The British Columbia Court of Appeal held an employer to be liable for nominal damages in defamation because a manager ticked an "inadequate performance" box on a human resources exit form without justification. The Court accepted that the act of completing and sending the form was subject to qualified privilege, but held that the employer exceeded its privilege because the manager e-mailed the form to a person who did not have a proven duty to receive it (as a member of human resources). It awarded the plaintiff $1,000.

Dawydiuk v. Insurance Corporation of British Columbia, 2010 BCCA 353 (CanLII)

PRODUCTION – PRIVACY PROTECTION

COURT SAYS LAWYER'S SEIZED HARD DRIVES OUGHT TO BE STORED BY A NEUTRAL EXAMINER

The Ontario Superior Court of Justice ordered a number of computers and hard drives that had been seized from a lawyer as part of a child pornography investigation to be stored by a neutral examiner.

The devices were seized, immediately sealed and stored by the local police. Presumably, they all contained solicitor-client communications belonging to the lawyer's clients. The Attorney General and the Law Society agreed to a protocol that involved retaining a neutral examiner to image hard drives and use a non-manual review process to look for and extract any images of child pornography. They did not, however, agree on where the drives and images would be stored.

The Law Society argued that the risk of an inadvertent security breach at the police station required that the devices be stored either at the Court or by the neutral expert. It argued that public confidence in the administration of justice would be compromised if privilege holders learned that communications related to their criminal defence were in the care and the control of the police.

Though she held that the risk of a breach of privilege was minimal, Justice Hennessy nonetheless ordered the devices to be stored by the neutral. She said:

This Court has a duty to ensure that all safeguards are put in place to avoid completely or reduce as completely as possible, any risk of a breach of solicitor-client privilege. This duty is particularly onerous in this situation, where any breach of the privilege would put the privileged material in the hands of the police, who are adverse in interest to the privilege holders. This is not the case of a generic protection of privilege against any disclosure to an uninterested person. The consequences of a breach of the solicitor-client privilege in this case go to fundamental principles.

According to Justice Hennessy, the Attorney General, though objecting to the Law Society's position, did not identify any specific concerns with storage at the neutral expert's facility. She also noted that her order was based on special circumstances, a likely reference to the fact that the police investigation did not require an examination of any solicitor-client communications.

Attorney General v. Law Society, 2010 ONSC 2150 (CanLII)

ARBITRATOR MAKES PROTECTIVE ORDER GOVERNING PRODUCTION OF SENSITIVE DOCS

Professor Etherington, acting as arbitrator, imposed the following protective terms to govern the production of a clinical research protocol in a labour arbitration:

- The copies of documents produced should be redacted only to the extent required to prevent the unnecessary disclosure of personal health information. Normally such prevention should only require the redaction of the names of patients involved in clinical trials. Redaction for any other purpose should only be done with the consent of opposing counsel or the approval of the arbitrator.
- The production of the documents should be to the union's legal counsel only.
- Union counsel may disclose the documents to a potential witness (including the grievor), to the union's advisor and to members of counsel's law firm, only as necessary for preparation for the hearing and with appropriate redactions of information that does not pertain to a potential witness.
- Counsel and the union, and all other participants in the proceeding, shall not use or disclose the produced documents or information therein for any purpose other than the proceeding.
- Following the final disposition of the matter, the documents/materials shall be returned to the employer. Union counsel shall shred any working copies made and confirm this to the employer.

University of Western Ontario v. University of Western Ontario Staff Assn. (Ansari Grievance), [2010] O.L.A.A. No. 262 (Etherington) (QL)

PRIVILEGE – SPOUSAL

BCCA TELEPHONE RECORDING CASE DEALS WITH SPOUSAL PRIVILEGE AND THE REASONABLE EXPECTATION OF PRIVACY CONCEPT

The British Columbia Court of Appeal issued a judgment with two findings of note – one on whether spousal privilege applies to communications intercepted by a third-party and another on the protection of information subject to a reduced yet reasonable expectation of privacy.

The matter involved recordings of telephone calls made from a correctional facility by an accused person, some of which were to his spouse. The facility received a production order, listened to the recordings for the first time and turned them over to the Crown. They apparently contained statements favourable to the theory on which the Crown's prosecution was based, but no "direct evidence of criminal activity." The accused person argued that the recordings were inadmissible based on spousal privilege and section 8 of the *Charter*.

The Court first rejected the spousal privilege claim. It held that, under the *Canada Evidence Act*, spousal privilege does not

preclude a third-party from giving evidence about statements made from one spouse to another. The one exception, explained the Court, is for private communications between spouses that are intercepted by a lawful wiretap – a result derived from a provision in the *Criminal Code* that deems intercepted communications to maintain their privileged status. The Court held that the deeming provision (section 189(6)) did not apply in the circumstances.

The Court then upheld the section 8 claim. It held that the production order served on the facility was invalid because of insufficient grounds and held that disclosure by the facility to the Crown was therefore made in breach of the accused person's reduced, but nonetheless reasonable, expectation of privacy. In reaching this finding, the Court gave effect to the regime for recording and reviewing inmate telephone calls authorized under the British Columbia *Correction Act*, which recognizes a facility's right to record, review and disclose calls within certain parameters. This privacy-security balancing regime led the Court to apply the reasonable expectation of privacy concept in a more nuanced manner than the "all or nothing" manner in which it is often applied.

R. v. Siniscalchi, 2010 BCCA 354 (CanLII)

PROCEDURAL FAIRNESS

CASE ABOUT FILING "UNOFFICIAL TRANSCRIPT" OF ADMINISTRATIVE TRIBUNAL HEARING TO PROCEED AT BCCA

The British Columbia Court of Appeal granted leave to appeal a decision that permitted a judicial review applicant to file a self-produced transcript of a British Columbia Human Rights Tribunal hearing.

The applicant first asked the Tribunal to produce an official transcript and was denied. The applicant then took recordings and produced its own transcript with the Tribunal's consent pursuant to a provision in the Tribunal rules that specifies that such a recording, "is not part of the official record of the tribunal's proceedings."

The applicant lost the Human Rights proceeding on the merits and brought an application for judicial review. It alleged that the Tribunal breached procedural fairness by declining to record the hearing itself and also raised bias and "unreasonable findings of fact not supported by the evidence" as grounds for review. The applicant filed its "unofficial transcript" and the respondent was unsuccessful on its motion to strike.

In granting leave to appeal, the Court said:

Whether this development accords with the complex framework of modern administrative law in British Columbia seems to be a question that should be fully argued and canvassed. If leave were to be denied and the judicial review were to proceed, the issue could become lost in the 'factual matrix' of the case and the human rights and labour law communities would be left in doubt on this important evidentiary point. As it is, the hearing of the substantive issue before the court below has been adjourned and this appeal could be heard without delay.

SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611, 2010 BCCA 371 (CanLII)

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