Information, Privacy and Data Security Post

Hicks Morley Information and Privacy Highlights – Fall 2011

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Welcome to the Fall 2011 Hicks Morley Information and Privacy Highlights!

This second edition of our new re-vamped publication includes many note-worthy decisions, including *Vaughan (City) (Re)* , where the Information and Privacy Commissioner of Ontario found that personal information received on an unsolicited basis is not "collected" for the purposes of the *Municipal Freedom of Information and Protection of Privacy Act*, and *Jones v. Tsige*, where the Ontario Superior Court of Justice found that there is no tort of invasion of privacy in Ontario. The appeal of *Jones v. Tsige* was heard on September 29, 2011 and the decision has yet to be issued. It remains to be seen what direction the Court will take with respect to the tort of invasion of privacy.

We hope you find these case summaries to be useful and informative and that they provide some food for thought!

As always, we welcome your comments.

THE PITFALLS OF ACCESSING PRIVATE EMAILS

An interesting decision was released earlier this year by the British Columbia Supreme Court, which awarded damages for improper publication of the plaintiff's personal emails. The parties were former spouses who were already engaged in extensive family law litigation — which sets the backdrop for the privacy-related litigation. The defendant husband published a number of defamatory comments about his ex-wife, by way of emails and internet postings. He included references to private email exchanges of his former spouse, which he discovered on an old home computer.

The Court concluded that the defendant had "taken his battle with [his ex-wife] over custody and access far outside the ordinary confines of the family court litigation." In addition to defaming his ex-

wife, the defendant was found to have breached her privacy by publishing the contents of her private emails. As a result, he was ordered to pay damages of $40,000 for breach of privacy and defamation.

The breach of privacy aspect of the decision flows from British Columbia's *Privacy Act*, which creates express statutory recourse for privacy violations. Other jurisdictions, including Ontario, have not adopted such statutory causes of action for privacy violations, so courts in those jurisdictions would not necessarily arrive at the same result. However, some cases have suggested that there may be a common law tort for invasion of privacy, which could form the basis for similar claims.

The decision provides a reminder of the need to be prudent in accessing – and certainly in publishing – emails in respect of which there is a right or an expectation of privacy.

Nesbitt v. Neufeld, 2010 BCSC 1605 (CanLII)

COURT GRANTS *EX PARTE* ORDER TO PRESERVE FACEBOOK

The New Brunswick Court of Queen's Bench issued an *ex parte* order that required the plaintiff in a motor vehicle action to print and otherwise preserve the contents of her Facebook profile. Significantly, the order required the plaintiff's own solicitor to appoint an agent to initiate and supervise the preservation process before speaking with his client.

The Court held that there was reason to believe the plaintiff had not produced evidence from her Facebook that would meet the "semblance of relevance" test for production. The plaintiff claimed that she could not travel by motor vehicle for more than one hour without discomfort, suffered headaches four to five days per week and could not carry groceries or any object weighing more than five to ten pounds. However, the public part of her Facebook contained a number of pictures of her riding a "zip line" and there was (untested) evidence that these photographs were taken after the accident that gave rise to her claim. For example, the plaintiff publicly posted a photo in an album entitled "USVI 2010," which contained a picture of her lying on a beach with "St. John USVI 2010" scrolled in the sand.

The Court did not apply the test for an *Anton Piller* order, but did question whether it was proper to grant *ex parte* relief. In resolving this question, it relied on evidence about the difficulty in determining whether Facebook data has been deleted. Specifically, the evidence showed that the creator of a Webpage on Facebook can add or delete to and from the site without leaving an electronic trail that can be followed. Accordingly, it is not possible to data mine what may have been posted on that personal site over time and subsequently removed.

Notably, this evidence was about the consequences of deletion rather than the likelihood that the plaintiff would actually delete once put on notice. In fact, the Court judged the plaintiff's disposition

positively, suggesting she likely failed to produce the contents of her Facebook page out of mere ignorance.

The Court also recognized that an order requiring the plaintiff's lawyer to help ensure the pages were properly preserved could do serious harm to the solicitor-client relationship, but felt that an *ex parte* preservation procedure was warranted and felt that it did not have the power to order a search by a neutral third-party. As a kind of compromise, the Court ordered the plaintiff's lawyer to appoint an agent to schedule a meeting with the plaintiff, advise her of the order, observe the printing and downloading of content and obtain and seal copies of same for delivery to the plaintiff's lawyer. The most troubling part of the order is that it bound the plaintiff's lawyer to initiate this process without advising his client.

Sparks v. Dubé, 2011 NBQB 40 (CanLII)

NO INVASION OF PRIVACY TORT IN ONTARIO

The Ontario Superior Court of Justice issued a significant judgment in which Justice Whitaker held that Ontario law does not recognize a common law invasion of privacy tort. More specifically, he held that he was bound by the Court of Appeal's 2005 judgment in *Euteneier v. Lee*, in which the Court commented that there is no "free standing" right to privacy in assessing a privacy-related claim by a police detainee that was based in negligence, assault, civil conspiracy and the *Charter*. Justice Whitaker said:

While it is certainly the case that in *Euteneier*, the plaintiff was not suing on the basis of an intentional tort, the extent to which privacy rights are enforceable at law was squarely before the court for the purposes of determining the content of the duty of care owed by the police to the plaintiff while in custody. In my view, the inescapable conclusion, put quite plainly by the Court of Appeal in paragraph 63 of that decision, is that "there is no 'free standing' right to… privacy… at common law."

Justice Whitaker departed from the Court's well-known decision in *Somwar v. McDonald's Restaurants of Canada*. Justice Stinson decided *Somwar* shortly after the Court of Appeal decided *Euteneier* and did not consider it in finding (on a summary judgment motion) that it is not settled law in Ontario that there is no tort of invasion of privacy.

This is not the last that we will hear on the issue however, as the appeal of Justice Whitaker's decision was heard on September 29, 2011. Stay tuned to see how the Courts will deal with this controversial issue.

Jones v. Tsige, 2011 ONSC 1475 (CanLII)

PERSONAL INFORMATION RECEIVED ON AN UNSOLICITED BASIS

IS NOT “COLLECTED”

The Information and Privacy Commissioner of Ontario issued a notable privacy investigation report dealing with complainants who complained, amongst other things, that the Municipality in issue had improperly collected their personal information contained in correspondence they sent to the Municipality, in contravention of the *Municipal Freedom of Information and Protection of Privacy Act* (“*MFIPPA*“).

Investigator Ratner found that the Municipality did not “collect” personal information under *MFIPPA* when it received unsolicited correspondence. This finding was based on an interpretation of the language in the *Act*, which distinguishes between personal information having been “obtained or compiled” by an institution and being “collected” by an institution. Investigator Ratner recognized that personal information may come into the custody or control of an institution in a number of ways: it may be actively solicited, it may be passively received, or it may be created by the institution. The phrase “obtained or compiled” is intentionally broad, and intended to accommodate the various ways in which an institution may acquire personal information.

The phrase “obtained or compiled” is used in the context of use and disclosure obligations, which apply regardless of how information comes into the custody or control of an institution, as opposed to the term “collect” that is used in the context of collection obligations, which apply only to personal information that is actively sought or created by an institution.

This decision has great significance for institutions that receive unsolicited personal information and confirms that it will not be considered to have been “collected” for the purposes of the corresponding collection obligations under the *MFIPPA*.

Vaughan (City) (Re), 2011 CanLII 47522 (ON IPC)

ORDER TO DISCLOSE ANONYMOUS POSTINGS DENIED (ONTARIO)

In *Morris v. Johnson*, Justice Carole Brown of the Ontario Superior Court of Justice declined to order production of information that would tend to identify individuals who anonymously posted statements on a municipal affairs website.

Justice Brown held that the plaintiff did not meet her burden of establishing a *prima facie* case of defamation because she failed to provide sufficient particulars and failed to serve a timely notice of intended action in defamation. While the motion was disposed of on these technical grounds, Justice Brown also stressed the importance of the *prima facie* case standard given that the statements the plaintiff alleged to be defamatory related to her former political office and commented as follows:

I am cognizant, in the present case, that the alleged defamatory statements were made in the

context of a hard-fought political campaign. They clearly related to the mayoral position and the governance of the Mayor, councillors and the municipal government generally. In ensuring that proper weight is given to the important value of freedom of expression, particularly in the political context, the importance of the stringent *prima facie* test is necessary to protect and balance the public interest in favour of disclosure with the competing interests of privacy and freedom of expression.

The Canadian Civil Liberties Association intervened in opposition to the plaintiff's motion.

Morris v. Johnson, 2011 ONSC 3996 (CanLII)

IPC/ONTARIO CONTINUES TO SHOW PRAGMATISM IN DEALING WITH E-FOI ISSUES

The Information and Privacy Commissioner/Ontario has thus far demonstrated a good deal of pragmatism in exercising its power to review the quality of *FIPPA* and *MFIPPA* institutions' email searches. For example, it recently issued an order in which a requester claimed that an institution ought to have retained an independent IT expert to search and retrieve responsive e-mails, including "erased emails." Despite the requester's perception of conflict, IPC Adjudicator Morrow upheld the institution's search as "coherent, systematic and responsible" in the circumstances.

This demonstrates that the IPC will defer to a reasonable search process and, absent special circumstances, is not likely to order the use of an external "e-discovery vendor." Note that the IPC has also endorsed the choice to use vendors, a choice which allows institutions to pass through 100% of the reasonable costs of search and retrieval (which is not the case for internal searches). For an example of a case in which the use of an external IT vendor led to a valid, yet very high, yet reasonable, fee estimate see Order MO-2154.

Vaughan (City) (Re), 2011 CanLII 43653 (ON IPC)

NBCA SAYS PRE-EXISTING ALCOHOL PROBLEM NOT A PREREQUISITE TO RANDOM ALCOHOL TESTING

The New Brunswick Court of Appeal issued a rather remarkable decision in which it held that employers who manage "inherently dangerous" workplaces do not require evidence of a pre-existing alcohol problem to justify random alcohol testing.

The decision is most remarkable for its approach. Specifically, Justice Robertson held that a great need for policy guidance, especially in light of conflicting arbitral jurisprudence, justified review on the correctness standard:

Finally, I am struck by the fact that there comes a point where administrative decision makers are unable to reach a consensus on a particular point of law, but the parties seek a solution which promotes certainty in the law, freed from the tenets of the deference doctrine. In the present case, it is evident that the arbitral jurisprudence is not consistent when it comes to providing an answer to the central question raised on this appeal. Hence, it falls on this Court to provide a definitive answer so far as New Brunswick is concerned. This is why I am prepared to apply the review standard of correctness. But this is not to suggest that I am about to ignore the arbitral jurisprudence which has evolved over the last two decades. Let me explain.

Justice Robertson's "let me explain" line leads to a full analysis of the cross-Canada arbitral jurisprudence in an attempt to derive a principle for the justification of random alcohol testing respectful of arbitral efforts. He concludes as follows:

As matter of policy, this Court must decide whether an employer is under an obligation to demonstrate sufficient evidence of an alcohol problem in the workplace before adopting a policy requiring mandatory random alcohol testing. In my view, the balancing of interests approach which has developed in the arbitral jurisprudence and which is being applied in the context of mandatory random alcohol testing warrants approbation. Evidence of an existing alcohol problem in the workplace is unnecessary once the employer's work environment is classified as inherently dangerous. Not only is the object and effect of such a testing policy to protect the safety interests of those workers whose performance may be impaired by alcohol, but also the safety interests of their co-workers and the greater public. Potential damage to the employer's property and that of the public and the environment adds yet a further dimension to the problem and the justification for random testing. As is evident, the true question is whether the employer's workplace falls within the category of inherently dangerous. It is to that issue I now turn."

On the facts, Justice Robertson held that Irving's kraft paper mill met the "inherently dangerous" criterion, a finding made somewhat easy by the arbitration board's finding that Irving's workplace was "dangerous," but not dangerous enough to justify random alcohol testing without evidence of a workplace substance abuse problem.

Syndicat canadien des communications, de l'énergie et du papier, section locale 30 c. Les Ptes et Papier Irving, Limitée, 2011 NBCA 58 (CanLII)

JUSTICE PERELL SAYS DEEMED UNDERTAKING NORMALLY ADEQUATE, TWEAKS IT FOR PROCEEDING

Justice Perell of the Ontario Superior Court of Justice issued an order that clarified the scope of the deemed undertaking and slightly modified it for a particular class proceeding. He also affirmed, however, that the undertaking is the normal source of privacy protection for parties to litigation in Ontario.

The class proceeding defendant argued that the deemed undertaking was inadequate for protecting its confidential business information. In particular, it argued that undertaking would not preclude the filing of production materials (on the public record) in interlocutory motions without notice and would not protect against misuse by experts and "third parties." It proposed a confidentiality order that would restrict access to production materials to certain "permitted persons," some of whom would be required to sign a confidentiality order.

Justice Perell rejected the defendant's proposed confidentiality order as inconsistent with the basis for the deemed undertaking rule and too cumbersome. He said that the deemed undertaking will normally provide adequate protection and issued an order imposing a modified form of the rule. In response to the defendant's particular concerns, Justice Perell ordered a provision for serving material on an interlocutory motion 15 days before filing, a specification that the undertaking binds lawyers' staff, experts and consultants and a specification that the undertaking prohibits the disclosure of information to class members unless in ordinary circumstances. Justice Perell also imposed a term requiring the parties to destroy production materials (without specification as to means) at the conclusion of the action.

Robinson v. Medtronic Inc., 2011 ONSC 3663 (CanLII)

CITY COUNSELLOR FINED FOR LEAKING HARASSMENT REPORT

In *R. v. Skakun*, a city counsellor was convicted under the British Columbia *FIPPA* by the British Columbia Provincial Court. Counsellor Brian Skakun was convicted and fined $750 for disclosing information in contravention of *FIPPA.* The Court found Skakun leaked a harassment report to a CBC reporter. Notably, it rejected an argument that Skakun's actions were justified based on a common law whistleblower defence.

R. v. Skakun, 2011 BCPC 98 (conviction) and *R. v. Skakun*, 2011 BCPC 108 (sentence) (CanLII)

EMPLOYER DENIED ORDER TO HAVE TELCO PRODUCE TEXT MESSAGES

The Ontario Superior Court of Justice dismissed an employer's application for an order to compel a telephone company to produce text messages in aide of an internal investigation.

The employer, a social services agency, was investigating an allegation that a caseworker had an inappropriate sexual relationship with a client. The client admitted the relationship, but the caseworker did not. The client said he no longer had text messages between him and the caseworker that would prove the allegation, but consented to their release from the TBay Tel. The caseworker and her union refused to consent to the release.

Rather than discipline or discharge the caseworker and seek a production order through the grievance arbitration process as necessary to defend a grievance, the employer deferred the completion of its investigation and sought a production order in court. It argued this was in the best interest of “all concerned,” likely a sign that it did not want to rest its discipline case too heavily on its client’s evidence.

Justice Fregeau denied the order, primarily because he did not find that it was not necessary to achieve the employer’s end. He said:

CLFFD has some evidence that J.T. violated their employment policy. They are in a position to discipline her for her conduct should they choose to do so. Their expressed position during the hearing of this Application is that for the interests of all concerned, they do not want to do so without “full information” or the “best evidence” available. It would certainly be advantageous or beneficial for CLFFD to have the information sought, but I do not find that they require it to proceed with the discipline of J.T.

While a Norwich order is a discretionary, flexible and evolving remedy, it is also an intrusive and extraordinary remedy that must be exercised with caution. I do not feel that it is appropriate to grant Norwich relief on all the facts and circumstances of this case.

Notably, the caseworker’s union opposed the requested order as being beyond the Court’s jurisdiction because the essential nature of the dispute arose out of the collective agreement between the caseworker’s union and the employer (i.e., because of the *Weber* principle of exclusive arbitral jurisdiction). The Court did not decide this issue.

This case should be considered by employers wishing to use a Norwich order as an aide to an internal investigation. They should also beware that many (if not most) telephone companies do not log text messages.

Community Living v. TBay Tel, 2011 ONSC 2734 (CanLII)
