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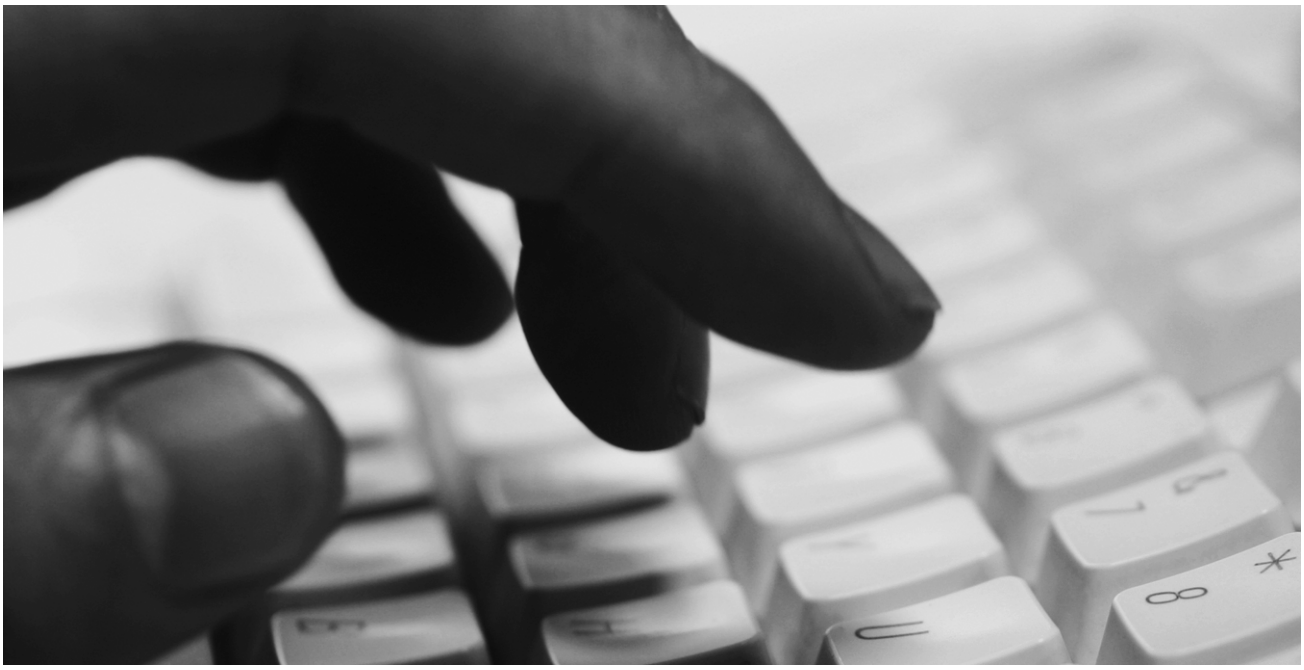

Information and Privacy Post 2008 Year in Review

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Dear Friends:

On behalf of the Hicks Morley information and privacy practice group, I'd like to take this opportunity to welcome you to 2009 and announce the publication of our second annual *Information and Privacy Post Year in Review*.

Once again we have assembled the leading decisions from courts, access and privacy tribunals, and labour arbitrators on privacy and access to information, protection of confidential business information and the law of production.

In the upcoming year we will continue to provide you with timely updates on significant developments in the law of information and privacy in our Privacy Post as well as other firm publications. We invite you to send us your comments about any of these publications to privacypost@hicksmorley.com so we can continually increase its value to you. Please also let us know if there is anyone in your organization who may benefit from receiving a copy of the Privacy Post and we'll gladly add them to our mailing list.

Information and privacy issues will continue to be top of mind for public and private sector organizations in 2009. We have set the scope of our coverage in the Post broadly in a conscious effort to draw a new boundary around the subject matter we consider to be at the core of a management-side information and privacy practice. We are dedicated to developing and maintaining a high-performing team of lawyers who are ready to advise and represent you on all these issues, from those about employment and commercial privacy, to e-discovery issues, to search and seizure issues that arise in regulatory inspections and investigations. Please feel free to call me or any member of our group if you require further information with regards to the cases raised in the *Year in Review* or with respect to your general information and privacy questions.

Scott T. Williams
Information and Privacy Practice Group Leader

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Dear Friends:

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

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

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

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

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

SCC says Privacy Commissioner can't adjudicate on privilege claims
The well-known July decision in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health* is the strongest endorsement of solicitor-client privilege yet by the Supreme Court of Canada. And judging by the attendance at a recent Ontario Bar Association panel discussion, it has caused administrative tribunals and regulators some concern. They may take some comfort that litigants have already tried to push *Blood Tribe* too far. For more on this, see our reports on the Saskatchewan Court of Appeal's decision in *Law Society of Saskatchewan v. E.F.A. Merchant Q.C* and the Ontario Labour Relations Board decision in *Proplus Construction & Renovation Inc.*

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

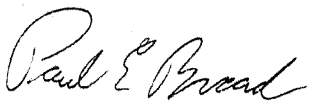
Judging by the number of reported cases on spoliation this year, alleging spoliation is certainly *en vogue*. But does it hinge on bad faith? If there is a positive duty to preserve, what exactly is required of the reasonable in-house counsel?

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

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

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

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



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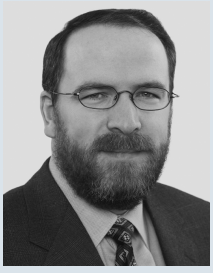

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1. CONFIDENTIALITY DUTIES

1.1 Professionals

ABCA addresses the duty of confidentiality of an expert witness

The Alberta Court of Appeal issued a split judgement that touches on the scope of confidentiality that is waived by the act of filing an expert report in court. The majority held that the filing of a report only waives confidentiality as between a litigant and its expert in the content of the report itself.

This was a case about an expert report written by an accounting firm for a woman engaged in a child support and custody dispute (the "complainant"). The firm traced her husband's assets and drafted a preliminary report, which the complainant filed in court in support of her position in two proceedings. This action, which the firm claimed she did not have authorization to take, led to a series of events that culminated in a complaint by the woman to the Institute of Chartered Accountants of Alberta.

After viewing the report, the husband (also an accountant and familiar to the firm) called the author of the report to complain about its quality. The author wrote an e-mail to the managing partner which stated, "If Danny feels we have slighted his reputation, we have not." Soon after, the firm decided to withdraw the report. It took the position that withdrawal was justified because the report was filed without its authorization and the complainant's account was unpaid. It told the husband about the withdrawal at around the same time it sent a letter to the wife, who heard about the withdrawal through the husband's counsel before she received the letter. Later, in response to a summons issued by the husband, an accountant from the firm swore an affidavit to confirm the withdrawal.

Based on these facts, the Institute made findings of professional misconduct, which the majority of the Court of Appeal (in an award written by Picard J.A.) upheld on a "reasonableness" standard. She first affirmed a finding that the author's e-mail, despite being sent internally, was "false and misleading" and constituted a breach of the professional rule against making such statements. Picard J.A. read the rule broadly; since it didn't exclude internal communications, she held that it applied to them.

Picard J.A. also affirmed breach of confidence findings that were based on the firm's direct communications with the husband, and its affidavit. She rejected the firm's reliance on the rule governing litigation privilege that deems privilege to be waived for all information relevant and material to an expert report filed in court. She held that this was a rule about litigation privilege and was not incorporated into the Institute's confidentiality standard, and so upheld the Institute's finding that the firm acted improperly by disclosing information about the terms and reasons for the report's withdrawal, the state of the complainant's account and its relationship with the complainant.

Slatter J.A. wrote a very strong dissent that took issue with the internal e-mail finding and the majority's confidentiality findings.

Deloitte & Touche LLP v. Institute of Chartered Accountants of Alberta (Complaints Inquiry Committee), 2008 ABCA 162 (CanLII).

2. FREEDOM OF INFORMATION

2.1 Application, exclusions and jurisdiction

Federal Court says ministerial offices beyond the scope of ATIA

The Federal Court held that the Prime Minister's Office and other ministerial offices are not "institutions" whose records are subject to the federal *Access to Information Act*.

Canada (Information Commissioner) v. Canada (Minister of National Defence), 2008 FC 766 (CanLII).

Doctors' Association a "trade union" for the purposes of FIPPA

The Divisional Court dismissed an application for judicial review of an Information and Privacy Commissioner/Ontario order in which parts of a memorandum of agreement between the Ontario Medical Association, the Canadian Medical Protective Association and the Ministry of Health and Long Term Care were ordered to be disclosed.

Canadian Medical Protective Association v. Loukidelis, 2008 CanLII 45005 (ON S.C.D.C.).

OCA interprets MFIPPA application provision broadly

The Ontario Court of Appeal interpreted the section 2(3) application provision of the *Municipal Freedom of Information and Protection of Privacy Act*, and held that the City of Toronto Economic Development Corporation ("TEDCO") is deemed to be part of the City of Toronto for the purposes of the *Act*.

TEDCO is an OBCA corporation that is wholly-owned by the City. The City appoints all TEDCO directors, who in turn elect or appoint all TEDCO officers pursuant to a by-law. The Court held that all of TEDCO's officers are "appointed or chosen by or under the authority" of the City as contemplated by subsection 2(3). It based its decision on the ordinary meaning of the word "authority," the purpose of access to information legislation and the non-technical character of the language used in section 2(3) – marked by the phrase "appointed or chosen."

City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario, 2008 ONCA 366 (CanLII).

2.2 Exemptions

NSSC case speaks to harm flowing from disclosure of information outside of its context

In this freedom of information decision, the Nova Scotia Supreme Court addressed a technical yet noteworthy point about unfairness that can flow from disclosing information that may send a stigmatizing message without more context.

The Court ordered access to a list of the names of the 25 employers with the highest number of workplace accidents in Nova Scotia. The WCB had tried to argue that disclosure of the list alone would harm the companies by unfairly stigmatizing them as employers with a poor attitude towards workplace safety.

The WCB's exemption claim failed because it had not adduced sufficient evidence to prove an unfair stigma. It seemed to accept the validity of the "bad attitude" stigma that would attach to the employers, but said the WCB had failed to prove that this stigmatization would be unfair. Without such proof, the WCB's claim amounted to a claim that the employers would suffer ordinary embarrassment, which is not a basis for exempting information from public access under any freedom of information statute.

The logic of the unfair stigma exemption claim is sound and not upset by this decision. The decision does, however, illustrate the burden on institutions that raise such a claim. They must (1) establish the reasonable inference that would flow from disclosure of the de-contextualized information (i.e. the stigma) and (2) prove unfairness by adducing evidence about the full context.

Halifax Herald Ltd. v. Nova Scotia (Workers' Compensation Board), 2008 NSSC 369 (CanLII).

IPC says personal information in OSR shall not be released

The IPC/Ontario denied a parent's appeal for access to information about an incident that led to the suspension of two students, and in doing so made a significant statement on a student's privacy interest in information contained in the Ontario Student Record.

The records at issue were about two students other than the parent's child, so the Board claimed they were exempt based on the exemption in section 14 – i.e. it claimed that disclosure would constitute an "unjustified invasion of privacy." The Board also argued that disclosure should be presumed to constitute an unjustified invasion of privacy based on section 14(3)(d) of MFIPPA (the "educational history" presumption) because the records had been included in the OSR pursuant to the Ministry's Violence-Free School Policy. The IPC acknowledged that the OSR is "the core of a student's educational history" and held that the presumption applied.

It also rejected the requester's claim that the "public interest override" applied. Although it recognized that a parent's interest in ensuring a safe environment for his or her own children and other children was a "compelling public interest," it did not find that this interest outweighed the special privacy interest of youth at risk.

Hastings and Prince Edward District School Board (Re), 2008 CanLII 24747 (ON I.P.C.).

University President's contract ordered to be released

The IPC/Ontario ordered McMaster University to release parts severed from its President's renewal employment contract and claimed to be exempt based on section 21 (unjustified invasion of privacy).

McMaster University (Re), 2008 CanLII 4963 (ON I.P.C.).

FIPPA court award on "Branch 2 privilege" released

The Divisional Court issued a FIPPA judicial review decision that dealt with multiple issues.

1. The Court held that records related to the Crown's defence of a legal action based on actions taken by its employees were not excluded by the employment-related records exclusions. It said, "Employment-related matters are separate and distinct from matters related to employees' actions."

2. The Court held that a letter from plaintiffs' counsel to the Crown sent in the course of litigation was not "prepared for Crown counsel for use in litigation" and exempt under Branch 2 of section 19 (the so-called "statutory litigation privilege").

3. The Court held that the same letter, which included information provided by the Ministry in the course of litigation, was not exempt based on the implied undertaking rule. It held the implied undertaking rule could not be read into section 19.

4. The Court questioned whether Branch 2 of section 19 protects any document simply copied for inclusion into the Crown brief, but did not answer this question since the records in question had qualified for the exemption based on the more rigid common law test from *Nickmar*: the relevant records were compiled by research or the exercise of skill and knowledge on the part of the Crown.

5. The Court held that the IPC did not err by ordering disclosure of information with personal identifiers severed without considering whether information available to the press would cause individuals to be identifiable. The Court suggested that the Ministry had a burden to adduce evidence of the facts within the requester's knowledge given that it was not otherwise obvious how individuals could be identified from the information disclosed.

6. The Court ordered the IPC to reconsider the requester's claim to the public interest override as applied to the records that were held to be exempt under section 19. At the time, the IPC held that there was a compelling public interest in the disclosure of these records, but did not balance

this public interest against the interest protected by 19 because it made its decision before the Ontario Court of Appeal read section 19 into to the override clause.

Although this is award is mainly of general interest, any court decision on Branch 2 privilege is of significance given the uncertainties that remain regarding the scope of its application.

Ontario (Correctional Services) v. Goodis, 2008 CanLII 2603 (ON S.C.D.C.).

Denial of access to complainants' identities upheld

The IPC/Ontario held that Queen's University could deny access to records that would reveal the identities of three female complainants whose harassment complaints led the University to issue a trespass notice to an individual who was not a member of the university community. It noted that the requester had engaged in persistent and harassing behaviour towards the complainants and concluded that the requester's motives were not benevolent. The IPC held that exemptions in sections 14(1)(e) and 20(1)(e) of FIPPA applied. It further held that disclosure would be presumed to be an unjustified invasion of privacy under 21(3)(b) (which protects information compiled as part of an investigation into a possible violation of law) and that the "absurd result principle" did not justify giving the requester access to e-mails he had sent the University in the course of its investigation.

Queen's University (Re), 2008 CanLII 5953 (ON I.P.C.).

Arbitrator Brent's teaching evaluation data award upheld

The Divisional Court dismissed a judicial review of a February 2007 decision of Arbitrator Gail Brent in which she held that the University of Windsor did not violate its faculty collective agreement or the Ontario *Freedom of Information and Protection of Privacy Act* by publishing teaching evaluation scores on a secure network for access by students and other members of the university community.

It held that Ms. Brent was reasonable in construing the term "personal information" in the relevant collective agreement provision narrowly such that it excluded teaching evaluation scores. It also held, without deciding on the applicable standard of review, that Ms. Brent was correct in deciding that teaching evaluation records were excluded from FIPPA based on the employment-related records exclusion.

University of Windsor Faculty Association v. University of Windsor, 2008 CanLII 23711 (ON S.C.D.C.)

2.3 Freedom of the press

Manitoba QB quashes orders for production of media tapes

The Manitoba Court of Queen's Bench quashed two *Criminal Code* production orders issued against the CBC and CTV. It held that the deficiency of the information as it related to the media's privacy interest led to a flawed exercise of judicial discretion. The decision stresses that the police ought to do their best to help issuing judges conduct the public interest balancing exercise required by the media search jurisprudence, an exercise made difficult given that the media does not participate. The Court also suggested that issuing judges should provide reasons to facilitate effective review.

Canadian Broadcasting Corporation v. Manitoba (Attorney-General), 2008 MBQB 229 (CanLII).

Rise of citizen journalism does not devalue work of professional journalists

The Ontario Court of Appeal restored a search warrant and assistance order that was served on the National Post. Unless the order is stayed pending an appeal, it will require the Post's editor-in-chief to provide the RCMP with a document and envelope received from a confidential informant. The RCMP believes the document and envelope will contain evidence that could identify a person who committed a criminal conspiracy against former Prime Minister Jean Chrétien.

The Court of Appeal award turned on an analysis of the fourth "Wigmore criterion", the final criterion for recognition of a case-by-case privilege, which asks whether the injury to the relationship between the parties to the communication that would flow from the disclosure is greater than the benefit gained from the correct disposal of the litigation. The Court held that it was appropriate to simply assess the Post's *Charter* claim based on the Wigmore analysis because it required the same balancing of interests required by section 2(b) of the *Charter.*

The Court held that the judge who reviewed the search warrant erred in finding that balance weighed in favour of finding that the envelope and document were privileged because she wrongly inferred that there was only a speculative possibility that the documents would advance the investigation and wrongly disregarded the law enforcement interest at stake. In its reasoning, the Court held that an investigative journalist cannot insulate a potential wrongdoer from a law enforcement investigation by giving an absolute promise of confidentiality because this would lead to law enforcement's role (and the court's oversight of its role) being usurped.

Notably, the Court rejected the Crown's argument that the rise of citizen journalism was reason not to treat the journalist-source relationship as one which should be "sedulously fostered" under the third Wigmore criterion.

R. v. National Post, 2008 ONCA 139 (CanLII), leave to appeal to Supreme Court of Canada allowed, 2008 CanLII 48605 (S.C.C.).

OCA sets aside contempt order issued against journalist

The Ontario Court of Appeal held that a trial judge erred in finding a journalist in contempt and ordering him to pay over $36,000 in costs for failing to reveal the identity of a confidential source before the source was given a chance to come forward. The thrust of its judgement is about the restraint that judges should exercise in compelling testimony which reveals a source's confidences when a claim of privilege is not available. On this point, the Court's essential finding is well-summarized from a quote it drew from a British Columbia Supreme Court judgement: "where members of the media are called to give evidence, it is incumbent upon courts to balance the necessity of having evidence before the court against the special role of the media as recognized by section 2(b) of the *Charter*."

St. Elizabeth Home Society v. Hamilton (City), 2008 ONCA 182 (CanLII).

2.4 Open courts

Manitoba CA denies access to child and family services records

The Manitoba Court of Appeal held that the media ought not to be allowed to publish information in records protected under child and family services legislation that were tendered in a public inquest into the death of a 14-year-old child. The Court held that the Manitoba *Child and Family Services Act* does not strip a judge holding an inquest of his or her discretion to permit publication of the protected records. The Court also held that section 31(1) of the *Manitoba Fatality Inquiries Act* does not mean that protected records that are filed as exhibits in an open inquest are automatically "public" in the sense that they are open to all use.

Canadian Broadcasting Corp. v. Manitoba (Attorney General) et al, 2008 MBCA 94 (CanLII)

ABQB says media has no right of access to exhibits at trial

The Alberta Court of Queen's Bench denied a mid-trial application made by the CBC for access to an audiotape played in open court. Madam Justice Moen engaged in considerable analysis of the applicable jurisprudence and held as follows:

1. The open courts principle gives the public and the media a right to attend in open court and to report and publish widely what they heard and saw. Any limits on this right must be subject to the *Dagenais/Mentuck* test.

2. The open courts principle does not, however, give the public and the media a right to receive copies of evidence – the *Dagenais/Mentuck* test does not apply.

3. Mid-trial applications in criminal jury trials will generally work an unfairness on the parties and interfere with the trial process; hence, they should only be entertained in "special circumstances."

4. The onus in applications for access to exhibits should be on the media, which should be required to give notice to all persons that may be directly affected by the broadcast of the recording, and to show that "extraordinary circumstances" weigh in favour of access.

5. In considering applications for access to exhibits, the Court should consider the property and privacy interests of third parties.

This decision comes shortly after the Court launched a new Audio Recording Policy, which allows accredited members of the media to record proceedings if they provide a signed undertaking to use the recording for verification purposes only.

R. v. Cairn-Duff, 2008 ABQB 576 (CanLII).

OCA outlines procedure on an application to quash a sealing order

In a recent decision, the Ontario Court of Appeal declined to quash sealing orders issued in respect of search warrant materials, in part because the court record was not suitable for appellate review. The outcome is largely fact-driven, but the Court did explain in general terms how the procedure on an application to quash a sealing order should be managed to ensure a full and fair hearing and a court record that supports appellate review.

The Court said this process, and in particular, a requirement on the Crown to produce an index with its grounds, "reflects the presumption that once a search warrant has been executed, the warrant and the information upon which it is based must be available to the public unless it is demonstrated that the ends of justice would be subverted by the disclosure of the information."

R. v. Canadian Broadcasting Corporation, 2008 ONCA 397 (CanLII).

2.5 Procedure

US Supreme Court revives FOI request precluded as *res judicata*

The Supreme Court of the United States unanimously held that an FOI claim filed by an acquaintance of a person who was unsuccessful in previously filing the same claim should not be barred.

The first requester asked the Federal Aviation Administration for technical documents related to a model of vintage airplane he owned and was seeking to restore. The FAA denied the request based on the FOIA's third-party trade secrets exemption. The first requester eventually filed a lawsuit that was heard by the Tenth Circuit Court of Appeals. The Tenth Circuit upheld the lower court's finding that the third-

party restored its right to protect the records (despite an earlier waiver) by objecting after the FOI request had been filed. It did, however, significantly qualify its decision by noting that the first requester had not challenged whether it was possible to "restore" trade-secret status once waived and, if so, whether the timing of the third-party's objection enabled such restoration.

The second requester then filed the same request and eventually filed suit, but was barred in the first instance and on appeal based on a finding that he was "virtually represented" by the first requester. The virtual representation doctrine expands the traditional exceptions (in American federal law) to the rule that one must be a party in order to be barred by a prior judgement. This had not previously been considered by the Supreme Court.

The Supreme Court rejected the virtual representation doctrine but remanded the matter for a determination as to whether the second requester filed suit as the first requester's agent. This may have seemed a possibility to the Court because the first requester had a greater interest in the records (he owned the aircraft; the second requester did not) and had asked the second requester to help him restore the aircraft and because both requesters used the same legal counsel. There was no determination of the question of agency on the record, however, so the Court let the agency issue live with a note that "courts should be cautious about finding preclusion on this basis."

Taylor v. Sturgell, 553 U.S. _____2008. [128 S. Ct. 2161 (2008)]

3. PRIVACY

3.1 Access to personal information

Fed Ct. minimizes the consequences of the dreaded "all e-mails" access request

The Federal Court held that PIPEDA does not give employees of federally-regulated employers a right of access to e-mails concerning them that are sent between co-workers in their personal capacity.

The applicant, a former employee, filed a request for all e-mails "concerning" him. At the Federal Court, the primary issue in dispute was whether "personal" (i.e. non-work related) e-mails about the applicant were subject to the right of access in PIPEDA.

Mr. Justice Zinn held that the personal e-mails sought were not collected in connection with the operation of a federal work or undertaking and were also excluded as e-mails collected, used and disclosed for personal or domestic purposes. Zinn J. appears to have been influenced by the rights of the co-workers who sent and received the impugned e-mails and their interest in what has otherwise been called "mixed personal information." He suggests that these individuals would be deprived of the personal and domestic purposes exclusion if PIPEDA was held to apply to their e-mails, hence framing the exclusion as a form of right. Notably, Zinn J. did not expressly consider whether the employer reserved a right to monitor "personal" e-mails under its computer use policy.

There are other very significant aspects of the judgement that relate to the nature of an organization's duty to clarify the scope of a request and its duty to conduct a reasonable search for responsive information.

Johnson v. Bell Canada, 2008 FC 1086 (CanLII).

FCA raises the question of mixed personal information under PIPEDA

The Federal Court of Appeal ordered a matter back to the Privacy Commissioner so that she could determine what parts of notes taken by a doctor in the course of providing an independent medical examination were the examination subject's personal information.

The dispute arose under PIPEDA, and was about access to information in notes taken by a doctor in the course of conducting an IME. In response to the doctor's argument that the information in his working notes was not the subject's personal information, the Court held that the information could be both the personal information of the patient and the doctor.

The Court suggested a balancing of the two individual's rights was appropriate without mentioning section 9(1) of PIPEDA, which reads, "Despite clause 4.9 of Schedule 1, an organization shall not give an individual access to personal information if doing so would likely reveal personal information about a third party."

Other parts of the award are potentially significant. For example, it contains the most detailed discussion by a court about the meaning of "in the course of commercial activity", the key trigger language for the application of the *Act*.

Wyndowe v. Rousseau, 2008 FCA 89 (CanLII).

3.2 Application, exclusions and jurisdiction

NB court turfs broad challenge to PIPEDA interference with litigation

The New Brunswick Court of Queen's Bench held that the Federal Court was the appropriate forum for a very broad challenge to the Privacy Commissioner's jurisdiction to investigate a PIPEDA complaint.

The underlying PIPEDA complaint apparently alleged that the applicant, an insurance company, had conducted unlawful surveillance of a plaintiff in a motor vehicle claim. The insurance company asked the New Brunswick court for an order declaring that PIPEDA does not apply to "document disclosure, privilege or other privacy interests" of the plaintiff in relation to his lawsuit or its defence of the lawsuit. Alternatively, the insurance company asked for an order declaring that PIPEDA is *ultra vires* the legislative authority of Parliament.

State Farm v. Privacy Commissioner and AG of Can., 2008 NBQB 33 (CanLII).

Appeal foreseeable in broad challenge to PIPEDA's interference with litigation

The New Brunswick Court of Appeal held that State Farm Mutual Automobile Insurance Company did not need leave to appeal a January 30th order by the New Brunswick Court of Queen's Bench (see above). The Queen's Bench had stayed State Farm's application, which challenged the Privacy Commissioner's jurisdiction to investigate its surveillance of a plaintiff in a motor vehicle claim.

State Farm Mutual Automobile Insurance Company v. Canada (Privacy Commissioner), 2008 CanLII 6112 (NB C.A.)

3.3 Biometrics

Encrypted form in which information stored weighs in favour of biometric security system

The Alberta OIPC upheld the use of biometrics after conducting a contextual analysis that de-emphasized the invasiveness of standard biometric timekeeping systems.

The investigation report was issued in response to a complaint brought under Alberta's public sector privacy legislation. The complainant objected to a biometric timekeeping system which relied on a numeric template produced from hand measurements. The rationale for the system – time fraud protection and administrative efficiency – was not particularly unique, though the institution did provide evidence that it had dismissed one employee for "buddy punching" in the past. The adjudicator

nonetheless held that the institution met the FIPPA necessity requirement, in part because the information was stored in a form in which it was not likely to be misused.

Investigation Report F2008-IR-001 (Alberta OIPC).

Use of biometrics okay, but notice especially important for employers

As in *Investigation Report F2008-IR-001*, the Alberta OIPC upheld the use of biometrics under the Alberta PIPA.

The complaint involved the use of a numeric template produced from employee thumbprints. The employer's rationale for use was fairly general, but the OIPC nonetheless held that the employer's use was permissible in light of the secure form in which thumbprints were stored.

Although endorsing the employer's use of biometrics for timekeeping purposes, the OIPC held that the employer did not meet the reasonable notification requirement embedded in the Alberta PIPA employee personal information provisions because it did not explain to employees that it would only collect a numerical representation of thumbprints and not thumbprints themselves. It stressed that identifying personal information to be collected with specificity is important, particularly when information is to be collected through new and misunderstood technologies and particularly for employers, who are relieved from the ordinary consent requirement under PIPA.

Investigation Report P2008-IR005 (Alberta OIPC).

3.4 Collective agreement administration

Arbitrator says what PI is necessary to assess a job competition

British Columbia arbitrator James Dorsey recently considered what personal information needs to be disclosed to fulfil the purpose of a collective agreement clause that gives a union access to information to assess the propriety of a job competition.

This award follows a 2005 judgement by the British Columbia Court of Appeal in which it held that the purpose for disclosing bargaining unit members' personal information to the union as contemplated by the clause was consistent with the purpose for which it was collected and therefore permitted under the British Columbia *Freedom of Information and Protection of Privacy Act*. The Court of Appeal also held that only what is necessary to the purpose should be disclosed to the union, and perhaps unfortunately, said that "personal identifiers" should be redacted from the disclosure.

Following the Court of Appeal's judgement, the employer applied a very literal and narrow view of the union's right to "applications" and a very literal and broad view of the Court's comment on redacting personal identifiers. Arbitrator Dorsey held that the employer's position was improper given the purpose of the access to information clause.

He held that the union's right to "applications" gave it an entitlement to resumes, interview questions and responses, score sheets, and essentially all other records collected and used in the application process except reference information. He also held that the Court of Appeal's suggestion to redact personal identifiers did not allow the employer to redact all information that would tend to identify individuals.

Ontario employers have generally been unsuccessful in resisting disclosures required by labour law on the basis of employee privacy rights.

Canadian Office and Professional Employees Union and Coast Mountain Bus Co. (Re) (7 September 2007, Dorsey).

3.5 Drug testing

Arbitration board upholds challenge to post-incident testing provision

An arbitration board chaired by David Elliot held that a post-incident drug and alcohol testing provision was unreasonable because it required for an automatic test of any employee "involved" unless there were reasonable grounds to find that alcohol or drugs did not cause the incident.

The board felt that this reverse onus was improper. It did not, however, find that an employer must have reasonable grounds in order to test, and endorsed an approach whereby a test could also be ordered where there is "no credible explanation for the accident, near miss or other potentially dangerous incident." This finding may have been influenced by evidence that supervisors were applying the reverse onus improperly by asking, "Can the use of drugs or alcohol be ruled out?"

Communications, Energy and Paperworkers Union, Local 707 and Suncor Energy Inc. *(Re)* (3 September 2008, Elliot).

Drug testing JR application dismissed

A panel of the Ontario Superior Court of Justice (Divisional Court) dismissed an application for judicial review of a drug testing arbitration decision in which Imperial Oil was held to have violated a collective agreement by implementing random and unannounced drug testing for cannabis impairment.

The policy challenged at arbitration was the same policy that had been upheld by the Ontario Court of Appeal in 2000 in *Entrop*. Based on *Entrop*, and the Court of Appeal's specific finding that random alcohol testing in safety-sensitive positions did not violate the *Human Rights Code*, Imperial Oil re-instituted random drug testing for safety-sensitive positions by using a new testing technology that could determine current impairment by way of a saliva test.

In December 2006, the majority of an arbitration board chaired by Arbitrator Michel Picher upheld a grievance which challenged the re-implemented random drug testing policy. The board held that the Union was not barred from challenging random drug testing despite being barred from challenging random alcohol testing (based on an equitable doctrine that bars claims after inordinate delay) because random alcohol testing by breathalyzer and random drug testing by saliva test were qualitatively different tests. A key factor, as Mr. Picher wrote, was that the saliva testing process in use by Imperial Oil did not provide an immediate, on-site reading of impairment. The board also found that sampling by buccal swab was more invasive than sampling by breathalyzer and distinguished *Entrop* by finding that the Court of Appeal's decision was made in consideration of rights granted under the *Human Rights Code* rather than a collective agreement.

The Divisional Court rejected Imperial Oil's argument that the board erred by amending the collective agreement and by relying on unsupported findings of fact. It also held that the board did not err in assessing Imperial Oil's policy against the somewhat unique anti-discrimination clause in its collective agreement, nor did it err in assessing Imperial Oil's exercise of management rights.

Imperial Oil Ltd. v. Communications Energy and Paperworkers Union of Canada, *Local 900*, 2008 CanLII 6874 (ON S.C.D.C.), leave to appeal to Ont. C.A. granted (28 July 2008).

Drug and alcohol testing condition does not give CHRT grounds to assess merits of discrimination complaint

This Canadian Human Rights Tribunal decision illustrates the limits to advancing drug testing claims under human rights legislation.

The Tribunal dismissed a discrimination and harassment complaint brought by an employee who was terminated and then reinstated on the condition he abstain from using drugs and alcohol and engage in

unannounced testing. The employee did not claim that he suffered from an addiction; rather, he claimed that the reinstatement contract created the perception that he suffered from alcoholism and was disabled. The Tribunal disagreed, finding that the contract was imposed because of objective behaviour and not perceived disability.

Witwicky v. Canadian National Railway, 2007 CHRT 25 (CanLII).

Alberta Court upholds site access drug testing decision

The Alberta Court of Queen's Bench dismissed a judicial review application which sought to quash an arbitrator's endorsement of a site-access testing policy established by an Alberta construction site owner.

Petro Canada implemented a site access drug and alcohol testing rule at an Oil Sands construction site in 2004. It required Bantrel (the employer) to apply the policy to its employees who were already on site. The drug test to be conducted was not a "current impairment test", but it gave employees two months' notice so they could refrain from drug use and pass a test. Most or all of the employer's available work was on the Petro Canada site, so employees who refused or failed the test were laid off with or without accommodation as appropriate.

In March 2007, an arbitration board chaired by Arbitrator Phyllis Smith held that the employer had implemented a reasonable work rule. She reasoned that an employer that imposes a work rule based on a third-party requirement must still demonstrate that it is reasonable to enforce the third-party requirement. Despite this, she held that testing was reasonable in all the circumstances. Even though the employer was not testing for current impairment, she held that site access testing implemented on two months' notice was a reasonable risk management tactic.

Risk management was justifiable, she held, based on the nature of the work (undoubtedly safety sensitive) and based on general evidence of work-related drug use in the Alberta construction industry and general evidence supporting efficacy of testing over supervisory monitoring. Ms. Smith expressly held that the employer need not prove that it has a drug and alcohol problem to justify risk management testing (as opposed to current impairment testing).

Ms. Smith also held the employer had not violated the Alberta *Human Rights, Citizenship* and *Multiculturalism Act*. Although her analysis is not particularly probing, she appears to have held that site access testing is a BFOR based on the same general evidence supporting its reasonableness. She did note that employees were accommodated, with treatment where appropriate.

The Alberta Court of Queen's Bench upheld both of these parts of Ms. Smith's award as reasonable.

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488 v. Bantrel Constructors Co., 2007 ABQB 721 (CanLII).

3.6 Employee medical information management

Divisional Court says reasons for ordering medical exam required

The Divisional Court quashed a medical assessment order issued by the Ontario College of Nurses because the College did not provide the affected nurse with reasons for its order.

In accordance with the *Health Professions Procedural Code*, the College's Executive Committee appointed a board of inquiry to assess the nurse's capacity. The board of inquiry gave notice to the nurse of its intention to order her to submit to a medical examination (on the threat of suspension) because it had reasonable and probable grounds to believe she was incapacitated. The power to make this order is specified in the Code, as is the requirement to give notice.

The nurse made submissions through counsel, and included two medical opinions and statements from her colleagues that supported her capacity. Regardless, the board ordered an assessment and did not provide reasons for its order. The Court award also says the College "refused" to provide the nurse with a record of its proceedings or file the record with the Court, though it did file an Affidavit in its response which attached all the material before it at the time it made its decision.

The Court quashed the order because the College breached the nurse's right to procedural fairness. It considered that the privacy interest at stake weighed in favour of a high standard.

Although the substantive basis for ordering a medical assessment is often litigated, judicial comment on the process of ordering an assessment is rare. The outcome in this decision is certainly driven by its specific factual context, but it nonetheless has some broader significance.

Cotton v. College of Nurses of Ontario, 2008 CanLII 26674 (ON S.C.D.C.).

Leak of information side-tracks STD adjudication claim

Arbitrator Devlin upheld a grievance which claimed an improper denial of short-term disability benefits and awarded $5,000 for the manner in which the employer (together with its third-party adjudicator) denied the benefit.

The main problem with the decision to deny benefits was that it relied on a finding that the grievor was not eligible because her condition (an episode of situational depression) was caused by her husband's terminal illness. The grievor gave this information to the employer in an informal telephone conversation at the start of her absence, and the employer forwarded it to the benefits adjudicator in an "employee profile" form. Ms. Devlin found the underlying reason for the grievor's absence was not a relevant factor in the claim, which was otherwise justified. She held that there was evidence that the improper denial caused the grievor additional stress and awarded $5,000 in damages.

Hamilton Health Sciences and Ontario Nurses Association (Re), [2008] O.L.A.A. No. 103 (Devlin) (QL).

Surdykowski speaks on medical forms for STD admin

Ontario Arbitrator Surdykowski made some broad statements in upholding a grievance which challenged a standard medical information form administered for the purpose of adjudicating short term disability benefits. He held that employee privacy rights cannot be outweighed by expediency or efficiency, so even though the collection of further and more detailed medical information may be justified as an absence becomes prolonged and attendance management and accommodation processes become engaged, such information should not be routinely collected at the beginning of an absence on a form that is administered strictly for the purpose of determining benefit eligibility. And while recognizing that broader requests for medical information up front may actually reduce conflict given that health professionals are not "always entirely objective," Mr. Surdykowski held that employee privacy rights weigh against a departure from a strict necessity requirement.

Hamilton Health Sciences and Ontario Nurses Association (Re) (2008), 169 L.A.C. (4th) 293 (Surdykowski).

Alberta OIPC issues helpful medical information management decision

The Alberta Office of the Information and Privacy Commissioner issued an investigation report that analyzed various information flows that employers typically use in managing employee medical issues.

The first information flow involved information transferred from a third-party Employee Assistance Program provider (EAP) to the employer's occupational health services (OHS) department. The OIPC held the EAP improperly disclosed information to the OHS about whether the employee was complying

with his treatment program. The disclosure itself was not objectionable because the employee was on leave and in receipt of short term disability benefits on the condition he obtain appropriate medical care. However, the employer and the EAP drew a distinction between voluntary entrance into the EAP and a formal referral into the EAP; voluntary care was treated as absolutely confidential, while care pursuant to a referral involved a limited disclosure of information back to the OHS. The EAP argued that it had obtained oral consent for this disclosure, but the OIPC held that the employee was rightly confused about the EAP's role, partly because he had received EAP services voluntarily in the past. Hence, The OIPC held that the EAP violated its obligation to give reasonable notice of its purposes as required by the Alberta PIPA.

The second information flow involved information transferred from the employer's OHS to a member of the employer's human resources department (and also to the local union president). The OIPC held that it was okay for the employer's OHS to know about the nature of the employee's condition so it could ensure it was being properly managed, but all human resources needed to know was whether the employee had successfully completed treatment and would comply with return to work conditions.

The third information flow involved a communication sent by human resources, which indicated that the employee was not complying with the employer's policies, that the OHS had given the employee notice of his requirements and the reason why the employee was not in compliance. The information was contained in a letter copied to the local union president, the employee's immediate supervisor, the employer's director of disability management, the employer's director of operations, the nurse who ran the employer's OHS, the employer's site production manager and the manager of the employee's department.

The OIPC held that the employee's direct supervisor and the individuals responsible for administering the employer's short term disability program had a need to know information about the ongoing employment-related dispute, but that the other members of management copied on the letter only needed to know that the employee was not yet eligible to return to work and should not be on-site.

Investigation Report P2008-IR-003 (10 April 2008, Alberta OIPC).

3.7 Health privacy

Div. Ct. considers pre-hearing production of psychiatric records under *Mental Health Act*

The Divisional Court considered conflicting jurisprudence and held that section 35(9) of the Ontario *Mental Health Act* does not require a court application to be heard before psychiatric facility medical records can be produced to another party pursuant to a pre-hearing production order. It held that section 35(9) only establishes a precondition to the admission of psychiatric records as evidence and to the hearing of oral testimony about information obtained in the course of assessing or treating a patient in a psychiatric facility.

Toronto Police Association v. Toronto Police Services Board, 2008 CanLII 56714 (ON S.C.D.C.).

3.8 Outsourcing

Federal OPC dismisses complaint about cross-border personal information transfer

The federal OPC has issued another report dismissing a PIPEDA cross-border outsourcing complaint. The report echoes the position the OPC established in *Case Summary 313* and *Case Summary 333* – that is, that the transfer of personal information into the United States does not necessarily breach the safeguarding requirement in PIPEDA because it exposes the information to the dictates of United States law, but that notification is required given the principle of openness.

Outsourcing of canada.com e-mail services to U.S.-based firm raises questions for subscribers, 2008 CanLII 58164 (P.C.C.).

3.9 Personal information (meaning of)

Fed Ct. considers "identifiability" question

This is a case where the Federal Court held that the disclosure of the data about the province from which adverse drug reactions were reported to Health Canada was personal information.

The proceeding followed an access request made by the CBC. Health Canada had given the CBC some information from its adverse drug reactions database but denied access to the "province" field. The CBC brought a court application, and the OPC intervened in support of Health Canada's decision.

In disposing of the matter, the Federal Court accepted a "serious possibility" test proposed by the OPC:

> Information will be about an identifiable individual where there is a serious possibility that an individual could be identified through the use of that information, alone or in combination with other available information.

The Court accepted that disclosure of the province field would meet this test based on the other information disclosed by Health Canada (which included a subject's height, weight, age and reaction description among other data) and other publicly available information.

Gordon v. Canada (Health), 2008 FC 258 (CanLII).

Alberta OIPC prescriber detailing order quashed

The Alberta Court of Queen's Bench quashed an order by the Alberta OIPC that prohibited disclosure of prescriber data to IMS Health.

The Court made two substantive findings. First, it held that the OIPC did not err in limiting the scope of its investigation to disclosures to IMS only, even though a determination on the issue it was investigating could affect other related programs and other parties. Second, and more significantly, it held that the OIPC erred in finding that the *Act* required consent to disclose data that could be used to profile or detail a prescriber – namely, information about how a prescriber chose to diagnose and treat a patient of a particular age, with a particular condition, and specifically what medication was used, in what dosage, and for how long.

The Court declined to make the order on the basis of IMS's broader arguments about the nature of "work product information" and health information custodians' right of expression, so its judgement is technical and confined in its significance.

IMS Health Canada, Limited v. Alberta (Information and Privacy Commissioner), 2008 ABQB 213 (CanLII).

LSAC allowed to substitute submission of photos for fingerprints

This is a federal Privacy Commissioner report on the Law School Admission Council's practice of collecting fingerprints from LSAT test takers. Her office recommended that LSAC cease the practice, but allowed it to substitute a practice of collecting test takers' photographs.

There are some notable findings in the report. Namely:

1. the OPC rejected LSAC's argument that it was engaged in educational rather than commercial activity, finding that its core activities provided a service to its member law schools;

2. the OPC held that fingerprints are less sensitive than voice prints and more sensitive than one's photographic image; and

3. the OPC made another comment de-emphasizing the significance of cross-border transfers of personal information.

The report also highlights the difficulty of sustaining a collection practice based on deterrence alone. The case for deterrence is often logically compelling, but proving that collecting information effectively deters misconduct is hard. LSAC had not once used a fingerprint to identify whether a fraudulent test had been submitted since it started collecting fingerprints in the mid-1970s, so it was difficult for the LSAC to justify its practice on any ground other than deterrence. It also claimed that it simply wanted to assure its members that it was doing all it could to ensure the security of the test. The OPC seemed to accept this purpose as legitimate, but not compelling enough to justify the collection of fingerprints. The LSAC proposed collecting photographs as a step-down solution mid-way through the investigation, and the OPC held that this alternative would achieve the appropriate balance because images are "marginally" less sensitive.

Law School Admission Council Investigation, 2008 CanLII 28249 (P.C.C.).

3.10 Safeguards

BC OIPC says 41 days too long for breach notification

The British Columbia OIPC issued an investigation report in which it held that the Ministry of Health breached the security measures provision of the British Columbia *Freedom of Information and Protection of Privacy Act* in circumstances involving the loss of an unencrypted magnetic tape that contained the personal information of British Columbia residents who received health care in New Brunswick.

The OPIC held that the Ministry breached the *Act* in light of the following actions:

1. sending data on unencrypted magnetic tapes (even though the data on the tapes would not be highly accessible given the near-obsolescence of the medium)

2. not requiring the sender to give notification of when the package would be received and not requiring the sender to use a courier with a tracking service (which contributed to the delay in discovering that the package had been lost)

3. not instructing the sender to refrain from sending another unencrypted tape while the incident was still under investigation

4. taking 41 days to notify individuals of the breach.

The OIPC also held that the Ministry did not follow best practice by only notifying the OIPC shortly before it gave notice to the affected individuals. It expressed a desire to help public bodies develop effective strategies to mitigate the risk of harm flowing from data breaches.

Investigation Report F08-02, 2008 CanLII 21699 (BC I.P.C.).

3.11 Search and seizure

NB judge grants motion to exclude evidence on seized hard drive

A New Brunswick Provincial Court judge excluded evidence on a hard drive obtained by the Canada Revenue Agency pursuant to a search warrant.

The dispute related to files that were stored on a hard drive but were also beyond the temporal scope of the search warrant and over which the accused consistently asserted an expectation of privacy. The motions judge found that the CRA did not act improperly by seizing the hard drive, but breached section 8 of the *Charter* because it did not immediately file an amended return before the issuing judge and undertake not to use the out-of-scope records. He found a second breach because the CRA, instead, used the out-of-scope records to file a second search warrant in another unrelated investigation.

The section 24(2) analysis turned on the seriousness of the breach, which the judge characterized as a "clear pattern of a continuous obtrusive breach."

R. v. Daley, 2008 NBPC 29 (CanLII).

Crown violates section 8 of the *Charter* by obtaining employment records via subpoena

The Ontario Superior Court of Justice held that the Crown conducted an unlawful search and seizure by obtaining an accused person's employment records via subpoena rather than a search warrant.

While noting that subpoenas are issued within a judicial process, Trotter J. accepted the defence argument that proceeding by way of subpoena to seek records belonging to an accused person deprives the accused person of the procedural safeguards embedded in the *Criminal Code* search warrant provisions. He also engaged in a significant discussion of an employee's interest in his or her employment records, records which Trotter J. notes are deemed to be "private records" for certain purposes under the *Criminal Code*. While finding that an accused person's interest in his or her employment records is of such a character to demand the Crown retrieve them via a search warrant, he also notes that employment files are kept by employers subject to a broad right of use (and therefore, in the circumstances, the Crown's breach was less serious).

R. v. Incognito-Juachon, 2008 CanLII 36164 (ON S.C.).

Identifying web user through ISP does not invalidate subsequent police search

The Ontario Court of Justice dismissed a *Charter* application that was based, in part, on a challenge to an RCMP letter request to Bell Canada.

Bell answered the request and identified the accused as being associated with several internet protocol addresses at specific points in time. The local police later obtained a search warrant for the accused's home, seized computers containing child pornography and laid charges.

Mr. Justice Lalande distinguished *R. v. Kwok* – in which the Court found a *Charter* breach and excluded evidence in similar circumstances earlier this year – by noting that the judge hearing *Kwok* did not receive any evidence about the ISP's terms of service. Though noting that the Bell Sympatico terms of service that governed the accused referred to disclosures "required by statute or a court order," Mr. Justice Lalande nonetheless relied heavily on them in finding that the accused's reasonable expectation of privacy was low. He was also strongly driven by his characterization of the information revealed by Bell as being non-sensitive in nature.

R. v. Ward, 2008 ONCJ 355 (CanLII).

***Charter* challenge to investigation allowed by PIPEDA rejected**

The Ontario Superior Court of Justice dismissed an application that claimed RBC violated section 8 of the *Canadian Charter of Rights and Freedoms* in investigating a case of mortgage fraud.

RBC had collected information from TD Bank which allowed it to pursue an alleged fraud. Both banks are members of the Bank Crime Investigation Office of the Canadian Bankers Association, a designated

"investigative body" under PIPEDA. They relied on sections 7(3)(d)(i) and (h.2) of PIPEDA in sharing the information. The Applicants took issue with these provisions and RBC's actions taken in reliance on these provisions.

The Court held the grant of discretion to make disclosures under sections 7(3)(d)(i) and (h.2) did not necessarily threaten *Charter* rights, so was not unlawful itself. It also held that RBC was not acting as a government agent in its investigation and therefore was not bound directly by the *Charter*.

Royal Bank of Canada v. Welton, 2008 CanLII 6648 (ON S.C.).

Propriety of border crossing laptop search affirmed on appeal

The United States Ninth Circuit Court of Appeals overturned a much-discussed order to suppress evidence obtained in a border crossing laptop search.

The case involves a traveller named Michael Arnold, who was routinely selected for secondary questioning after returning from a three week vacation in the Philippines. A border agent turned on Arnold's computer and discovered photos of two nude women in folders on his desktop. She called in other officials, who then questioned Arnold and examined his computer some more, and ultimately seized the computer after finding what they believed was child pornography. Based on these facts, in 2006 a district court judge granted Arnold's motion to suppress on a finding that there was no reasonable suspicion for the search.

The appeal from the lower court's order centered on whether the Fourth Amendment requires the United States government to meet a "reasonable suspicion" standard in conducting border crossing laptop searches because laptops are different than other closed containers. The Court's description of Arnold's argument nicely highlights its significance:

> Arnold argues that "laptop computers are fundamentally different from traditional closed containers," and analogizes them to "homes" and the "human mind." Arnold's analogy of a laptop to a home is based on his conclusion that a laptop's capacity allows for the storage of personal documents in an amount equivalent to that stored in one's home. He argues that a laptop is like the "human mind" because of its ability to record ideas, e-mail, internet chats and web-surfing habits.

The Court rejected the laptop argument as contrary to United States Supreme Court jurisprudence, which it read as weighing against any analysis that would differentiate between the types of property searched at border crossings. In short, it held that property is property.

United States v. Arnold, 08 C.D.O.S. 4533.

Tower dump" warrant breaches Charter, evidence admissible

Quigley J. of the Ontario Superior Court of Justice held that the police violated section 8 of the Charter by obtaining a warrant for a "dump" of records of cellphone traffic from two cellphone towers located near the scene of a robbery. He held that the investigating officer's suspicion that the culprits likely used cellphones to communicate with each other was not reasonable grounds for the warrant and violated section 8 of the Charter in light of the affected cellphone subscribers' expectation of privacy. Quigley J. nonetheless admitted the evidence subsequently obtained on an application of the Collins test.

R. v. Mamhood, 2008 CanLII 51744 (ON S.C.).

3.12 Tort claims

Court finds constructive dismissal for workplace surveillance

The Ontario Superior Court of Justice held that an employee was constructively dismissed because her employer installed a video camera in her office on questionable grounds and recorded images surreptitiously for about nine months before being discovered.

Prudent employers and their counsel have long been cautious about the enforcement of employee privacy rights through constructive dismissal claims, claims in which an employee alleges a fundamental breach of an express or implied term of an employment contract based on a privacy violation. This case, however, is the first we are aware of in which such a claim has been successfully made.

While significant in illustrating the risk to employers who take a casual approach to employee privacy, the outcome is not surprising given the facts. Most significantly, the employer installed the camera to address an undisputed theft problem, but did not suspect the plaintiff. The only reason it had for installing the camera in her office was that it thought the suspects would go to the plaintiff's office to "review the loot," a suggestion the Court said was "preposterous." The plaintiff also appears to have discovered the camera when she visited a supervisor's office and saw a live feed of her office, raising a serious question about use and security of the images.

The Court did not mention whether the employer had a policy incorporated into the employment contract that gave it license to conduct surreptitious monitoring of its workplace or anything about the plaintiff's expectation of privacy, but even a well-drafted and properly incorporated policy might not have given rise to an effective defence on these facts.

Colwell v. Cornerstone Properties Inc., 2008 CanLII 66139 (ON S.C.).

OCA says private investigation allows negligent investigation claim to proceed against employer's investigator

The Ontario Court of Appeal held that a private investigation firm retained by an employer owed a duty of care to an employee under investigation.

The employer suspected theft and drug dealing at its plant. It hired a private investigation firm, to investigate. The firm identified several employees involved in the theft and drug dealing. The employer kept the police apprised of the investigation but the police were not involved. The plaintiff, a 62-year-old long-term employee, was accused of theft, terminated and then arrested, all because he was misidentified. He and his family sued the employer, its parent company, the private investigation firm, the police force and several individuals, on grounds of negligent investigation, malicious prosecution, false arrest, intentional infliction of mental distress, vicarious liability and intentional interference with economic relations.

The Court of Appeal dismissed the negligent investigation claim as brought against the employer. It held that an employer does not owe a duty to employees other than the duty of "good faith" in the manner of termination that was recognized by the Supreme Court of Canada in *Wallace*. It did however, allow the claim to proceed against the private investigator. Though the investigator was retained by the employer to fulfil the employer's own purpose, it said, "the fact that private investigation firms perform public policing functions but with limited oversight or clear lines of redress to those injured by their activities strongly favour extending tort liability."

The Court of Appeal also allowed the plaintiff's negligent infliction of mental distress claims to proceed against the employer, its head of human resources and the private investigation firm.

Correia v. Canac Kitchens, 2008 ONCA 506 (CanLII).

BCCA lets negligent investigation claim proceed against individual employee

The British Columbia Court of Appeal held that it was not plain and obvious that an individual who directed an investigation into an allegation of employment-related misconduct did not owe a duty of care to the subject of the investigation.

The facts of the case are not unique. A school board received a complaint that a principal had been physically abusive to a teaching assistant. The superintendent retained an external investigator, who investigated and prepared a report that the superintendent relied upon in issuing a letter of discipline. Although the principal's legal counsel objected that the principal had not been given an opportunity to review and respond to the final report before discipline was imposed and requested that the board refrain sending a copy of the letter to the British Columbia of College of Teachers before such an opportunity was granted, the superintendent nonetheless sent the letter to the College. The principal sued the school board and the superintendent for various deficiencies in the investigation and for publishing the letter of discipline.

The Court of Appeal held the action should not be struck because it was not plain and obvious that the superintendent owed no duty of care. It distinguished the Ontario Court of Appeal's recent finding in *Correia v. Canac Kitchens* as being a case about whether an employer itself owed a civil duty of care to its employees in conducting internal investigations. Though the Ontario Court of Appeal rejected such a duty in *Correia*, according to the British Columbia Court of Appeal it did not address whether an individual employee could owe an independent duty of care to another employee under investigation. The British Columbia Court of Appeal also held that the policy reasons that weigh against recognizing an employer duty of care did not apply to claims made against an individual employee.

The Court also rejected the superintendent's attempt to strike the action because he was acting strictly in the course of his employment. It held that the well-known principle in *Said v. Butt* (that shields employees from liability for causing a breach of contractual duties owed by their employers) does not extend to the tort of negligence even when the acts alleged to be negligent occurred in the performance by the employee of a contract between the employee's corporate employer and a plaintiff.

Hildebrand v. Fox, 2008 BCCA 434 (CanLII).

Court says privacy claim may proceed

The Ontario Superior Court of Justice held that a deceit and breach of privacy claim regarding a journalist's news article may proceed.

The claim was based on series of articles in which the journalist discussed her experiences in working as an undercover maid. The plaintiffs alleged she identified them as one of her subjects and that this caused them personal injury. The filed their claim in deceit and breach of privacy 22 months after publication, leading the defendants to argue the claim was a dressed up defamation claim that should be barred by the 3 month limitation period in section 6 of the *Libel and Slander Act*.

The Court held the claim was *bona fide*, stating:

> In my view, the plaintiffs' claims based on torts of deceit and invasion of privacy do stand alone and are not subsumed in the law of libel and defamation. In this particular case, the damages claimed in the Statement of Claim are not exclusively damages to reputation. Furthermore, it is not the mere words or the publication that is at issue. The plaintiffs allege Wong's unlawful conduct in gaining entry to their home by deceit resulted in personal harm and damages discrete from, and beyond, harmed reputation or the publication alone. Damages for invasion of privacy and deceit do not necessarily engage damages for

> loss of reputation. See, for example, *Yonge v. Bella* 2006 SCC 3 (CanLII), [2006] 1 S.C.R. 108 at para. 55-56 [sic]. The Supreme Court of Canada clearly rejected the submission that the law of defamation has "cornered the market" on damages for reputational injury.

This sets up a significant trial if the matter does proceed, as the Court further stated:

> *Charter* values will take into account the privacy interests of the plaintiffs, but also the ability of investigative journalists to play their role in a free and democratic society. Where to draw the lines when *Charter* values
>
> butt up against one another ought to be decided after a full hearing, not in Motions Court.

Nitsopoulos v. Wong, 2008 CanLII 45407 (ON S.C.).

Privacy tort damages are distinct from assault damages

The Court ordered the defendant to pay $50,000 in damages for assault and defamation for what the plaintiff claimed was an internet and e-mail based "campaign of terror."

The Court did dismiss the plaintiff's breach of privacy claim, which he based on the defendant's act of publishing his home address (identified with the aide of an aerial map). Significantly, the Court held that the damages for breach of privacy only flow from harm that is not subsumed by the torts of defamation (which addresses harm to reputation) and assault (which the Court said addresses the interest in freedom from fear of being physically interfered with). In this case, the Court held that the damages claimed by the plaintiff were subsumed by the damages claimed for assault.

Warman v. Grosvenor, [2008] O.J. No. 4462 (S.C.J.) (QL).

3.13 Workplace monitoring and employee surveillance

Workplace surveillance system survives arbitral scrutiny

Arbitrator Craven partially upheld a policy grievance which challenged the expansion of an employer's in-plant video surveillance system but nonetheless gave a strong endorsement to the employer's purpose for using video surveillance.

Arbitrator Craven focussed on the use of the cameras rather than their mere presence. Though the system gave the employer the capacity to monitor employees, he was satisfied the employer was only using the system for investigatory purposes. Arbitrator Craven's distinction between using cameras to support an investigation and using cameras to monitor is strong. He suggests that an investigatory purpose is more likely to be upheld as a legitimate exercise of management rights and less likely to be objectionable because of its intrusiveness.

Based on a separate finding that the employer had breached a technological change provision in its collective agreement by not engaging in discussions with the union when it expanded the system, he ordered the employer to meet with the union to engage in discussions.

Cargill Foods, a Division of Cargill Ltd. and United Food and Commercial Workers International Union, Local 633 (Privacy Grievance) (Re), [2008] O.L.A.A. No. 393 (Craven) (QL).

Arbitrator orders call centre to stop recording calls

Arbitrator Veniot ordered the Halifax Regional Municipality to cease and desist from recording calls to its municipal call centre for quality monitoring, coaching and dispute resolution purposes.

The union grieved the implementation of a system whereby the Municipality recorded all calls to its call centre. It claimed a breach of the privacy protection provisions of the Nova Scotia *Municipal Government Act* and the collective agreement. The system was implemented after the Municipality had engaged in a successful program of customer service improvement. The evidence showed its call centre was "functioning well" at the time of the implementation, so the Municipality argued that the call centre attendants had little expectation of privacy, that it was simply supervising work product and that it was being diligent in its attempt to improve service.

Mr. Veniot rejected this argument and ordered the Municipality to cease and desist, and in doing so made the following findings:

1. He found that the characteristics of a person's voice are personal information, but he did not consider the sensitivity of this information in the balance. He did not engage in an explicit analysis of whether the content of call centre employees' communications are their "work product" or their personal information.

2. He interpreted the "necessity" standard for collection in the legislation strictly, distinguishing the text of the Nova Scotia statute from text of PIPEDA (which speaks of "reasonableness") and implying that a necessity standard does not entail a balancing of legitimate interests.

3. Although finding there is no "free-standing" right of privacy for unionized employees, he also stated that employees come into the collective bargaining relationship with a right to "some" privacy, and therefore, "the question is never whether that right is in the agreement - something [he has] never seen - but how and on what basis the employer can argue that employee [sic] have surrendered any portion of that right."

Halifax (Regional Municipality) and Nova Scotia Union of Public and Private Employees, Local 2 (Policy Grievance) (Re), [2008] N.S.L.A.A. No. 13 (Veniot) (QL).

Albertyn articulates standard for use of surreptitious surveillance

Arbitrator Albertyn articulated the standard for use of surreptitious video surveillance in practical terms in this award.

University Health Network v. *Ontario Public Service Employees Union*, 2008 CanLII 4546 (ON L.A.)

Surveillance evidence admitted and termination upheld

Arbitrator Watters upheld a termination based on the admission of evidence obtained by surreptitious video surveillance which revealed the grievor performing activities inconsistent with his medical restrictions. He also rejected the Union's argument that the evidence of malingering should be excluded because the employer had improperly terminated the grievor's modified work arrangement (as he had found). Instead, he ordered compensation as a remedy.

Windsor Casino Ltd. and National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada), Local 444 (Hideq Grievance)(Re), [2008] O.L.A.A. No. 35 (Watters) (QL).

4. PRODUCTION

4.1 *Anton Piller* orders

Plaintiffs can't (yet) capitalize on loss of evidence seized on an *Anton Piller* order

The Ontario Superior Court of Justice dismissed a motion brought by defendants after their documents and things seized under an *Anton Piller* order were lost by the supervising solicitor.

The Court held that the defendants had not established any basis for modifying or setting aside the *Anton Piller* order. It also held that the claims for damages and a dismissal of the action were premature and best resolved after a trial, except that the defendants could bring a summary judgement motion to forward their argument that the loss of evidence prejudiced their defence.

Bell ExpressVu Limited Partnership v. Echostar Satellite LLC, 2008 CanLII 12837 (ON S.C.).

Party too quick to protect individual privacy

This case is about an employee who e-mailed himself a great number Alberta Treasury Branch records before departing from employment from a company who provided IT services to the ATB and the service provider's very aggressive reaction. Any employer's counsel will tell you that this is a very common occurrence.

The service provider applied for an *Anton Piller* order based on its concern about ATB client privacy and the risk of identity theft (though there was no evidence the defendant had any motive to perpetrate identity theft or sell the information). It turned out the records taken did not contain any client information. The Court criticized the service provider for its lack of diligence and vacated the *Anton Piller*.

Design Group Staffing v. Fierlbeck, 2008 ABQB 35 (CanLII).

Court sets aside *Anton Piller* order for material non-disclosure

The Ontario Superior Court of Justice issued an order setting aside an *Anton Piller* order. The judgement is another example that stresses the extreme burden on parties who seek such orders.

The *Anton Piller* order was initially granted in 2006 in support of a departing employee claim that included allegations of fraud and breach of confidence. The Court set it aside because the plaintiff failed to fully and frankly disclose material facts and failed to make reasonable inquiries into material facts. More specifically, it held that the plaintiff:

1. failed to ask customers whose business it claimed was lost or threatened due to the individual defendant's actions whether they had been approached by the individual defendant;

2. failed to disclose that a customer relationship on which it relied was responsible for only a 2% portion of its gross profit; and

3. despite raising the difficulty in seeking production of the individual defendant's MSN Hotmail (which resided in the United States), failed to disclose that it had launched an action in Texas against the individual defendant's new employer concurrently with its Ontario action, that it had sent a preservation letter to the new employer in conjunction with the action and that it had an agreement from Microsoft to retain the individual defendant's MSN Hotmail e-mails indefinitely.

The Court also criticized the execution of the order and, in particular, a search conducted of the purse of the individual defendant's wife.

Factor Gas Liquids Inc. v. Jean, 2008 CanLII 15900 (ON S.C.).

Party pays for executing *Anton Piller* at the wrong address

The Ontario Superior Court of Justice ordered a party to pay $15,000 in damages for trespass plus costs on a full indemnity basis for misidentifying its intended target and seizing documents from the wrong target's residence based on what the Court held to be an inadequate investigation. The order was made on a motion brought by the subject of the *Anton Piller*, who waived any claim to mental distress damages so he could have an immediate remedy.

Multimedia Global Management v. Soroudi, [2008] O.J. No. 4383 (S.C.J.) (QL).

4.2 "Custody or control" and "records" (meaning of)

Ireland Supreme Court on creating records and proportionality

A 2-1 majority of the Supreme Court of Ireland held that it was not improper to order a defendant to create and produce a special report from a database. However, a separately constituted majority held that, in the circumstances, the costs of such an order would be disproportionate to its benefit until and unless the plaintiff proved the defendant was liable.

The defendant ultimately prevailed at the Supreme Court based on its proportionality argument. Fennelly J. and Kearns J.'s reasoning arguably turned on a factual admission by the plaintiff, which they held made production unnecessary to proof of liability and disproportionate in light of the cost of production (claimed to require the purchase of hardware costing approximately €150,000 and significant other cost outlays to be made over a six month period). Both recognized the potential necessity of production to proof of damages, and held that the plaintiff may file a fresh application for discovery should it first prove liability.

Geoghegan J., dissenting on the proportionality issue, took the opposite view on the burden of proof, making comments that favoured a strict burden of proving disproportionate costs once evidence is shown to be relevant and necessary. He noted that the defendant had raised cost as a barrier to production well into the dispute and then had argued cost in its submissions without adducing supportive evidence.

While the bifurcation of production in response to cost is novel and the dispute on burden of proof significant, the Court's treatment of the "creating records" issue was dealt with on a more broadly-reasoned basis. Fennelly J. endorsed Geoghegan J.'s reasoning, and Kearns J. did not make comment. Geoghegan J. reasoned that the form in which data is stored is not relevant to the form in which its produced.

Dome Telecom v. Eircom, [2007] IESC 59.

FC orders party to generate and produce an accounting record

The Federal Court rejected a party's argument that it should not be compelled to create a record that does not exist and ordered it to generate and produce monthly financial statements from its accounting software program. Though the party did not retain copies of the specific reports requested, the Court held it was possible to generate them with minimal burden.

Shields Fuels Inc. v. More Marine Ltd., 2008 FC 947 (CanLII).

4.3 Deemed/implied undertaking rule

No prejudice where information simply made to "lie about in the great wide world"

The Alberta Court of Appeal quashed a procedural appeal brought by a non-party to a longstanding commercial litigation dispute and, in doing so, made some comments on the use of information gathered in the discovery process.

The non-party appealed from an order which granted the plaintiffs partial relief from the implied undertaking rule and a confidentiality order. The non-party claimed the order caused it prejudice in a second related action, presumably in which it was a defendant. The Court rejected the prejudice argument and noted that the order appealed from gave the non-party an express right to raise the matter of fairness in the second action.

Dreco Energy Services Ltd. v. Wenzel Downhole Tools Ltd., 2008 ABCA 36 (CanLII).

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

The Supreme Court of Canada unanimously held that a litigant's undertaking of confidentiality prohibits a party from making a *bona fide* report of criminal conduct to law enforcement officials without seeking court approval.

The underlying action was a negligence claim against a day care and day care worker that was filed after a child suffered a seizure while under care. The police investigation was ongoing, but the police had not yet laid charges by the time the day care worker's examination for discovery was scheduled. The day care worker filed a motion to request an express restriction on disclosure of her transcript, and the Attorney-General brought a competing motion seeking to vary the implied undertaking rule to allow disclosure of the discovery transcript to the police.

The chambers judge held that both motions were premature but declared that the A-G and the police were under an obligation not to cause the parties to violate their undertakings without the day care worker's consent or leave of the court.

The Court of Appeal allowed an appeal of this order. It acknowledged an exception to the undertaking rule when disclosure is necessary to prevent serious and imminent harm and then went further to permit the disclosure of suspected crimes to law enforcement officials without court approval in non-exigent circumstances.

Binnie J., writing for the Court, favoured the chambers judge's approach. He held that giving litigants a discretion to make *bona fide* reports to law enforcement was a recipe for conflict. More generally, Binnie J. made a number of statements that favour a high standard for relief from the implied undertaking rule, a stance he said is justified because examinees are subject to compelled testimony. His award also includes a nice general discussion of the rule, its basis and its exceptions.

In Ontario a litigant's privacy interest in discovery transcripts and other un-filed pre-trial productions is protected by Rule 30.1.01, but the analysis is the same.

Juman v. Doucette, 2008 SCC 8 (CanLII).

Federal Court says relief from implied undertaking unnecessary and unfair

The Federal Court denied a motion for relief from the implied undertaking rule to allow documents produced in one action to be used in another related action. The Court held that the defendant (and

plaintiff by counterclaim) did not meet the strict standard of "necessity" established by the Supreme Court of Canada in *Lac d'Amiante du Québec Ltée* and recently endorsed in *Juman v. Doucette*.

Sanofi-Aventis Canada Inc. v. Apotex Inc., 2008 FC 320 (CanLII).

4.4 E-Discovery

Self-responsibility stressed in e-discovery order

Master MacLeod of the Ontario Superior Court of Justice issued an order which allowed the parties to a complex e-discovery to proceed. He cited the Sedona Canada Principles and issued a limited order after considering the potential costs and the impact on individual privacy rights that would be associated with a definitive order for more fulsome production.

Andersen v. St. Jude Medical Inc., 2008 CanLII 29591 (ON S.C.).

No basis for questioning preservation steps

Master MacLeod had the opportunity to consider whether a party should be compelled to answer, in the ordinary course of oral discovery, questions about its efforts to preserve evidence. He held that questions about preservation were not justified in the circumstances because there was no evidence of malfeasance.

Andersen v. St. Jude Medical Inc., 2008 CanLII 30281 (ON S.C.).

Forensic inspection ordered but party trusted to deal with results

Mr. Justice Elliot Myers of the BCSC ordered the forensic examination of a computer hard drive, declined to order the appointment of independent counsel and suggested that the forensic expert was precluded from communicating the results of his analysis to the parties to whom records were produced.

The hard drive was in the custody of the plaintiffs and contained records relating to a fatal helicopter crash. The parties agreed that it contained relevant records, some of which were deleted prior to litigation and needed to be recovered. This caused the plaintiffs to hire a forensic computer specialist to retrieve and produce records to the defendants, but when the defendants asked for information about the methodology used by the specialist, the plaintiffs refused. They claimed that providing the requested explanation would involve a substantial expense and, for whatever the reason, neither the defendants nor the plaintiffs invited the Court to assess or order the obvious mid-ground solution – simply ordering the plaintiffs to provide the information originally requested by the defendants.

In making his order (which entailed having the defendants' forensic computer specialist administer agreed-upon search terms), Myers J. distinguished between the need for an order to give assurance that a search is done effectively and the need for an order to protect against bad faith conduct. He also held that it was implicit in the order granted that the defendant's forensic expert would not communicate the results of his search to the defendants and suggested he would deal with any questions about the validity of the expert's process, if necessary, post-disclosure.

Chadwick v. Canada (Attorney-General), 2008 BCSC 851 (CanLII), leave to appeal to BCCA dismissed, 2008 BCCA 346 (CanLII).

Limited forensic inspection allowed

The Ontario Superior Court of Justice upheld an order which allowed a plaintiff's expert to recover and search data from a defendant's personal computer.

In furthering its $1 million departing employee claim, the plaintiff had proven that the individual defendant used his personal computer for business purposes. It had also produced e-mails it had received from the defendant that the defendant had not produced himself because they had been deleted. The plaintiff claimed that the missing e-mails were relevant to whether the defendant breached his non-solicitation duty. In these circumstances, Master Dash ordered an inspection to be be made by way of a search of recovered e-mails based on client names.

Mr. Justice Perell considered the existing jurisprudence and Sedona Canada Principle 2 (on proportionality) and upheld Master Dash's order.

Vector Transportation Services Inc. v. Traffic Tech Inc., 2008 CanLII 11050 (ON S.C.).

4.5 Misconduct and sanctions

Supreme Court of Canada finds CSIS has duty to retain operational notes

The Supreme Court of Canada held that Canadian Security Intelligence Service officers have a duty to retain their operational notes when they are made in the course of investigating a particular individual or group. It said the duty arises from section 12 of the *CSIS Act* and a *Charter* principle that requires investigation notes to be retained when the investigation will have serious consequences to one or more individuals' life, liberty or security of the person.

CSIS had destroyed original notes and tape recordings of two interviews with the applicant from which it produced summaries that led to the issuance of an *Immigration and Refugee Protection Act* security certificate in which the applicant was named. The Court held that it was premature to determine the prejudice that would flow from the unavailability of the original notes and tape recordings and dismissed the applicant's request to stay his security certificate confirmation proceedings and quash the certificate.

Charkaoui v. Canada (Citizenship and Immigration), 2008 SCC 38 (CanLII).

Motion for discovery sanctions dismissed, conduct not proven to be deliberate

The New Brunswick Court of Queen's Bench dismissed a contempt motion and a request for sanctions in a protracted discovery dispute.

Based on an earlier motion, decided on July 16, 2006, the defendants were ordered to provide a further and better affidavit of documents and to provide direct access to a computer system (including active and archived data). They did not provide such access and were sluggish in disclosing documents. The plaintiffs then brought a second motion in June 2007, asking the Court to infer malfeasance from the sluggishness and the fact that the defendants had continued to disclose documents after certifying earlier that they did not exist.

The plaintiffs' motion was initially heard in June but concluded in late December. While the Court remained seized of the motion, in late November and December, the defendants provided two further and better affidavits and provided access to the computer system as previously ordered (without a cost-shifting order as they had requested). The Court held that the plaintiffs had received meaningful production by December 2007 and rejected the plaintiffs' sanction request.

The Court stressed the high standard for the requested order-framed as a contempt order and striking a defence which the Court said had merit. While it held that the defendants were not diligent in preventing electronic information from being downgraded (i.e. altered to be stored in a less accessible form) and even stated that it wondered whether this downgrading was purposeful, it held that this conduct did not merit a contempt order. It also did not draw an inference of malfeasance from the defendant's sluggishness, recognizing that the discovery task wasn't easy.

While dismissing the motion, the Court did note that cross-examination at trial may shed more light on the issue of deliberate non-disclosure.

Doucet v. Spielo Manufacturing Inc., [2008] N.B.J. No. 27 (Q.B.) (QL).

Defendant sanctioned for failure to produce

The Supreme Court of Prince Edward Island (Trial Division) struck a statement of defence as a sanction for non-production. The judgement is notable for its strong statements in favour of full production despite burden and despite any assignment of particular value to the evidence sought. However, the defendant's ability to raise proportionality was limited by a number of factors, including that the burden of production appeared to have been caused by a failure to take reasonable preservation steps (i.e. there was a so-called "downgrading" of data). The defendant also raised the burden of production late in the dispute in response a contempt motion.

Jay v. DHL, 2008 PESCTD 13 (CanLII).

ABCA dismisses appeal of order to produce hard drives as sanction

The Alberta Court of Appeal dismissed an appeal of an order that allowed a plaintiff in a departing employee case full access to hard drives it had seized earlier in executing an *Anton Piller* order.

The defendants were initially ordered to produce a further and better affidavit of documents, failing which the plaintiffs would be given direct access to the seized hard drives (subject to confidentiality terms to be agreed upon or ordered). The defendants did not appeal the order and went ahead and negotiated a confidentiality order. The Court later held them to be in breach of the previous order, and confirmed the production order after rejecting arguments that it would be overly burdensome.

The Court of Appeal said, "…the chambers judge's order is plainly supported by ample evidence. The law as to orders for a further and better affidavit of records also supports the order, as does the earlier order of the case management judge."

Spar Aerospace v. Aerowerks Engineering Ltd., 2008 ABCA 47 (CanLII).

4.6 Preservation

Man QB stresses spoliation claims will be dealt with at trial

The Manitoba Court of Queen's Bench dismissed a motion for an order striking out a statement of defence on the basis of a spoliation claim. It stressed that spoliation claims will ordinarily be dealt with at trial.

The claim was for defamation and abuse of public authority and centred on an investor alert published by the Manitoba Securities Commission. The warning was published after the conclusion of an MSC investigation in which it had met with the plaintiffs and surreptitiously recorded the meeting. The MSC destroyed the audiotape after litigation had commenced on the advice of the RCMP, who said that destruction was required by section 184.1 of the *Criminal Code*, a wiretap authorization provision that puts certain restrictions on the retention of wiretap evidence. The plaintiffs claimed that this provision did not apply and that the MSC was reckless in following the RCMP's advice. They claimed the transcript of the interviews that remained was inaccurate, refused to answer questions about the authenticity of the transcript and moved for an order to strike.

In dismissing the motion, the Court adopted the Alberta Court of Appeal's recent six-part conclusion in *McDougall v. Black & Decker Canada Inc*. In fact, it treated the conclusion like a code, taking pains to modify the sixth part of the Alberta Court of Appeal conclusion to ensure slightly greater leeway to award pre-trial relief for spoliation.

The Court held that the plaintiffs had not proven any prejudice on the motion, but it stated that a "qualitative assessment" of the MCP's actions and the impact on the plaintiffs' case could be heard by the trial judge. And despite its preference for slightly more flexibility than in Alberta, the Court nonetheless stressed that pre-trial relief for spoliation claims should be rare: "Our legal system is structured to require issues of admissibility of evidence to be determined at trial and not by a pre-trial judge."

In the end the Court did issue an order barring the defendants from using the transcript in discoveries. Though the plaintiffs had not yet proven prejudice, it held this restriction was fair given the MCP's continued reliance on the *Criminal* Code provision, which on the MCP's reading, ought to also have required it to destroy the transcript.

Commonwealth Marketing Group Ltd. et al v. Manitoba Securities Commission et al, 2008 MBQB 319 (CanLII).

Ontario court says spoliation inference doesn't hinge on bad faith

In this product liability case, the Ontario Superior Court of Justice dismissed a defendant's motion for a spoliation inference brought because the plaintiff destroyed a ventilation fan that it later argued had caused a damaging fire. The Court made a number of broad statements in disposing of the spoliation motion. Most significantly, it held that in Ontario (as opposed to the approach seemingly favoured in British Columbia) proof of bad faith is not required to support an inference that the evidence destroyed would have been favourable to the party who destroyed it. There are other elements of the spoliation decision that are more difficult to decipher but, in the end, the Court decided for the defendant on other grounds.

Dickson v. Broan-NuTone Canada Inc., [2007] O.J. No. 5114 (S.C.J.) (QL), appeal dismissed without consideration of spoliation argument, 2008 ONCA 734 (CanLII).

Adverse inference drawn based on negligent spoliation

The New Brunswick Court of Queen's Bench dismissed a counterclaim because the plaintiff (by counterclaim) had allowed documents that the defendant required for its defence to be destroyed.

After terminating its franchise agreement with the defendant, the plaintiff transferred a job order file on an over-bid construction project to the new franchisee, who later destroyed the file. The defendant (by counterclaim) did not allege bad faith, but alleged that the plaintiff ought to have instructed the new franchisee to safeguard the files, which were essential to its defence. The Court rejected the plaintiff's claim that the defendant did not call an available witness in favour of raising its spoliation defence. It also held that the plaintiff had a duty to preserve the job order files that was bolstered by its own termination letter, which said it would make the records available to the defendant in the event of litigation.

Elliott v. Trane Canada Inc., 2008 NBQB 79 (CanLII)

Saskatchewan QB rejects spoliation claim

The Saskatchewan Court of Queen's Bench held there is no independent tort of spoliation in dismissing a claim against a doctor for destroying patient charts and other hospital records.

The Court dismissed the claim because there was no duty to preserve the records at the time they were destroyed, which was before litigation was filed, apparently pursuant to a routine records management process and in accordance with a compliant records retention period. The Court did not comment on whether litigation was reasonably foreseeable at the time the records were destroyed.

In the alternative, the Court cited the British Columbia Court of Appeal's decision in *Endean v. Canadian Red Cross Society* for the proposition that spoliation is only a rule of evidence, not an independent tort. It

did not deal with the Ontario Court of Appeal's decision in *Spasic (Estate) v. Imperial Tobacco Ltd.,* where the Court held it was not plain and obvious that a pleading based on the tort of spoliation discloses no reasonable cause of action and therefore that claims based on the tort should be allowed to proceed to trial.

Galenzoski v. Awad, 2007 SKQB 436 (CanLII).

BCCA speaks on spoliation

The British Columbia Court of Appeal dismissed an appeal in which allegations of spoliation were made. The outcome is not remarkable, as the claim was based on the routine destruction of records pursuant to policy before litigation was reasonably contemplated. In a testament to how interesting this issue has become, however, Madam Justice Rowles went on gratuitously about spoliation in great detail, describing the debate about the doctrine in both Canadian and American law.

Holland v. Marshall, 2008 BCCA 468 (CanLII).

ABCA speaks clearly on spoliation remedies

The Alberta Court of Appeal reinstated an action that had been dismissed because the plaintiff had destroyed evidence. In doing so, it made some very clear and principled statements on the remedies for spoliation.

First, the Court confirmed that the spoliation presumption first recognized by the Supreme Court of Canada in the 1896 *St. Louis* case is simply a rebuttable presumption of fact that requires a finding of intentional destruction of evidence.

Next, the Court distinguished this specific remedy from the broader range of remedies that might flow from the Court's rules-based or inherent jurisdiction to control its process. It suggested the maintenance of trial fairness should be the primary guide to the exercise of discretion and warned that the striking of an action is extraordinary: "While the court always has the inherent jurisdiction to strike an action to prevent an abuse of process, it should not do so where a plaintiff has lost or destroyed evidence, unless it is beyond doubt that this was a deliberate act done with the clear intention of gaining an advantage in litigation, and the prejudice is so obviously profound that it prevents the innocent party from mounting a defence."

And finally, the Court noted that there is no recognized civil duty to preserve evidence in Canadian law: "The issues of whether a party may be guilty of negligence where it destroys documents it had a duty to keep, or whether spoliation exists as an intentional tort, are not engaged in this case and any comment about whether the law should be developed in these areas should be left to a case where these issues arise from the facts."

McDougall v. Black & Decker Canada Inc., 2008 ABCA 353 (CanLII).

Ontario SCJ dismisses spoliation claim on its merits

The Ontario Superior Court of Justice considered and dismissed a tort claim for spoliation.

The plaintiff established that the defendant arranged to have the testator's computer wiped after the plaintiff threatened litigation and after he had received correspondence from the plaintiff's counsel. The plaintiff also established that there was at least one e-mail destroyed (which was later produced from a third-party) which supported his claim that the defendant asserted undue influence over the testator.

The Court's very brief treatment of the spoliation issue leaves its significance doubtful. It is unclear whether the Court finds that a claim for tort damages for spoliation can be made out on mere proof of bad

faith destruction of evidence or whether such a claim also requires proof of prejudice. The Court also did not consider whether the defendant had a positive duty to take reasonable steps to preserve the testator's computer or the nature and extent of such a duty.

Tarling v. Tarling, 2008 CanLII 38264 (ON S.C.).

Court considers nature of spoliation claim in allowing leave to amend Statement of Claim

Master McLeod granted a plaintiff leave to amend its statement of claim to add an allegation of spoliation first brought on the eve of trial.

The action was brought by a doctor whose hospital privileges were revoked in 1991. He sought to add a claim that original notes of the board meeting at which his privileges were revoked were suppressed in a purposeful attempt to obscure relevant details of how the meeting unfolded. The spoliation allegation was made, in part, based on actions taken by the hospital's former executive director and a member of the medical staff who the plaintiff alleged instigated the case against him because of a personal vendetta. The executive director was alive and denied the spoliation allegation, but the allegedly vindictive doctor had died sometime after 1991.

Master MacLeod held that the executive director had ultimate responsibility for preparation of the corporate minutes and could answer the spoliation claim. He also dismissed an argument that amendment should be denied because of the expiration of a limitation period, but noted that the defendant could plead the *Limitations Act* in its defence.

Zahab v. Salvation Army in Canada, 2008 CanLII 41827 (ON S.C.)

4.7 Privacy

ABCA addresses investigatory remedy for anonymous internet use

The Alberta Court of Appeal dismissed an appeal arguing for a *Norwich Pharmacal* order brought by an organization that had sued its former chief executive officer for fraud and sought information from the bank accounts of various third-parties (presumably to whom payments were made).

Norwich Pharmacal orders, also called "equitable bills of discovery", enable a person to conduct pre-action discovery against a third party who is likely to have important information about a *bona fide* wrongdoing. The development of the Canadian standard for these and similar third-party orders is of high relevance today because they are a potential means of investigating and pursuing claims based on anonymous internet use.

The judgement is not particularly principled. The Court ultimately dismissed the appeal because the appellant had not proven the order was necessary, but did not opine in detail on the standard of proof. The leading case in Canada remains the Federal Court of Appeal's 2005 decision in *BMG Canada Inc. v. Doe*, an intellectual property infringement case, in which the Court detailed the factors to be considered in balancing the public interest in the effective administration of justice against individual privacy rights.

A. B. v. C. D., 2008 ABCA 51 (CanLII).

Balance favours disclosure of photographs on Facebook given number of plaintiff's friends

The Ontario Superior Court of Justice ordered a plaintiff in a motor vehicle suit to produce copies of her Facebook pages. The defendant successfully argued that the pages were likely to contain photographs relevant to the plaintiff's damages claim, and was buttressed by the fact that the plaintiff had served photographs showing herself participating in various forms of activities pre-accident.

Murphy v. Perger, [2007] O.J. No. 5511 (S.C.J.) (QL).

BCCA rejects request to postpone production to aid a test of credibility

The British Columbia Court of Appeal dismissed a defendant's motion to postpone the production of a non-privileged video surveillance tape so it could better test the plaintiff's credibility in oral discovery.

The dispute was about the discretion to order relief from production that is granted expressly by Rule 26(1.2) of the British Columbia *Supreme Court Rules*. The judgement contains detailed discussion on how Rule 26(1.2) has been applied to protect privacy (by allowing for the redaction of non-relevant and sensitive information) and to encourage proportionality in production. The only other jurisdiction with a comparable provision is the Federal Court.

Stephen v. McGillivray, 2008 BCCA 472 (CanLII).

4.8 Privilege

4.8.1 Case-by-case (Wigmore) privilege

Court says case-by-case privilege does not protect identity of expert's client

The Supreme Court of Nova Scotia granted a motion for the production of information relating to a "private client" of an expert because the expert said that she used the information to support the reasonableness of an assumption. Though the expert attempted to discount the significance of the private client's information to her opinion, the Court held that it must be produced as an essential fact upon which her opinion was based. It also rejected an argument that a case-by-case ("Wigmore") privilege applied.

South West Shore Development Authority v. Ocean Produce International Ltd., 2008 NSSC 240 (CanLII).

4.8.2 Informer privilege

Significant case on waiver of informer privilege proceeds

In a case on a narrow but novel point of law, Nordheimer J. of the Ontario Superior Court of Justice held that a confidential informant should be given notice of a motion to determine the scope or validity of a purported limited waiver of privilege.

The defendants were police officers who were accused, in part, of mistreating one or more individuals who worked as their confidential informants. One such informant agreed to a limited waiver of privilege to testify in support of the prosecution - i.e. he agreed to testify against the accused while maintaining the privilege as it applied to his other "work" with the police. The defendants argued that there can be no limited waiver of privilege as a matter of law and also argued that limited waiver would cause an unfairness in the proceeding.

The Court rejected the Crown's argument that the informant had no interest that justified giving him notice.

It also held that the accused police officers have no standing to argue that the Crown had breached the informant's privilege (in an attempt to stop him from testifying). While recognizing that a police officer has a duty to protect an informant's identity, he held that the privilege belongs to the informant and the Crown.

R. v. Schertzer, 2007 CanLII 56497 (ON S.C.).

BCCA holds defence counsel may attend informer privilege hearing

The British Columbia Court of Appeal dismissed an appeal from an order which allowed defence counsel to be present at an *in camera* hearing to determine whether informer privilege was validly claimed. It did

so by issuing three separate judgements and, in the end, is less authoritative than it is revealing of sharp divide on a key point of criminal procedure and the law of privilege.

R. v. Virk, Basi and Basi, 2008 BCCA 297 (CanLII), leave to appeal to Supreme Court of Canada filed (21 July 2008).

4.8.3 Litigation privilege

PEI Court of Appeal says civil rules trump litigation privilege

The Prince Edward Island Court of Appeal issued a principled judgement on the scope of litigation privilege as it stands against the production and discovery requirements in the PEI civil rules.

Rule 31.06 in the Prince Edward Island Rules of Court governs oral discovery and requires a person who is examined to answer "any proper question relating to any matter in issue in the action." The identical provision exists in the Ontario Rules, where it has been interpreted to override litigation privilege subject to provision's own express limitations. The PEI Court of Appeal endorsed the Ontario approach and rejected the contrary position taken by the Manitoba Court of Appeal.

Llewellyn v. Carter, 2008 PESCAD 12 (CanLII).

4.8.4 Solicitor-client privilege

SCC says Privacy Commissioner can't decide privilege claims

The Supreme Court of Canada issued its much-anticipated decision in *Blood Tribe* in July. In a judgement written by Mr. Justice Binnie, it unanimously held that the Privacy Commissioner of Canada does not have the power to compel production of records over which an organization claims solicitor-client privilege. In doing so, the Court affirmed the well-established principle that solicitor-client privilege cannot be abrogated by inference and made its first comments yet on the mandate granted to the OPC by the *Personal Information and Protection of Electronic Documents Act*.

The dispute arose when the respondent to an access to personal information complaint refused to produce records of communications that it claimed to be subject to solicitor-client privilege. In demanding the records be produced, the Commissioner relied on investigatory powers granted by section 12 which allow her to order production "in the same manner and to the same extent as a superior court of record."

The Supreme Court held that section 12 does not give the OPC the power to compel production of records over which solicitor-client is claimed by mere inference or by necessary implication in light of the OPC's mandate.

While the principle that solicitor-client privilege can only be abrogated by express statutory language is not new, the Court's application of the principle in this case demonstrates its strength because (as pointed out by the Information Commissioner in support of the OPC's appeal), "verification of the privilege is the very object of the Privacy Commissioner's statutory ombudsperson function and not merely a preliminary step to determine the record's use for another purpose."

The Court was not convinced by this argument, especially given the OPC's mandate, which it characterized as adversarial rather than independent. Though the Court acknowledged that the validity of a solicitor-client privilege claim which is raised in response to a PIPEDA right of access request is of concern to the OPC given her mandate, it said her only valid means of seeking a determination of such a claim is to engage the Federal Court as she is empowered to do under the *Act*.

Canada (Privacy Commissioner) v. Blood Tribe Department of Health, 2008 SCC 44 (CanLII).

No solicitor-client relationship formed in casual law office conversations

The Nova Scotia Court of Appeal affirmed a 2007 decision in which a judge held that two casual conversations between a lawyer, another lawyer and the other lawyer's wife did not give rise to a solicitor-client relationship.

The facts involve a partner and his associate whose wife was contemplating leaving her employment as a real estate broker.

The associate first had a conversation with the partner that was held to be "brief," and likely lasted for less than 20 minutes. The associate admitted that he sought "off the cuff" advice on the partner's "two cents worth" and at the same time sought an opinion about the qualities of his wife's potential new business partner. The conversation did touch upon legal matters, however, including the wife's obligation to give notice.

The second conversation happened when the wife attended the office and she and her husband intercepted the partner when he was on his way out to lunch. The wife testified that she attended the office to seek legal advice from the partner, but also admitted that she had no intention of retaining him as counsel on her impending departure. The subject matter of the second conversation was the same as the first, and the partner testified that he was just lending support to his associate.

The wife left her employment and her former employer sued. In the course of pursuing its claim, the employer contacted the partner, who spoke openly about his meeting with the wife and his now estranged associate. The partner said, "If they had listened to me there would likely have not been a lawsuit." The wife (with others) sued for breach of solicitor-client privilege.

Mr. Justice Boudreau of the Nova Scotia Supreme Court dismissed the claim in April 2007. The Nova Scotia Court of Appeal upheld Boudreau J.'s decision in a brief award.

Cushing v. Hood, 2007 NSSC 97 (CanLII), affirmed 2008 NSCA 47 (CanLII).

NBCA says counsel can continue to act given nature of privileged records

The New Brunswick Court of Appeal affirmed an order that allowed counsel who received and read privileged communications to continue to act and affirmed the part of the order that stated that counsel was not precluded from establishing the facts underlying the privileged communications.

The defendants claimed that various written statements from a witness for an adjusting firm retained by legal counsel were subject to solicitor-client privilege after they were inadvertently disclosed to the plaintiff along with a draft affidavit of documents several days before examinations for discovery. The plaintiff had thoroughly reviewed and made notes of the written communications in question by the time its counsel showed up at the discovery and was told what he had read was privileged. The plaintiff eventually destroyed the written communications, though it kept its notes and made the point that its actions were taken without prejudice to its right use information contained in the communications now destroyed.

The defendants filed a motion to disqualify the plaintiff's counsel, but only succeeded in obtaining a protective order that required the destruction of documents and notes and prohibited use of documents. The order also specifically stated that the plaintiff was not precluded from establishing the facts underlying the privileged communications. The defendants appealed, and the third-party defendants who had not participated in the motion for fear of gaining knowledge of privileged communications filed a cross-appeal, arguing that they were now at a relative disadvantage and deserved access to the facts underpinning the privileged communications.

In dismissing the appeal and cross-appeal, the Court of Appeal stressed that solicitor-client privilege only protects communications and not underlying facts. The judgement seems swayed by the Court's

scepticism about the privilege claim. It did not review the impugned communications (nor did the motions judge), but said the Court's assumption that the communications were privileged was "questionable" and that, in any event, the documents were likely "fact-focussed."

Euclide Cormier Plumbing and Heating Inc. v. Canada Post Corporation, 2008 NBCA 54 (CanLII).

Sask. CA affirms law society's right to demand access to privileged communications

On October 9th, the Saskatchewan Court of Appeal held that the Saskatchewan *Legal Profession Act* authorizes the Law Society of Saskatchewan to demand production of records required for an investigation despite a claim to solicitor-client privilege.

The Court distinguished the Supreme Court of Canada's recent *Blood Tribe* decision and held that section 63 of the Saskatchewan *Act* clearly contemplates that privilege will be abrogated by a proper demand. Since the respondent law firm conceded the Law Society's production demand was sufficiently tailored, the Court held that it could lawfully seize the disputed records.

Notably, the Court also rejected a broader argument by the Law Society that the common law "extends the envelope of solicitor-client privilege" to include law societies. The Law Society relied heavily on United Kingdom jurisprudence and, in particular, on a 2002 House of Lords decision called *Morgan Grenfell & Go. Ltd*. The Court explained that the cases raised by the Law Society did not support its broad proposition, and stressed that the basis for the solicitor-client privilege must be assessed through the eyes of the client: "Disclosure of privileged communication to the Law Society would surely, to most clients, represent an infringement of confidentiality."

Law Society of Saskatchewan v. Merchant Q.C., 2008 SKCA 128 (CanLII).

OLRB affirms power to adjudicate on privilege

The Ontario Labour Relations Board affirmed an order requiring a party to attend at a hearing along with all arguably relevant records that it claimed to be subject to solicitor-client privilege.

The Board made its order in its joint hearing of two construction industry contracting out grievances. The responding employer had failed to disclose or produce records customarily produced in such grievances (e.g. contracts, bid documents and payroll records). Instead, it produced a few records and claimed "all other records in our client's possession are privileged." The impugned order became necessary after the employer twice resisted Board orders to specifically identify the records it claimed were privileged.

The Board rejected the employer's argument it lacked jurisdiction to order the production of documents over which a claim of solicitor-client privilege has been made. It distinguished the Supreme Court of Canada's recent *Blood Tribe* decision by explaining that it was not about an adjudicative body's power to control its hearing procedure.

Proplus Construction & Renovation Inc. (Re), 2008 CanLII 65158 (ON L.R.B.).

OCA grants leave in case about leak of privileged report to Crown

The Ontario Court of Appeal granted leave to appeal in a noteworthy case about breach of privilege by the Crown

The case involves an investigation report prepared at the request of external legal counsel after a critical injury for which *Occupational Health and Safety Act* charges were ultimately laid. An employee who was given a draft of the report on the undertaking he destroy it gave a copy to the Crown. This was after the company had asserted privilege to the Ministry inspector, who had agreed not to order the report's production.

When the Crown disclosed the report to the company it immediately objected, and at trial moved for a declaration that the report was privileged and for a stay. It succeeded in obtaining a declaration, a stay and an order for $38,000 in legal costs. On appeal, the stay and the costs order were overturned.

In its judgement on leave, the Ontario Court of Appeal explained that the Justice of the Peace and the appeal judge differed on their views of the prejudicial impact of the breach of privilege. In granting leave, it commented that the civil law cases on inadvertent disclosure of privileged records are not "particularly on point" and that this was likely an issue that would often arise in the context of corporate accused who face "disgruntled" employees.

R. v. Bruce Power Inc. (7 July 2008, Ontario Court of Appeal).

4.8.5 Statutory privilege

Records ordered to be produced despite arguments made about youth privacy

The Ontario Superior Court of Justice ordered parts of a student's Ontario Student Record and various records in the custody of the police to be disclosed to a plaintiff in a civil action.

The lawsuit related to a violent incident by one grade seven student against another who later sued the offending student's guardian and others for an alleged lack of supervision.

In ordering the offending student's OSR to be disclosed, the Court explained how the statutory privilege in section 266 of the *Education Act* has not been interpreted as a barrier to production, in particular when the student or his or her guardian is a party.

Regarding the police records, the offending student was never prosecuted, so the police did not oppose the motion and took the position that the *Wagg* screening process need not be engaged. The Children's Lawyer argued, however, that records should not be produced because the police had no right to obtain any statement from the offending student because they were not investigating any offence and because the child was not afforded a right to counsel and to have a guardian present. The Court rejected this argument, though it also held that, in any event, the admissibility of evidence should be determined at trial and potential inadmissibility is not a barrier to production.

Lee v. McNeil, 2008 CanLII 20984 (ON S.C.).

4.8.6 Waiver

E-mail leak does not result in waiver of privilege

The Ontario Superior Court allowed a motion to suppress e-mails containing privileged communications that were filed by a former spouse after she received them from her former husband's girlfriend.

After rejecting an argument that the e-mail communications were subject to the criminal intent exception to solicitor-client privilege, the Court went into detail on the waiver argument. Although there was a sharp factual dispute about how the e-mails were leaked, the Court held that the respondent's best case – that the applicant had his girlfriend type e-mails to his lawyer and left such e-mails around the home – would not be grounds for waiver in the circumstances.

The Court stressed that waiver is a question of intent, and held that the applicant had a reasonable expectation of confidence that was breached by his girlfriend (i.e. he was not reckless to ask a friend for administrative help nor was he reckless to leave documents around a private home). The Court also stressed that the test for waiver requires a balancing of interests and that a court must assess all factors, including the "threshold relevance" of the impugned evidence, before allowing it to be admitted despite a valid privilege claim. In the circumstances, therefore, the Court's finding that the leaked e-mails had little probative value weighed in favour of its decision that they ought to be suppressed.

Though the decision is fact-specific, the Court goes on to make a rather principled statement about electronic documents and how they are hard to control, suggesting that protecting solicitor-client privilege requires a more forgiving application of the waiver doctrine.

Eizenshtein v. Eizenshtein, 2008 CanLII 31808 (ON S.C.).

BCCA considers proportionality and waiver of privilege by implication

In a leave to appeal application, Smith J. of the British Columbia Court of Appeal rejected an argument that proportionality is not part of the test for implicit waiver of solicitor-client privilege.

The respondent was 15 days late in complying with a court order to serve an affidavit. The applicant brought on contempt proceedings based on the respondent's pattern of conduct. As part of its defence, the respondent addressed the 15 day delay by claiming his solicitor did not make him aware of the deadline until too late. He served a second affidavit along with an e-mail from his counsel as evidence.

The applicant unsuccessfully applied for production of other related communications between the respondent and his counsel. The applications judge held that the 15 day delay was not central to the contempt proceeding so an order for production would not be "proportional."

Smith J. held that the applications judge did not err by applying an inappropriate test for waiver. She held that "proportionality" was concept that is consistent with the fairness aspect of the test for waiver by implication - a rule by which privilege will be waived in communications related to those in which there is an intention to waive privilege where fairness and consistency demand a broader waiver. According to Smith J., "Fairness dictates that requests for access to non-material information do not satisfy the waiver test."

Hub International Limited v. Tolsma, 2008 BCCA 500 (CanLII).

4.9 Regulatory powers

Competition regulator's production order set aside

The Federal Court set aside a production order obtained by the Commissioner of Competition. She held the Commissioner, who obtained the order under section 11 of the *Competition Act* by way of an *ex parte* application, did not make a full and frank disclosure of material facts and made statements that bordered on misrepresentations.

There were three specific bases for McTavish J.'s decision. First, she held that the Commissioner ought to have disclosed a statement it had made in a previous section 11 application that the order obtained on that application would likely be sufficient for its inquiry-related purposes. Second, she held that the Commissioner provided "misleading, inaccurate and incomplete" information on the extent of the overlap between the information it sought and information it already had. Third, she held that the Commissioner ought to have drawn the concerns brought to her attention by the respondent earlier in the year in response to a previous and similarly-broad production order in the same inquiry. Most notably, the respondent had complained that the previous order was so burdensome that its process of retrieving documents had caused its file server to crash and likely involved data restoration costs exceeding $500,000.

The decision stresses the strict burden of disclosure on parties seeking *ex parte* orders for production, whether in the regulatory or civil context. The part about disclosing expressed concerns about the burden of retrieving electronic documents may apply in a limited number of situations because an *ex parte*

process often starts the course of inquiry or investigation, but it is nonetheless significant given the broader challenges associated with managing the retrieval and production of electronic documents.

Commissioner of Competition v. Labatt Brewing Company Limited, 2008 FC 59 (CanLII).

Appeal in eBay PowerSellers case dismissed

The Federal Court dismissed an appeal in the well-known eBay "PowerSellers case."

This was an appeal of eBay's unsuccessful application to vacate a production order made under section 231.2 of the *Income Tax Act*. The order required two Canadian eBay subsidiaries to produce data about specific Canadian eBay users that resided on servers operated by eBay's American subsidiary in the United States.

The Court of Appeal held:

1. that the data sought was not "located" in the United States (and therefore subject to different production power) given eBay Canada's right of access to the information and ready means of gaining access to the information;

2. that it should not depart from its recent decision in *Greater Montreal Real Estate Board*, where it held that an production order seeking access to information unnamed persons under section 231.2 may be granted if the information is "required to verify compliance with the *Act* by one or more unnamed persons in the group" or that "the information is required for a tax audit conducted in good faith"; and

3. that the motions judge did not err by failing to give notice to eBay US and eBay International, who were said by eBay Canada to "own" the records and information in question.

eBay Canada Ltd. v. Canada (National Revenue), 2008 FCA 348 (CanLII).

Ontario Div. Ct. interprets doctors' college investigatory powers broadly

The Divisional Court held that investigators appointed under the *Ontario Health Professions Procedural Code* have the power to compel observation of surgery conducted by an investigated physician and the power to compel an individual physician under investigation to submit to an interview.

The Court held that the College of Physicians and Surgeons of Ontario's power to "inquire into and examine," interpreted purposively, allows it to compel the observation of surgeries. It stressed that the College's evidence showed observation is an effective, customary and even necessary process for assessing a health care practitioner's competence. It held that the grant of power in the *Code* was unambiguous, so there was no scope for interpreting it narrowly to conform with *Charter* values that weigh against self-incrimination and unreasonable search.

The Court also dealt with the privilege against self-incrimination in finding that an investigator can compel a physician to submit to an interview. The Court held that neither the privilege against self-incrimination nor (implicitly) the right to silence were engaged given the purpose of a College investigation. It said that the aim of an investigation is not to gather evidence for use in a subsequent prosecution; rather, it was "to ensure appropriate regulation of the medical profession in the public interest." In this regard, it suggested that the use immunity provision in section 9 of the *Public Inquiries Act* was also incorporated into the *Code*.

Gore v. College of Physicians and Surgeons of Ontario, 2008 CanLII 48643 (ON S.C.).

SCC says no power to order costs of production order

The Supreme Court of Canada unanimously held that the *Criminal Code's* production order scheme does not allow a court to order that the police compensate a third party for the costs of compliance with a production order.

The Court held that costs could not be ordered based on a reading of the statutory text in light of the relevant legislative history and the recognized social duty of citizens to assist in the administration of justice. It noted that the Department of Justice and the telecommunications industry had a dialogue before Bill C-45 was promulgated in which industry members requested an express jurisdiction to order costs.

The Court also held that the standard for an exemption based on "unreasonable" burden should not be altered by establishing alternative criteria such as "undue hardship." It held that reasonableness in the entire circumstances was a justiciable standard, noting that parties who are subject to frequent production orders may raise this fact as a relevant circumstance.

Tele-Mobile Company v. Ontario, 2008 SCC 12 (CanLII).

SCC says CRA may audit one taxpayer through another

A 4-3 majority of the Supreme Court of Canada held that the Canada Revenue Agency need not seek judicial authorization to examine information about one taxpayer's compliance by auditing another.

The case involved an audit of a university's charitable foundation and the powers granted to the CRA under the *Income Tax Act*. The CRA sought to examine the Foundation's records to determine whether it was receiving valid charitable donations. There was no dispute that, at the same time, it intended to pursue individual donors who may have made donations it expected to be invalid.

The question, given the CRA's dual purpose, was whether it could seek Foundation records that would identify individual donors under its section 231.1 audit power (which allows it to look at a taxpayer's records without judicial authorization) or whether it needed to rely on its section 231.2 production power (which allows it to look at a person's records which relate to one or more "unnamed persons," but only with judicial authorization).

The majority held that the CRA does not need judicial authorization in conducting audits that are aimed at both parties to a tax-related transaction: "The s. 231.2(2) [judicial authorization] requirement should not apply to situations in which the requested information is required in order to verify the compliance of the taxpayer being audited." It held that section 231.2 still has a meaningful role in the enforcement scheme because the CRA may need to seek information outside of a formal audit.

Redeemer Foundation v. Canada (National Revenue), 2008 SCC 46 (CanLII).

4.10 Scope of production

Request for ultra-broad production order dismissed as a fishing expedition

The Ontario Superior Court of Justice dismissed a motion requesting that a defendant to a wrongful dismissal claim image all computers, mobile handheld devices and other electronic devices for inspection because it had produced an attachment to a single e-mail without the lead e-mail itself. The defendant claimed the lead e-mail was blank (containing only the attachment) and had long-since been destroyed. The Court ordered the defendant to use its best efforts to locate the lead e-mail and dismissed the requested order as speculative.

Ritchie v. 830234 Ontario Inc. (Richelieu Hardware Canada Ltd.), 2008 CanLII 4787 (ON S.C.).

Burden of production argument can't be raised as defence to contempt motion

The New Brunswick Court of Appeal released the latest award in a long-running e-discovery dispute. It held that the defendants ought to have sought leave to appeal a fairly broad order to provide access to its "computer system."

The impugned order was made in July 2006 by Savoie J. of the New Brunswick Court of Queen's Bench. The defendants did not appeal, but also did not comply, and in 2007 the plaintiffs brought a motion for contempt. The motion was heard by Lavigne J., who held that she could not upset Savoie J.'s order in a collateral motion and rejected the defendants' argument that costs should be shifted due to the burden of providing access to electronic records. She reserved on the matter of contempt, later rejected in January 2008. The Court of Appeal agreed with Lavinge J.'s approach.

Spielo Manufacturing and Manship v. *Doucet and Dauphinee*, 2007 NBCA 85 (CanLII)

4.11 Subpoena powers

BCCA lays out discretionary factors for *Criminal Code* subpoena of reluctant expert

On October 3rd the British Columbia Court of Appeal heard an appeal of application to quash a subpoena that compelled an expert to testify against his wishes in a criminal trial. It rejected arguments for a general rule against compelling a reluctant expert to testify in a case where she has no prior connection as inappropriate given criminal defendants' right to make a full answer and defence.

The Court also held (1) that defence counsel's perceived competence and the potential for a negative impact on other matters in which the expert is engaged are not proper factors and (2) that proof of the necessity of the evidence is not required.

R. v. Blais, 2008 BCCA 389 (CanLII).

Table of Cases