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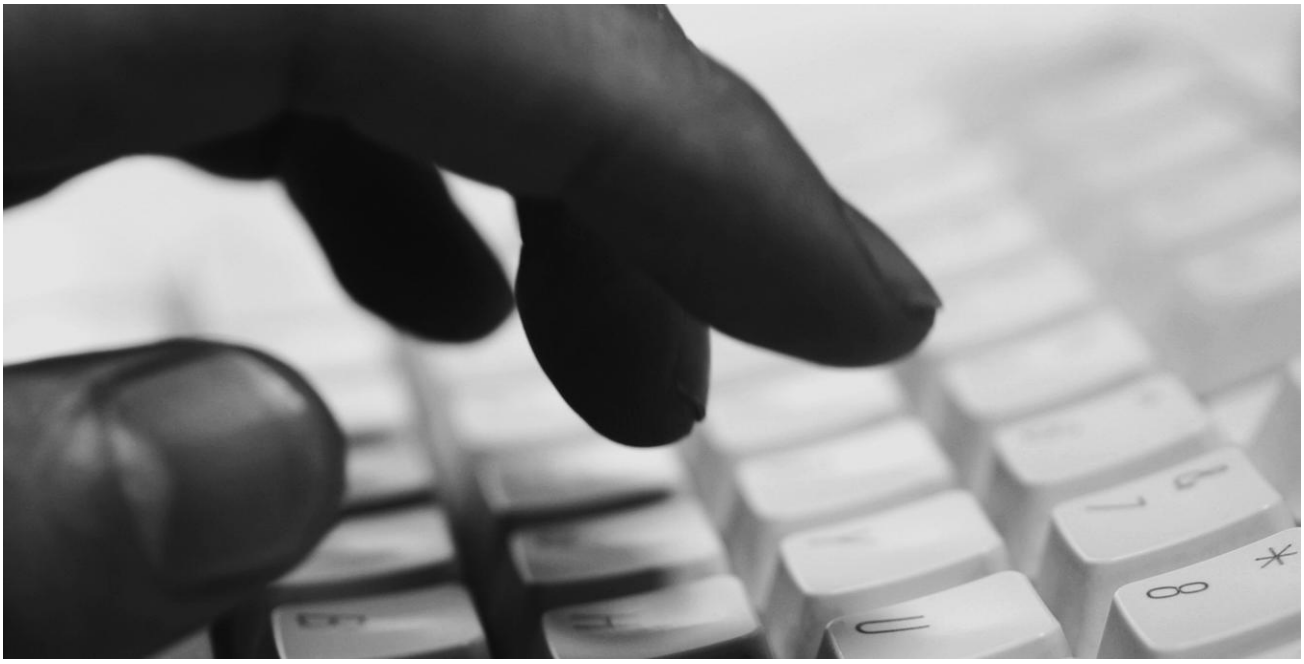

Information and Privacy Post 2009 and Spring 2010

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On behalf of the Hicks Morley privacy practice group, I'd like to welcome you to the Information and Privacy Post, which brings you summaries of leading access and privacy, records management and production cases from Ontario and other jurisdictions. We thought it would be a good idea to pull all of the material from the last year and a quarter together, to highlight some of the key development in these areas. Enclosed is an extensive overview of some of the most important cases of 2009 and Spring 2010.

We hope that the Information and Privacy Post will continue to provide you with a source of timely, interesting and valuable information about developments in privacy and we will continue to look for ways of improving our service to you. We invite you to send us your comments about the Post to privacypost@hicksmorley.com and let us know if you have any suggestions on how we can 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 Post and we'll gladly add them to our mailing list.

We look forward to an exciting and challenging year and to working with all of you and your organizations on your ongoing and evolving information and privacy issues. Please feel free to call any member of the privacy practice group if you require further information with regards to the cases raised in the Post or with respect to your general privacy questions.

Scott T. Williams
Privacy Practice Group Leader

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Dear Friends:

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

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

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

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

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

2. Information about lifestyle abandoned when trashed

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

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

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

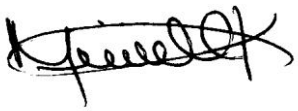
4. Court says Privacy Commissioner can't access documents subject to Solicitor-Client Privilege

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

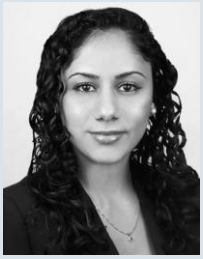
As always, we hope that you enjoy our review of the most timely and relevant privacy law cases. Our aim is to provide you with material to consider as you evaluate the most recent trends and their potential impact on your organization. We encourage also you to share the Post with your colleagues.

I would like to thank my colleague Dan Michaluk, firstly, for granting me the privilege of serving as editor of the Information and Privacy Post, which he spearheaded 3 years ago, and secondly, for his continual tireless work in compiling and summarizing the latest information and privacy jurisprudence across Canada and the U.S., providing a wealth of material for the Information and Privacy Post.

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



Mireille Khoraych
Editor



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1. FREEDOM OF INFORMATION

1.1 APPLICATION, EXCLUSIONS AND JURISDICTION

Ont. C.A. deals with creating records in Ontario FOI law

The Ontario Court of Appeal has affirmed the IPC/Ontario's position that records produced by replacing unique identifiers in a database with randomly generated numbers are "records" under Ontario freedom of information legislation.

The evidence showed that the custodian could extract the data in the form requested by writing an algorithm and relying upon its existing technical know-how, hardware and software.

In June 2007, the Divisional Court quashed an IPC order made in favour of the requester. The Court held that the request was not for "records" as defined in section 2(1)(b) of the *Municipal Freedom of Information and Protection of Privacy Act*. The Ontario Court of Appeal reversed the Divisional Court's judgement and restored the IPC order. The Court of Appeal decision is technically based on the standard of review – i.e. it only held that the IPC's interpretation of the record definition was not unreasonable. This, however, hardly limits the force of the judgement. The Court reasoned that the IPC's order was consistent with the text of the MFIPPA General Regulation, which has provisions that allow institutions to recover programming and related costs. It also applied a very strong purposive analysis in construing the definition.

This decision makes clear that Ontario institutions must ordinarily undertake programming tasks that enable them to provide access to information stored in databases, even to mask personal information by substituting de-personalized unique identifiers for identifying information. There are two clear limits to this rule: (1) a record only capable of being produced through a process that "unreasonably interferes with the operations of an institution" is deemed not to be a record; and (2) a record that can only be produced with technical expertise not "normally used by [an] institution" is deemed not to be a record. The Court left open whether a record that can only be produced with "hardware and software or any other information storage equipment" not normally used by an institution is deemed not to be a record but said this interpretation was "open to argument."

The "creating records issue" is a significant one in civil litigation and in other circumstances where one has a simple right to a "record in custody or control". This case is based on very specific statutory language, but is nonetheless significant to Ontario FOI-regulated institutions.

Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner, 2009 ONCA 20.

NSCA opines on meaning of "educational history" in FOI law

The Nova Scotia Court of Appeal affirmed a chambers judge's finding that a list of names of over 4,000 certified electricians was not exempt from public access. In doing so, it held that the list's disclosure was not presumed to be an unreasonable invasion of privacy as a disclosure of information that "relates to educational history," since it only listed the names of certified construction electricians. To constitute educational history, the information must list more then mere certifications achieved, such as schools attended, courses, discipline, and assessments.

The Court relied on the Supreme Court of Canada's 2003 decision in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*.

A.B. v. Griffiths, 2009 NSCA 48.

Fed Court comments on jurisdiction to receive *ATIA* applications

The Federal Court had an opportunity to comment on its jurisdiction to receive applications for review under section 41 of the *Access to Information Act*. It held that the Court's jurisdiction is based on a "genuine and continuing claim of refusal of access." This supported a finding that it had no jurisdiction to (a) hear an application about a series of requests that were deemed to be refused but, through a series of events, answered by the time the application was filed; and (b) reprimand the responding institution for delay.

Statham v. Canadian Broadcasting Corp., 2009 FC 1028.

Court lacks jurisdiction to grant access to materials not filed

The Nova Scotia Supreme Court held that it did not have jurisdiction to order access to records that were referenced in a joint sentencing submission but not entered as exhibits.

The CBC applied for an order against the RCMP, who possessed audio and video recordings made in the course of a high profile murder investigation. The CBC relied on section 2(b) of the *Canadian Charter of Rights and Freedoms* and argued access was necessary to assess the joint sentencing submission. The Court held that, given the records had not been filed in Court, the proper forum for such a request was the Federal Court under the authority of the *Access to Information Act*.

Canadian Broadcasting Corporation v. Canada (Attorney General), 2009 NSSC 400.

1.2 EXEMPTIONS

Raitt "lost recorder" judgement published

The Nova Scotia Supreme Court has published Moir J.'s decision on the lost digital recorder containing embarrassing comments made by Minister of Natural Resources Lisa Raitt.

Ms. MacDonnell, who had misplaced the tape recorder, relied on a privacy and property-based claim to prevent publication of the recording. Moir J. held that she had not established a case sufficient to restrain publication. He agreed with the reporter, who intended to publish the recording, that the recorded conversation was not private because some or all of it was heard by a department driver. He also commented that it is wrong to deprive the press, and the public it serves, of remarks made privately, but not confidentially in the sense of trade secrets or privileged communications, after those remarks became available because of poor record keeping or management.

Two points are worth mentioning. One, the judgement creates a hierarchy of concepts: privacy seems less important than privilege and trade secret protection. Two, whether the property torts can be used to re-gain control of information is a big issue for employers.

MacDonnell v. Halifax Herald Ltd., 2009 NSSC 187.

Federal Appeal Court says FOI requester's identity matters

The Federal Court of Appeal has issued a unique FOI judgment that turned on the identity of the requester. The Court held that records supplied to the Minister of Indian Affairs and Northern Development by an Indian band were not exempt under the *Access to Information Act* "confidential information supplied to government" exemption. Though the Court accepted the records were confidential, it held they were not exempt vis-à-vis the requester because she had an independent right to the records as a band member based on an *Indian Act Regulation*. The requester filed an access request to the Minister because the Band imposed a strict confidentiality condition on providing access. The Court held the condition was unlawful and granted access under the ATIA via the Minister.

Although, the identity of a requester under the ATIA is normally confidential, and therefore the identity of a particular requester cannot normally determine whether information is exempt from disclosure under paragraph 20(1)(b), in this case, the Court found that the requestor had consented to the disclosure of her identity to the Band, in order to establish her status as a Band member. In these very unusual circumstances, and consistently with a broad interpretation of the AIA and a narrow interpretation of the exceptions, the court commented that the identity of the requester can be taken into account to determine whether the information was confidential as against the requester.

Canada (Indian Affairs and Northern Development) v. Sawridge First Nation, 2009 FCA 245 (CanLII).

Div. Ct. says documents protected by settlement privilege exempt from public access

The Divisional Court issued a decision in which it held that documents protected by settlement privilege are exempt from public access under the Ontario *Freedom of Information and Protection of Privacy Act*. This finding is of consequence itself, but the purpose-driven means by which the Divisional Court reached its secrecy-favouring finding are very significant.

The "solicitor-client privilege" exemption in section 19 of FIPPA, has two branches. Branch 1 exempts records that are subject to solicitor-client privilege and litigation privilege, as these privileges are conceived at common law. Branch 2 exempts records that are "prepared by or for Crown counsel for use in giving legal advice or in contemplation or for use in litigation."

The requester appealed to the Information and Privacy Commissioner/Ontario, who held that Branch 1 of section 19 does not exempt records that are subject to settlement privilege from public access. The IPC also held that the custodian did not prove that the records were exempt under Branch 2 of section 19 because, having not submitted affidavit evidence, the custodian had not proved its stated intention to use the records in litigation, should the mediation have failed.

The Divisional Court held that the records were exempt because they were subject to settlement privilege and because they fit within the Branch 2 exemption. The first finding is very remarkable because the Court relied on FIPPA's purpose provision, rather than any one of the sixteen enumerated exemptions in FIPPA. In effect, the Court created an implied exemption from public access on the basis that, in the circumstances of this case, the public policy interest in encouraging settlement as embodied in the common law concept of settlement privilege trumps the public policy interest in transparency of government action.

The Court also held that Branch 2 of section 19, interpreted purposively, ought to exempt materials otherwise subject to settlement privilege as a class.

The Court's protective outlook is very atypical and will certainly be of great concern to the IPC and open government advocates. There is also some dicta in the decision that reveals a significant subtext.

What flows from the IPC's view of the law regarding settlement negotiations? First, the details of negotiations and settlement of any dispute between a government institution and a third party will be available to the world at large, following a request. There is an irony in this matter, whereby the IPC, in the name of transparency, labours for an anonymous Requester.

Ontario (Liquor Control Board) v. Magnotta Winery Corp., [2009] O.J. No. 2980 (Div. Ct.) (QL).

More e-mail skirmishes in Canadian FOI law

There have been a number of recent Ontario cases in which public institutions have argued that "personal" e-mails are not subject to public access because they are not under institutional "custody or control." In this case, the Edmonton Police Service searched and retrieved three e-mails but made redactions on the basis that full disclosure would constitute an "unjustified invasion of privacy." In support

of this position, it argued that the e-mails were communicated by members of the Edmonton Police Association in the course of association business and with a reasonable expectation of privacy. The Alberta Court of Queen's bench affirmed the Commissioner's finding that the e-mails were, in fact, not sent in the course of association business. Although this finding was determinative, it also commented that the Service's computer use policy warned users of the network that communications may be monitored and accessed by system administrators, and there was nothing improper in the Commissioner's reference to the Policy in considering whether the authors of the e-mails would have had an expectation of confidentiality.

The Court also affirmed a finding that the Service did not conduct a reasonable search and set aside an order to restore and search backup tapes. On the search itself, the requester had argued that the Service ought to have conducted an "electronic search" for responsive records instead of the "field filtering" process it actually employed – i.e. one in which custodians were asked to search, retrieve and deliver up records. The OIPC held that field filtering is reasonable, but that the head, or the head's delegate, should take a supervisory role, as the head is accountable for the quality of the search under section 10. The Court agreed with this, and affirmed the OIPC's finding that the Service did not engage in proper supervision of its field search.

Finally, the Court held the OIPC erred by ordering the Service to restore and search backup tapes without considering the restriction on the obligation to create records that require an institution to use more than its normal "computer hardware and software and technical expertise" or cause "unreasonable interference" with its operation. The Court appeared to assume that restoring compressed e-mails from a backup tape involves "creating" a record. This is a point that may be disputed.

Edmonton Police Service v. Alberta (Information and Privacy Commissioner), 2009 ABQB 593.

Divisional Court addresses meaning of "correctional record" in FIPPA

The Divisional Court affirmed the IPC/Ontario's interpretation of "correctional record" as a record pertaining to sentenced inmates, not remanded inmates.

The Court held that the IPC was reasonable to assign "correctional" its ordinary meaning in the section 42(e) exemption for correctional records containing information supplied in confidence. It held this interpretation was within the range of possible, acceptable outcomes in light of (1) the express language giving "correctional" an expanded meaning in other Ontario statutes, (2) other language in FIPPA that addresses an alleged risk posed by the ordinary meaning construction and (3) the openness-favouring purpose of FIPPA.

This is confined in its significance to the interpretation of section 42(e) and is otherwise a standard of review and statutory interpretation case. The Court did make the following notable comment on how to construe exemptions in freedom of information legislation: "[The call for a purposive analysis] does not mean that a strict interpretation by itself with respect to exemptions in privacy statutes [sic] endows the interpretation with reasonableness."

Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), [2009] O.J. No. 5455 (S.C.J.) (QL).

1.3 FREEDOM OF THE PRESS

Ont. C.A. considers pre-trial publicity, jury contamination and the internet's long memory

A 3-2 majority of the Ontario Court of Appeal held that the mandatory ban on publication of bail proceedings when requested by an accused violates the *Charter*-protected right to freedom of the press and is not saved by section 1. The majority read down the *Criminal Code* ban so that it applies only to charges that may be tried by a jury.

All members of the panel agreed that the mandatory ban breached freedom of the press. They also agreed on the purpose of the ban: to ensure a fair trial by promoting expeditious bail hearings, avoiding unnecessary detention and allowing accused to retain scarce resources to defend their cases. The panel members differed, however, on how to apply the *Charter's* saving provision, section 1.

The majority held that the ban was over-broad in its application to charges that may not be tried by a jury. While finding that judges are "professional decision-makers" immune to the influence of pre-trial publication, the majority was not willing to invalidate the legislation as it applied against juries given the conflicting social science evidence on the impact of pre-trial publication on jury decisions. It held that the legislature is entitled to act upon a "reasoned apprehension of harm" in enacting laws based on such disputed domains.

The minority, in a judgment written by Mr. Justice Rosenberg, held that the conflicting evidence was a basis for striking down the ban in whole (with a 12 month suspension). The minority held that the salutary effects of the ban did not outweigh its deleterious effects because the causal connection between pre-trial publicity and jury contamination is weak and speculative.

Both the majority and minority made comments on the internet and the concept of practical obscurity. In particular, it was recognized that the mere passage of time from media publication could not be relied on to justify weakening publications.

Toronto Star Newspapers v. Canada, 2009 ONCA 59.

Man C.A. affirms quashing of orders to produce media tapes

The Manitoba Court of Appeal affirmed the quashing of two *Criminal Code* production orders issued against the CBC and CTV. The orders were for production of audio and video recordings of a press conference held at the Assembly of Manitoba Chiefs that the RCMP sought on a belief that they contained admissions by a man who had recently been shot and tasered in a confrontation with police.

Joyal J. of the Manitoba Court of Queen's Bench had previously considered the sufficiency of the supporting information in light of the discretionary factors for assessing the reasonableness of searching a media organization laid out by the Supreme Court of Canada in *New Brunswick and Lessard*. He held that the informant ought to have disclosed:

- that the police had been given prior notice of the press conference but had chosen not to attend;
- the possibility that the tapes might include one-on-one interviews given the media's greater privacy interest in this type of content (even though the informant only later discovered that the tapes being sought contained one-on-one interviews with subject of his investigation); and
- the existence of eyewitnesses to the admissions being sought (though such was obvious) and whether they were an adequate alternative source of evidence.

Joyal J. held that these deficiencies, as they related to the media's privacy interest, led to a flawed exercise of judicial discretion and quashed the production orders as unreasonable. The Manitoba Court of Appeal held that Joyal J. articulated and applied the proper legal test, did not err in his findings of fact and did not err in finding the police search unreasonable.

Canadian Broadcasting Corporation v. Manitoba (Attorney General), 2009 MBCA 122.

1.4 REASONABLE SEARCH

IPC blesses manual processing of FOI request despite push for "e-access"

The IPC/Ontario issued an order in what appears to be a well-litigated dispute about the access request process. It rejected a challenge to the reasonableness of a search and the reasonableness of a fee estimate that was based on the respondent municipality's manual process of providing access.

The responding municipality's FOI officer directed officials to conduct searches for responsive records and to print and forward responsive records. The officer then manually de-duplicated and reviewed records prior to providing access. The appellant argued that this process was unreliable and inefficient and that the municipality either should have used its IT department or third-party to process the request using automated means. The IPC deemed the municipality's chosen process to be reasonable, though it disallowed fees related to 2.5 hours of de-duplication and organization because the municipality did not provide sufficient supporting particulars.

The IPC has, in at least one order, endorsed an "e-access" process in upholding a fee estimate for about $12,500. Though such a process is more in tune with prevailing best practices for records search and retrieval, it tends to result in higher costs, all of which can be transferred to an Ontario requester if a third-party service provider is used.

MO-2472, 2009 CanLII 63119 (ON I.P.C.).

2. PRIVACY

2.1 ACCESS TO PERSONAL INFORMATION

Ont. C.A. allows criminal records check appeal about disclosure of withdrawn charges

The Ontario Court of Appeal held that a police service lawfully disclosed information about an individual's withdrawn criminal charges in the course of administering background checks.

The Court of Appeal held that the applications judge erred to the extent that he found that the applicant did not give specific consent to the disclosure of the withdrawn charges. The Court held that consent to disclose this information could be inferred in the circumstances even though the written consent form did not expressly refer to withdrawn charges. This essential finding is illustrative but fact-based. More broadly, however, the Court also found that the consent was not invalid because it was coercive as prospective employers involved with vulnerable persons require all potentially relevant information about potential employees, within the bounds of the permissible disclosure of personal information.

The Court also rejected arguments that the disclosure breached the applicant's rights under sections 7 and 8 of the *Charter*.

This highlights the vulnerability of individuals in Ontario who are charged with criminal offences but not convicted, given the recent finding by the Human Rights Tribunal of Ontario that the "record of offences" protected ground does not protect persons only charged with offences. See *de Pelham v. Mytrak Health Systems*, 2009 HRTO 172 (CanLII).

Tadros v. Peel (Police Service), 2009 ONCA 442.

Federal Court of Appeal confirms ministerial offices beyond the scope of ATIA requests

The Federal Court of Appeal dismissed the Information Commissioner of Canada's appeal of Justice Kelen's June 2008 finding that the Prime Minister's Office and other ministerial offices are not "institutions" whose records are subject to the *Access to Information Act*.

Justice Kelen had also found that some information in former Prime Minister Chretien's agenda book in the control of the Privy Council Office and the Royal Canadian Mounted Police was not exempt from public access as his personal information. In a separate appeal, the Federal Court of Appeal allowed an RCMP appeal of this finding. The Court of Appeal held that the Prime Minister is not an officer of the Privy Council Office whose job-related information excluded from the definition of personal information by section 3(j) of the ATIA.

Both of the Court of Appeal judgements turn on a finding that the ATIA was drafted on the basis of a well understood convention that the Prime Minister's Office is separate from the Privy Council Office and the offices of Minsters are separate from the departments over which Ministers preside.

Canada (Information Commissioner) v. Canada (Minister of National Defence), 2009 FCA 175.

Canada (Royal Canadian Mounted Police) v. Canada (Information Commissioner), 2009 FCA 181.

2.2 APPLICATION, EXCLUSIONS AND JURISDICTION

NBCA says Federal Court is proper forum for PIPEDA challenge

The New Brunswick Court of Appeal held that the Federal Court is the proper forum for a broad challenge to the powers granted to the Federal Privacy Commissioner by PIPEDA.

The Court held that the matter was essentially a request for judicial review of an OPC decision despite the applicant's constitutional validity argument, which it had made in the alternative. Given this characterization, the Court held that the Federal Court was the proper forum.

This is not a privacy judgement, but it is nonetheless worth noting, given the thrust of the applicant's substantive objection. As a defendant's insurer, it claimed the OPC had no jurisdiction to deal with its video surveillance of a plaintiff, since the relationship between the plaintiff and defendant arose from an accident, which is not a commercial activity. The Court found that whether the Insurer's actions amounted to a commercial activity is the very question the Privacy Commissioner must determine.

State Farm Mutual Automobile Insurance Company v. Privacy Commissioner of Canada, 2009 NBCA 5 (CanLII)

SCC broadens scope of Crown's "first party" disclosure duty and more

The Supreme Court of Canada issued a unanimous judgement that broadens the scope of the Crown's duty of disclosure to an accused person and facilitates an accused person's right to third-party production.

On Crown-to-accused ("first party" or *Stinchcombe*) production, the Court held that the Crown is not a single entity for the purposes of its obligation to disclose information in its possession and control. It did, however, stress that the "investigating Crown" has a positive duty to build-out the Crown brief by making "reasonable inquiries" of other Crown agencies and departments. This duty, said the Court, includes a duty to collect and disclose records of police misconduct, at least where an officer who is likely to be a witness at trial has a record with some arguably relevant blemishes. The broadening of the *Stinchcombe* duty means that accused persons will no longer face the prospect of fishing for records of police misconduct or other similar information by bringing third-party (*O'Connor*) motions.

The Court also modified the two stage O'Connor process: an accused person must still establish "likely relevance" to justify a court review of third-party records, but at the second stage reviewing judges must now focus on the "true relevance" of the records rather than the competing interest in protecting personal privacy. If a judge concludes that records examined are truly relevant, the Court held they should be ordered to be disclosed despite any subject's competing privacy interest. Reviewing judges should still be concerned with personal privacy, but the Court suggested that barring production was a less appropriate

means of protecting personal privacy than means such as redaction and protective orders. While establishing this production-favouring rule, the Court stressed that there is a higher standard for production of records in sexual assault cases, as such production is governed by the *Criminal Code* and *Mills*.

R. v. McNeil, 2009 SCC 3.

B.C. Court strikes privacy breach claim brought against raiding union

The British Columbia Supreme Court issued a judgment striking out a privacy breach claim brought by an incumbent union against another union engaged in a so-called membership raid.

The incumbent (the HEU) argued that the raiding union (the BCNU) breached the British Columbia *Privacy Act* and the British Columbia *Personal Information Protection Act* by misusing personal information collected from its members in executing a "high pressure campaign." The BCNU moved to strike the claim. It argued (1) the HEU had no standing to sue on behalf of its members (whether named or not); and (2) PIPA does not support a civil cause of action.

The Court agreed with both arguments. It concluded that both the *Privacy Act* and PIPA grant an individual right of privacy that cannot be asserted by a union on behalf of its members. On whether PIPA supports a civil cause of action, the Court stated that PIPA provides an adequate administrative scheme. Section 57 clearly shows that the Legislature considered the issue of civil claims and only included a right for an individual to advance a claim against an organization for damages after the commissioner has made an order. The Court noted that this had not occurred here.

The Court also struck claims based on fraudulent misrepresentation and deceit, leaving the HEU action to proceed on the basis of interference with contractual and economic relations.

Facilities Subsector Bargaining Association v. British Columbia Nurses' Union, 2009 BCSC 1562 (CanLII).

Newfoundland FOI judgement on "advice and recommendations" exemption

The Newfoundland and Labrador Supreme Court – Trial Division issued an FOI judgement. It is largely fact-specific, but the Court made this comment on the advice and recommendations exemption in the Newfoundland *Access to Information and Protection of Privacy Act*:

The words "advice" and "recommendations" have similar but distinct meanings. The term "recommendations" relates to a suggested course of action. "Advice" relates to an expression of opinion on policy-related matters such as when a public official identifies a matter for decision and sets out the options, without reaching a conclusion as to how the matter should be decided or which of the options should be selected.

The Court also held that the statutory privilege in section 55 of the Act protects records from production.

McBreairty v. College of the North Atlantic, 2010 NLTD 28 (CanLII).

Appeal Court interprets Alberta PIPA time limit

A majority of the Alberta Court of Appeal held that the time limit for completing an inquiry or giving notification of a time extension in the Alberta PIPA is mandatory, but that non-compliance does not necessarily result in a loss of jurisdiction.

Section 50(5) of Alberta PIPA establishes a time limit for completing an inquiry in the following language:

> 50(5) An inquiry into a matter that is the subject of a written request referred to in section 47 must be completed within 90 days from the day that the written request was received by the Commissioner unless the Commissioner
>
> (a) notifies the person who made the written request, the organization concerned and any other person given a copy of the written request that the Commissioner is extending that period, and
>
> (b) provides an anticipated date for the completion of the review.

The majority, in a judgment written by Watson J., held that the decision to extend (and notify of the same) must be given before the expiration of the 90 day time period and that the time period is mandatory rather than directory. The majority also held, however, that loss of jurisdiction does not flow from non-compliance if there has been (emphasis added):

> (a) **substantial consistency** with the intent of the time rules having regard to the reason for the delay, the responsibility for the delay, any waiver, any unusual complexity in the case, and whether the complaint can be or was resolved in a reasonably timely manner, and
>
> (b) that there was **no prejudice** to the parties, or, alternatively, that **any prejudice to the parties is outweighed** by the prejudice to the values to be served by PIPA.

Berger J. dissented. He held that the time limit was directory and also took issue with the Applicant's failure to raise a timely objection before the Commissioner.

This has obvious practical significance to the Alberta OIPC and Alberta practitioners. (Alberta FIPPA has a similar time limit.).

Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner), 2010 ABCA 26 (CanLII).

2.3 DRUG TESTING

ABCA quashes Bantrel site access drug testing award

The Alberta Court of Appeal quashed an arbitrator's endorsement of a site-access testing policy brought in by an Alberta construction site owner. The arbitration panel's March 2007 award was quite broad. Chairperson Phyllis Smith held that the parties' incorporation of a model drug and alcohol guideline did not preclude pre-access testing of current employees and then focused most of her analysis on whether the testing requirement was reasonable in all the circumstances.

Unlike the arbitration award, the Court of Appeal's judgement is narrow and based on contract language. It held that the panel erred in holding that the parties did not preclude site-access testing by incorporating the model. The model referred to "pre-employment" testing, which the Court stressed was different than the "pre-access" testing of current employees. It held that the incorporation of pre-employment testing impliedly excluded pre-access testing.

The Court also read a clause that was unique to one of the three collective agreements very narrowly. The agreement specified that the "parties will cooperate with clients who institute pre-access drug and alcohol testing." The Court read this as an agreement to negotiate, reasoning that the word "cooperate" was not strong enough to indicate an endorsement of pre-access testing given its exclusion from the model.

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488 v. Bantrel Constructors Co., 2009 ABCA 84 (CanLII).

Ont. C.A. affirms Arbitration Board's principled attack on random drug testing

The Ontario Court of Appeal affirmed a December 2006 award by an arbitration board chaired by Michel Picher, in which he held that Imperial Oil breached its collective agreement with Local 900 of the CEP by implementing random drug testing by buccal swab.

The Court of Appeal's judgement turns on the standard of review rather than on principle. The Court did not feel it necessary to reconcile the majority's strong stance against random drug testing with its own affirmation of random alcohol testing in the year 2000 *Entrop* decision. It simply noted that Mr. Picher had distinguished *Entrop* because Imperial Oil's testing method took two days to return a test result.

While this might appear to still leave employers with room for implementing random drug testing based on a method that does address current impairment, Mr. Picher made a very principled attack on random drug testing, suggesting it was unreasonable unless an employer is able to adduce evidence of "extreme circumstances" such as an "out-of-control drug culture." Mr. Picher's award does not bind other arbitrators who are charged with interpreting other collective agreements, but it is authoritative, particularly after the Court of Appeal's affirmation.

Imperial Oil Limited v. Communications, Energy & Paperworkers Union of Canada , Local 900, 2009 ONCA 420.

Arbitrator Kaplan follows *Imperial Oil* case… says no to random alcohol testing

Arbitrator Bill Kaplan held that an employer breached its collective agreement by implementing random alcohol testing for safety-sensitive positions. The employer attempted to argue that Arbitrator Michel Picher's strong pronouncement against random testing in his December 2006 *Imperial Oil* case was wrongly decided though it was upheld on a review for patent unreasonableness by the Ontario Court of Appeal. Mr. Kaplan disagreed and stated that the Court of Appeal made clear that it accepted Arbitrator Picher's analysis and conclusions based as they were on the facts, the language of the collective agreement and the synthesis of the arbitral authorities all set out within a context of balancing of interests. He added that, in any event, he found *Imperial Oil* persuasive and almost on all fours with the facts of this case.

The Picher decision suggests that a general policy of unannounced random alcohol or drug testing will only be justifiable if there is evidence of a significant problem in controlling the impact of drug and alcohol use on the workplace. In this case, Mr. Kaplan said, "There is no evidence of a problem to be addressed."

Petro-Canada Lubricants Centre (Mississauga) v. CEP, Local 593, 2009 CanLII 44405 (ON L.A.).

2.4 OUTSOURCING

Arbitrator dismisses Faculty Association challenge to e-mail outsourcing

Arbitrator Joseph Carrier dismissed a grievance that claimed a university violated faculty members' right to privacy by outsourcing its e-mail system to Google. The association relied on a collective agreement provision that required the university to provide a "computer connection", and another by which the university agreed "that members have the right to privacy in their personal and professional communications and files, whether on paper or in electronic form."

Mr. Carrier held that the promise to provide a "computer connection" was not a promise to provide members with e-mail service. He also held that, having provided e-mail service, the University did not breach its privacy-related undertaking by outsourcing to Google. His conclusion on the privacy claim rested on a finding that e-mail communications are inherently insecure and that the language in the collective agreement could not therefore be read to guarantee e-mail privacy.

Lakehead University (Board of Governors) v. Lakehead University Faculty Association, 2009 CanLII 24632 (ON L.A.)

2.5 COLLECTION

Court rejects complaint about intelligence gathering through corporate e-mail system

The Federal Court dismissed a PIPEDA application that alleged an executive, Mr. McCarthy, had unlawfully collected personal information about the applicant by sending an e-mail to members of his firm, J. J. Barnicke's.

These facts raise a good issue about PIPEDA application, but the Privacy Commissioner took jurisdiction over the complaint and the Court application did not address whether the collection at issue was made in the course of J.J. Barnicke's commercial activity or for Mr. McCarthy's personal purposes. (it is questionable whether a finding of jurisdiction is consistent with the Federal Court's recent *Johnson v. Bell Canada* ruling.)

The Court dismissed the unlawful collection complaint because the applicant had not proven that Mr. McCarthy had actually collected personal information as result of his request. Notably, the Court gave no weight to the applicant's argument that it should infer that Mr. McCarthy's inquiry was fruitful from the respondent's failure to adduce evidence of a thorough search of its computer system (including a search of e-mail archives and back-up tapes). It was satisfied with Mr. McCarthy's sworn denial, which the applicant did not challenge in cross-examination.

The Court also declined to award damages for breach of PIPEDA's accountability principle. The Privacy Commissioner had concluded that J.J. Barnicke did not have appropriate privacy policies in place nor did it have a designated privacy officer accountable for compliance as required by the Principles 4.1 and 4.1.4 of Schedule 1 to PIPEDA. The company complied with the Commissioner's recommendations, and she therefore deemed the complaint to be "well-founded and resolved." Without re-visiting the question of breach, the Court held that it was not proper to award damages in the circumstances.

Waxer v. J.J. Barnicke Limited, 2009 FC 168 (CanLII).

Alta. Q.B. quashes pawn shop order

The Alberta Court of Queen's Bench quashed an order of the Information and Privacy Commissioner of Alberta that dealt with a City of Edmonton directive to second hand goods dealers that required them to collect the personal information of individuals selling used goods.

The IPC had ordered the City to stop collecting information and to destroy its database. It held that the scheme established a "collection" by the City, but that this collection violated the Alberta *Freedom of Information and Protection of Privacy Act* because it was not authorized by law, was not collected for the purpose of law enforcement and was not necessary for an operating program or activity of the City. The key finding was that the City's longstanding by-law, which required used goods dealers to make information available to peace officers, did not allow the City to implement a scheme whereby information is uploaded to a database under the City's control.

The Court of Queen's Bench held that the IPC's reading of the by-law was too strict and that the by-law provision that required dealers to "record" and "make available" information authorized it to direct the uploading of personal information to a secure database to be accessed on a standing basis. The outcome of the Queen's Bench decision did not turn on this finding, because it held in any event that the City was not collecting information through dealers. Since dealers had their own purpose for collecting the information and also collected and uploaded additional information than that required by the City, the Court held they were not the City's agents. According to the Court, the scheme entailed a collection by the police rather than the City, a collection that was lawful because it was made for the purpose of law

enforcement. Finally, the Court held that the Commissioner erred in ordering the destruction of the database.

Business Watch International Inc. v. Alberta (Information and Privacy Commissioner), 2009 ABQB 10.

Alberta OIPC blesses picket line videotaping for limited purposes

The Alberta Office of the Information and Privacy Commissioner held that a union did not need consent to continuously video tape a picket line so it could capture any evidence of picket line misconduct. The OIPC held that the union could rely on the Alberta PIPA "investigations exception" to the rule against collecting personal information without consent. The exception applies when a collection, use or disclosure of personal information is "reasonable for the purposes of an investigation or legal proceeding." The OIPC held that this language is engaged when misconduct is "likely to occur." The determining factor was not the type of information collected, but rather the purpose for which it was collected.

The OIPC found that the union nonetheless violated the Act by collecting, using and disclosing images for purposes other than its investigative purpose and, specifically, by taking still photographs of individuals (which did not reveal any misconduct) and by using pictures of a vice-president of the employer in its posters and newsletters. The OIPC also held that the union failed to give notice of its investigative purpose as required by the Act.

This finding – that the investigations exception can apply to surveillance – is of significance that goes beyond the picket line scenario being considered. The OIPC's treatment of the picket line scenario itself is of less significance but nonetheless interesting.

Order P2008-008 (30 March 2009).

On wild coyotes and collecting personal information

The British Columbia Information and Privacy Commissioner's driver's licence swiping case illustrates some points about justifying personal information collection under a necessity standard – a standard for collection common to both public and private sector Canadian data protection legislation.

The IPC's most significant finding was that Vancouver's "Wild Coyote Club" could not require patrons to consent to a driver's licence swipe (or surrender a piece of ID) as a condition of service because the related collection of personal information went beyond what is "necessary to provide the product or service." It affirmed that British Columbia PIPA requires that a mandatory collection be reasonably necessary rather than strictly necessary. It also articulated the following two-part test:

> For personal information to be "necessary" for the purpose of s. 7(2) of PIPA, the purposes for the collection, use or disclosure must be integral to the provision of the product or service. In addition, the personal information must fulfill a significant role in enabling the organization to achieve that purpose.
>
> The IPC said that these questions will be assessed in light of the sensitivity of the personal information being collected and whether there are less intrusive means of meeting a legitimate objective for collecting the information.

Order P09-1, 2009 CanLII 38705 (BC I.P.C.).

Alberta OIPC says no to credit checks as part of retail security program

The Alberta OIPC held that a retailer's practice of conducting credit checks in the process of hiring sales associates violated the Alberta PIPA.

The retailer used the checks as part of a comprehensive retail security program. It argued they were justified based on two purposes:

1. To assess how applicants will handle financial responsibilities and tasks associated with their employment duties
2. To assess whether applicants have a probable risk of in-store theft or fraud

The OPIC held that these purposes did not justify the collection of credit related information. The OPIC's reasoning is as broad, or broader, than its reasoning in a 2005 credit check case in which it reached the same conclusion. This suggests that Alberta's private sector employers will need special circumstances to conduct credit checks on prospective employees.

Investigation Report P2010-IR-001

FCA quashes order for failure to consider privacy interest of non-party

The Federal Court of Appeal quashed an order by the Public Service Staff Relations Board, because it accepted a consent order between a union and several employers that required the employers to disclose employee home addresses and telephone numbers to the union.

The Board held that the employers breached the *Public Service Labour Relations Act* by failing to provide the union with "some" contact information to facilitate its representational role. It reserved judgment on remedy, raised the issue of employee privacy to the parties and encouraged them to seek agreement on a remedy. The parties later came back before the Board and it endorsed their agreement in a consent order without reasons.

The Court held that the Board erred in law by simply endorsing the consent order and failing to exercise its jurisdiction. The Court explained that this rarely-challenged practice can be fatal when there are non-parties whose privacy interests are affected by an agreement.

The Court also commented that the persons not before the board had statutorily protected privacy rights of which the Board was well aware. The Board had an obligation to consider those rights and to justify interfering with those rights to the extent that it did. The Court commented that the Board could not abdicate that responsibility by simply incorporating the parties' agreement into an order.

The Court ordered the matter to be remitted to the Board, ordered it to give notice to the Office of the Privacy Commissioner and suggested that the applicant also be given notice and standing.

Bernard v. Canada (Attorney General), 2010 FCA 40 (CanLII).

2.6 SEARCH AND SEIZURE

Ont. S.C.J. okays warrantless search of subscriber data

The Ontario Superior Court of Justice dismissed a *Charter* application that challenged a request made by the police to an internet service provider for the name and address of an account holder associated with a specific IP address, at a specific point in time.

The Court held that the applicant had no expectation of privacy in the information disclosed, which the police used to obtain a warrant and lay child pornography charges. The Court narrowly construed the personal information collected in the search as one's name and address (or the name and address of a cohabiting spouse) and held that this information is not "biographical information" that is protected by the *Charter*. It also relied on the service provider's contract of service, which expressly permitted the release of information. The Court concluded that by "virtue of the contractual terms on which the internet service was provided an expectation of privacy is not reasonable".

R. v. Wilson (10 February 2009), 4191/08 (Ont. S.C.J.).

Arbitrator Simmons rejects challenge to bag search

Arbitrator Gordon Simmons dismissed a motion to exclude evidence obtained in a bag check conducted by a municipal employer. The employer found stolen goods after examining the contents of two bags that were left near a receiving area of a care home. One of the bags was left open and there was signage nearby indicating that personal belongings should not be left unattended. The union argued that the evidence should be excluded because the employer breached section 8 of the *Charter*.

In the circumstances, Mr. Simmons held that the grievor had abandoned her expectation of privacy. More significantly, he held that the *Charter* did not apply to the municipality in its management of the grievor's employment relationship. In making this finding, Mr. Simmons relied on the Supreme Court of Canada finding in *Dunsmuir*, where it held that the termination of public sector employees is generally governed by private law.

Ottawa (City) and Ottawa-Carleton Public Employees Union, Local 503 (Nguyen Grievance), [2009], O.L.A.A. No. 37 (Simmons) (QL).

Information about lifestyle abandoned when trashed

In *R. v. Patrick*, the Supreme Court of Canada issued its unanimous judgment, which held that the police did not violate an accused person's right to be from unreasonable search and seizure by seizing information found in garbage.

The case is about the concept of abandoning one's subjective expectation of privacy. In a decision written by Binnie J., the six-judge majority framed the test for abandonment as follows: "The question is whether the claimant to s. 8 protection has acted in relation to the subject matter of his privacy claim in such a manner as to lead a reasonable and independent observer to conclude that his continued assertion of a privacy interest is unreasonable in the totality of the circumstances." The majority held that this test was satisfied in the circumstances, taking special note of the identifying information that would be mixed-in with the accused individual's household garbage long after the "bag of information" itself was no longer sitting outside of his home. The court reasoned that the point at which an individual can be said to have abandoned his or her subjective expectation of privacy must be based on the individuals' conduct, and not on anything that the police or garbage collectors may do.

This reasoning limits the impact of the majority judgment. It is about the reasonableness of asserting an expectation of privacy after disposing of household waste in a manner that leaves it identifiable. The outcome may have differed if the accused individual had shredded his bills and other identifying information.

R. v. Patrick, 2009 SCC 17.

Alta. C.A. says "chewing gum survey" does not cause an unreasonable search

The Alberta Court of Appeal held that a defendant abandoned an expectation of privacy in his DNA by depositing chewing gum into a paper cup provided by an undercover officer who had asked him to

participate in a "gum survey." It rejected the defendant's argument that spitting something out into a receptacle (as opposed to an environment that would promote anonymity) did not demonstrate abandonment. It also held that the police set up was neither a trick that warranted sanction, nor was it an act that affected the Crown's abandonment claim.

R. v. Delaa, 2009 ABCA 179 (CanLII).

Ont. SCJ says no expectation of privacy in data stored on work computer

The Ontario Superior Court of Justice held that a teacher had no expectation of privacy in information stored on his work laptop. The Ontario Superior Court of Justice allowed an appeal of the trial judge's decision to exclude evidence based on a finding that the board had breached the teacher's *Charter* right to be free from unreasonable search and seizure. It held that the trial judge had erred in concluding that the teacher had an objectively reasonable expectation of privacy, given that the laptop was issued by his employer, remained the property of the school board, and that he used the software, server, and network of the school board.

While the judgement contains numerous broadly worded statements, the Court did state that its judgement turned on a number of specific facts. It stressed that the teacher was bound by his employment contract to an acceptable use policy that limited his interest in information stored on the laptop and that the teacher (quite remarkably) had a special role in supervising computer use at the board that ought to have reinforced this point.

This appeal judgement reflects an approach that has been traditionally adopted by Canadian labour arbitrators and, to the extent they have addressed the question, Canadian courts. It is not surprising in itself, but the sharp difference in view held by the trial judge illustrates the current tension on this issue. The trial judge had found that the teacher's exclusive use of the laptop, which was protected by a password, demonstrated that the school board accepted and permitted employees to load private material on their laptops.

R. v. Cole, 2009 CanLII 20699 (ON S.C.).

SCC alters section 24(2) test… applies it in search and seizure case

In July, the Supreme Court of Canada issued two search and seizure decisions. In *R. v. Harrison*, the majority applied a newly-developed test for excluding evidence obtained in breach of the *Charter* and excluded evidence obtained in a "brazen" and "flagrant" unlawful search of a rental car. In *R. v. Shepherd*, the Court unanimously held that a breathalyzer demand was made based on reasonable and probable grounds and was therefore lawful.

Real and non-conscriptive evidence excluded in Harrison

The Ontario Court of Appeal's majority decision in *Harrison* was criticized for allowing in evidence that would bring the administration of justice into disrepute. This case was about a drug charge that followed a police demand to pull over a rental car on a Northern Ontario highway, where the officer had no real reason to stop the car.

Though the trial judge found the officer's in-court testimony to be misleading, he admitted the evidence of the found drugs because he felt the criminality of the offence to be serious. A majority of the Ontario Court of Appeal agreed.

A majority of the Supreme Court of Canada, with Dechamps J. dissenting on his own, held that the evidence ought to have been excluded based on the police officer's blatant disregard for *Charter* rights and his misleading testimony. The majority applied the new three-part test articulated in the Court's

concurrently-issued decision in *R. v. Grant*, in which it said a court must assess and balance the effect of admitting evidence on society's confidence in the justice system having regard to:

- the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct);
- the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little); and
- society's interest in the adjudication of the case on its merits.

This framework was endorsed by the majority in *Grant* to encourage a more contextualized approach to admissibility and to retreat from a rule that conscriptive evidence is generally inadmissible. In *Harrison*, the found cocaine was neither conscriptive evidence nor unreliable in any way. Regardless of this, the Court held that it should have been excluded, finding that the exclusion of reliable evidence of a serious offence did not outweigh the importance of maintaining *Charter* standards.

R. v. Harrison, 2009 SCC 34.

Trial judge wrong in finding officer had no reasonable grounds for breathalyzer demand

The sole issue in *Shepherd* was whether a trial judge erred in finding that a police officer had insufficient grounds to demand a breathalyser test. The judge found that the officer had a sufficient subjective belief but that his belief was not objectively reasonable, in part because he had relied on the accused person's initial failure to pull over. The accused person said that he didn't pull over because he thought the police car was an ambulance. The trial judge felt this excuse was valid, and held that the officer did not have reasonable grounds, even though he testified that the accused person looked lethargic, had red eyes and smelled of alcohol.

The Supreme Court held that the existence of reasonable grounds is a question of law subject to review on a standard of correctness. It then held that the trial judge erred in finding that the officer's subjective belief of impairment was not objectively supported on the facts, since the officer's belief was based not only on the accused's erratic driving pattern, but also on the various indicia of impairment which he observed after he arrested Mr. Shepherd. The Court stated that the officer need not have anything more than reasonable and probable grounds to believe that the driver committed the offence of impaired driving or driving "over 80" before making the demand. He need not demonstrate a *prima facie* case for conviction before pursuing his investigation. The Court concluded that there was ample evidence to support the officer's subjective belief that Mr. Shepherd had committed an offence under s. 253 of the *Criminal Code*.

R. v. Shepherd, 2009 SCC 35.

Alberta C.A. splits on police use of electricity consumption recording technology

The Alberta Court of Appeal issued a split judgement in which the majority held that the police violated an accused person's *Charter* rights by using a digital recording ammeter (used to measure electrical consumption) to gather information in support of a grow-op investigation. Partly on the strength of this evidence, the police obtained a warrant that led them to lay charges.

Whether the police violated the accused person's reasonable expectation of privacy by conducting a warrantless "DRA search" was the key issue in the case. It turned on (1) the quality of the electricity consumption information (and whether it went to the accused person's "biographical core of personal information") and (2) the effect of a regulatory provision promulgated under the *Alberta Electrical Utilities Act* that expressly permits Alberta service providers to disclose customer information to the police without consent unless contrary to their express wishes. This statutory permission, in the circumstances, was also backed by a contractual provision that warned the accused person that his information could be provided to law enforcement "for drug investigations."

The majority held that the police violated the accused person's reasonable expectation of privacy. It distinguished the Supreme Court of Canada decisions in both *Plant* (no expectation of privacy in electrical billing records) and *Tessling* (no expectation of privacy in heat patterns emanating from a residence) based on the quality of the information. The majority explained that the DRA technology at issue is more intrusive and more revealing; it produces information as to the amount of electricity being used in a home and when it is being used, all over a significant period of time.

On the effect of the statutory permission, the majority construed the regulation strictly, and only to permit the disclosure of already *recorded information* about electrical consumption; and not information that is not useful to the homeowner's relationship with the utility.

O'Brien J.A. issued a very thorough dissent, finding that there was no reasonable expectation of privacy with respect to the DRA record disclosed to the police, a finding he noted is the same as reached by the Saskatchewan Court of Appeal in *R. v. Cheung*. O'Brien J.A. reasoned that *Plant* and *Tessling* were not distinguishable and supported a finding that the DRA graph provided to the police did not reveal any part the accused person's "biographical core of personal information." He also reasoned that the *Electrical Utilities Act* regulation and the related service contract clearly permitted disclosure in the circumstances and therefore weighed heavily against an expectation of privacy. Note that O'Brien J.A. also made two alternative findings. He held that the search was also reasonable because it was authorized by statute and, in the further alternative, by common law police powers.

R. v. Gomboc, 2009 ABCA 276.

Court finds warrantless search for ISP subscriber info unreasonable, admits evidence

Pringle J. of the Ontario Court of Justice held that the police violated section 8 of the *Charter* by obtaining the identity of an individual suspected of possessing and sharing child pornography by making a simple letter request to an ISP. She admitted the evidence despite the *Charter* breach though, and in doing so made some significant comments about the impact of terms of service on internet user privacy.

There have been a number of recent Canadian cases about whether the police can investigate internet crime by asking an ISP to reveal the identity of the individual linked to an IP address that is associated with unlawful and anonymous activity. The cases turn on whether this investigatory tactic violates a reasonable expectation of privacy. Two factors have featured strongly in the analysis: (1) the nature of the information obtained by the police; and (2) the contractual terms between the individual and ISP.

Unlike some other judges who have decided the issue, Justice Pringle held that the nature of the information obtained by a police request to an ISP *does* go to an individual's biographical core. She explained that this tactic allows the police to obtain the identity of an otherwise anonymous internet user and not simply an ISP subscriber's name and address, and also a great deal of information about his lifestyle and interests.

Pringle J.'s treatment of the contract is even more significant. Like other judges before her, she held that a contract between the ISP subscriber and ISP can negate an otherwise reasonable expectation of privacy. In the case before Pringle J., however, the Crown did not prove the specific contract entered into between the defendant and his ISP, and therefore failed to negate what Pringle J. called a "premise of confidentiality" regarding one's ability to engage in anonymous internet use. Her judgement suggests that reliance on ISPs alone does not negate an otherwise reasonable expectation of privacy in anonymous internet use, but the specific terms of service an individual agrees to may change this.

Ultimately, ISP terms of service did have a significant influence on the outcome in this case even though the Crown failed to prove the defendant's specific contract. Pringle J. decided to admit the impugned evidence despite the proven *Charter* breach, in part because ISPs often put customers on notice that they will make disclosures to law enforcement. She also noted that subscriber information is important and can

provide a critical link to personal information, whereas a subscriber name and address does not have a great deal of intrinsic privacy on its own.

In conclusion, Pringle J. said that the practice of contracting for disclosure is "unfortunate," but also suggested that the courts will often be powerless to grant a *Charter* remedy in the face of such private action.

R. v. Cuttell, 2009 ONCJ 471 (CanLII).

RCMP allowed to access flight manifest without a warrant

The Nova Scotia Court of Appeal held that the RCMP did not conduct an unreasonable search by reviewing a WestJet passenger manifest without a warrant and without making a formal request.

The issue of law enforcement's access to personal information held by business organizations has arisen in a number of recent criminal cases, and it is becoming common for courts to judge the reasonableness of a police search in light of standards set by PIPEDA. PIPEDA restricts regulated organizations from disclosing personal information without consent, but includes an exemption for disclosure that is made to a government institution that suspects that the information is related to national security and is being requested for the purpose of administering or enforcing a law.

Mr. Justice Simon MacDonald of the Nova Scotia Supreme Court held the RCMP breached PIPEDA because it did not make a "request" required by section 7(3)(c.1) given its "cozy" relationship with WestJet. In addition to signalling that the procedural requirements in section 7(3)(c.1) are likely to be read strictly, the decision was notable for its close consideration of WestJet's privacy policy. The policy stated that WestJet might be "required by legal authorities" to disclose personal information without consent, but did not provide that WestJet would voluntarily cooperate with law enforcement. MacDonald J. said the policy "seems to emphasize that WestJet would only collect and disclose what is required by law and nothing more." This weighed in favour of finding the search to be unreasonable and therefore unconstitutional. MacDonald J. then excluded the evidence based on an application of the *Collins* test.

The Court of Appeal held that MacDonald J. erred by finding that the RCMP did not have legal authority for the collection of information and by equating a breach of PIPEDA with a breach of the *Charter* right to be free from unreasonable search and seizure. It then conducted its own contextual expectation of privacy analysis and held that section 8 of the *Charter* was not engaged in the circumstances. It noted the following in its analysis:

- It could not infer a subjective expectation of privacy given the information used by the RCMP was not particularly private – that is, the defendant purchased a ticket from Vancouver to Halifax at the last minute with cash and checked a single bag, all in public view.
- The place searched was a third-party's office, not a home or a business premises.
- Westjet's privacy policy, with its reference to being "required by authorities" to disclose certain information, was nonetheless a warning to passengers.
- Given the exception to the consent rule in section 7(3)(c.1)(ii), PIPEDA does not support an expectation of privacy.
- The police tactic was limited, in that the RCMP relied on a drug courier profile and sought only information that fit that profile.
- The information collected by the RCMP did not go to the defendant's "biographical core" of information. The Court said it "amounted to no more than Westjet's record of Mr. Chehil's public activities in transacting business with the airline."

- The fact that the passenger record had a space where more sensitive personal information could be entered (e.g. food preferences) did not support an expectation of privacy. The Court said this fact was too theoretical to count.

R. v. Chehil, 2009 NSCA 111.

Charter challenge to investigation allowed by PIPEDA rejected

The Ontario Court of Appeal affirmed the dismissal of a *Charter* application that claimed RBC violated section 8 of the *Charter* in investigating a case of mortgage fraud.

RBC had collected information from T-D 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.

In February, the Superior Court of Justice held that the grant of discretion to make disclosures found in PIPEDA 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*.

The Court of Appeal affirmed the application judge's reasoning and added that the "main protagonist" was in a solicitor-client relationship with RBC that stripped him of standing to make a section 8 claim: "In the circumstances, he cannot lay claim to a reasonable expectation of privacy in the records relating to the receipt and disbursement of funds received from his client concerning the suspect mortgage transactions."

Royal Bank of Canada v. Ren, 2009 ONCA 48.

BCCA says aerial surveillance by telephoto zoom lens not a search

The British Columbia Court of Appeal held that police did not violate section 8 of the *Charter* by conducting aerial surveillance of a rural property from in excess of 1000 feet by using a digital camera equipped with a telephoto lens.

The police obtained a search warrant based partly on this surveillance evidence. The pictures showed plants of a "distinctive green" colour through the opaque walls of a number of greenhouses. The grounds for the search warrant were also based on the location of the greenhouses on the rural property, which suggested they were meant to be obscured from public view, and a variety of observations taken from an adjacent property.

The Court held there was no search that engaged section 8 of the *Charter*. In doing so, the Court stated that the greenhouses, and the plants inside, were visible from the air, and thus in public view. It was not advanced or unique technology and it did not permit the police to determine what activities were taking place inside the greenhouses that were not otherwise observable given the translucent walls of the structures.

The Court also held that the police did not need to announce their presence on the property given it was a large rural property. It said, "To require the police to first alert persons working in or around the greenhouses was, as the trial judge accepted, impractical and an invitation to those present to flee, destroy evidence, or set up an ambush."

R. v. Kwiatkowski, 2010 BCCA 124.

2.7 TORT CLAIMS

Alberta Court of Appeal case discusses qualified privilege and threat reports

In *Chohan v. Cadsky,* the Alberta Court of Appeal found that three individuals acted within the scope of a qualified privilege in reporting expressions of concern about a colleague's mental health and were therefore not liable for defaming the colleague. The Court dismissed the appeal on the basis that the defendants each had an honest concern about the health of a colleague, and believed that, as a medical professional, he had a duty to either investigate this concern, or inform someone who was in a position to investigate. Each contacted the person he believed appropriate to provide assistance or investigate to ensure that there was no cause for concern. The Court also noted that these three defendants were not engaged in idle gossip or general discussion in making these communications and found that the defence of qualified privilege was designed for exactly such a situation.

The principled aspect of this statement is not surprising, and the application of the qualified privilege defence will always turn on the specific facts. However, given that bona fide reports of potential threats should be encouraged as part of managing workplace (and campus) violence, the case is worth a note.

Chohan v. Cadsky, 2009 ABCA 334.

Bare claim that individual published an anonymous letter can proceed

The British Columbia Court of Appeal recently published a judgment in which it declined to strike a defamation claim on the basis that it did not allege facts that connected an anonymous letter to the defendant, who was alleged to have published it.

The defendant (by counterclaim) argued that defamation pleadings are subject to a high standard of particularity and that the pleading of the plaintiff (by counterclaim) demonstrated mere speculation that she wrote the anonymous letter. She also argued that the plaintiff should not benefit from the presumption of truth normally accorded to pleadings attacked on the basis of their sufficiency, given his speculation.

The Court disagreed, stating that all the necessary elements of the cause of action were alleged. The fact that all the allegations were denied did not change that fact. Nor does the fact that the letter is anonymous on its face mean that something more is required in the pleadings. The Court stated that the Plaintiff did not make general allegations against a number of people without stating who did what. The allegations may be "conclusory" in the sense that the Court will be asked to 'connect' some 'dots' but the Plaintiff has pleaded the facts material to each element of the cause of action in respect of the Defendants as he is required to do.

The Court also rejected arguments that the plaintiff did not properly plead malice and breach of section 114 of the British *Columbia Business Practices and Consumer Protection Act*.

Lougheed v. Wilson, 2009 BCCA 537 (CanLII).

2.8 WORKPLACE MONITORING AND EMPLOYEE SURVEILLANCE

Arbitrator makes (surveillance) camera-by-camera order

Arbitrator Robert Howe issued an award upholding an employer's expanded video surveillance program while issuing a camera-by-camera order to minimize its privacy impact.

The employer installed cameras at its milk production facility, primarily to improve plant bio-security. The plant had not experienced a bio-security incident, but its auditor and a major customer urged it to improve its bio-security program. The employer installed additional cameras as part of this program, though it also

acknowledged that the cameras would be used to investigate employee misconduct, including documented incidents of sabotage to equipment.

Arbitrator Howe applied a balancing of interests approach. He held that the new cameras were helpful in addressing the bio-security threat, and that the employer did not have to await a bio-security breach before implementing safeguards. He also held that the cameras were the only means of addressing employee misconduct.

Though endorsing the employer's expanded surveillance program, Arbitrator Howe also issued an order that required the employer to direct cameras away from work areas as much as possible while preserving each camera's efficacy. He also ordered that images obtained only be used as a tool to investigate bio-security threats or incidents, incidents of health and safety violations, and incidents of culpable conduct, with no real-time monitoring of employees for any other purposes, and no use of those images for purposes of monitoring production, lateness, or attendance.

Re Teamsters Local Union 647 and William Neilsen Dairy (Surveillance Camera Grievance), [2009] O.L.A.A. No. 129 (Howe) (QL).

Arbitrator says relevant surveillance evidence is admissible… period

There is a division in Canadian arbitral jurisprudence on whether an arbitrator can (or should) refuse to admit surveillance evidence where the surveillance does not meet a standard of reasonableness. In June, Ontario Arbitrator Stephen Raymond held that relevant surveillance evidence is admissible, notwithstanding an alleged breach of privacy. He reached this conclusion on the basis that the method by which evidence is obtained does not impact on its admissibility; if it is relevant, it must be admitted.

Arbitrator Raymond also noted that many arbitrators who have excluded surreptitious videotape surveillance evidence seem to base their decision, in part, on the nature of the evidence. He did not agree with the view that the nature of the evidence impacts its relevance. With respect to the right to privacy, Arbitrator Raymond stated: "I also am of the view that the right to privacy, however it may arise, is not germane to this issue. If the right exists, and I take no view at this time as to whether it does or does not, it can be pursued for its infringement."

Re Ready Bake Foods Inc. and United Food and Commercial Workers International Union, Local 175, [2009] O.L.A.A. No. 308 (Raymond).

Court upholds arbitrator order that stops call centre from recording calls… with reservations

The Supreme Court of Nova Scotia upheld a labour arbitrator's order that required the Halifax Regional Municipality to cease and desist from recording calls to its call centre for quality monitoring, coaching and dispute resolution purposes. In resolving the employer's application for judicial review, Wright J. displayed a remarkably honest application of the "reasonableness" standard of review by disagreeing with the arbitrator's weighing of management versus employee interests but nonetheless upholding his decision as reasonable.

Though it did not affect the outcome of the application, Wright J.'s more legally significant finding was on whether the employee voice recordings at issue were protected as "personal information" under the applicable privacy legislation. He stressed that the recordings captured non-sensitive employee work product and, in the context, this feature of the recordings was more significant than anything personal the characteristics of an employee's voice might reveal (such as age or race).

Wright J. noted that call centre agents answer inquires from the public about various municipal matters and that there is no component of personal information in that. It is therefore not recorded information about an identifiable individual within the meaning of s.461(f). Wright J. stated that "the question of whether voice recording in the fact situation at hand constitutes 'personal information' cannot be decided

irrespective of the content of those calls. Here, the content of those calls is undoubtedly of a non-personal nature made in the course of the performance of the job duties of these employees."

Halifax (Regional Municipality) v. Nova Scotia Union of Public and Private Employees, Local 13, 2009 NSSC 283.

Arbitrator says exhausting less intrusive means is not required to engage in workplace surveillance

Arbitrator Watters held that video surveillance evidence taken from a hidden camera installed in a long-term care facility resident's room was admissible in a termination arbitration.

Many labour arbitrators will balance employer and employee interests in determining whether to admit surveillance evidence. This case is notable because the parties engaged in a dispute about whether the reasonableness test used to effect this balance includes a "no less intrusive means" component. Arbitrator Watters held that it does not – the test is a reasonable grounds/reasonable means test, though consideration of other options may support the grounds for surveillance.

The National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 127 and The Municipality of Chatham-Kent (Riverview Gardens) (Re), [2009] O.L.A.A. No. 424 (Watters).

Arbitrator orders stipulations on use of in-plant video surveillance

Arbitrator Craven partially upheld a policy grievance that challenged the expansion of an employer's in-plant video surveillance system. He later issued a remedial order that imposed certain conditions on the employer's use of video surveillance.

In the first decision, Arbitrator Craven found that the employer had breached a technological change provision in its collective agreement by not engaging in discussions with the union when it expanded its system. He ordered the employer to meet with the union to engage in discussions.

The parties were not able to reach a resolution, and came back before Arbitrator Craven in December. Following a hearing, he made an order that included the following stipulations:

1. The Employer shall not use the video surveillance system to monitor employees, in real time or otherwise.
2. Recordings made by the video surveillance system shall be retained for no longer than six (6) months, except in the circumstances set out in the following paragraph.
3. When an incident or investigation occurs requiring the retention of video surveillance recordings, the Employer may retain those recordings for as long as is necessary for the purpose of dealing with the specific incident or investigation (including any related legal process or proceeding), but shall not use them for any other purpose.
4. When the Employer intends to use recordings made by the video surveillance system in any legal process or proceeding which specifically relates to the Union or to a member of the bargaining unit, the Employer shall provide the Union with a copy of the recordings prior to their use in the legal process or proceeding.
5. When the Employer intends to rely on recordings made by the video surveillance system in support of employee discipline, the Union and the employee concerned shall have the same right to access and view the recordings as if they were documents in the central personnel file as provided for in article 4.03(a) of the Collective Agreement.

Despite the reference in the fifth stipulation, none of these appear to turn on any specific collective agreement language.

Cargill Foods, division of Cargill Ltd. v. United Food and Commercial Workers International Union, Local 633 (Collective Agreement Grievance), [2009] O.L.A.A. No. 633 (Craven) (QL).

Federal Commissioner dismisses GPS complaint

The Office of the Privacy Commissioner of Canada dismissed a GPS complaint as not-well founded. The decision is evidence of a developing model for permissible GPS use in the Canadian privacy commission and arbitral jurisprudence.

Decision-makers have recognized that vehicle-based GPS systems entail the collection of non-sensitive personal information. Such systems are therefore ordinarily upheld for common fleet management purposes such as dispatch, scheduling and driver safety. Use of GPS data in support of investigations or exception follow-up also appears to be safe. In this case, for example, the OPC held that it was reasonable for a transit organization (the custodian of the GPS data) to report late arrivals to its contracted driver's employer. Other requirements include notification and the implementation of reasonable security measures.

There are certain limits to the use of GPS though. There is an expressed aversion to the use of GPS for routine supervisory purposes; in ordinary circumstances GPS is not a substitute for calling a driver to check on his or her whereabouts. Use of GPS as a tool to manage a documented performance management problem on a time-limited basis might be looked upon more favourably.

PIPEDA Case Summary #2009-011.

Arbitrator says relevant video surveillance evidence is admissible…period

On January 26th, Saskatchewan Labour Arbitrator William Hood rejected a union argument to exclude surveillance evidence recorded by an in-plant video surveillance system. In doing so, he made the following broad statement on the admissibility of unlawfully obtained evidence at labour arbitration:

"Video evidence, even if improperly obtained, is admissible. As a general rule, subject to circumstances where the *Canadian Charter of Rights and Freedom* [sic] apply, the test for admissibility of evidence in a court of law is relevance and if admissible, the court is not concerned with how the evidence was obtained (see *R. v. Wray*, [1971] S.C.R. 272)."

Not all Canadian labour arbitrators apply this traditional rule of evidence.

Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. McKesson Canada Corp. (Birch Grievance), [2010] S.L.A.A. No. 1 (QL) (Hood).

No interim injunction for employer's vehicle telematics program

A British Columbia labour arbitrator dismissed a union request for an interim order to restrict an employer from using vehicle telematics to monitor the use of its maintenance fleet.

The employer allowed employees to drive its vehicles home but prohibited personal use. One of its reasons for implementing a telematics program was to enforce this rule.

Arbitrator John Steeves suggested that the employer's collection of vehicle use information (trip start, trip end, distance driven, idle time, stop time between trips, gas consumption, speed) was reasonable for the purpose of managing the employment relationship. He also suggested that such information was less sensitive than location information, which the employer did not collect.

This is just an interim award and the reasoning is qualified, so it is not particularly authoritative. However, it is consistent with the relatively permissive existing jurisprudence on fleet monitoring by employers.

Otis Canada Inc. v. International Union of Elevator Constructors, Local 82 (Telematics Devices Grievance), [2010] B.C.C.A.A.A. No. 28 (QL) (Steeves).

2.9 EMPLOYEE USE OF EMPLOYER COMPUTER SYSTEMS

Strong words on employers' interest in controlling employee computer use by the Alberta C.A.

The Alberta Court of Appeal's judgement in *Poliquin v. Devon Canada Corporation* is not a privacy judgement, but contains some very strong dicta supporting employers' interest in controlling employee use of their computer systems.

The case is about an employer that terminated a long-service supervisor for, among other things, sending and receiving pornographic and racist e-mails. In holding that the employee's wrongful dismissal claim ought to be dismissed summarily, the Court of Appeal found that employees have no reasonable expectation of privacy in their workplace computers and that while employers may permit employees limited personal use of workplace computers, the employer is entitled to restrict the terms and conditions on which that use may be permitted. This is because the potential for harm to an organization flowing from this kind of misconduct is great.

If an employer fails to act, it faces a significant risk of actions by employees who are subjected to discrimination or harassment. Therefore, the Court reasoned, employers are fully justified in taking proactive steps, including the adoption of codes of conduct, to curtail and prevent improper conduct.

Poliquin v. Devon Canada Corp., 2009 ABCA 216.

Ontario C.A. comments on faculty e-mail privacy

The Ontario Court of Appeal affirmed an order that required images of two work computers of a university professor to be sent to France for use in a terrorism investigation.

In the earlier leave decision, Simmons J.A., sitting in chambers, made a decision to grant leave and in doing so, commented on the applicant's privacy interest in her work computer based on evidence of faculty collective agreement provisions that granted a right of privacy in personal communications. He did not have the university's acceptable use policy before him and refused to take judicial notice that there was a privacy-limiting policy in place.

He also commented that the work and research generally done by university professors is qualitatively different than done by high school teachers [as in the *Cole* case] and could require a heightened level of personal privacy and security.

Simmons J.A. found that the collective agreement referred to above suggested that Carleton University professors were entitled to use their work computers for personal communications and research and that they had an objectively reasonable expectation of privacy in relation to personal electronic data. Moreover, because computers can be used to store large quantities of personal information, it was at least arguable that the applicant's claim to a reasonable expectation of privacy in her electronic data was a matter of significant importance to her.

Though very qualified and therefore limited in its authority, this finding reveals a different attitude than is commonly expressed about stored communications on employer systems, whether inside or outside of the university sector.

On February 17th, a three-judge panel of the Court dismissed the appeal without commenting on the reasonable expectation of privacy issue. The Court held that the order was lawful because there were reasonable grounds to suspect that the terrorism suspect was using the applicant's work computers to e-mail others.

France (Republic of) v. Tfaily (2009), 98 O.R. (3d) 161 (C.A.) [not online] and 2010 ONCA 127 (CanLII).

2.10 BACKGROUND CHECKS

Arbitrator affirms background check program based on soft C-TPAT requirement

Arbitrator Watters held that a criminal background check program initiated in response to the United States Customs-Trade Partnership Against Terrorism program was reasonable.

The key features of the company's background check program: (1) it applied to new employees and current employees transferring into positions deemed to be sensitive based on C-TPAT requirements; (2) it excluded employees who were checked by the company pre-hire and employees employed by the company for more than five years; (3) the company assessed the results of checks on a case-by-case basis; and (4) the company undertook not to rely on information received about provincial offences convictions and pardoned criminal offences in excluding an employee from an opportunity to work in a sensitive position.

The company wanted to ensure that its "Tier 3″ C-TPAT status would not be jeopardized, because this status is associated with fast track movement of goods into the United States. The C-TPAT criminal background check requirement is flexible, in that it is subject to restrictions in local laws. Moreover, U.S. Customs and Border Services provided a very qualified opinion to the company that only suggested that failing to conduct background checks "might affect" its top tier status. The company was also not certain how being degraded to Tier 2 status would affect its ability to move goods in to the United States. It could only argue that it did not want to find out.

Despite these challenges, Arbitrator Watters held that the company's background check program was reasonable. He commented that, though it was difficult to precisely gauge how CBP would respond to a change in status, he accepted that a reduction in Tier status, as a consequence of a decision not to require criminal background checks for employees in sensitive roles, would likely result in: increased screening of the company's product; delay in the shipment process; loss of market share, as consumers move to the available product of some other competitor; and the delay could compromise product quality in respect of certain brands with a finite shelf-life.

Arbitrator Watters appears to have been influenced by the company's willingness to take steps to ameliorate the impact of its program and ordered the company to implement these steps.

Unfortunately, the parties appear to have argued the case as if Ontario provincial public sector privacy legislation applied to the company. Though a common misunderstanding, provincially regulated employees in Ontario (whether public or private sector) are not protected by privacy legislation.

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 2098 v. Diageo Canada Inc. (Amherstburg Plant), [2010] O.L.A.A. No. 21 (Watters) (QL).

2.11 EMPLOYEE MANDATORY MEDICAL ASSESSMENT

Order to attend assessment following employee's aggressive outburst not discriminatory

The Yukon Territory Court of Appeal affirmed a decision of a Yukon Human Rights Board of Adjudication, which held that an employer did not discriminate against an employee with a bipolar condition by

suspending him pending a medical assessment. It held that the employer ordered the assessment based on an observation of objectively concerning behaviour, rather than on any stereotypical assumptions about the employee's disability.

Whether Mr. March's conduct was disruptive and inappropriate or not was a question of fact. The Board heard the evidence and concluded that Mr. March's conduct was disruptive and inappropriate and the respondents acted reasonably in the circumstances in removing him from the workplace pending a medical assessment. The action taken was temporary and responsive to the disruptive conduct and not an arbitrary reaction attributable to a discriminatory stereotyping of his disability. Instead, it was directed to ascertaining the cause of his conduct, and deciding how it should be addressed.

Though employers do have a general right to request medical information in circumstances similar to those demonstrated in this case, the employer here had accommodated the employee for years and further helped its case by making a genuine expression of continued support for the employee at the same time as making its direction.

March v. Yukon (Human Rights Board of Adjudication), 2010 YKCA 3.

3. PRODUCTION

3.1 *ANTON PILLER* ORDERS

BCCA sets aside *Anton Piller* order because findings in prior order were inadmissible

The British Columbia Court of Appeal set aside an *Anton Piller* order obtained by the Crown against acquitted Air India bombing defendant Ripudaman Singh Malik and his family members.

The Crown filed an action against Malik and his family members to recover monies paid to support his defence in the Air India trial. The monies were paid pursuant to an agreement that was premised on Mr. Malik transferring his assets to the Crown. When he did not make the transfer, the Crown refused to continue funding Mr. Malik's defence. In response, Mr. Malik brought a *Rowbotham* application for a state-funded defence. He was unsuccessful, but reached a subsequent agreement with the Crown and was eventually acquitted.

The Crown sued for repayment of advances made under the first agreement. It claimed it entered the agreement based on misrepresentations and claimed that Mr. Malik and his family members conspired to hide assets and hinder the Crown's collection of monies owed. The Crown obtained a *Mareva* injunction and *Anton Piller* by submitting and relying heavily upon the judge's finding in the *Rowbotham* application.

The Court of Appeal held that the Crown had not established a strong *prima facie* case of fraud nor had it shown a real possibility the defendants would destroy any incriminating documents that may be in their possession because only some of the judge's findings from the *Rowbotham* application were admissible. The Court held that Mr. Malik could not be bound by the application judge's *alternative* finding in a subsequent proceeding because it was a collateral finding. It explained that the doctrines of issue estoppel and abuse of process "will not prevent a person from re-litigating findings that were collaterally made by the court and were not fundamental to the decision in the earlier proceeding."

Also notable is the Court's finding that the jurisdiction to order an *Anton Piller* flows from a superior court's inherent jurisdiction. It rejected an argument that the British Columbia Supreme Court has no jurisdiction to order an *Anton Piller* because the Court's rule-based power to preserve property on an interim basis is narrowly worded.

Note that the Court did preserve the *Mareva* injunction against Mr. Malik alone based on a finding that the Crown had *prima facie* claim for an equitable interest in his property and otherwise met the test for an injunction.

British Columbia v. Malik, 2009 BCCA 201.

Court affirms *Anton Piller* in departing employee case

The Alberta Court of Queen's Bench affirmed an *Anton Piller* order that permitted a search of business premises and private residences, and seizure of materials and information related to a departing employee claim.

There is a three-part test for the making of an *Anton Piller* order: (1) there must be an extremely strong *prima facie* case; (2) the potential or actual damage to the applicant must be very serious; and (3) clear evidence that the defendants have incriminating evidence in their possession and that there is a real possibility they may destroy such material.

The Court examined the mixed jurisprudence on the "serious harm" element and held that it requires proof of procedural rather than financial harm. That is, an applicant must demonstrate that its proposed order will preserve evidence without which it could not prove its case. The Court reasoned that irreparable financial harm can be addressed through an ordinary injunction. The Court held that the applicant met its burden of proving serious harm, even though it had copies of the information taken and (presumably) evidence showing it was taken. The Court suggested that the applicant would also need forensic evidence about how its information was stored and maintained on the defendants' computers to prove misuse of confidential information.

The Court also engaged in a detailed analysis of the evidence to determine whether the applicant had established a "real possibility" of destruction based on a "compelling inference." Where the departing employee took electronically-stored confidential information and claimed that they deleted it because they realized that taking it was wrong, the Court drew an inference that destruction of evidence was therefore a possibility based partly on the applicant's own good information management practices.

While this case highlights the applicant's good information management practices, the applicant also suffered for agreeing to give another of its departing employees his work laptop in return for a promise to make a charitable donation and then failing to wipe the laptop when requested by the employee. The Court held that it could not draw any negative inference from the employee's deletion of over 4,000 e-mails in these circumstances because this action was consistent with the actions of an honest employee who wanted to rid himself of his employer's e-mails. As a result, the Court revised the order to exclude the laptop.

The plaintiff brought a cross-motion to deal with the scope and form of production of information from a number of seized hard drives. The award discusses the protocol by which the parties will deal with production but is not very directive, as it appears they were in substantial agreement on how to proceed.

CCS Corp. v. Secure Energy Services Inc., 2009 ABQB 275 (CanLII).

Plaintiffs draw sharp rebuke in Saskatchewan *Anton Piller* case

Dufour J. of the Saskatchewan Court of Queen's Bench set aside an *Anton Piller* order on the basis that the plaintiffs had failed to prove a real possibility that the defendants would destroy the information subject to the order.

In making his finding, Dufour J. described the standard of proof for the "real possibility" branch of the *Anton Piller* test. Dufour J. stated that direct evidence that a defendant is preparing to destroy relevant evidence is not required. Rather, the fourth *Celanese* condition can be addressed by the plaintiff

adducing evidence of the defendant's dishonest nature, which proves that the defendants are the types of persons who would destroy evidence and not that they are merely generally dishonest. Important to this case is that the plaintiffs must satisfy the Court by adducing admissible evidence. Opinion, supposition or the plaintiffs' "fear" that documents will be destroyed will not suffice.

Dufour J. also held that he would have set aside the order given the plaintiffs' non-compliance with their duty of full and frank disclosure. He identified the following defects, among others:

- Filing evidence of mere belief that the key defendant was dishonest;
- Exhibiting an agreement without drawing a material notation on the agreement to the judge's attention;
- Referring to two different business entities by a single acronym in a manner that favoured their position;
- Citing the paragraphs in Celanese that explain that Anton Piller orders are becoming more commonplace without citing a paragraph in Celanese that explains that an Anton Piller is still an exceptional remedy; and
- Citing Celanese for the proposition that Anton Piller orders are becoming more commonplace without citing post-Celanese cases that demonstrate that an Anton Piller is still considered to be an exceptional remedy

There is no shortage of cases that highlight the very onerous burden on a party that moves for an *Anton Piller*, but Dufour J.'s warning is notable for its vigour.

Agracity Ltd. v. Skinner, 2009 SKQB 361 (CanLII).

3.2 "CUSTODY OR CONTROL" AND "RECORDS" (MEANING OF)

IPC finds personal e-mails under City's custody or control

In this order, the IPC held that the City of Ottawa was in custody or control of e-mails its solicitor sent and received in his personal capacity, as a board member of a local Children's Aid Society. Though acknowledging that the e-mails had nothing to do with City business, it held:

- The City was in physical possessions of the records, which were stored on its e-mail server;
- The City had the authority to regulate the use of the e-mail system upon the records were kept even though personal e-mails were excluded from the definition of "business record" under the City's retention by-law; and
- The City reserved a right to monitor its system for unauthorized use.

The factual basis for this decision is not unique, so it has broad significance for FIPPA and MFIPPA institutions. The City has filed an application for judicial review.

Order MO-2408, 2009 CanLII 16569 (ON I.P.C.).

IPC orders municipality to sue third-party record holder

The IPC issued a compliance order that required a municipality to take "all steps necessary," including legal action, to obtain records that it decided earlier were under the municipality's custody or control.

The request was for a model and input data that was in the custody of a third-party consultant who was retained by the municipality to evaluate a proposed landfill site. There was no formal retainer, and after an analyzing the IPC's traditional "custody or control" factors, the IPC ordered the municipality to "issue a written direction to Jagger Hims to provide the County with the records responsive to the appellant's

request." The municipality did exactly what the IPC ordered, but the third-party did not cooperate and deliver up the records at issue.

The IPC re-initiated its proceeding. Its compliance order was based in part on a finding that the municipality had a "potent legal basis" for causing the third-party to turn over the records.

Order MO-2449, 2009 CanLII 47235 (ON I.P.C.).

Judge says, "You've got the hard drives, you review them."

Marrocco J. of the Ontario Superior Court of Justice dismissed a motion for a further and better affidavit because the moving party had previously taken custody of the records that it wanted the respondent to produce.

The moving party had executed an *Anton Piller* order that apparently gave it unrestricted access to a number of hard drives, and it used the drives to demonstrate deficiencies in the respondent's production. In dismissing the motion, Marrocco J. noted that Rule 30.03(2) of the *Rules of Civil Procedure* provides that the affidavit of documents shall list and describe all documents relevant to any matter in issue in the action that are in a party's "possession control or power…". In this case, the respondent's hard drives were seized under an *Anton Piller* order. They were imaged and the imaged hard drives were made available to the plaintiff. The plaintiff had access to the imaged hard drives at any time. Therefore, it seems to the Judge that the imaged hard drives were within the power, if not also the possession and control of the plaintiff. Therefore, pursuant to Rule 30.03(2), the plaintiff is obliged to review the documents on the imaged hard drives when preparing its affidavit of documents.

Marrocco J. also noted that the respondent had not made any claim of privilege in the records contained on the hard drives.

Bell ExpressVu Limited Partnership v. Heeren, 2010 ONSC 665 (CanLII).

Proprietary rights weigh against non-party production order

Justice Perell of the Ontario Superior Court of Justice dismissed a motion for non-party production. In doing so, he made some notable comments about how to weigh the interests of non-parties whose information is sought by parties to litigation.

The plaintiffs in a proposed class action sought production from an automotive sector market research company. Their expert obtained the data under an academic licence and used it to prepare an opinion supporting allegations that General Motors, the defendant, had engaged in anti-competitive behaviour. The non-party research company claimed that the expert had breached his licence, that its reputation was built on independence, which would be harmed if its data was allowed to be used against industry members, including its customer General Motors.

Perell J. dismissed the motion based on a finding that the plaintiffs did not prove necessity. He went on, however, to consider the fairness component of the test for production and gave heavy recognition to the market research company's direct proprietary interest in the data. Perell J. said:

> I appreciate that the court has the power, and has exercised it, to take away a non-party's rights of property and privacy, but, in my opinion, the exercise of the power to compel production must be rare when a non-party wishes to assert its property and privacy rights as opposed to objecting merely on the grounds that the information it has is irrelevant to the proceedings or on the grounds that it would simply be bothered or inconvenienced by producing the information.

> In some cases, a non-party may simply have the property right of possession over such things as banking records, accounting records, medical records, minutes of meetings, contractual documents, deeds and certificates of ownership, etc., and in those instances a court may be more ready to exercise its power, but in the case at bar, JATO has valuable proprietary rights that go beyond possession and rather the property being sought is its stock in trade and its forced sale of its products may harm JATO's goodwill.

The last paragraph is more likely about the distinction between information with commercial value and information with operational value than a comment on the ability to access non-party records that one possesses on behalf of others who have a personal privacy interest in the records.

Tetefsky v. General Motors Corp., 2010 ONSC 1675 (CanLII).

3.3 DEEMED/IMPLIED UNDERTAKING RULE

Ont. C.A. considers deemed undertaking rule

The Ontario Court of Appeal issued a judgement on the deemed undertaking rule. It held that:

- it only proscribes use and disclosure of information obtained in discovery by the recipient (and not by the provider, whose privacy interest the rule protects);
- it acts as a shield against production in a subsequent action subject to its exceptions, including the exception for court-ordered relief; and
- the "interests of justice" versus "prejudice" balancing test for court-ordered relief does not protect the personal privacy interest of an individual in the records at issue.

The last point arose because the records being considered by the Court included video surveillance footage and medical information of the plaintiff. She had obtained these records from her opponent in prior litigation, thereby engaging her opponent's privacy interest. It appears that she attempted to argue that her personal privacy interest in the records was relevant to the exercise of discretion in ordering relief given the content of the records. The Court disagreed, and said the only privacy interest engaged by the rule is that of a party compelled to produce records.

Kitchenham v. AXA Insurance Canada, 2008 ONCA 877 CanLII.

BCCA affirms that implied undertaking terminates after evidence adduced

The British Columbia Court of Appeal declared that defendants to a defamation action were not restricted from "publicizing" documents adduced as evidence at trial by the plaintiff.

In another action, *Juman v. Doucette*, the Supreme Court of Canada made clear that a litigant's implied undertaking of confidentiality terminates once information is adduced as evidence in open court. Even though the defendants' motion for a permissive declaration was heard after *Juman*, the motions judge was sympathetic to the plaintiff's confidentiality claim. The motions judge stressed that the law was not settled at the time of trial and recognized that the plaintiff had a genuine and ongoing interest in keeping its information confidential even though it had not asked for a protective order at trial.

The Court of Appeal held that the motions judge erred and granted a declaration that the defendants were released from their confidentiality undertaking vis-a-vis the documents in question. It held that, ambiguities in the law aside, "courts do not change the law but declare it." It also held that the policy reasons favouring a continuing undertaking could not possibly apply given the plaintiff had entered the documents into evidence itself. According to the Court of Appeal, the plaintiff should have asked for a protective order.

International Brotherhood of Electrical Workers, Local 213 v. Hochstein, 2009 BCCA 355.

3.4 MISCONDUCT AND SANCTIONS

Appeal Court restores defence struck as a remedy for spoliation

The Prince Edward Island Court of Appeal held that a motions judge erred in striking a statement of defence as a sanction for non-production. The Court suggested that such a strong sanction should not be utilized for discovery abuse in the absence of a finding of bad faith or contempt given the difficulties in assessing relative prejudice before trial. It nonetheless sanctioned the defendant by imposing conditions on the use of records subsequently found, by specifying that the trial judge may presume damages and by awarding costs of the motion and appeal to the plaintiff.

Jay v. DHL, 2009 PEICA 2 (CanLII).

Court puts off spoliation claim until trial

Mr. Justice Peter Lawers of the Ontario Superior Court of Justice rejected a motion to dismiss a personal injury claim based on the defendant's allegation of spoliation. The idea that spoliation claims should generally be settled at trial is not remarkable, but the Court did reject the defendant's argument that spoliation claims relating to records of loss of earnings should be treated differently; as the defendant should not be forced to gamble that the jury will appropriately punish the plaintiff for his failure to keep proper records when a loss of income case is normally based thereon.

The Court also noted the ambiguity in the claim, which seems to be more about bad record keeping than spoliation itself: "The heart of the problem from the viewpoint of the defendants is the lack of documents relating to Mr. Carleton's income." If there is no duty to keep records, there can be no valid spoliation claim when records are not available for production. This appears to be a simple case where bad business record keeping may prevent a plaintiff from meeting its burden of proving loss.

Carleton v. Beaverton Hotel, 2009 CanLII 4245 (CanLII).

Court says party ought to have taken counsel's word about missing computer

The Ontario Superior Court of Justice dismissed a motion for production of a personal computer and criticized the moving party for proceeding in the face of a sworn statement by the opposing party's solicitor that indicated the computer was gone.

The computer once contained information relevant to a loss of income claim. The plaintiff discarded it because it had broken down sometime after she printed and produced invoices from her personal business and sometime before a mediation attempt, which occurred slightly less than a year later. In the interim, the defendant made and sustained a request for electronic copies of the invoices.

When the defendant moved for production, plaintiff's counsel wrote and later swore that the computer had been discarded and consented to allow the defendant to plead spoliation. Defence counsel persisted and generated some damning evidence in cross-examining the plaintiff's witnesses, including a statement by the IT professional whom the plaintiff relied upon, who said that he never actually examined the plaintiff's computer.

Though the defendant had reasonable basis for bringing the motion, Master Brott was not impressed that the defendant persisted despite the plaintiff's agreement to deal with the issue by way of a spoliation claim and, in particular, plaintiff counsel's statement that the computer was gone.

Cerkownyk v. Ontario Place, 2009 CanLII 62065 (ON S.C.).

Court reminds us the spoliation inference is based on more than a missing record

Mr. Justice Flynn of the Ontario Superior Court of Justice dismissed an argument for a spoliation-based adverse inference.

The respondents argued against an application for occupation rent that was brought by a tenant in common's estate trustees. They claimed, in part, that the applicants suppressed a letter referred to in the testator's will that was in their favour. The applicants couldn't find the letter, which they claimed they had never seen. In dismissing the spoliation argument, Flynn J. state that the onus to prove that a missing letter actually existed and that it was being suppressed by the Applicants was clearly and heavily on the Respondents, and that the Respondents' evidence had not risen above mere speculation or conjecture.

Gladding Estate v. Cote, 2009 CanLII 72079 (ON S.C.).

3.5 PRESERVATION

Manitoba CA affirms deferral of spoliation hearing to 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 Manitoba Court of Appeal issued a short endorsement in dismissing an appeal of this finding.

Commonwealth Marketing Group Ltd. v. The Manitoba Securities Commission, [2009] M.J. No. 77 (C.A.) (QL).

Case report – Manitoba sunglasses at night case illustrates key requirement for spoliation inference

This Manitoba Court of Queen's bench decision nicely illustrates that an adverse inference for spoliation requires proof of intentional misconduct. The Court held that the plaintiff contributed to her slip and fall injury because she was wearing her sunglasses at dusk. The defendant's evidence supporting this conclusion went in through a witness who viewed the incident as it occurred via feed from a surveillance camera and testified that the plaintiff was wearing her sunglasses. The defendant also adduced a photo frame taken from the surveillance tape that showed the plaintiff holding her sunglasses in her hand after the accident. The defendant destroyed the tape itself, however, even though it had made a preservation request to its security department.

The plaintiff agreed that an adverse inference, i.e. that the contents of the video tape would have harmed the defendant's position, ought to be made against the defendant, as it destroyed the videotape itself. The Court rejected the plaintiff's argument for an adverse inference because it had not proved the tapes were destroyed intentionally. The Court did not consider whether a remedy should be granted under the abuse of process doctrine in consideration of the apparent prejudice to the plaintiff, though the Alberta Court of Appeal's leading *Black & Decker* case suggests that an abuse of process remedy will also only be available if there is proof of intentional spoliation.

Kulynych v. Manitoba Lotteries Corp., 2009 MBQB 187 (CanLII).

3.6 PRIVACY

BCCA says non-parties get no notice of production motion despite privacy interest

The British Columbia Court of Appeal dismissed an argument that various non-parties whose private communications had been intercepted by the RCMP should be given notice of a motion brought to compel production of the interceptions. The production motion was brought by the Director of Civil

Forfeiture in forfeiture proceedings. It appears to have been opposed by the defendants, but not by the RCMP.

The motions judge held that notice ought to be given to the "objects of the interception" and adjourned the motion. He relied on Rule 44(5) of the B.C. *Supreme Court Rules*, which demands that persons "who may be affected" by an interlocutory order shall be given notice of motion.

The Court of Appeal held the motions judge had erred. It reasoned that the *Rules'* third-party production provision – Rule 26(11) – is a complete code that governs the requirement to give notice of third-party production motions in British Columbia. This provision only requires notice to the third-party and "other parties", but not other persons "who may be affected." The Court held that the general notice requirement in Rule 44(5) could not override the specific and more limited notice requirement in Rule 26(11).

Though the outcome of the appeal is based on interpretation, the Court also made broad statements about non-party privacy. It suggested that the Court ought to guard non-party privacy, even by ordering a two-stage hearing, but held that notice to non-parties would only lead to "unnecessary expense and complication" and would conflict with the Court's mandate to "secure the just, speedy and inexpensive determination of every proceeding on its merits."

The issue of non-parties' right to receive notice of production motions based on a privacy interest is significant and can arise whenever records subject to production contain non-party personal information. See *Datatreasury* for a recent example.

British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd., 2009 BCCA 124.

Court orders disclosure of anonymous message board users' identities

The Ontario Superior Court of Justice ordered the owner/operator of a right-wing internet message board to disclose the identities of eight John Doe defendants who had posted commentary about lawyer Richard Warman.

There are two significant aspects of the decision. First, the Court seemed to distinguish the *BMG* case (where the Federal Court of Appeal endorsed a protective balancing test) on the basis that the plaintiff filed an action directly against the website owner/operator.

Second, the Court relied on recent search and seizure cases that have endorsed voluntary identification of internet users by ISPs to police based on permissive ISP terms of service. It used these cases to draw a general conclusion that individuals cannot reasonably expect online anonymity. Though specific terms of service should govern, this aspect of the decision illustrates that ISP policy favouring disclosure to police may affect users' right of anonymity as against potential civil claimants.

Warman v. Wilkins-Fournier (23 March 2009, Ont. S.C.J.).

Motion for listing of Facebook records dismissed

The Ontario Superior Court of Justice dismissed a motion for an order requiring three plaintiffs in a personal injury action to list the current content of their Facebook and MySpace pages.

Master Haberman took issue with the timing of the motion, which she heard a month before a fixed trial date and almost three years after the matter was set down for trial. She held that she had no jurisdiction to make an order that was certain to interfere with the fixed trial date and, in any event, would not have granted leave in the circumstances. She rejected the defendant's claim that the February 2009 decision in *Leduc v. Roman* brought about a "substantial change" which justified leave to conduct pre-trial discovery

and held that there was no evidence that proceeding without disclosure of the requested information would cause an injustice.

Master Haberman also held, in obiter, that the request for disclosure from the injured plaintiff's family members, who had claimed only for loss of care and companionship under the *Family Law Act* was improper. She reached this conclusion on the basis that there was no connection between the matters in the action and the documents sought by the plaintiffs.

Kent v. Laverdiere, 2009 CanLII 16741 (ON S.C.).

Court orders plaintiff to list relevant documents contained in Facebook site

After hearing a motion in this motor vehicle accident claim, Boswell J. ordered the plaintiff to include relevant documents from his Facebook account in a further and better affidavit of documents, granted the defendant leave to cross-examine the plaintiff on the affidavit and ordered the plaintiff to preserve all information in his Facebook account for the duration of litigation. He followed the Court's now well-known decision in *Leduc v. Roman.*

Wice v. Dominion of Canada General Insurance Co., 2009 CanLII 36310 (ON S.C.).

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

The Ontario Court of Appeal clarified the requirements for pre-action discovery and affirmed that an applicant for pre-action discovery must establish that the discovery sought is "necessary" to the process of obtaining justice for some wrongdoing.

Norwich 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 dispute in this case arose because the applicant had substantial evidence supporting actions for fraud against two known potential parties, all of which was submitted in support of its successful action for pre-action discovery of other persons. On appeal, the strongest position against the order taken by one of the respondents was that it ought not to have been granted because the information sought was not necessary to plead.

In allowing the appeal and setting aside the order, the Court of Appeal held that necessity is a requirement for a *Norwich* order, but rejected a necessity to plead requirement as being too strict. It commented that the applicant for a *Norwich* order must demonstrate that the discovery sought is required to permit a prospective action to proceed.

The applicant had asserted that pre-action discovery would allow it to determine the circumstances of wrongdoing and assess its legal remedies. Though the Court of Appeal implicitly accepted these purposes as legitimate, it held that the applicant did not need pre-action discovery given it knew "the nature, timing and apparent purposes of the frauds", as well as the identity of the suspected wrongdoers.

GEA Group AG v. Ventra Group Co., 2009 ONCA 619.

Wrongful dismissal plaintiff can discover his former subordinate about her harassment complaint

Strathy J. held that it was not improper for a wrongful dismissal plaintiff to conduct oral discovery of a former subordinate whose harassment complaint led to his termination. When the plaintiff sought to

examine the complainant, the employer moved for an order directing the examination of the human resources manager, who had conducted the harassment investigation instead.

Strathy J., hearing an appeal of a master's order, dismissed the employer's argument that the choice was improper because the complainant did not participate in the decision to terminate and had no knowledge of the corporate imperatives underlying the decision. Strathy J. held that the request was "rational" and made for a proper purpose and held that the plaintiff would be prejudiced by being deprived of an opportunity to examine the person whose evidence "goes to the heart of the case." Strathy J. also noted that the plaintiff's counsel had undertaken that the complainant need not prepare herself for examination on issues of which she had no personal knowledge, as he would be happy to receive undertakings on such issues and suggested that he would be willing to examine the complainant without the plaintiff present.

Ciardullo v. Premetalco Inc., 2009 CanLII 45445 (ON S.C.).

Court orders identity of gmail user to be disclosed, balancing of interests

The Ontario Superior Court of Justice ordered Bell and Rogers to identify an individual who used a gmail account to communicate allegedly defamatory statements about York University and its president. The case is notable for two points. First, it contains a relatively detailed discussion of the balancing of interests factor and the privacy interests of the anonymous poster. Strathy J. considered that both Bell and Rogers had privacy policies and terms of service that lowered the individual's expectation of privacy. Second, Strathy J. held that, in some circumstances, an individual whose identity may be disclosed should be given notice of the proceeding and an opportunity to participate. He did not elaborate, but held that York's failure to give notice in this case did not tip the balance against making an order.

York University v. Bell Canada Enterprises, 2009 CanLII 46447 (ON S.C.).

Another Facebook production order made

The New Brunswick Court of Queen's bench ordered a plaintiff in a disability insurance claim to obtain "a history of her computer account use" from her ISP and "request" that her ISP generate a record accounting for her Facebook use. These orders are becoming very common, but a few observations are worth noting:

- The tactic of seeking information through the plaintiff but held by a third-party is unique. The order seems bound to lead to delay and frustration but at least is backed by the plaintiff's right of access to personal information in PIPEDA. Perhaps the defendant didn't like its chances of obtaining an order for forensic inspection of a home computer;
- Ferguson J. reviews the applicable principles, and reminds us that the Supreme Court of Canada has endorsed necessity as a principle for dealing with production disputes over highly sensitive information by including this quote from *A.M. v. Ryan*: "I accept that a litigant must accept such intrusions upon her privacy as are necessary to enable the judge or jury to get to the truth and render a just verdict. But I do not accept that by claiming such damages as the law allows, a litigant grants her opponent a license to delve into private aspects of her life which need not be probed for the proper disposition of the litigation"; and
- Ferguson J. does not, however, apply this filter in the circumstances, because he finds that the type of information subject to the order (mere usage data) is not part of the plaintiff's "biographical core" of personal information. The biographical core concept, from the Supreme Court of Canada's *R. v. Plant* decision, is a concept that restricts certain information from court protection.

Carter v. Connors, 2009 NBQB 317.

Order for production of hard drive to probe at late night Facebook use will stand

The British Columbia Supreme Court ordered a hard drive to be produced to a neutral expert to identify and extract information about the amount of time the plaintiff spends on Facebook between eleven at night and five in the morning. It held that this information met the standard of relevance for production given the plaintiff had claimed that fatigue is preventing him from maintaining employment. It also characterized the scope of the defendant's request as narrow and suggested the privacy interest of the plaintiff and other users of the (home) computer were resolved by engaging a neutral third party.

The British Columbia Court of Appeal dismissed a motion for leave to appeal. In doing so, Garson J. held that the appeal was not *prima facie* meritorious, but did note specific facts that indicated the order was not based on speculation.

Bishop v. Minichello, 2009 BCCA 555.

BCCA rejects privacy claim by criminal defendants

The British Columbia Court of Appeal directed that factums filed on a criminal appeal be provided to a non-party. The matter was before the Court because a British Columbia Court of Appeal criminal practice directive limits routine access to factums and, instead, requires that a request be made to the Chief Justice.

While the outcome is not surprising, the Court of Appeal also commented on a criminal defendant's right to privacy. Chief Justice Finch rejected an argument made by the defendants, whose order of acquittal was under appeal. The defendants argued that access should not be granted on the basis that the factums contained references to unproven allegations of fact. The Chief Justice found that there was nothing contained in any of the factums that was not said or disclosed in Provincial Court in proceedings that were open to the public.

The Chief Justice therefore concluded that there was no principled basis upon which disclosure of the information to a non-party could be refused. It had not been suggested that publication of the information would in any way prejudice the fair trial interests of the respondents should the Crown's appeal succeed. Whatever privacy interests or protection of innocence interests may have been at risk had already been overtaken by the open proceedings in Provincial Court.

R. v. Bacon, 2010 BCCA 102.

Court addresses rule on redacting information from relevant documents

The Ontario Superior Court of Justice issued an endorsement outlining the rule on when relevant information may be redacted from producible records. The Court stated that the whole of a relevant document must be produced, except to the extent that it contains information that would cause significant harm to the producing party or would infringe public interests deserving of protection. The Court also commented that: "Irrelevance alone is not a sufficient ground on which to redact portions of a document. The party seeking to do so bears the onus of establishing that redaction is necessary to protect an important interest."

McGee v. London Life Insurance Company Limited, 2010 ONSC 1408 (CanLII).

Court won't order disclosure of health professional's identity

The British Columbia Supreme Court denied a request for an order requiring an online contact lens and eyeglass business to disclose the identity of an eye care professional it employs.

The College of Opticians of British Columbia sought the identity of the registrant who worked for the respondents (which were affiliated companies) in the course of an investigation. The College applied to the Court for an order based on the Court's equitable jurisdiction (a *Norwich Pharmacal* order), or alternatively, its inherent jurisdiction (in aid of an inferior tribunal).

The Court held that an order should not be made on either basis. This was partly based on a finding that the evidence did not show the unidentified registrant was involved in the matter under investigation. The Court also held that an order would not be appropriate in light of the statutory powers granted to the College. The Court suggested that the College had ample means to identify the registrant without relying on the Court, noting its power to inspect the premises and records of a registrant, the possibility of asking for warrant to search a non-registrant's premises and the possibility of requiring registrants to file their business address and telephone number.

College of Opticians of British Columbia v. Coastal Contacts Inc., 2010 BCSC 104 (CanLII).

Court says government must not use Norwich orders to investigate crime

Justice Donald Brown of the Ontario Superior Court of Justice dismissed a motion for a Norwich order (for pre-action production) that was brought by the Attorney-General for the purpose of tracing funds in anticipation of an application for forfeiture of money, commenting that *Norwich* orders should not be used for purposes of criminal investigation.

Justice Brown stated that the *Criminal Code* and *Provincial Offences Act* both contain tools, available in specified circumstances, to assist in the investigation of crime and that the equitable jurisdiction of the courts should not be used to assist in criminal investigations. Courts must be vigilant in ensuring that requests for *Norwich* orders by government departments or agencies are limited to the purpose of assisting in initiating civil proceedings, and not subtly converted into a device to investigate crime.

With regards to the privacy implications of such orders, Justice Brown that that "Requests by government actors to compel disclosure of personal information from third parties, such as financial institutions, engage the consideration of privacy interests which are protected by section 8 of the *Canadian Charter of Rights and Freedoms*. To ensure the continued protection of such interests in the context of civil proceedings initiated by the government, the courts should screen and measure carefully requests by government parties for the issuance of the 'rare and extraordinary' device of the *Norwich* order."

On the facts, Justice Brown dismissed the motion on the basis that the Attorney-General's materials did not demonstrate a sufficient link between the information requested and the tracing of funds recoverable under the *Civil Remedies Act*.

Attorney General of Ontario v. Two Financial Institutions, 2010 ONSC 47 (CanLII).

3.7 PRIVILEGE

3.7.1 Litigation privilege

Defendant can maintain privilege against third party it sues for spoliation

The Ontario Superior Court of Justice held that a defendant to a negligence claim could claim privilege in certain records against a third-party that it sued for destroying evidence related to its defence.

The matter arose out of a building fire. The owner sued a roofing contractor, who obtained several reports from a company hired to conduct an origin and cause investigation. It claimed litigation privilege in the reports in the main action. The roofing contractor later brought a third-party claim against the owner's investigator, alleging that the investigator negligently destroyed evidence and prejudiced its defence. The

third-party brought a motion to compel the roofing contractor to produce the investigation reports over which it had claimed privilege in the main action.

The Court held that the spoliation action was independent from the main action but that it was sufficiently related to the main action for privilege to apply across both actions, as the pivotal issue in both the main action and the third party action was whether or not the parties had been able to identify the source area and the cause of the fire.

The Court also dismissed an argument that the defendant waived privilege by disclosing one of the reports subject to its privilege claim. It held that the plaintiff had not met its burden of proving an implied waiver.

Rudolph Meyer & Son Ltd. (c.o.b. Meyer's County Sausage) v. Endurowe Consulting, 2009 CanLII 10400 (ON S.C.).

"Crown brief" production judgement by the BCCA

The British Columbia Court of Appeal allowed an appeal of an order that required the Vancouver Police Department to produce records that had become part of the Crown's brief in an ongoing prosecution.

The plaintiff was the father of a man who was struck and killed by a motor vehicle in a hit and run. The defendant was the man charged criminally for the hit and run. The defendant's criminal trial was adjourned. In the civil action, the defendant did not produce to the plaintiff the materials he received from the Crown in its disclosure. This led the plaintiff to apply for third-party production from the police. The Crown then objected, claiming litigation privilege and public interest immunity.

The Supreme Court ordered production of records as a class (the class of all records produced in the criminal matter) from the Vancouver Police Department subject to an objection by the Crown to the production of any specific documents. The Crown objected to this process and argued for a process more like that endorsed by the Ontario Court of Appeal in *D.P. v. Wagg* - that is, one in which the protected status of the documents is presumed subject to an application to be brought by the party seeking production.

The Court of Appeal accepted the Crown's argument, allowed the appeal and endorsed a rather complex form of order that contemplates a police inspection, a police decision on production and privilege, recovery of costs incurred by the police and court supervision of the police decision on production and privilege.

Wong v. Antunes, 2009 BCCA 278.

3.7.2 Solicitor-client privilege

Information Commissioner can impose confidentiality screen on joint legal retainer

The Federal Court held that the Information Commissioner of Canada acted lawfully in making a confidentiality order that prohibited Crown counsel from sharing information with the Crown that it gained while jointly representing individual Crown servants.

The Crown servants were compelled to give evidence before the Deputy Commissioner in the course of his investigation into an *Access to Information Act* complaint. Department of Justice counsel accompanied the witnesses and acted as their counsel. In order to preserve the integrity of his investigation, the Deputy Commissioner prohibited the witnesses from disclosing the questions asked, answers given and exhibits used in the examination and prohibited counsel from disclosing the same. The Crown applied for judicial review of the orders, arguing that they interfered with its solicitor-client relationship with Crown counsel.

The Court held that the Information Commissioner has an implicit power to make confidentiality orders and that the potential for a conflict of interest given the witnesses were not high-ranking officials made the Deputy Commissioner's orders reasonable and necessary in the circumstances. It said:

> The investigatory process would simply be unworkable and profoundly undermined if the Attorney General had a *de facto* right to attend all hearings simply by providing a counsel to the witnesses compelled to give evidence. The Court also rejected an argument that the confidentiality orders unjustifiably violated section 2(b) of the *Charter*.

Canada (Attorney General) v. Canada (Information Commissioner) (F.C.), [2008] F.C.J. No. 1235 (F.C.) (QL).

When employees use business systems to communicate with their lawyers

In *Universal Sales, Limited v. Edinburgh Assurance Co. Ltd.*, the Federal Court dealt with inadvertent disclosure of solicitor-client communications. The case was about a transcript of a telephone conversation containing solicitor-client communications that was inadvertently produced to an opponent in litigation. The judgement includes a summary of the law on inadvertent disclosure of privileged information.

The Court agreed with the plaintiff that the mere physical loss of custody of a privileged document does not automatically end privilege, especially in the context of modern litigation where large quantities of documents are exchanged between counsel and accidental disclosure is bound to occur from time to time. The Court stated that in cases of inadvertent disclosure, the waiver question turns more on the conduct of the privilege holder after it discovers its disclosure and also on any special prejudice that might be faced by the recipient (e.g. by *bona fide* reliance that does not conflict with any professional duty to immediately seal the communication).

The issue is whether the waiver is intentional as opposed to inadvertent and will turn on the facts. The most authoritative Canadian case on the issue is the *Daniel Potter* decision by Mr. Justice Scanlan of the Nova Scotia Supreme Court. Scanlan J. found that the CEO of a company had not waived privilege by sending solicitor-client communications through his employer's computer system. He did consider argument based on the employee privacy cases, but held that solicitor-client communications deserve special treatment. He also noted, however, that Mr. Potter was CEO and had "day to day executive control over policies which may have threatened his expectation of privacy."

Some concluding thoughts: (1) *Daniel Potter* likely does not close the debate, (2) Canadian courts will demand very special facts to find waiver because they are staunch defenders of solicitor-client privilege and (3) the occasions when it makes tactical sense to engage in a dispute over the waiver issue are likely rare.

Universal Sales Lt.d v Edinbourgh Assurance Co., [2009] F.C.J. No. 196 (QL).

BCCA considers implied waiver of solicitor-client privilege and non-party production

The British Columbia Court of Appeal published an oral judgement on an implied waiver of privilege claim and a motion for production of non-party documents.

On the implied waiver claim, the Court held that a pleading by a plaintiff that alleged it would not have entered a settlement agreement had it known about certain fraudulent conduct did not give rise to an implied waiver of solicitor-client privilege in communications related to the settlement. It stressed that a mere allegation as to a state of affairs on which a party may have received legal advice does not warrant setting aside solicitor-client privilege.

On affirming the chambers judge's refusal to order production from a non-party, the Court stated, "A chambers judge has a discretion to refuse production of documents that are of marginal relevance where other documents relevant to the same issue have already been produced: see *Peter Scherle Holdings Ltd. v. Gibson Pass Resort Inc., 2007 BCSC 770*."

Procon Mining & Tunnelling Ltd. v. McNeil, 2009 BCCA 281.

Whistle-blower leaks privileged report to Crown… charges stayed

The Ontario Court of Appeal allowed an appeal of 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 in its *Stinchcombe* production the company immediately objected, and at trial moved before a justice of the peace for a declaration (that the report was privileged) and a stay. It initially succeeded in obtaining a declaration, a stay and an order for $38,000 in legal costs. On appeal to a judge, the Court overturned the stay and the costs order. It held that the proper remedy for breach of the defendants' section 8 rights was an order excluding the report and that the motion for a stay based on prejudice to trial fairness was premature.

In allowing the appeal, the Court of Appeal started by minimizing a statement made by the justice of the peace about the report being "primarily informational." It held that the lower Court had found the report was subject to solicitor-client privilege, and that this point was not challenged in the appeal.

The Court of Appeal then held that the presumption of prejudice endorsed by a majority of the Supreme Court of Canada in *Celanese* applies whenever the Crown comes into possession of a defendant's solicitor-client communications. The presumption, however, is rebuttable.

On the facts, the Court of Appeal held that a stay was the appropriate remedy. The basis for the finding is narrow. It stressed that the justice of the peace had made a specific finding that the report set out items that could be used to the disadvantage and prejudice of the defendants and held that the Crown had not led any evidence about its distribution and use of the report to rebut the inference.

R. v. Bruce Power, 2009 ONCA 573.

Federal Court comments on confidentiality of drafts

The Federal Court dismissed a federal *Access to Information Act* application on the basis of the solicitor-client privilege exemption. Notably, Montigny J. commented about the confidentiality of draft documents.

Montigny J. found that legal advice privilege may continue to apply to material to which litigation privilege no longer attaches, which is particularly true of draft court documents or submissions. Montigny J. stated that:

> Draft court documents, while being drafted, represent an interchange between solicitor and client, wherein the solicitor provides the client with direction or options as to the legal position to be taken in pending litigation. The client, in turn, comments on that legal advice, provides further instructions, and so forth. Draft court documents and submissions are, by their very nature, intended to be confidential. It is only the final version that is filed with, or submitted to, the court that is not so intended. The draft court documents or submissions clearly satisfy the three criteria set out in *Solosky*, *supra*, for legal advice privilege.

This reasoning has general significance to the law of solicitor-client privilege. It is also relevant to exemptions such as the government advice exemption in Ontario freedom of information legislation. The IPC/Ontario has previously taken the position that draft records do not reveal "advice" and are therefore not exempt from public access.

Blank v. Canada, 2009 FC 1221.

Contact with defendant's former employee not grounds to disqualify plaintiff counsel

The Ontario Superior Court of Justice declined to disqualify plaintiff counsel for its contact with a former employee of the defendant, Mr. O'Mara. The defendant alleged that Mr. O'Mara had received confidential information related to the action in the context of a solicitor-client relationship while employed.

Plaintiff counsel represented various adult entertainment establishments in an action against the Toronto Police Services Board for matters arising out of a large scale investigation that was led by O'Mara. It claimed the TPSB was vicariously liable for O'Mara's conduct.

In 2001, right around his retirement, O'Mara met with lawyers for the TPSB to discuss his evidence. Sometime later O'Mara contacted plaintiff counsel about providing them with private investigation services. In 2003 plaintiff counsel retained O'Mara on two files unrelated to the action against TPSB in which he prepared affidavits.

The Court held that disqualification was not justified because O'Mara did not receive confidential information attributable to a solicitor-client relationship. In doing so, it declined to apply a rebuttable presumption that such information was communicated, because O'Mara did not meet with the TPSB as a client and, unlike in the Court of Appeal's recent *Humber v. Stewart* decision, was neither a potential expert witness, nor responsible for giving instructions to counsel as a member of management.

It considered the communications between counsel and O'Mara an ordinary interview with a potential witness to obtain information from the potential witness and were not shown to be of a kind to make it reasonably likely that confidential information would be imparted to Mr. O'Mara. The fact that the potential witness was still, at the time, employed with the TPS does not change the nature of the communications.

728654 Ontario Inc. (Locomotion Tavern) v. Ontario (Attorney General), 2010 ONSC 1184 (CanLII).

Newfoundland court says Privacy Commissioner can't access documents subject to solicitor-client privilege

The Newfoundland Supreme Court – Trial Division, held that the Newfoundland Information and Privacy Commissioner cannot require a public body to produce records claimed to be exempt from public access as subject to solicitor-client privilege.

The Newfoundland *Access to Information and Protection of Privacy Act* gives a requester a right to seek review of an access decision either through the Commissioner or the Trial Division. In the event of a review, the Commissioner may require production of records, and a public body has a corresponding duty under section 52(3) to provide responsive records "notwithstanding another Act or a privilege under the law of evidence." The Commissioner argued that section 52(3) allows it to compel the production of records claimed to be exempt from public access as subject to solicitor-client privilege. It made a purposive argument and also adduced text from a legislative committee report that suggested that the Commissioner be granted a power of review that would operate "notwithstanding any law or privilege."

The Court relied on the long line of jurisprudence that establishes solicitor-client privilege can only be abrogated by clear and unequivocal language, including the Supreme Court of Canada's recent *Blood*

Tribe decision. It held that reference to "a privilege under the law of evidence" is not clear indication that the legislature intended solicitor-client privilege to be infringed, because solicitor-client privilege is a rule of evidence *and* a substantive legal right, which was not caught by the language in section 52(3). To suggest otherwise would necessitate ignoring the evolution of the privilege as described by the Supreme Court of Canada.

The Court also held that the Commissioner's power to review access decisions does not include a power to adjudicate solicitor-client privilege claims because such claims involve substantive rights that exist independently of the Act.

Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner), 2010 NLTD 31 (CanLII)

3.7.3 Statutory privilege

BCCA says statutory privilege not a barrier to production

The British Columbia Court of Appeal held that the privilege in section 517(5) of the *Canada Elections Act* is not a bar to production.

The section deems the fact that a person entered into a compliance agreement and any statement in a compliance agreement that admits responsibility for a violation of the Act to be inadmissible as evidence. The Court held that the provision only deems evidence to be inadmissible and does not bar production. It also held that the information, in the circumstances, was not subject to litigation privilege.

Ontario courts have read the statutory privilege governing an Ontario Student Record similarly.

Lougheed Estate v. Wilson, 2009 BCCA 438.

Production favoured over privacy interests in two orders relating to Air France crash litigation

The Ontario Superior Court of Justice has issued two production-related decisions in litigation flowing from the 2005 Air France crash in Toronto. In the first decision, it held that the Transportation Safety Board should produce Air France's cockpit voice recorder. In the second decision, it ordered Air France to produce relevant medical records and an internal investigation report.

Strathy J. issued the cockpit voice recorder decision. He held that production was warranted despite the statutory privilege for "on-board recordings" in section 28 of the *Transportation Safety Board Act.* This privilege is based on a need to protect pilot privacy and a need to encourage free communication between pilots, both necessary given that continuous voice recording is invasive. Strathy J. held that, in the circumstances, these interests did not outweigh the public interest in the "integrity of the judicial fact-finding process and the reliability of the evidence before the court." He stressed that the cockpit voice recorder evidence was highly relevant, probative and reliable and that the pilots' remaining privacy interest was minimal given their pre-crash communications were fully probed by the TSB and discussed publicly in its accident report.

Master Brott issued the second production-related decision. She rejected Air France's argument that production of a captain's medical records should not be ordered given strict French privacy laws and because Air France had produced a certificate of medical fitness. She held that the captain was a party to the action, that "Medical records in France and Ontario belong to the patient" and that the records were relevant in light of the pleadings. Master Brott also rejected an argument that an internal investigation report prepared by Air France as a matter of due diligence was immune from production on account of case-by-case privilege.

Société Air France v. Greater Toronto Airports Authority, 2009 CanLII 69321 (ON S.C.).

Société Air France v. Greater Toronto Airports Authority et al, 2010 ONSC 432 (CanLII).

3.7.4 Waiver

Privilege in e-mails waived based on uncontested waiver claim

The Ontario Superior Court of Justice dismissed a motion to disqualify counsel who received allegedly privileged e-mails and used them to amend its pleadings. It held that the privilege holder had waived privilege either knowingly or through the reckless conduct of its counsel.

The privilege dispute arose in the context of a wrongful dismissal claim and a counter-claim brought against a departing plaintiff. The plaintiff had communicated with her legal counsel by e-mail on her former employer's system. The employer's American counsel retrieved the e-mails and turned them over to its Canadian counsel, who produced twelve suspect e-mails to the plaintiff in September 2007 along with 135 other documents. The next day, the employer's counsel wrote a one page letter to the plaintiff's counsel to deal with a number of production issues and expressly took the position that privilege in the e-mails had been waived.

The plaintiff objected to the production in May 2009. This was after its counsel had responded to all points in the one page letter except the privilege issue and had sought a further and better affidavit of documents. It was also after the defendant retained new counsel who assumed the plaintiff had accepted its privilege waiver position and sought to amend its pleadings to refer to the solicitor-client communications in November 2007. On these facts, Master Glustein held that the plaintiff had waived privilege. He also held that he would not have otherwise disqualified the defendant's newly-retained counsel, who he said was blameless in proceeding with its understanding that privilege had been waived.

Master Glustein did not consider whether the plaintiff waived privilege in her communications by using her employer's e-mail system, but did comment that he found no "blame" in the employer going through the former employee's emails at the outset. Even if the e-mails are privileged, the employer's counsel believed that the e-mails were not privileged because they were the employer's documents, and that as such, the plaintiff waived privilege.

This obiter statement is of some interest given the frequency with which employers find themselves in custody of their former employees' solicitor-client communications. The case is otherwise driven by its facts.

Eisses v. CPL Systems Canada Inc., 2009 CanLII 45440 (ON S.C.).

3.7.5 Settlement Privilege

Ontario Court addresses scope of settlement privilege

The Ontario Superior Court of Justice dismissed a settlement privilege claim brought by a third-party to a breach of confidence and unjust enrichment suit.

Pepall J. considered the applicable jurisprudence and held that settlement privilege does not shield information that is sought for a purpose other than use as an admission against interest. Given the agreement in dispute was relevant to issues of custom, damages and the breach of confidence claim itself, she dismissed the third-party's motion for protective relief without prejudice to its right to object to the agreement's admissibility at trial.

Sabre Inc. v. International Air Transport Association, 2009 CanLII 9452 (ON S.C.).

3.8 SCOPE OF PRODUCTION

Court infers that Facebook pages include relevant information about lifestyle

The Ontario Superior Court of Justice granted leave to cross-examine a plaintiff in a motor vehicle accident suit about the nature of content he posted on his Facebook profile. In defence of a claim for compensatory damages for loss of enjoyment of life, the defendant sought production of all content on the plaintiff's Facebook profile. It did not examine the plaintiff on whether he had any photographs revealing of his post-accident lifestyle in oral discoveries, but learned of his Facebook profile's existence after discovery and developed a theory that it would contain such photos.

Master Dash held that the existence of the plaintiff's Facebook profile was not reason to believe it contained relevant evidence about his lifestyle. He distinguished the Court's decision in *Murphy v. Perger* by noting that the plaintiff in *Murphy* had produced publicly-available photos from her Facebook profile, therefore creating a reasonable suspicion that the private part of her Facebook profile contained additional relevant photos. Master Dash said the defendant, without any such evidence, was just fishing.

The appeal judge disagreed, stating that it was reasonable to infer that the plaintiff's social networking site likely contained some content relevant to the issue of how he had been able to lead his life since the accident.

Based on this inference, the appeal judge also said that a party should ordinarily be granted a right to cross-examine on an affidavit of documents where it does not have a right of discovery (as in Simplified Rules actions under the old rules of civil procedure) and when a plaintiff who makes a claim that puts his or her lifestyle in issue produces "few or no documents" from his or her Facebook profile.

Leduc v. Roman, 2009 CanLII 6838 (ON S.C.).

Court says there's no right to forensic inspection absent evidence of non-disclosure or omission

Master Sproat of the Ontario Superior Court of Justice held that a plaintiff had provided no basis for an order permitting the forensic inspection of two hard drives. In doing so, he commented that a party is not entitled to conduct forensic inspection as a matter of right, absent some evidence of non disclosure or omission and upon a proper consideration of the issue of proportionality now required under the new rules. Master Sproat stated that all litigants have a right to disclosure of relevant documents, regardless of the nature of the case. He did accept that electronic discovery may have a greater role or be of greater importance in certain cases over others depending on the allegations in the action (for example, if there is a dispute concerning when a key document was prepared), but this is not such a case, despite the allegations of a political conspiracy.

The Court also dismissed a request for an order requiring the defendant municipality to conduct a second search for records in the absence of any evidence that its first search was flawed.

Rossi v. Vaughan (City), 2010 ONSC 214 (CanLII).

3.9 DISCOVERY

Alta. C.A. says plaintiff's mother need not answer questions about son's injuries

The Alberta Court of Appeal held that a third party (who was also the plaintiff's next friend and mother) was not required to answer questions at examinations for discovery relating to the injuries suffered by the infant plaintiff.

The plaintiff child claimed against a school bus operator for injuries arising out of an accident. The defendant third partied the mother, alleging that she was negligent in failing to provide instruction to her

son. The mother denied negligence and causation but did not dispute the plaintiff's claim against the defendant or the quantum of damages claimed.

In these circumstances, the Court held that the mother was adverse in interest to the defendants on the issue of liability and therefore could be examined. However, it also held that the defendant could not ask questions about the plaintiff's injuries on discovery, because it was not adverse in interest to the mother on the damages issue: "In this case, the happenstance that the third party is the mother of the plaintiff should not be allowed to extend the scope of discovery beyond what is 'relevant and material' in the pleadings."

Briggs Bros. Student Transportation Ltd. v. Collacutt, 2009 ABCA 17 (CanLII).

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