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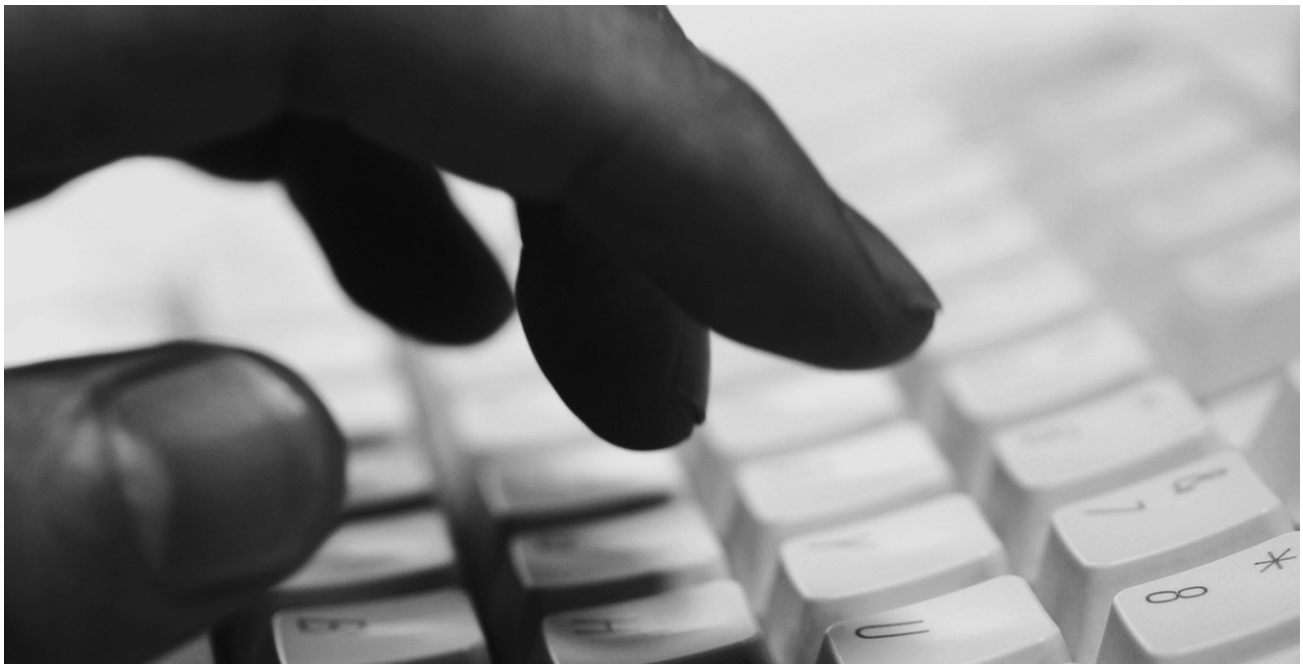
HUMAN RESOURCES
LAW AND ADVOCACY



HICKS MORLEY INFORMATION AND PRIVACY POST

2013

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Dear Friends:

It's early October 2013, and here's what's on our minds

With great pleasure, we've released this year's *Information and Privacy Post* – a review of 60 information management and privacy cases that caught our attention in the last year.

We like the exercise of producing the *Post* because pulling together and organizing recent case law developments sheds some light on trends. The prevailing view in the social media production cases, for example, has clearly departed from the view expressed in *Leduc v Roman*, a 2009 Ontario case in which Justice Brown of the Ontario Superior Court of Justice suggested photos on Facebook are presumptively relevant when a Facebooking plaintiff claims loss of enjoyment of life. We've reported on three cases in which courts have taken a more conservative approach and drawn a line between "action photos" that are probative of physical restrictions and more ambiguous photos of individuals in social situations that, in ordinary circumstances, are too marginally relevant to warrant production.

The Facebook cases are in our section on "production" – a seemingly mundane collection of cases that you may find useful in deriving insight about corporate information management. *State Street Global Advisors Ltd*, for example, is an example of the great difficulties that can befall organizations that do not properly govern e-mail communications.

Finally, we also have reported on a notable data incident class action settlement – *Maksimovic* – which involves an action that followed a 2011 attack on their online services that caused a significant service outage and a loss of personal information. The affected company offered its subscribers a substantial remedial package soon after the incident, and after two years without evidence that the loss of personal information led to any identity fraud, settled by promising class members some modest benefits plus a claims process by which they could pursue reimbursement of out-of-pocket payments for losses arising out of proven harm. Although class counsel's approved fees were $265,000, the settlement is the second of its kind in Canada that is rather benign. Boards of directors should be *very* concerned about data security, but the greatest pain associated with typical incidents is suffered *whether or not there is a lawsuit* and is associated with the required investigation, remedial planning and stakeholder and public affairs management. *Maksimovic* is further evidence that typical data incidents start with a bang and finish with a whimper.

Please enjoy. If you have questions or if your organization requires assistance on related matters, we would be very pleased to speak with you.

Dan Michaluk
Information and Privacy Practice
Group Leader

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BUSINESS INFORMATION (PROTECTION OF)

Arbitrator upholds discharge for use of personal computing devices

On December 21, 2012, Ontario arbitrator Ian Anderson dismissed a termination grievance brought by an employee who was terminated for bringing personal computing devices into a high-security workplace and downloading significant volumes of unauthorized (and risky) software onto an employer's network.

The outcome is driven by the facts, but Arbitrator Anderson did deal with an asserted employer duty to investigate suspected wrongdoing. He dismissed the union's argument that the employer could not charge the grievor with the downloading offence given it did not investigate and discover the grievor's downloading sooner.

General Dynamics Land Systems v National Automobile, Aerospace, Transportation and General Workers Union (Caw-Canada, Local no 27), 2012 CanLII 86240 (ON LA).

BC court signals that breach of privacy is a serious offence

On March 24, 2013, the Supreme Court of British Columbia held that an employer had cause to summarily dismiss an employee for gaining unauthorized access to personal information.

The plaintiff was a 20-year employee who worked on a helpdesk and required access to confidential information to perform her job duties. The employer had policies in place regarding access to private and confidential information, including a protocol to be followed by helpdesk employees when they needed to access the personal folders in order to provide technical assistance. The plaintiff was aware of these policies.

The Court upheld the employer's for-cause termination, finding that the plaintiff was in a position of "great trust" and that she worked for an employer (a credit union) that operated in an industry where trust was of "central importance." It also dismissed arguments that the plaintiff could be monitored as impractical.

Steel v Coast Capital Savings Credit Union, 2013 BCSC 527 (CanLII).

FREEDOM OF INFORMATION

BC access decision quashed for improper consideration of expert evidence

On January 8, 2013 the Supreme Court of British Columbia quashed an access decision because the Commissioner admitted opinion evidence but did not consider it to be expert evidence.

The Court differed with the Commissioner in finding that the opinion was "necessary" to resolve an issue about whether the disclosure of sales data, by postal code, could reasonably be expected to cause economic harm to the British Columbia Lottery Corporation. The Commissioner held that the opinion was unnecessary because it went to the very question before her. The Court held that the opinion was necessary because it went to constituent facts such as whether the data had monetary value and could provide grey market competitors with a competitive advantage. Given the opinion met the criteria for admissibility, the Court held the Commissioner erred in law by failing to consider it as expert evidence. It said, "Opinion evidence is only admissible as expert evidence."

British Columbia Lottery Corporation v Skelton, 2013 BCSC 12 (CanLII).

BC OPIC orders release of union pension plan information

On January 28, 2013, the British Columbia Office of the Information and Privacy Commissioner ordered the British Columbia Financial Institutions Commission to release certain information about union-run

pension plans to an employers' association. It held that that release of the requested information would not harm the business interests of the pension plans.

Financial Institutions Commission (Re), 2013 BCIPC 2 (CanLII).

Court affirms order to disclose salaries based on public interest override

On October 30, 2012, the Divisional Court affirmed a 2010 order by the IPC/Ontario that required a police board to publicly disclose the specific salary entitlements of a police chief and two deputy chiefs.

The request dealt with base salary entitlements for various years (as granted and recorded in employment contracts). Total salary to be paid to the affected employees exceeded the $100,000 threshold for annual publication under the *Public Sector Salary Disclosure Act*. The requested disclosure, therefore, would reveal the amount of performance pay received by the affected employees.

The IPC held that disclosure of the affected employees' salary entitlements would constitute an unjustified invasion of personal privacy based on a provision that shields an employee's "income" from public disclosure. However, it also issued a broadly-framed finding that disclosure of the "senior level" employees' personal information was nonetheless warranted based on the "public interest override." The Divisional Court affirmed the latter finding as reasonable.

York (Police Services Board) v (Ontario) Information and Privacy Commissioner, 2012 ONSC 6175 (CanLII).

Documents obtained under access legislation producible in litigation

On January 10, 2013, the New Brunswick Court of Appeal held that various RCMP records obtained by a plaintiff under access legislation and listed in her Schedule B were producible notwithstanding her privilege claim.

The Court, in essence, rejected the plaintiff's suggestion that the RCMP had a continuing interest in the plaintiff's use of the documents. It held that the *Wagg* screening process for dealing with production and use of Crown brief materials did not apply because the plaintiff did not obtain the records from the Crown pursuant to the *Stinchcombe* duty. Similarly, it held the documents could not be subject to public interest privilege given they had been produced by the RCMP pursuant to an access request.

The Court also held the records were not subject to litigation privilege, though plaintiff's counsel obtained them after the start of litigation.

Bennett v State Farm Fire and Casualty Company, 2013 NBCA 4 (CanLII).

Federal Court confirms ATIA institutions can make only one access decision

On July 11, 2013 the Federal Court held that an *Access to Information Act* institution's access decision was null and void because it had made a prior access decision in response to the same request. It confirmed that institutions can only make one decision, though they may make supplementary disclosure based on an Information Commissioner recommendation (pursuant to section 29) and change their position in responding to a section 44 application to Federal Court.

Porter Airlines Inc v Canada (Attorney General), 2013 FC 780 (CanLII).

Judicial review moot after requester loses interest in obtaining access

On January 8, 2013, the Supreme Court of British Columbia dismissed a British Columbia Lottery Corporation petition for judicial review because the requester was no longer interested in receiving a copy of the policies and procedures manual at issue. It rejected the BCLC's argument that the petition should be heard because of the prejudice it would face in dealing with future requests for the same record,

stating “If, in the future, some other party seeks production of the Manual, the Commissioner will have to decide the matter based on the law and evidence as it then exists.”

British Columbia Lottery Corporation v Dyson, 2013 BCSC 11 (CanLII).

Nova Scotia judge deals with FOI requests, responsiveness and “mixed” e-mails

On October 22, 2012, Justice Scanlan of the Nova Scotia Supreme Court said the following about the responsiveness of e-mails in disposing of an FOI appeal:

> There are a couple of issues that I wish to address further. It appears the initial review officer may have taken the position that the Respondent could not withhold documents on the basis that they were irrelevant. The Respondent referred to those materials as “not applicable”. According to the Respondent the Review Officer suggested there was no recognized exemption under FOIPOP legislation for “non applicable” materials. Any such ruling would defy commonsense. What possible relevance would it be to the Appellant if someone commented in a document that their grandmother had a wart removed from her nose. (Not that any such comment was made in the redacted materials). With e-mail communications the author on a number of occasions mixed personal or non relevant communications with information which was properly disclosed. The personal, non relevant, information is not something to which the Appellant is entitled to access. There are some things in records, such as e-mail, which are clearly irrelevant and should not be disclosed. The types of documents that fall in the “not applicable” category include, for example notes from unrelated investigations or proceedings. The Appellant has no right to see those types of documents just because they are in an officer’s notebook. As I have noted, to suggest non relevant documents are to be produced on a FOIPOP application defies common sense and the scope of the legislation.

Under a strict analysis the “responsiveness” of an entire record is assessed against the wording of an FOI request. Justice Scanlan supports a more purposive approach (which reflects common practice) in which parts of records that are unresponsive may be redacted.

Stevens v Nova Scotia (Labour), 2012 NSSC 367 (CanLII).

Ontario IPC issues strong order limiting access to “constituency records”

On December 21, 2013 the IPC/Ontario issued an order that held that communications about “cycling issues” between two councillors were not under a municipality’s custody or control.

The IPC reached its finding even though the requested records (assuming their existence) would relate to municipal business and be found (at least in part) on the municipality’s information technology system. It explained, in general terms, that records arising exclusively out of a councillor’s political activity – commonly called “constituency records” – are not subject to the right of public access.

Toronto (City) (Re), 2012 CanLII 81955 (ON IPC).

Ontario IPC orders institution to validate authenticity of record

On January 19, 2013 the IPC/Ontario ordered the Ministry of Community Safety and Correctional Services to validate the authenticity of a 911 call recording that it provided to a requester.

The Ministry filed an affidavit about how the recording was extracted from the system on which it was recorded and burned to CD. However, when the requester challenged the recording's authenticity the Ministry provided the requester with a second CD that the requester successfully claimed did not match the first. The IPC ordered the Ministry to re-produce the CD and provide the requester with a sworn statement about the authenticity of the to-be-produced CD after listening to compare it with the original.

The Ministry adduced evidence of its extraction process that was very strong, but its affidavit seemingly did not capture the entire chain of custody - *i.e.*, the first-produced CD was not marked and identified in the affidavit. This can be done relatively easily by using a hash number or even physically marking the disc that's produced.

LIBEL AND SLANDER

BCCA dismisses fair comment defence for failure to state facts

On July 17, 2013, the Court of Appeal for British Columbia dismissed a fair comment defence because the defendant did not sufficiently reference the "factual foundation" required to establish the defence. The case involved commentary about a fish farm that made general reference to peer-reviewed scientific evidence but gave no details and did not include hyperlinks. The Court held that the factual foundation for the impugned commentary was not stated, involved non-notorious facts and was not identified by a "clear reference."

Mainstream Canada v Staniford, 2013 BCCA 341 (CanLII).

Employer not liable for response to disparagement of its employees

On January 22, 2013, the Public Service Grievance Board (of Ontario) dismissed a complaint by managers that alleged an inadequate employer response to disparaging publications on an Ontario Public Service Employees Union blog. Vice-Chair O'Neil said:

> In general, as a matter of common sense, I accept that a significant stream of disrespect coming from co-workers or those with opinions about the workplace, whether at work, in social situations, or on-line, will likely impact the workplace, often insidiously, because it is hard to measure and any particular example may be fleeting or hard to attribute to any particular author.

The resulting employer duty, Vice-Chair O'Neil explained, is to take "reasonable steps." She held that the Ministry had taken such steps by issuing a joint communication with the union that "laid the foundation" for discipline, following which the offending blog was made password-protected but not taken down. Vice-Chair O'Neil further held that the Ministry was not required to discipline employees or take any particular action in response to the OPSEU blog.

Lee v Ontario (Ministry of Community Safety and Correctional Services), 2013 CanLII 4672 (ON PSGB).

Ontario CA says no to the single publication rule

On June 17, 2013, the Court of Appeal for Ontario held that the "single publication rule" does not apply in Ontario.

As stated by the Court, the single publication rule "holds that a plaintiff alleging defamation has a single cause of action, which arises at the first publication of an alleged libel, regardless of the number of copies of the publication distributed or sold. In other words, the entire edition of an newspaper, book or magazine is treated as a single publication when it is first made available to the public." The Court rejected the rule based on an interpretation of the *Libel and Slander Act* and broader policy-related considerations.

The Court also held that whether an internet publication is subject to a notice of intended action requirement and a three month limitation period is a matter that should be dealt with at trial.

Shtaif v Toronto Life Publishing Co Ltd, 2013 ONCA 405 (CanLII).

Ontario claim attacking a report of concerning behavior may proceed

On December 20, 2012, the Ontario Superior Court of Justice dismissed a motion to strike a defamation and negligence claim that arose out of a student's report of concerning behavior to her university.

The plaintiff alleges he was wronged by the student's report of the following facts and the university's further (and allegedly negligent) "reporting" and "publication" of the following facts (as summarized by the Court):

> Two weeks earlier the plaintiff had approached the individual defendant after class and advised her he really liked her, had strong feelings for her, and wanted to pursue his feelings in a relationship knowing she had a boyfriend.
>
> That the plaintiff told the individual defendant he was not able to sleep, paced in his bedroom all night to fall asleep, and also advised her he could not live without her.
>
> That the individual defendant was concerned for the plaintiff's health as he might hurt himself and did not seem to have any friends or family in the area.
>
> That the individual defendant had reported that the plaintiff had asked her out four times and had said things that made her feel uncomfortable.

The Court held that there was no basis for concluding the claim was about an academic matter within the university's exclusive jurisdiction. It also held that the claim, as pleaded, appeared to disclose a reasonable cause of action.

Thode v University of Ottawa, 2012 ONSC 7284 (CanLII).

Ontario court blesses agreement to fund employee defamation suit

On March 3, 2013, the Ontario Superior Court of Justice dismissed a motion to strike a defamation action the action because it was based on an allegedly unlawful funding arrangement.

The University of Ottawa agreed to fund the legal costs of a defamation action brought by a professor who had issued a report exonerating the University from an allegation of systemic racism and who the defendant referred to in a blog post as the University President's "house negro." The professor approached the University and said that she "had to sue" the defendant.

In dismissing the defendant's motion to strike the action because it was based on an allegedly unlawful funding arrangement, the Court noted that the professor would have pursued her action without the University's support, that there was no agreement that the University would share in any proceeds of the

litigation and that University's purpose for providing support (to address discrimination and reputational harm occasioned by work) was proper.

St Lewis v Rancourt, 2013 ONSC 1564 (CanLII).

Union defames hospital administrator by publishing grievance, no privilege

On March 1, 2013, the Saskatchewan Court of Appeal held that a union and its representatives defamed the director of a teaching hospital by publishing a grievance that alleged he became "an active part of the harassment himself" by his handling of a harassment complaint against others.

The Court accepted that a publication by a union made for the purpose of "fair representation" (including for the purpose of locating witnesses for a pending arbitration) might attract qualified privilege, but held that the union went too far in the circumstances "having regard for the manner of communication, the wording of the communications, their timing and to whom they were given." In particular, the Court held that the union could not satisfy the "reciprocity of interests" element of the qualified privilege defence because it published the grievance on the open internet.

Also notably, the Court awarded $100,000 in general damages, which the Court characterized as just shy of an amount that might be awarded for "extreme and egregious conduct." It declined to award aggravated or punitive damages.

Rubin v Ross, 2013 SKCA 21 (CanLII) (leave to appeal to Supreme Court of Canada dismissed August 15, 2013).

PRIVACY

BCSC says PIPA does not have quasi-constitutional status

The British Columbia Supreme Court issued an oral judgment in January of 2012 that appears to have been just recently published. The Court found that the clear right to membership information given to members of a co-op under the British Columbia *Cooperative Association Act* does not conflict with prohibitions in the British Columbia PIPA and is not superseded by prohibitions in British Columbia PIPA. Justice Gaul commented:

> While the respondent is correct in noting that the Supreme Court of Canada in *Lavigne* considered the "quasi‑constitutional" nature of privacy legislation, the court did so with specific reference to the *Privacy Act* RSC, 1985, c. P-21. This federal legislation focuses on the privacy obligations of governmental organizations as opposed to private organizations. That is an important distinction when it comes to the case before me because the PIPA is a legislative enactment designed to govern the privacy obligations of private organizations. I am unpersuaded that the PIPA has any "quasi-constitutional" roots or purpose that would give it the special status the respondent argues it has.

The Court issued a declaration that any member of the respondent co-op in good standing may obtain a copy of its membership list.

Pearson v Peninsula Consumer Services Cooperative, 2012 BCSC 1725 (CanLII).

Court orders therapeutic records returned to their maker despite privacy claim

On March 8, 2013, the Ontario Superior Court of Justice ordered the return of therapeutic records allegedly obtained through fraudulent means despite an argument that such return would cause harm to the individuals to whom the records related.

The records were created by a psychotherapist and hypnotist alleged to have held himself out as a medical doctor. He took notes of sessions with a number of complainants that the police seized but that were no longer needed for investigation or for trial. The Crown asked the Court to hold the return of the records based on section 37 of the *Canada Evidence Act* because returning the records would, "encroach upon a specific public interest and privacy concern of the alleged victims of this fraudulent conduct."

The Court dismissed the Crown's application, questioning whether a privilege or privacy claim could apply to information known by the accused and records created by the accused.

R v Kent, [2013] OJ No 1037 (SCJ) (QL).

Court orders safekeeping of medical records held by departed employee

On March 7, 2013, the Ontario Superior Court of Justice issued an order to secure medical records held by a former employee of an addiction clinic.

The employee had copies of urinalysis reports stored on her personal e-mail account at the time of termination because she had used her personal e-mail account for work purposes. She allegedly used her continuing possession of the e-mails to extort the employer into offering reinstatement and later refused to return the e-mails, arguing they were evidence of the employer's wrongdoing. (It is not clear from the decision what wrongdoing the employee alleges.)

The Court granted an *ex parte* order after applying the test for an *Anton Piller*. Notably, the order required the employee to turn control of her e-mail account to an independent supervising solicitor authorized to copy and retain the e-mails, delete the e-mails on the account and return control of the account to the employee. The Court authorized the employer to serve the order by e-mail.

Garber v Robinson, 2013 ONSC 1427 (CanLII).

Court suggests PIPEDA does not limit its power to assist execution creditors

The Ontario Superior Court of Ontario issued an endorsement on November 19, 2012 that demonstrates a proper understanding of the Court of Appeal for Ontario's judgement in *Citi Cards v Pleasance* - that a Court will entertain a motion for production of a mortgage statement from a mortgagee notwithstanding PIPEDA. *Citi Cards* says that courts should grant such orders sparingly given PIPEDA protects the privacy of mortgagors but does not mean that a court is prohibited from making such an order. There has been some confusion about this point.

McBean v Griffin, 2012 ONSC 6555 (CanLII).

In dispute over custodianship of medical files, balance favours established clinic

On May 22, 2013, the Ontario Superior Court of Justice ordered medical files to be returned to a clinic by a departing doctor who claimed she had an independent practice and was the legal custodian of the files.

Justice Perell dismissed the defendant's argument that a corporation could not be a "health information custodian" under the *Personal Health Information Protection Act* and held that the plaintiff clinic had made out a strong *prima facie* case that it had such status. His suggestion that the defendant was also a health information custodian could best be understood as a function of the qualified burden of proof on an interlocutory motion given, under PHIPA, there can be only one custodian of a record of personal health information.

Justice Perell's balance of convenience analysis is noteworthy. He said the following about the public interest in providing patients with access to their personal health information pending final resolution of the dispute:

> In considering the balance of convenience, it is appropriate to consider the interests of the patients whose health records have been removed from a health clinic to the home of a health care practitioner. In my opinion, a patient will have better access to his or her health records and the health care practitioner who will treat the patient during Dr. Simon's semi-retirement will have better access to the health records if the records are at professional offices with normal business hours and full-time staff.

A plaintiff in a similar situation could similarly attempt to make a case for return of records based on a claim to relatively superior security measures, though the stakes of pursuing such an approach would be high.

1615540 Ontario Inc carrying on business as Healing Hands Message v Simon, 2013 ONSC 2986 (CanLII).

Intrusive mobile application class action certified in Québec

On June 27, 2013, the Superior Court of Québec certified a class action about the alleged intrusive nature of free applications offered through Apple's "App Store."

The petitioner alleges that Apple breached various Québec statutes by failing to inform users that free applications would facilitate the collection and use of their personal information, including their "geolocation." The petitioner also claims that individuals were harmed (a) by the loss of computing resources and (b) by being led to overpay for their Apple devices, such devices being "inextricably linked" to undesirable characteristics associated with free applications distributed through the App Store. The petitioner asked the Court to grant certification so he could prosecute Apple on behalf of all residents in Canada who downloaded free applications from December 1, 2008 to present.

Apple attacked the action's suitability for certification on a number of bases. Most fundamentally, it complained that the action provided for an "infinite variety of classes" – for example (and at the least), classes of individuals who were exposed to applications with different information-gathering characteristics. Nonetheless, the Court granted certification of a Québec only class. Its analysis is very forgiving, especially in addressing Apple's (very valid) concerns about the individualized nature of a consent dispute.

Albilia c Apple Inc, 2013 QCCS 2805 (CanLII).

Judicial review not the regular means to challenge PIPEDA investigation reports

On January 15, 2013, the Federal Court dismissed two judicial review applications brought by a self-represented applicant who took issue with two OPC investigation findings made under PIPEDA. The Court held that an application under section 14 of PIPEDA, which invites a *de novo* hearing, was an adequate alternative remedy to judicial review.

In making this finding the Court suggested that a judicial review application to allege bias or that the OPC committed some other procedural injustice might be amenable to judicial review.

Kniss v Canada (Privacy Commissioner), 2013 FC 31 (CanLII).

Ministry of Labour breaches FIPPA in administering an OLRB production order

On November 9, 2012, the Information and Privacy Commissioner/Ontario held that the Ministry of Labour breached FIPPA's safeguarding duty after it investigated the administration of a production order made by the Ontario Labour Relations Board.

The directors of a bankrupt employer appealed an order to pay wages and vacation pay to 309 former employees to the OLRB. The directors and the prosecutor agreed to a consent order that required production of relevant financial information about the 309 employees, and the prosecutor agreed to one or more participating employees that all 309 employees (as parties to the proceeding) would receive the production. The OLRB mailed an unencrypted CD-ROM containing the 309 employees' names, social insurance numbers, total annual remuneration, period of earnings and address information. After complaints were lodged by some recipients the OLRB attempted to recall the mailing, but in the end did not recover 137 of the CD-ROMs.

The production order itself was the real source of difficulty here, but the IPC rightly acknowledged it had no jurisdiction to scrutinize the OLRB's exercise of procedural powers. Instead, the IPC looked at the adequacy of the OLRB's and Ministry's security practices, recommending first that the OLRB take the added precaution of making clear to parties that they can request orders to restrict the manner and scope of disclosure. The IPC also held that the Ministry ought to have used a bonded courier service, ought to have considered encryption and ought to have attempted to confirm addresses.

Ontario (Labour) (Re), 2012 CanLII 71576 (ON IPC).

No privacy tort in British Columbia

On May 22, 2013, the Supreme Court of British Columbia confirmed that there is no common law tort of invasion of privacy in British Columbia despite recent recognition of the tort in Ontario. British Columbia has a statutory tort set out in the British Columbia *Privacy Act*.

Demcak v Vo, 2013 BCSC 899 (CanLII).

Ontario court says PIPEDA does not apply to LawPro

On August 28, 2013, the Ontario Superior Court of Justice held that LawPro (which insures Ontario lawyers) was entitled to report various allegations made against an insured to the Law Society of Upper Canada.

LawPro made the report after the insured was sued and before it denied him coverage. The Court held that LawPro wrongly denied coverage but dismissed the insured's breach of confidence and privacy claim.

The Court held that LawPro did not breach PIPEDA because it is not engaged in commercial activity. It explained:

> Counsel for LawPro submits, correctly in my view, that the providing of mandatory professional liability insurance to the province's lawyers is not a commercial activity within the meaning of section 4(1)(a) of PIPEDA. Although LawPro is designed to conduct itself in a financially viable manner, its principal shareholder is the Law Society – a regulatory body – and its mandate entails "a commitment to working with the bar in the public interest over the long term". *LawPro, Our Story: 15 Years of Making a Difference (Lawyers Professional Indemnity Company, 2010*), online:

> http://www.practicepro.ca/LawPROmag/15Anniversary%20Booklet.pdf, at p. 4. That mandate takes LawPro outside of the type of activities to which PIPEDA applies.

The Court also held that LawPro acted properly in making the report notwithstanding the insured's argument that his communications with LawPro were made to a solicitor further to a common interest held by him and LawPro and were therefore subject to solicitor-client privilege. The Court held that LawPro had a duty to report that superseded solicitor-client privilege.

Cusack v The Lawyers' Professional Indemnity Co, 2013 ONSC 5511 (CanLII).

Settlement approved in Canadian cyber attack suit

On June 10, 2013, the Ontario Superior Court of Justice approved a settlement in a class action brought against Sony of Canada Ltd. and others. The action (for breach of contract) followed an April 2011 cyber attack that targeted accountholder information of approximately 4.5 million individuals enrolled in various Sony online services. The following is the Court's summary of the settlement:

> Class Members who had a credit balance in their PSN or SOE account at the time of the Intrusions but have not used any of their accounts shall receive cash payments for credit balances.
>
> The Sony Entities will make available online game and service benefits to class members geared principally to the type of account (PSN, Qriocity, and/or SOE) held by the class member at the time of the Intrusions.
>
> The settlement benefits are available through a simple process. To become entitled to benefits, Class Members need only to complete a claim form.
>
> The Sony Entities will reimburse any Class Members who can demonstrate that they suffered Actual Identity Theft, as defined in the Settlement Agreement. Class Members that prove Identity Theft can submit claims for reimbursement of out-of-pocket payments (not otherwise reimbursed) for expenses that are incurred as a direct result of the Actual Identity Theft, up to a maximum of $2,500.00 per claim.
>
> The Sony Entities are to pay for the costs associated with providing notice of the Settlement Agreement and the settlement approval hearing, all administration costs, as well as an agreed amount for plaintiffs' lawyers' fees and expenses ($265,000).

The parties sent a notice of certification and notice of motion for settlement approval to 3.5 million e-mail addresses. Fifteen percent of the e-mails were returned as undeliverable, 28 individuals opted out and nobody objected. Justice Perell noted that the agreement was premised on the understanding that there has in fact been no improper use of personal information resulting in identity theft. He also said, "The Settlement Agreement reflects the state of the law, including possible damage awards, for breach of privacy/intrusion upon seclusion and loss/denial of service claims."

Maksimovic v Sony of Canada Ltd, 2013 CanLII 41305 (ON SC).

Voluntary bank disclosure to police lawful

On August 7, 2013, Justice Fuerst of the Ontario Superior Court of Justice held that the police did not breach an individual's reasonable expectation of privacy by receiving information from two banks and using the information to obtain restraint orders.

The judgment is notable for the Court's recognition of the banks' legitimate interest in providing voluntary assistance to the police. Justice Fuerst said:

> The bank was directly implicated in allegations of money-laundering. It had a legitimate interest in preventing the criminal misuse of its services, particularly in circumstances where accounts associated to the applicant were alleged to be offence-related property subject to forfeiture.

Disclosing personal information to the police (within certain parameters) is permitted by sections 7(3)(c.1) and 7(3)(d) of the *Personal Information Protection and Electronic Documents Act*, which Justice Fuerst noted in her reasonable expectation of privacy analysis. Section 7(3)(d) authorizes disclosures initiated by commercial organizations. Notably, Justice Fuerst held that section 7(3)(d) allows for some two-way dialogue between the disclosing organization and the police: "It is unreasonable to interpret s. 7(3)(d) so narrowly that police officers to whom information is given by organizations like banks about possible criminal activity can do no more than passively receive it and are prevented from asking for specifics or details necessary to take steps in response."

R v Kenneth James, 2013 ONSC 5085 (CanLII).

PRIVILEGE

ABQB finds grievance response privileged

On February 26, 2013, the Alberta Court of Queen's Bench held that a grievance response is issued by an employer as part of the settlement process and is therefore privileged. The Court denied production in a civil action brought by the grievor (and in which the employer disputes the Court's jurisdiction).

Thomson v University of Alberta, 2013 ABQB 128 (CanLII).

Breach of undertaking not within crime and fraud exception to s-c privilege

On July 16, 2013 Justice D. M. Brown of the Ontario Superior Court of Justice dismissed a motion to compel answers to three cross examination questions that were refused based on a solicitor-client privilege claim. He dismissed an argument that the evidence sought was a communication between lawyer and client in furtherance of crime or fraud because the communication was for the purpose of breaching the deemed undertaking rule.

Brome Financial Corporation v Bank of Montreal, 2013 ONSC 4816 (CanLII).

Five principles from the SCC's settlement privilege decision

Here are five principles endorsed by the Supreme Court of Canada in its June 21, 2013 settlement privilege decision (quoted loosely from the decision itself):

- Settlement privilege is a class privilege associated with a *prima facie* presumption of inadmissibility; exceptions will be found "when the justice of the case requires it."

- Settlement privilege extends beyond documents and communications expressly designated to be "without prejudice"; what matters instead is the intent of the parties to settle the action.

- Settlement privilege protects documents and communications from production to other parties to the negotiation and to strangers, and extends as well to admissibility and whether or not a settlement is reached.

- Settlement privilege extends to the negotiated settlement itself.

- To come within an exception to settlement privilege, a party must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement."

The Court held that, in the circumstances before it, there was an insufficient interest favouring the disclosure of settlement amounts to two non-settling defendants in a multi-party dispute.

Sable Offshore Energy Inc v Ameron International Corp, 2013 SCC 37 (CanLII).

Lawyer's notes of opposing party's statements to be produced

On October 30, 2012, the Ontario Superior Court of Justice issued a decision that illustrates the burden on a party who claims that notes taken of an opposing party's statements are subject to litigation privilege.

The Court rejected a litigation privilege claim because it was impossible to discern from a review of the notes alone that they contained solicitor's work product – *i.e.*, confidential comments, remarks and notes personal to the transcriber and made for the dominant purpose of preparing for litigation. Although the notes contained some annotations and underlining, the Court held that it was not self-evident these markings were work product. It also held that counsel's submission that certain text in the notes represented an evaluation of the opposing party's value as a witness was not sufficiently persuasive to justify a withholding of otherwise producible information.

Hart v (Canada) Attorney General, 2012 ONSC 6067 (CanLII).

Non-party witness can receive document subject to litigation privilege

On August 23, 2013, the Supreme Court of British Columbia held that a non-party witness should have access to a statement she gave to an insurance adjuster even though it was subject to the adjuster's litigation privilege. It ordered the statement to be produced to the witness with the proviso that it the witness keep the statement confidential.

Minnie v ICBC, 2013 BCSC 1528 (CanLII).

OCA denies access to identity of person paying bankrupt's legal fees

On November 29, 2012, the Court of Appeal for Ontario held that the identity of a person paying the legal fees of a bankrupt person was protected by solicitor-client privilege.

The matter at issue deals with a trustee's pursuit of assets from a person it alleged to be holding assets for the bankrupt. The bankrupt had lost a motion in the matter and was ordered to pay a large costs award which, unpaid, led the trustee to move to discover the identity of the person paying the bankrupt's fees.

The Court held that the trustee could not rebut solicitor-client privilege because the identity of the payor was relevant to the trustee's broader allegation if not the motion that had led to the costs order. Much

more broadly, it also held that disclosing the identity of the payor would reveal a confidential communication between the bankrupt and his counsel about how the bankrupt would pay his fees – a communication necessary to the bankrupt's process of obtaining legal advice.

Kaiser (Re), 2012 ONCA 838 (CanLII).

Ontario decision deals with scope of litigation privilege and e-discovery issues

On March 25, 2013, the Ontario Superior Court of Justice issued a decision in which it held that that communications sent and received in order to build a public relations strategy ancillary to ongoing litigation were not subject to litigation privilege. Master McLeod stated:

> I am not however persuaded that strategy associated with public relations, media relations or lobbying ancillary to litigation would or should be protected. The notion of the adversarial advocate and the zone of privacy cannot be stretched so far as to protect the strategy of the party in the court of public opinion.

This is the most principled finding in a decision that also canvasses and provides helpful comment on a number of issues related to the production of e-mails. Master McLeod remarks, for example, that a search for documents containing keywords is a means of discovering relevant and privileged documents but does not "render the document automatically relevant" or "answer the question of privilege."

Kaymar Rehabilitation v Champlain CCAC, 2013 ONSC 1754 (CanLII).

Ontario master questions state of jurisprudence on OSR privilege

On January 22, 2013, Master Muir of the Ontario Superior Court of Justice held that answers to discovery questions that would disclose information contained in the Ontario Student Records of non-party students should not be answered based on the statutory privilege in section 266 of the *Education Act*. Master Muir held that he was bound by *Pandremenos v Riverdale Collegiate Institute*, but not without expressly stating his disagreement with an interpretation of section 266 that precludes access to all the information that finds its way into an OSR (as opposed to the privilege that attaches to an OSR itself).

Master Muir also noted other decisions by the Court in which discovery was allowed because the information at issue was not required to be contained in the OSR by the Ministry's guidelines. Master Muir said these decisions are distinguishable from cases in which the information at issue is required to be contained in the OSR as in *Pandremenos* and the matter before him.

Robinson v Northmount School for Boys, 2013 ONSC 1028 (CanLII).

Recent OCA journalist-source case a "squeaker" with good statements of principle

The Court of Appeal for Ontario's March 27, 2013 decision in *1654776 Ontario Limited v Stewart* is a journalist-source privilege decision in which the Court made some significant statements of principle in protecting a journalist's confidential sources.

The case is about whether the Court would reveal the identities of two insiders to the attempted takeover of BCE in 2008. The insiders provided information about the tenor of confidential negotiations to the Globe and Mail, which published the information and protected its sources. The plaintiff claimed the insiders breached the *Securities Act* by making false and materially misleading statements. He sought their identities, stressing that the insiders were not whistleblowers leaking information about wrongdoing and, rather, had merely given business information to a journalist and used the Globe to manipulate the markets.

Here are the statements of principle Justice Juriansz made on behalf of the Court:

> It is an error of law to apply an elevated standard in the first step of the *Norwich Pharmacal* test because an expressive interest is involved; at the first step, an applicant must merely demonstrate a *bona fide* claim. This finding weighs against protection.
>
> Courts should recognize that "generally" the relationship between a journalist and a confidential source should be "sedulously fostered"; concerns about the value of the specific source-journalist relationship at issue should be considered in weighing competing interests. This finding weighs in favour of protection.

On the facts, Justice Juriansz protected the sources, noting the case was "difficult." The lack of evidence to support the plaintiff's assertions was significant to Justice Juriansz as was the plaintiff's alternative potential remedy against several corporate actors. Justice Juriansz did not devalue the journalist-source claim because the insiders were not whistleblowers; making information about the transaction available was in the public interest, he held. However, given the plaintiff's attack on the quality of the sources' information, Justice Juriansz held that the public's right to know was a neutral factor in the circumstances. It seems, therefore, that if the plaintiff had a stronger factual basis for his claim, he would have prevailed in his quest to identify the anonymous sources.

1654776 Ontario Limited v Stewart, 2013 ONCA 184 (CanLII).

Settlement privilege and disclosure of partially redacted Mary Carter agreement

On July 18, 2013, the Ontario Superior Court of Justice affirmed a master's decision that ordered the disclosure of a partially redacted Mary Carter Agreement ("MCA") to a non-settling defendant. After reviewing the relevant case law, the Court noted that "there has been greater focus in the courts on the extent of disclosure required in order to ensure that the parties remain on a level playing field where adversarial orientations in the litigation may have changed due to the MCA, and in order that the non-settling party properly understands the case to be met."

Stamatopoulos et al v Harris et al, 2013 ONSC 4143 (CanLII).

PRODUCTION

BCCA denies access to patient information to further class proceeding

On May 27, 2013, the Court of Appeal for British Columbia vacated an order that required non-party physicians to provide a class action plaintiff with the contact information of patients who were potential class members. It rendered a principled judgment on physician-patient confidentiality, stating:

> Laudable as the plaintiff's intention may be to seek redress for persons who may have a claim to compensation for deleterious consequences from this medical treatment, such generous intention does not justify, in my view, the invasion of privacy that is inherent in dipping into the physician-patient relationship to discover the names, addresses, and contact information of persons who received this treatment. Each patient is entitled to maintenance of the confidentiality implicit in his or her attendance in a physician's examining room and protection of his or her privacy on a personal matter, absent serious concerns relating to health or safety, or express legislative provisions compelling release of the information in the public interest. In my view, the judge erred in principle by elevating the purposes of the *Class*

> *Proceedings Act* and the search for legal redress above the fundamental principle of confidentiality that adheres, for the benefit of the community, to the physician-patient relationship.

The Court distinguished other orders in which contact information was provided to class action plaintiffs as not involving physician-patient confidentiality.

Logan v Hong, 2013 BCCA 249 (CanLII).

Court says no to production of 1100 Facebook photos

On September 6, 2013, Master Muir of the Ontario Superior Court of Justice declined to order production of approximately 1100 photos that a personal injury plaintiff posted to her Facebook friends. The plaintiff employed the "I've got nothing to hide" approach by filing the photos under seal with an accompanying affidavit, an approach also used effectively last year in *Stewart v Kempster*. Master Muir held that pictures of the plaintiff happy and socializing were not relevant and that there was no reason to believe that the plaintiff had failed to produce pictures of engagement in physical activity.

Garacci v Ross, 2013 ONSC 5627 (CanLII).

Master McLeod sets out parameters of hard drive review

On June 27, 2012, Master McLeod of the Ontario Superior Court of Justice issued an e-discovery order that makes some points about the discovery of a hard drive.

The order involves an external hard drive that a departed employee (and defendant) admitted contained his former employer's (and plaintiff's) information and turned over to plaintiff counsel for "forensic review." Plaintiff counsel did not use a forensic IT specialist to review the drive but used in house firm resources to review the drive and segregate a number of potentially privileged files. The firm discovered over 400 zip files that contained backups of information from the defendant's personal laptop.

Master McLeod held that the defendant should review the files that plaintiff counsel's firm had segregated as potentially privileged. In doing so, he commented that there was an honest misunderstanding about the meaning of "forensic review" and that plaintiff counsel took adequate steps to protect himself from exposure to privileged communications. Nonetheless, according to Master McLeod "conducting the document review in house without specific agreement or disclosure was less than prudent."

Master McLeod also held that the plaintiff could continue to review the 400 plus zip files through its forensic expert. He said:

> In my view this kind of analysis is best conducted by an arm's length expert for two reasons. The first is that the data ostensibly belongs to the opposing party and will contain irrelevant confidential information (as anticipated) and apparently privileged information (which does not appear to have been anticipated by the defendant at least). The second reason is that the personnel conducting the analysis may have to be witnesses at trial and that militates against the use of in house I.T. or paralegal staff.

Notably, Master McLeod rejected a defendant argument that the zip files should not be reviewed at all based on a statement in the *Sedona Canada Principles* that indicates recourse to backup files should not ordinarily be within the scope of production. He held that, in the circumstances, the backup files were a potentially critical source of evidence that the plaintiff was prepared to review. The plaintiff would bear the cost of the review subject to cost recovery at the end of the day.

Descartes v Trademerit, 2012 ONSC 5283 (CanLII).

Existence of unfound docs no reason to allow a hard drive inspection (Ontario)

On December 19, 2012, Justice Morgan of the Ontario Superior Court of Justice made the following statement of principle in dismissing a request to inspect a party's hard drive that followed the party's service of a supplementary affidavit of documents:

> Plaintiff's counsel submits that computers do not err, and the fact that a document was overlooked the first time implies that the search was unredeemably deficient. However, computer storage and search systems, like traditional filing systems, are subject to human error. The Defendant's obligation is to make every effort to produce what the Rules require it to produce, but there must be evidence stronger than a corrected error for a court to order that the Plaintiff actually take control of the search through the Defendant's computer hard drive.

Justice Morgan also dismissed a request for an order requiring the provision of information about how the party's electronic search was conducted. He commented that the Rules "do not require a party to explain how or where the relevant documents were found or the methodology of its search for those documents."

Zenex Enterprises v Pioneer Balloon, 2012 ONSC 7243 (CanLII).

Master MacLeod gives a boost to role of particulars under new Ontario rules

On November 23rd of last year the Alberta Court of Queen's Bench issued an *Anton Piller* order based significantly on a concern for the privacy interest of customers whose information the plaintiff alleged had been stolen.

The plaintiff is a BMW dealership that was confronted with a regrettable breach of its sales and customer relationship management system when it failed to remove system privileges from a terminated manager. It alleged the manager gained unauthorized access to the system and downloaded the names, e-mail addresses and "other personal details" of about 5000 customers.

The Court noted that it contained gaps, but seemed to be swayed by the customer privacy interest at stake and stated that a public interest supported making the order.

Bavaria Autohaus (1997) Ltd v Beck, 2011 ABQB 727 (CanLII).,

Master MacLeod gives a boost to role of particulars under new Ontario rules

In a decision issued June 6, 2012, Master MacLeod of the Ontario Superior Court of Justice asked whether particulars should be more readily ordered under the Ontario rules given the relationship between pleading, discovery and expense. He concluded the answer is "yes."

Ottawa (City) v Cole & Associates Architects Inc, 2012 CarswellOnt 7204.

No disclosure of information from Facebook in Ontario case

On December 21, 2012, the Ontario Superior Court of Justice dismissed a motion for production of all content on the private portion of a plaintiff's Facebook account. The decision suggests that pictures of people who claim to have suffered a loss of enjoyment of life lounging around looking happy are generally not relevant (or have limited probative value), but pictures of skydiving, surfing and other action photos might be different.

Stewart v Kempster, 2012 ONSC 7236 (CanLII).

Nova Scotia court orders hard drive review to disclose usage patterns

On February 8, 2013, the Supreme Court of Nova Scotia ordered the forensic review of an injured plaintiff's hard drive because it would likely contain evidence relevant to a claim that he could only work at a computer for two to three hours a day. Although the computer was used by others (perhaps through separate user profiles, though this is unclear on the record), the Court held that use by others went to the weight of the evidence, a matter to be assessed at trial. Notably, the order contemplates a search to be conducted by a third party under a protocol proposed by the defendant.

Laushway v Messervey, 2013 NSSC 47 (CanLII).

Order for production from non-party the exception, not the rule

On July 3, 2013, the Ontario Superior Court of Justice held that a plaintiff's motion for production of documents from a non-party bordered on an abuse of process in a case where it had been unsuccessful in adding the non-party as a defendant due to an expired limitation period.

The Court reviewed the law relating to production from a non-party; the moving party must show the documents that are sought are relevant to a material issue in the action and that it would be unfair to require it to go to trial without those documents. The burden rests with the moving party. Such an order is the exception not the rule and should only be made in exceptional circumstances.

The plaintiff was attempting to prove its damages through the non-party production. In the absence of evidence that the plaintiff's customers were wrongfully diverted by one of the defendants to the non-party, and given fact the non-party was not party to the litigation, the plaintiff failed to meet the first part of the rule 30.10 test. Moreover, in light of the procedural history of the matter, it was not unfair to deny the plaintiff's request for production.

Atlas v Ingriselli, 2013 ONSC 4540 (CanLII).

Plaintiff left to lie in its e-mail mess

On November 15, 2012, the Supreme Court of Nova Scotia dismissed a motion to amend a production order that caused a pension plan great difficulty given its committee members had used their work e-mail accounts to send and receive relevant communications.

The pension plan sued its investment advisors to recover investment losses. About a year earlier the Court ordered it to conduct keyword searches involving 51 terms. This required the pension plan to search for e-mails sent and received by its committee members who held day jobs for the plan sponsor (a separate legal entity) and used their work e-mail accounts to send and receive relevant communications. Matters were made worse because the pension plan's litigation counsel was actively engaged in matters adverse to the sponsor, which meant the sponsor was unwilling to let the pension plan review e-mails without first vetting them itself. The 51 terms produced too many responsive records for the sponsor, who objected to the pension plan. In response, the pension plan moved for relief. It argued that the 51 terms produced too many "false positives" and asked for an amendment.

The Court dismissed the motion. It held that an amendment to the order could only be justified based on "compelling reasons" given that the order was the product of argument, reasoning and a lengthy decision and because it would invite selective application of a narrower search (to the benefit of one party) than applied to all other data sources under the parties' control. The Court held that the pension plan failed to meet this burden. It was unimpressed with the evidence adduced through counsel's paralegal, who gave hearsay evidence about search quality analysis conducted by the pension plan's litigation support company.

The Court did not clearly rely on the committee members' use of the sponsor's e-mail system in dismissing the motion, but did comment that the pension plan's situation was "of its own making."

Halifax (Regional Municipality Pension Committee) v State Street Global Advisors Ltd, 2012 NSSC 399 (CanLII).

Raw test data disclosed over doc's objection

On July 29, 2013, the Supreme Court of British Columbia ordered raw test data to be produced over the objection of the plaintiff's (neuropsychologist) expert, who claimed her professional obligations restricted her from disclosing the data forming the foundation of her expert report to anyone but another neuropsychologist. It said:

> Counsel for the applicant defendant correctly submits that there is nothing in the *Code of Conduct* to substantiate the apparent position of the College of Psychologists of BC that test material cannot be released except to another psychologist or psychological service provider in another jurisdiction. He is correct. That is not what the *Code of Conduct* states. The Court also held that the defendant's brother, who had merely viewed a copy of the business letter, did not breach the Act.

The Court noted that not all experts are equal in interpreting data, but held that the quality of interpretation is a matter for trial.

Smith v Rautenberg, 2013 BCSC 1347 (CanLII).

SCC articulates rule on testimonial self-incrimination

On November 7, 2012, a 6 – 3 majority of the Supreme Court of Canada held that section 13 of the *Canadian Charter of Rights and Freedoms* does not prevent a Crown prosecutor from using prior compelled testimony for impeachment purposes if the testimony does not prove or assist in proving one or more essential elements for which the witness is being tried.

The accused crashed a motorcycle. His passenger sued and the police laid dangerous driving and impaired driving charges. On discovery in the civil matter the accused said he had no memory of the events of the day. At his criminal trial the accused gave a detailed account of the events of the day. The Court granted the Crown leave to cross-examine the accused on his discovery testimony. The Crown successfully discredited the accused based on his conflicting testimony.

The majority, in a judgment written by Justice Moldaver, held that use of the discovery testimony for impeachment purposes did not breach the accused's rights under section 13 because the discovery evidence was not "incriminating."

Justice LeBel, for the minority, strongly criticized the majority for causing an unprincipled departure from the Court's unanimous 2005 judgment in *R v Henry*. This departure, he argued, will invite uncertainty in criminal matters and discourage full and frank testimony. The latter issue was of interest to the Advocates' Society, which argued in intervention that a bright-line rule is needed to protect the integrity of the civil discovery process.

R v Nedelcu, 2012 SCC 59 (CanLII).

Trial judge unimpressed by Facebook photos

On January 8, 2013, a British Columbia Supreme Court trial judge commented on how unimpressed he was with Facebook photos relied upon by the defendant in a personal injury case. He said, "I do not place much weight on those photographs. They are staged, at a party, and taken on holidays."

Dakin v Roth, 2013 BCSC 8 (CanLII).

SEARCH AND SEIZURE

Child porn files seized from work computer admissible

On March 6, 2013, the Court of Appeal for British Columbia held that an accused person's rights under section 8 of the *Canadian Charter of Rights and Freedoms* rights were violated when his work computer was seized by the police without a warrant. It also allowed the admission of evidence from the computer because it would not bring the administration of justice into disrepute.

The case illustrates that the standard for finding an objective reasonable expectation of privacy on a work computer following the Supreme Court of Canada's decision in *R v Cole* is very low. While the evidentiary record in *Cole* weighed particularly in favour of an expectation of privacy finding, in this more recent case, there were no special facts. The employee (a school principal), for example, only used his work computer for browsing the internet. The Court nonetheless recognized a *Charter*-protected privacy interest.

Unfortunately, as in *Cole*, the record in this case did not appear to support any discussion of whether the computer was networked or the impact of the employer's control over its network.

R v McNeice, 2013 BCCA 98 (CanLII).

SCC addresses the line between hunch and suspicion

On September 27, 2013, the Supreme Court of Canada issued two decisions that attempt to define the "reasonable suspicion" standard – a relaxed standard that allows for searches in the absence of prior judicial authorization in certain investigative contexts, including sniffer dog searches and school searches, for example.

The more principled of the two decisions is *R v Chehil*, which involves a sniffer dog search at an airport that the police conducted after determining that the accused fit the profile of a drug carrier: (1) he was traveling on a one-way plane ticket; (2) his flight originated in Vancouver; (3) he was traveling alone; (4) he purchased his ticket with cash; (5) his ticket was the last one purchased before the flight departed; (6) he checked one piece of luggage; (7) his flight was overnight; (8) his flight took place mid- to late-week; and (9) he flew on a WestJet flight. These factors, based on their training and experience, led the police to form a suspicion that the Court unanimously held was reasonable.

Justice Karakatsanis wrote the decision in *Chehil*. She held that the existence of a reasonable suspicion must be assessed against the totality of the circumstances. The police must assess all the objective factors that weigh for and against the possibility of criminal behavior and may have a reasonable suspicion even if the factors (each on their own or together) could support an innocent explanation.

Though the ratio of *Chehil* is therefore permissive, Justice Karakatsanis does state that the police must be subject to "rigorous judicial scrutiny":

> The constellation of facts must be based in the evidence, tied to the individual, and capable of supporting a logical inference of criminal behaviour. If the link between the constellation and criminality cannot be established by way of a logical inference, the Crown must lead evidence to connect the circumstances to criminality. This evidence may be empirical or statistical, or it may be based upon the investigating officer's training and experience.

Evidence of police training and experience was a prominent feature of the dialogue in *R v MacKenzie*, a case in which the Court split five to four in affirming a police search.

MacKenzie is about a sniffer dog search that the police executed after conducting a highway traffic stop. The factors at issue were about guilty appearance and demeanor and more equivocal than in *Chehil*: the accused slowed down and pulled over upon sight of the police; he was nervous when confronted, he was sweating (on a warm day); he was breathing rapidly; he had pinkish eyes; he was driving west to east; he corrected an initial response given about travel dates. The police evidence about the probity of the factors was also more qualified; the police testified that the factors were associated with drug carrying, but not strongly.

The majority and minority in *MacKenzie* differ on how much weight to give a police opinion that is based on training and experience. Both accept that police opinions based on training and experience should be considered in assessing the probity of the factors. Justice Moldaver (for the majority) says that deference is not "necessarily owed to a police officer's view of the circumstances" but that police should be "allowed to carry out their duties without undue skepticism." Justice LeBel (for the minority) says quite clearly that the police are owed no deference.

R v Chehil, 2013 SCC 49 (CanLII).

R v MacKenzie, 2013 SCC 50 (CanLII).

WORKPLACE PRIVACY

Alberta OIPC deals with use and disclosure of work e-mails

On September 11, 2012 the Alberta Office of the Information and Privacy Commissioner upheld a complaint that dealt with an employer's retrieval and use of e-mails from its work e-mail system. The decision suggests that information in e-mails from a work e-mail system that are accessed and used as reasonably required for an employment-related purpose are regulated as "employee personal information" under Alberta PIPA regardless of their content.

Order P2012-06, 2012 CanLII 70629 (AB OIPC).

Alcohol testing decision invites peace in the valley by boosting arbitral precedent

The Supreme Court of Canada's June 14, 2013 decision in *Irving Pulp and Paper* represents a remarkable elevation of arbitral precedent to near binding law, contributing clarity on an issue that has been heavily litigated by employers and unions for years. The ratio, at paragraph 31, is that an employer with a safety-sensitive workplace needs proof of "enhanced safety risks" (such as a workplace substance abuse problem) to implement universal random substance testing. Although the judgment was split, both majority and minority agree that this is the evidentiary burden endorsed in "remarkably consistent arbitral jurisprudence."

Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd, 2013 SCC 34 (CanLII).

Arbitrator says employer's broad direction to report personal legal troubles okay

On July 13, 2012, Arbitrator Sims held that an employer could promulgate and rely upon a policy that requires employees to report legal troubles with the potential to affect their ability to work or, more generally, the company's interests.

The policy language at issue read as follows:

> Involvement in a legal matter

> If you are involved in a legal matter or a police case which has the potential to affect your ability to perform your job or harm the interests of TELUS, you must immediately inform your manager.

Arbitrator Sims held that this language, read in the context of the employer's entire ethics policy, was a reasonable means of enabling the employer to assess whether potential risks to its interests needed to be addressed. He was impressed that the employer offered employees a confidential ethics line to seek guidance on their reporting duty, but the decision does not appear to rest on this fact.

Telus Communications Inc v Telecommunication Workers Union, 2012 CanLII 51085 (AB GAA).

BC commissioner uses fleet management complaint to answer BIG questions

On December 19, 2012, the British Columbia Office of the Information and Privacy Commissioner dismissed a complaint about the collection and use of vehicle location and operation data for the purpose of managing employee performance. In doing so, the OIPC opined broadly on the meaning of "personal information" and "work product information" and on the standard of reasonableness for collecting and using employee personal information under BC PIPA.

The case deals with an elevator company and its field mechanics. The mechanics objected to the company's collection of data about service vehicle location and data about service vehicle operation – *e.g.*, distance travelled, speed and incidents of harsh braking. The company argued this information is not regulated by BC PIPA at all because it is not "personal information" or, alternatively, is "work product information."

The OIPC rejected the company's primary argument and held that vehicle location and operation data is personal information. In doing so it rejected a narrow definition of personal information that requires personal information to be "about an identifiable individual" in that it reveals something private or intimate about the individual – a concept accepted in some case law and loosely related to the "biographical core" concept featured in *Charter* search and seizure jurisprudence. Instead, the OIPC said that information about an identifiable individual is personal information if it "is collected, used or disclosed for a purpose related to the individual."

The OIPC also rejected the company's alternative argument and held that vehicle location and operation data is not work product information. It reasoned that vehicle location and operation data is not "prepared or collected" by an individual in the course of work and that, generally, data that is automatically recorded "without directed, conscious input by an individual" is not work product information.

While these principles favour privacy protection, the OIPC also demonstrated respect for employer interests in finding the company's collection and use of employee personal information was reasonable for its purposes. The OIPC expressly rejected a four part reasonableness test (generally disliked by employers) in favour of a more flexible "reasonableness in all the circumstances" test.

As part of its reasonableness discussion, the OIPC also noted that an organization need not adopt the least privacy-intrusive alternative regardless of cost or consequences (though it should be able to demonstrate that it has given "reasonable consideration" to less intrusive alternatives).

Schindler Elevator Corporation (Re), 2012 BCIPC 25 (CanLII).

OLRB dismisses vehicle telematics policy grievances

On January 21, 2013, the Ontario Labour Relations Board dismissed three policy grievances that challenged the use of vehicle telematics and a rule against the personal use of company vehicles without permission. Vice-Chair Silverman stressed that use of company vehicles to get to and from work was optional but of benefit to employees and said the following about the union's "less intrusive means" argument:

> The union suggested that the employer use another system for monitoring use, such as the PDA or the vehicle's odometer or gas consumption, but either is not germane to what the employer is permitted to do. The issue is whether the employer is precluded from using the Telematics device not whether some other device, is adequate to the purpose.

In assessing the reasonableness of the personal use prohibition, Vice-Chair Silverman recognized that the employer exercised a discretion to relieve against the prohibition and it was reasonable to do so based on a disclosure of off-work plans.

International Union of Elevator Constructors, Local 50 v Otis Canada Inc, 2013 CanLII 3574 (ON LRB).

Sask CA affirms union right to observe job interviews despite privacy claim

On January 31, 2013 the Court of Appeal for Saskatchewan affirmed a union's right to observe job interviews with external candidates notwithstanding the employer's claim that the observation right should be "read down" to protect individual privacy.

The case involves a collective agreement provision that gives a union a right to observe job interviews "for which any [bargaining unit member] has applied." At arbitration, the employer argued that the union's observation right extinguishes after all bargaining unit members have been eliminated from a competition. It raised the privacy rights of external applicants in making this argument.

The arbitration was a disaster for the employer. The arbitrator held that the union's right to observe was unlimited. The arbitrator also suggested that the Saskatchewan *Local Authority Freedom of Information and Protection of Privacy Act* required the employer to notify external candidates of the union's observation rights and obtain their consent. The employer managed to have the latter finding overturned on judicial review by successfully arguing that the disclosure to the union was for a "consistent purpose." It did not upset the arbitrator's interpretation of the collective agreement provision, however, so appealed.

The Court of Appeal affirmed the arbitrator's interpretation of the collective agreement based on the reasonableness standard of review. It also suggested that the employer's privacy argument was disingenuous, questioning how the employer could argue that observation by the union was okay so long as bargaining unit members were in the competition but offensive to external candidate privacy interests if they were not.

Saskatchewan Institute of Applied Science and Technology v Saskatchewan Government, 2013 SKCA 8 (CanLII).

Twin BC commissioner reports okay use of telematic data

On August 28, 2013, the British Columbia OIPC affirmed two elevator companies' (Kone's and Thyssenkrup's) use of telematic data for the purpose of managing their service employees.

The outcome is not surprising. The Commissioner herself affirmed another elevator company's fleet management program in a thoroughly-reasoned decision last December. Also, all Canadian decisions have recognized the legitimacy of such programs (which rest on the collection of location data and vehicle operation data). Kone's program was unique in that it collected data from cellular telephones (rather than vehicle units). The OIPC held that Kone's program collected more sensitive personal information but was nonetheless reasonable.

The decisions are notable for the OIPC's conclusion that an organization in British Columbia does not need a stand alone GPS or telematics policy to comply with the notice and "policies and practices" requirements in BC PIPA. It held that Kone complied with its obligation by giving a detailed PowerPoint presentation that outlined the specific purposes for which it would use employee personal information in

advance of implementing its program. Thyssenkrup breached its obligations; it had difficulty establishing that it had a formal communication program that addressed the purposes of its program in any detail.

ThyssenKrupp Elevator (Canada) Limited (Re), 2013 BCIPC 24 (CanLII).

Kone Inc (Re), 2013 BCIPC 23 (CanLII).

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