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The Hicks Morley Information & Privacy Post

Canadian e-discovery enters next era

We're happy to be back with our second year of the Hicks Information & Privacy Post – our quarterly newsletter about case law developments in privacy, access to information, the protection of confidential business information and the law of production.

This year promises to be a transition year for e-discovery in Canada, with the recent launch of the “Sedona Canada Principles” – the Sedona Canada Working Group’s twelve non-binding statements of principle intended to facilitate electronic discovery in Canada.

For those of you unfamiliar with e-discovery, it refers to the production of records in electronic form and is of critical concern to lawyers, individuals and businesses because the cost of locating and producing electronic records can make litigation unaffordable for even large businesses. There are also risks associated with electronic records that further complicate the discovery process.

Together with developing case law, the Sedona Canada Principles will provide authoritative guidance in the resolution of electronic discovery disputes in Canada. The “scope of production” case law we’ve reported on in this issue is already starting to reflect the proportionality concept – a concept embedded into a number of the Principles that demands the time and expense of any proceeding (and the parties’ production efforts) should be proportional to the dispute.

While the signs that the Sedona Canada Principles are having an influence is positive, there is also ample evidence in our newsletter that many Canadian litigants are not yet prepared for the challenges of e-discovery. The problem of raising the burden of electronic production late (and often

after a court has already entered a production order) is a feature of five of the cases below, a pattern that shows that parties to litigation are not getting an early grip on production issues and costs themselves, let alone meeting with the other side to discuss those issues as suggested by the Principles. We hope these are simply adjustment pains, to be borne only as long as the Principles become well-known and applied. It should be an interesting year!

Dan Michaluk and Paul Broad, Co-editors

FREEDOM OF INFORMATION – EXCEPTIONS – PRIVILEGE

FIPPA court award on “Branch 2 privilege” released

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

- The Court held that records related to the Crown’s defence of a legal action based on actions taken by its employees were not excluded by the employment-related records exclusions. It said, “Employment-related matters are separate and distinct from matters related to employees’ actions.”
- The Court held that a letter from plaintiffs’ counsel to the Crown sent in the course of litigation was not “prepared for Crown counsel for use in litigation” and exempt under Branch 2 of section 19 (the so-called “statutory litigation privilege”).
- The Court held that the same letter, which included information provided by the Ministry in the course of litigation, was not exempt based on the implied undertaking rule. It held the implied undertaking rule could not be read into section 19.

- The Court questioned whether Branch 2 of section 19 protects any document simply copied for inclusion into the Crown brief, but did not answer its question because the records in question had qualified for the exemption based on the more rigid common law test from *Nickmar*: the relevant records were compiled by research or the exercise of skill and knowledge on the part of the Crown.
- The Court held that the IPC did not err by ordering disclosure of information with personal identifiers severed without considering whether information available to the press would cause individuals to be identifiable. The Court suggested that the Ministry had a burden to adduce evidence of the facts within the requester's knowledge given that it was not otherwise obvious how individuals could be identified from the information disclosed.
- The Court ordered the IPC to reconsider the requester's claim to the public interest override as applied to the records that were held to be exempt under section 19. At the time, the IPC held that there was a compelling public interest in the disclosure of these records, but did not balance this public interest against the interest protected by 19 because it made its decision before the Ontario Court of Appeal read section 19 into the override clause.

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

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

FREEDOM OF INFORMATION – EXCEPTIONS – UNJUSTIFIED INVASION OF PERSONAL PRIVACY

University President's contract to be released

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

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

FREEDOM OF INFORMATION – EXCEPTIONS – UNJUSTIFIED INVASION OF PERSONAL PRIVACY

Denial of access to complainants' identities upheld

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

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

FREEDOM OF INFORMATION – FREEDOM OF THE PRESS

OCA sets aside contempt order issued against journalist

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

against the special role of the media as recognized by section 2(b) of the *Charter*.”

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

PRIVACY – ACCESS TO PERSONAL INFORMATION

FCA raises the question of mixed personal information under PIPEDA

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

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

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

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

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

PRIVACY – APPLICATION, EXCLUSIONS AND MATTERS OF JURISDICTION

NB court turfs broad challenge to PIPEDA interference with litigation

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

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

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

PRIVACY – APPLICATION, EXCLUSIONS AND MATTERS OF JURISDICTION

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

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

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

PRIVACY – COLLECTION USE AND DISCLOSURE – DRUG TESTING

Drug testing JR application dismissed

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

The policy challenged at arbitration was the same policy that had been upheld by the Ontario Court of Appeal in 2000 in *Entrop*. Based on *Entrop*, and the Court of Appeal’s specific finding that random alcohol testing in safety-sensitive positions did not violate the *Human Rights Code*, Imperial Oil re-

instituted random drug testing for safety-sensitive positions by using a new testing technology that could determine current impairment by way of a saliva test.

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

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

Imperial Oil Ltd. v. Communications Energy and Paperworkers Union of Canada, Local 990, 2008 CanLII (ON S.C.D.C.).

PRIVACY – COLLECTION USE AND DISCLOSURE – DRUG TESTING

Alberta Court upholds site access drug testing decision

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

Petro Canada implemented a site access drug and alcohol testing rule at an Oil Sands construction

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

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

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

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

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

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

PRIVACY – COLLECTION USE AND DISCLOSURE – INVESTIGATIONS

Charter challenge to investigation allowed by PIPEDA rejected

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

RBC had collected information from TD Bank which allowed it to pursue an alleged fraud. Both banks are members of the Bank Crime Investigation Office of the Canadian Bankers Association, a designated “investigative body” under PIPEDA. They relied on sections 7(3)(d)(i) and (h.2) of PIPEDA in sharing the information. The Applicants took issue with these provisions and RBC’s actions taken in reliance on these provisions.

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

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

PRIVACY – COLLECTION, USE AND DISCLOSURE – MEDICAL INFORMATION

Surdykowski speaks on medical forms for STD admin

Ontario Arbitrator Surdykowski made some broad statements in upholding a grievance which challenged a standard medical information form administered for the purpose of adjudicating short term disability benefits. He held that employee privacy rights cannot be outweighed by expediency or efficiency, so even though the collection of further and more detailed medical information may be justified as an absence becomes prolonged and attendance management and accommodation processes become engaged, such information should not be routinely collected at the beginning of an absence on a form that is administered strictly for the purpose of determining benefit eligibility. And while recognizing that broader requests for medical

information up front may actually reduce conflict given that health professionals are not “always entirely objective”, Mr. Surdykowski held that employee privacy rights weigh against a departure from a strict necessity requirement.

Hamilton Health Sciences and Ontario Nurses Association, (Re) 91 C.L.A.S. 228 (Surdykowski).

PRIVACY – COLLECTION, USE AND DISCLOSURE – SURVEILLANCE

Surveillance evidence admitted and termination upheld

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

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

PRIVACY – COLLECTION, USE AND DISCLOSURE – SURVEILLANCE

Albertyn articulates standard for use of surreptitious surveillance

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

University Health Network and Ontario Public Sector Employees Union (Re), 2008 CanLII 4546 (ON L.A.).

PRODUCTION – DEEMED AND IMPLIED UNDERTAKINGS

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

The Alberta Court of Appeal quashed a procedural appeal brought by a non-party to a longstanding commercial litigation dispute and, in doing so,

made some comments on the use of information gathered in the discovery process.

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

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

PRODUCTION – DEEMED AND IMPLIED UNDERTAKINGS

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

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

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

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

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

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

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

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

PRODUCTION – MEANING OF “RECORD”

Ireland Supreme Court on creating records and proportionality

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

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

Geoghegan J., dissenting on the proportionality issue, took the opposite view on the burden of proof, making comments that favoured a strict burden of proving disproportionate costs once evidence is shown to be relevant and necessary. He noted that the defendant had raised cost as a

barrier to production well into the dispute and then had argued cost in its submissions without adducing supportive evidence.

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

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

PRODUCTION – MISCONDUCT

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

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

Dickson v. Broan-NuTone Canada Inc., [2007] O.J. No. 5114 (QL) (S.C.J.)

PRODUCTION – MISCONDUCT

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

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

Based on an earlier motion, decided on July 16, 2006, the defendants were ordered to provide a further and better affidavit of documents and to provide direct access to a computer system (including active and archived data). They did not provide such access and were sluggish in

disclosing documents. The plaintiffs then brought a second motion in June 2007, asking the Court to infer malfeasance from the sluggishness and the fact that the defendants had continued to disclose documents after certifying earlier that they did not exist.

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

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

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

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

PRODUCTION – MISCONDUCT

Saskatchewan QB rejects spoliation claim

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

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

foreseeable at the time the records were destroyed.

In the alternative, the Court cited the British Columbia Court of Appeal's decision in *Endean v. Canadian Red Cross Society* for the proposition that spoliation is only a rule of evidence, not an independent tort. It did not deal with the Ontario Court of Appeal's decision in *Spasic (Estate) v. Imperial Tobacco Ltd.*, where the Court held it was not plain and obvious that a pleading based on the tort of spoliation discloses no reasonable cause of action and therefore that claims based on the tort should be allowed to proceed to trial.

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

PRODUCTION – MISCONDUCT

Defendant sanctioned for failure to produce

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

Jay v. DHL, 2008 PESCTD 13 (CanLII)

PRODUCTION - MISCONDUCT

ABCA dismisses appeal of order to produce hard drives as sanction

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

The defendants were initially ordered to produce a further and better affidavit of documents, failing which the plaintiffs would be given direct access to the seized hard drives (subject to confidentiality terms to be agreed upon or ordered). The defendants did not appeal the order and went ahead and negotiated a confidentiality order. The

Court later held them to be in breach of the previous order, and confirmed the production order after rejecting arguments that it would be overly burdensome.

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

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

PRODUCTION – MISCONDUCT

Adverse inference drawn based on negligent spoliation

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

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

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

PRODUCTION – NORWICH PHARMACAL ORDERS

ABCA addresses investigatory remedy for anonymous internet use

The Alberta Court of Appeal dismissed an appeal arguing for a *Norwich Pharmacal* order brought by an organization that had sued its former chief executive officer for fraud and sought information

from the bank accounts of various third-parties (presumably to whom payments were made).

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

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

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

PRODUCTION – PRIVILEGE – CONFIDENTIAL SOURCES

Rise of citizen journalism does not devalue work of professional journalists

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

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

same balancing of interests required by section 2(b) of the *Charter*.

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

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

R. v. National Post, 2008 ONCA 139 (CanLII).

PRODUCTION – PRIVILEGE – WAIVER

Significant case on waiver of informer privilege proceeds

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

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

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

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

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

PRODUCTION – SEARCH AND SEIZURE AND REGULATORY ORDERS

Competition regulator's production order set aside

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

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

The decision stresses the strict burden of disclosure on parties seeking *ex parte* orders for production, whether in the regulatory or civil context. The part about disclosing expressed concerns about the burden of retrieving electronic documents may apply in a limited number of situations because an *ex parte* process often starts the course of inquiry or investigation, but it is nonetheless significant given the broader

challenges associated with managing the retrieval and production of electronic documents.

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

PRODUCTION – SEARCH AND SEIZURE AND REGULATORY ORDERS

NSCA says "Crown" must be implicated in search to be liable for costs

The Nova Scotia Court of Appeal issued a significant judgement on Crown liability for costs on an application to quash a search warrant.

The Court held that the Crown in Right of Canada ought not to be liable for costs of an application to quash an "ill-conceived and poorly executed" search warrant obtained and executed by the Canada Revenue Agency. It reached this conclusion because a Crown Attorney was not involved in the impugned investigation but, rather, had simply responded to the application to quash.

The Court also said that it did not matter that the CRA is a deemed agent of the Crown under the *Canada Revenue Agency Act* because the basis for an award of costs is rooted in the special role of the Crown as prosecutor.

The underlying facts involved a search based on a flawed Information and in which the CRA had seized records subject to solicitor-client privilege contained on computer and electronic storage devices.

R. v. Taylor, 2008 NSCA 5 (CanLII).

PRODUCTION – SEARCH AND SEIZURE AND REGULATORY ORDERS

SCC says no power to order costs of production order

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

The Court held that costs could not be ordered based on a reading of the statutory text in light of the relevant legislative history and the recognized social duty of citizens to assist in the

administration of justice. It noted that the Department of Justice and the telecommunications industry had a dialogue before Bill C-45 was promulgated in which industry members requested an express jurisdiction to order costs.

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

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

PRODUCTION – SCOPE OF PRODUCTION

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

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

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

PRODUCTION – SCOPE OF PRODUCTION

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

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

The impugned order was made in July 2006 by Savoie J. of the New Brunswick Court of Queen's Bench. The defendants did not appeal, but also did not comply, and in 2007 the plaintiffs brought a motion for contempt. The motion was heard by

Lavigne J., who held that she could not upset Savoie J.'s order in a collateral motion and rejected the defendants' argument that costs should be shifted due to the burden of providing access to electronic records. She reserved on the matter of contempt, later rejected in January 2008. The Court of Appeal agreed with Lavinge J.'s approach.

Spielo Manufacturing Inc. v. Doucet, and Danphinee, 2007 NBCA 85 (CanLII).

PRODUCTION – SCOPE OF PRODUCTION

Self-responsibility stressed in e-discovery order

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

Andersen v. St. Jude Medical Inc., [2008] O.J. No. 430 (QL) (S.C.I.).

PRODUCTION – SCOPE OF PRODUCTION

Limited forensic inspection allowed

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

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

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

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

Hicks Morley's Information and Privacy Practice Group

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