

SPRING 2009
BY: DAN MICHALUK AND PAUL BROAD

HICKS MORLEY INFORMATION & PRIVACY POST

We're happy to publish the first 2009 edition of the Hicks Morley Information and Privacy Post! As usual, we have summarized the most recent and notable cases relating to privacy and access to information, protection of confidential business information and the law of production.

So what's new?

Much has been said about *Leduc v. Roman*, the case in which Mr. Justice Brown of the Ontario Superior Court of Justice granted leave to cross-examine a plaintiff in a motor vehicle accident suit about the nature of content he posted on his Facebook profile. This is the second Ontario case in which a judge has shown little appreciation for an argument that information posted in a "friends only" section of a social networking profile page should be treated as private in considering the appropriateness of production. *Leduc* is significant, but there are a number of other decisions we've reported that also demonstrate an intensifying new dialogue on the law of production and personal privacy. If you're interested in this subject, *Warman v. Wilkins-Fournier* (on anonymous internet use) and *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.* (on non-party participation rights) are worth a read.

We've also covered the numerous recent "lawful access" cases – cases in which criminal defendants have argued that their *Charter* right to be free from unreasonable search and seizure has been violated because police have requested and obtained information from organizations to further an investigation, without seeking a warrant. For what these cases mean to employers, please see our recent client bulletin, *Pretty Please: Police requests for employee personnel files*.

We hope you enjoy, and encourage you to send this to your colleagues. If you don't subscribe and would like to, please e-mail ftrnow@hicksmorley.com.

Dan Michaluk and Paul Broad, Co-editors

FREEDOM OF INFORMATION – APPLICATION

IPC SAYS UNIVERSITY FOUNDATION IS NOT PART OF UNIVERSITY UNDER FIPPA

Unlike many entities designated as “institutions” under *FIPPA*, universities have complex corporate structures and are often affiliated with related corporations. Though the definition of “institution” in *FIPPA* is fairly black and white – it rests primarily on express designation – the issue of *FIPPA*’s scope of application has been of some concern to Ontario universities since they were made subject to the *Act* in 2006.

On December 1st of last year, the IPC issued an order on point, and did indeed see the analysis as being simple and based on corporate status. Adjudicator Smith concluded:

I find that the YUF is a separate corporation from the corporation that is the University. Therefore, I find that the YUF is not part of the University and that it is not subject to the provisions of the *Act*.

Though records held by a non-regulated corporation but “controlled” by a FIPPA-regulated institution are subject to the right of public access, this order does lend some clarity to an important issue for universities.

York University, (Re), 2008 CanLII 68864 (ON I.P.C.).

ONT. C.A. DEALS WITH CREATING RECORDS IN ONTARIO FOI LAW

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

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

normally used by an institution is deemed not to be a record but said this interpretation was “open to argument.”

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

FREEDOM OF INFORMATION – EXEMPTIONS

FC DOESN'T BITE ON BROAD ARGUMENTS IN ACCESS DISPUTE

The Federal Court upheld a Department of Foreign Affairs and International Trade decision to deny public access to information that was critical of the Afghanistan government because its disclosure could reasonably be expected to be injurious to international affairs.

Though the outcome turns on the evidence adduced by the Department in support of its exemption claim, the decision is nonetheless notable for the Court's rejection of several broader arguments brought by the applicant and intervenor. The Court held:

- that a department is not precluded from shielding information about torture under the international affairs exemption because of the status of torture in international human rights norms;
- that a right of public access to government information is not protected under section 2(b) of the *Charter*; and
- that a department does not need to consider section 2(b) *Charter* values in deciding whether to apply a discretionary exemption in the *ATIA*.

Attaran v. Canada (Foreign Affairs), 2009 FC 339 (CanLII).

INVESTIGATIVE RECORDS THAT FIND THEIR WAY INTO PROSECUTOR'S BRIEF NOT EXEMPT AS “PREPARED” FOR COUNSEL

The Ontario Divisional Court held that the police investigation records are not exempt from public access as being “prepared” for Crown counsel merely because they are incorporated into a Crown brief.

The dispute involved the so-called “Branch 2” privilege created by section 19(b) of the *FIPPA*. It exempts records from public access that were “prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.”

The Court held that preparing a record for the (policing) purpose of investigating a matter and deciding to lay charges is distinct from preparing a

record for the purpose of prosecution. It also held that the detailed exemptions in the *Act* for “law enforcement records” were an indication that the legislature did not intend the Branch 2 privilege exemption to protect the Crown brief. The law enforcement exemption includes a subpart meant to preserve trial fairness, but this could not be relied upon in the circumstances because the Crown had withdrawn the charges at issue.

Ontario (Attorney General) v. Information and Privacy Commissioner, 2009 CanLII 9740 (ON S.C.).

FREEDOM OF INFORMATION – OPEN COURTS

ONT. C.A. CONSIDERS PRE-TRIAL PUBLICITY, JURY CONTAMINATION AND THE INTERNET’S LONG MEMORY

A five-member panel of the Ontario Court of Appeal considered the constitutionality of the mandatory ban on publication of bail proceedings when requested by an accused. A majority of the panel (3 justices) read down the *Criminal Code* ban so that it applies only to charges that may be tried by a jury.

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

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

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

Both the majority and minority made comments on the internet and the concept of practical obscurity and the internet's "long memory."

Toronto Star Newspapers v. Canada, 2009 ONCA 59 (CanLII).

BCCA UPHOLDS BAN ON IDENTIFYING THIRD-PARTY SUSPECT

The British Columbia Court of Appeal upheld a ban on identifying a man linked to a series of sexual assaults that will be raised in Ivan Henry's appeal from conviction.

Ivan Henry was convicted on several sexual assault charges in 1983 and served 26 years in prison. In mid-January, the British Columbia Court of Appeal granted his application to reinstate a previously dismissed appeal. As part of the reinstated appeal, Mr. Henry will raise a series of sexual assaults that occurred after his arrest that involved a similar *modus operandi* to that used by the perpetrator of the assaults for which he was convicted. "Mr. X" was charged and convicted for perpetrating three of these assaults in 2005 and is now on parole. He has not been charged in respect of any of the other assaults.

The Court of Appeal applied the *Dagenais/Mentuck* test and upheld the publication ban, finding that a continuation of the ban is necessary to protect Mr. X's privacy interest and will have a minimal impact on free expression and open justice.

R. v. Henry, 2009 BCCA 86 (CanLII).

FREEDOM OF INFORMATION – PROCEDURE

INFORMATION COMMISSIONER CAN IMPOSE CONFIDENTIALITY SCREEN ON JOINT LEGAL RETAINER

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

The Crown servants were compelled to give evidence before the Deputy Commissioner in the course of his investigation into an *ATIA* complaint. Department of Justice counsel accompanied the witnesses and acted as their counsel. In order to preserve the integrity of his investigation, the Deputy Commissioner prohibited the witnesses from disclosing the questions asked, answers given and exhibits used in the examination and prohibited

counsel from disclosing the same. The Crown applied for judicial review of the orders, arguing that they interfered with its solicitor-client relationship with Crown counsel.

The Court held that the Information Commissioner has an implicit power to make confidentiality orders and that the potential for a conflict of interest, given that the witnesses were not high-ranking officials, made the Deputy Commissioner's orders reasonable and necessary in the circumstances. The Court also rejected an argument that the confidentiality orders unjustifiably violated section 2(b) of the *Charter*.

Canada (Attorney General) v. Canada (Information Commissioner) 2007 FC 1024 (CanLII), aff'd 2008 FCA 321 (CanLII).

PRIVACY – APPLICATION AND JURISDICTION

NBCA SAYS FEDERAL COURT IS PROPER FORUM FOR *PIPEDA* CHALLENGE

The New Brunswick Court of Appeal held that the Federal Court is the proper forum for a broad challenge to the powers granted to the federal Privacy Commissioner by *PIPEDA*. Despite the applicant's constitutional validity argument, which it had made in the alternative, the Court held that the matter was essentially a request for judicial review of an OPC decision. Given this characterization, the Court of Appeal held that the Federal Court was the proper forum.

This is not a privacy judgement, but it is nonetheless noteworthy, given the thrust of the applicant's substantive objection. As a defendant's insurer, it claimed the OPC had no jurisdiction to deal with its video surveillance of a plaintiff. The resolution of this argument would have broad significance in defining the meaning of *PIPEDA*'s application provision, which is triggered where an organization collects, uses or discloses personal information "in the course of commercial activity."

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

CHARTER CHALLENGE TO *PIPEDA* INVESTIGATION REJECTED

The Ontario Court of Appeal affirmed the dismissal of an application that claimed RBC violated section 8 of the *Charter* when it investigated 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 7(3)(h.2) of *PIPEDA* in sharing the information. The Applicants took issue with these provisions and RBC’s actions taken in reliance on these provisions.

In February, the Superior Court of Justice held that the grant of discretion to make non-consensual disclosures of personal information in *PIPEDA* did not necessarily threaten *Charter* rights, so was not unlawful itself. It also held that RBC was not acting as a government agent in its investigation, and therefore was not bound directly by the *Charter*.

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

Royal Bank of Canada v. Ren, 2009 ONCA 48 (CanLII).

PRIVACY – COLLECTION

ARBITRATOR ISSUES STRONG AWARD IN ALLOWING EMPLOYER TO IMPLEMENT BIOMETRIC TIMEKEEPING

Arbitrator Lorne Slotnick dismissed a grievance that challenged the implementation of a biometric timekeeping system.

The employer purchased a Kronos system and required employees to enrol. The system works by matching a person’s partial fingerprint against a 348-byte numeric representation or “template” of the fingerprint that is created in the enrolment process. The employer brought evidence that fingerprint templates were kept secure and could not readily be used to recreate a fingerprint image that could be used by law enforcement. The employer also admitted that it did not have a serious “buddy punching” problem, but wanted the superior biometric system anyway.

Arbitrator Slotnick applied a balancing test and dismissed the grievance because the employer had proven a concrete benefit to the system and that its invasiveness was minimal. He used strong language in doing so.

Unionized employers have been cautious about implementing biometric timekeeping systems since Arbitrator Tims upheld two similar grievances in *Dominion Colour* and *IKO Industries*, the latter being upheld on judicial review. Though arbitrators are not bound by the decisions of other arbitrators, the facts underlying most challenges to these systems are similar. This decision and two similarly permissive decisions of the Alberta OPIC from last year are therefore persuasive, and are beginning to tip the balance of authority in employers' favour. In fact, Arbitrator Slotnick noted that *Dominion Colour* and *IKO Industries* were not distinguishable on their facts, but that he preferred a different balancing of interests.

Agropur (Natre) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees (Teamsters Local Union No. 647), 2008 CanLII 66624 (ON L.A.).

COURT REJECTS COMPLAINT ABOUT INTELLIGENCE GATHERING THROUGH CORPORATE E-MAIL SYSTEM

The Federal Court dismissed a *PIPEDA* application that alleged that an executive had unlawfully collected personal information by sending an e-mail to members of his firm to inquire about the applicant.

The facts leading to the application are somewhat convoluted. Martha McCarthy, a prominent family law lawyer in Ontario, had represented the applicant's wife in a contentious family law dispute. The judgement reports that Ms. McCarthy told her brother, Peter McCarthy, that she had received two threatening phone calls from the applicant. Mr. McCarthy, a Vice-President at J.J. Barnicke, e-mailed the company's sales force for information. His subject line stated "Mark Waxer" and his e-mail stated, "Does anyone know what firm Mark is with?" Mr. Waxer complained to the federal Privacy Commissioner and subsequently filed his application.

These facts raise a good issue about *PIPEDA* application, but the Privacy Commissioner took jurisdiction over the complaint and the court application did not address whether the collection at issue was made in the course of J.J. Barnicke's commercial activity or for Mr. McCarthy's personal purposes.

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

tapes). It was satisfied with Mr. McCarthy's sworn denial, which the applicant did not challenge in cross-examination.

The Court also declined to award damages for breach of *PIPEDA*'s accountability principle. The Privacy Commissioner had concluded that J.J. Barnicke did not have appropriate privacy policies in place nor did it have a designated privacy officer accountable for compliance as required by the Principles 4.1 and 4.1.4 of Schedule 1 to *PIPEDA*. The company complied with the Commissioner's recommendations, and she therefore deemed the complaint to be "well-founded and resolved." Without revisiting the question of breach, the Court held that it was not proper to award damages in the circumstances. It held that the applicant could not claim damages for the stress of the proceedings themselves and held that he had not otherwise proven any other humiliation or embarrassment that would warrant a damages award. It noted that the applicant's aggressive and assertive position throughout the litigation was inconsistent with his damages claim.

Waxer v. J.J. Barnicke Limited, 2009 FC 169 (CanLII).

ABCA QUASHES BANTREL SITE ACCESS DRUG TESTING AWARD

The Alberta Court of Appeal quashed an arbitrator's endorsement of a site-access testing policy brought in by an Alberta construction site owner.

The arbitration panel's March 2007 award was quite broad. Chairperson Phyllis Smith held that the parties' incorporation of a model drug and alcohol guideline did not preclude pre-access testing of current employees and then focused most of her analysis on whether the testing requirement was reasonable in all the circumstances.

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

The Court also read a clause that was unique to one of the three collective agreements very narrowly. The agreement specified that the "parties will cooperate with clients who institute pre-access drug and alcohol testing." The Court read this as an agreement to negotiate, reasoning that the word

“cooperate” was not strong enough to indicate an endorsement of pre-access testing given its exclusion from the model.

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

ARBITRATOR SIMMONS REJECTS CHALLENGE TO BAG SEARCH

Arbitrator Gordon Simmons dismissed a motion to exclude evidence obtained in a bag check conducted by a municipal employer.

The employer found stolen goods after examining the contents of two bags that were left near a receiving area of a care home. One of the bags was left open and there was signage nearby indicating that personal belongings should not be left unattended. The Union argued the evidence should be excluded because the employer breached section 8 of the *Charter*.

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

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

ALTA. Q.B. QUASHES PAWN SHOP ORDER

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

The City required dealers to collect the name, date of birth, gender, eye colour, hair colour and identification details of all sellers and upload this and other information to a database hosted by a third party under contract to the City. The police could access the database, but the information also remained available to dealers (presumably) for use in their business.

In February 2008, the IPC ordered the City to stop collecting information and to destroy its database. It held that the scheme established a “collection” by

the City, but that this collection violated the Alberta *FIPPA* because it was not authorized by law, was not collected for the purpose of law enforcement and was not necessary for an operating program or activity of the City. The key finding was that the City's longstanding bylaw, which required used goods dealers to make information available to peace officers, did not allow the City to implement a scheme whereby information is uploaded to a database under the City's control.

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

The Queen's Bench decision is lengthy and includes more findings than described in this summary. Though most of the Court's conclusions are technical, it does seem to comment generally on the interpretation of municipal powers as they pertain to personal privacy and on the proper characterization of data flows. Moreover, the Court's rather quick, but clear, conclusion that the collection was for "law enforcement" purposes is significant and appears to conflict with the Ontario Court of Appeal's finding in the 2007 *Cash Converters* case. These points of significance aside, there is also an interesting subtext that is illustrated by the Court's rather complete and forceful quashing of the OIPC order.

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

PRIVACY – DISCLOSURE

ALBERTA COURT UPHOLDS PRIVACY COMPLAINT FOR DISCLOSURE OF FACULTY MEMBER MERIT AWARD

The Alberta Court of Queen's Bench affirmed an Alberta OIPC finding that a university had breached the Alberta *FIPPA* by disclosing a faculty member's recommended merit increase.

The complaint involved a document circulated within the complainant's department that included information about the department chair's annual merit increase recommendations. The document did not include names, but associated merit increase recommendations with data on papers published. The complainant argued that his merit increase was disclosed given that it was associated with data about an unnamed person who had published 37 papers in the year. The university argued that it had only disclosed statistical information.

The Court's finding is very fact-specific, but does illustrate that whether information is "personal information" – information about an identifiable individual – depends on the context in which it is published. The Court held that the OIPC reasonably concluded that the data on papers published revealed the complainant's identity given the size of the department and the complainant's well known and relatively superior level of academic output.

There are other aspects of the Court judgement that are noteworthy, including the more principled (but not surprising) finding that the document was not excluded from the act as "research information" or "teaching material."

University of Alberta v. Alberta (Information and Privacy Commissioner),
2009 ABQB 112 (CanLII).

PRODUCTION – CONFIDENTIALITY

ONT. C.A. CONSIDERS DEEMED UNDERTAKING RULE

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

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

The last point arose because the records being considered by the Court included video surveillance footage and medical information of the plaintiff. She had obtained these records from her opponent in prior litigation, thereby

engaging her opponent's privacy interest. It appears that she attempted to argue that her personal privacy interest in the records was relevant to the exercise of discretion in ordering relief, given the content of the records. The Court disagreed, and said the only privacy interest engaged by the rule is that of a party compelled to produce records.

Kitchenham v. Axa Insurance Canada, 2008 ONCA 877 (CanLII).

PRODUCTION – CRIMINAL

SCC BROADENS SCOPE OF CROWN'S "FIRST PARTY" DISCLOSURE DUTY AND MORE

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

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

The Court also modified the two-stage *O'Connor* process: an accused person must still establish "likely relevance" to justify a court review of third-party records, but at the second stage reviewing judges must now focus on the "true relevance" of the records rather than the competing interest in protecting personal privacy. If a judge concludes that records examined are truly relevant, the Court held they should be ordered to be disclosed despite any subject's competing privacy interest. Reviewing judges should still be concerned with personal privacy, but the Court suggested that barring production was a less appropriate means of protecting personal privacy than means such as redaction and protective orders. While establishing this production-favouring rule, the Court stressed that there is a higher standard for production of records in sexual assault cases; as such, production in these cases is still governed by the *Criminal Code* and *Mills*.

R. v. McNeil, 2009 SCC 3 (CanLII).

PRODUCTION – PRIVILEGE

GOVERNMENT FAILS TO MEET BURDEN OF PROVING SOLICITOR-CLIENT PRIVILEGE

Madam Justice Layden-Stevenson of the Federal Court held that the Minister of Fisheries and Oceans failed to prove a claim that two sentences in a ministerial briefing document were subject to solicitor-client privilege. The Minister argued the sentences, which were not authored by a lawyer, were revealing of legal advice. In dismissing this claim, Layden-Stevenson commented:

Regarding the Minister's submission that disclosure of the name of the lawyer is tantamount to disclosure of that which is subject to solicitor-client privilege, I would think that if that were so, it ought to have been stated in Mr. Ahluwalia's affidavit.

She also held that the Minister had waived privilege by implication given disclosure of similar information in the record before the Court.

Environmental Defence Canada v. Canada (Fisheries and Oceans), 2009 FC 131 (CanLII).

DEFENDANT CAN MAINTAIN PRIVILEGE AGAINST THIRD PARTY IT SUES FOR SPOILIATION

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

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

The Court held that the spoliation action was independent from the main action but that it was sufficiently related to the main action for privilege to apply across both actions. The Court also dismissed an argument that the defendant waived privilege by disclosing one of the reports subject to its

privilege claim. It held that the plaintiff had not met its burden of proving an implied waiver.

Rudolph Meyer & Son Ltd. v. Endurowe Consulting, 2009 CanLII 10400 (ON S.C.).

ONTARIO COURT ADDRESSES SCOPE OF SETTLEMENT PRIVILEGE

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

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

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

PRODUCTION – PROCEDURE

BCCA SAYS NON-PARTIES GET NO NOTICE OF PRODUCTION MOTION DESPITE PRIVACY INTEREST

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

The production motion was brought by the Director of Civil Forfeiture in forfeiture proceedings. It appears to have been opposed by the defendants but not by the RCMP.

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

The Court of Appeal held the motions judge had erred. It reasoned that the Rules' third-party production provision – Rule 26(11) – is a complete code that governs the requirement to give notice of third-party production motions in British Columbia. This provision only requires notice to the third party and

“other parties” but not other persons “who may be affected.” The Court held that the general notice requirement in Rule 44(5) could not override the specific and more limited notice requirement in Rule 26(11).

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

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

PRODUCTION – SCOPE

ALTA. C.A. SAYS PLAINTIFF’S MOTHER NEED NOT ANSWER QUESTIONS ABOUT SON’S INJURIES

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

The plaintiff claimed against a school bus operator for injuries arising out of an accident. The defendant third partyed the mother, alleging that she was negligent in failing to provide instruction to her son. The mother denied negligence and causation, but did not dispute the plaintiff’s claim against the defendant or the quantum of damages claimed.

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

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

COURT INFERS THAT FACEBOOK PAGES INCLUDE RELEVANT INFORMATION ABOUT LIFESTYLE

The Ontario Superior Court of Justice granted leave to cross-examine a plaintiff in a motor vehicle accident suit about the nature of content he posted on his Facebook profile.

In defence of a claim for compensatory damages for loss of enjoyment of life, the defendant sought production of all content in the plaintiff's Facebook. It did not examine the plaintiff on whether he had any photographs revealing of his post-accident lifestyle in oral discoveries, but learned of his Facebook's existence after discovery and developed a theory that it would contain such photos.

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

The appeal judge disagreed, stating:

With respect, I do not regard the defendant's request as a fishing expedition. Mr. Leduc exercised control over a social networking and information site to which he allowed designated "friends" access. It is reasonable to infer that his social networking site likely contains some content relevant to the issue of how Mr. Leduc has been able to lead his life since the accident.

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

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

BCCA DEALS WITH PRODUCTION OF CLASS MEMBER RECORDS IN PROPORTIONALITY DECISION

The British Columbia Court of Appeal affirmed an order that required the province to produce records pertaining to class members who had not opted out of a class proceeding.

The proceeding alleges systemic negligence and breach of fiduciary in the operation of a residential school. In ordering production of records related to individuals who had not opted out of a potential class of up to 2,200 members, the Court affirmed three findings:

1. that production should not be denied because of the records' potential misuse as evidence of individual incidents (given their *prima facie* relevance to the systemic breach claims);
2. that production should not be denied based on privacy concerns given that potential class members were given notice and an opportunity to protect their files from disclosure by opting out; and
3. that production should not be denied based on the scope of production (about 2.2 million pages of records), noting that the production request was not "a futile search for documents of unknown relevance."

As the concept of "proportional" production takes greater prominence in Canadian civil procedure, this case is a nice illustration of how the cost of production can have various elements. One might argue that it demonstrates a rather traditional or fulsome-production view, where costs related to procedural complications and delay, privacy and document review do not weigh heavily in the balance.

Richard v. British Columbia, 2009 BCCA 77 (CanLII).

COURT ORDERS DISCLOSURE OF ANONYMOUS MESSAGE BOARD USERS' IDENTITIES

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

There are two significant aspects of the decision.

First, the Court seemed to distinguish the *BMG* case (where the Federal Court of Appeal endorsed a protective balancing test) on the basis that the plaintiff filed an action directly against the website owner-operator. Website

owner-operators may question whether their status as first or third parties should really make a difference.

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

Warman v. Wilkins-Fournier, 2009 CanLII 14054 (ON S.C.).

“CROWN BRIEF” PRODUCTION ISSUE HEADING TO BCCA

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

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

The Supreme Court ordered production last December. It ultimately applied a screening test like that endorsed by the Ontario Court of Appeal in *D.P. v. Wagg* and held that the Crown had not demonstrated that the balance of public and private interests weighed against production.

Though the finding under appeal is discrete, in granting leave, the Court of Appeal framed the issue broadly as being about “the treatment of police investigations results in civil proceedings while criminal charges are outstanding” – that is, as being about the very principles reflected in *Wagg*.

Wong v. Antunes, 2009 BCCA 60 (CanLII).

PRODUCTION – SPOILIATION

COURT PUTS OFF SPOILIATION CLAIM UNTIL TRIAL

Mr. Justice Lauwers of the Ontario Superior Court of Justice rejected a motion to dismiss a personal injury claim based on the defendant's allegation of spoliation. The idea that spoliation claims should generally be settled at trial is not remarkable, but the Court did reject the defendant's argument that spoliation claims relating to records of loss of earnings should be treated differently.

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

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

MAN CA AFFIRMS DEFERRAL OF SPOILIATION HEARING TO TRIAL

Last December, the Manitoba Court of Queen's Bench dismissed a motion for an order striking out a statement of defence on the basis of a spoliation claim. It stressed that spoliation claims will ordinarily be dealt with at trial. This March, the Manitoba Court of Appeal issued a short endorsement in dismissing an appeal of this finding.

Commonwealth Marketing Group Ltd. et. al v. The Manitoba Securities Commission et. al., 2009 MBCA 33 (CanLII).

APPEAL COURT RESTORES DEFENCE STRUCK AS A REMEDY FOR SPOILIATION

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

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

SEARCH AND SEIZURE

COURT EXCLUDES EVIDENCE FOR UNLAWFUL POLICE ACCESS TO PASSENGER MANIFEST

The Nova Scotia Supreme Court excluded evidence supporting drug trafficking charges after finding that the RCMP breached *PIPEDA* by reviewing a WestJet passenger manifest without making a formal request.

The issue of law enforcement's access to personal information held by business organizations has arisen in a number of recent criminal cases, and it is becoming common for courts to judge the reasonableness of a police search in light of standards set by *PIPEDA*. *PIPEDA* restricts regulated organizations from disclosing personal information without consent, but includes an exception in section 7(3)(c.1) that allows for disclosure to law enforcement in response to a request that meets several formal requirements.

In this case, the RCMP reviewed a passenger manifest from a domestic flight, identified a passenger who had paid by cash shortly before the flight and who only had one piece of luggage and proceeded to search that passenger's luggage. It found drugs and laid charges.

The Court held the RCMP breached *PIPEDA* because it did not make a "request" required by section 7(3)(c.1), given its "cozy" relationship with WestJet.

In addition to signalling that the procedural requirements in section 7(3)(c.1) are likely to be read strictly, the judgement is notable for its close consideration of WestJet's privacy policy. The policy said that WestJet might be "required by legal authorities" to disclose personal information without consent, but did not say that WestJet would voluntarily cooperate with law enforcement. The Court said the policy "seems to emphasize that WestJet would only collect and disclose what is required by law and nothing more." This weighed in favour of finding the search to be unreasonable and therefore unconstitutional.

The Court then excluded the evidence based on an application of the *Collins* test. In characterizing the breach as serious it said, "It is not the rights of a drug trafficker here that I am protecting. It is the rights of a member of society who chooses to give personal information to an airline ticket agent which is recorded on a flight manifest."

R. v. Chehil, 2008 NSSC 357 (CanLII).

APPEAL COURT SAYS “NO KNOCK” ENTRIES NEED NOT BE ENDORSED IN A WARRANT

The New Brunswick Court of Appeal held that the police need not have express authorization to use a “no knock” or “dynamic” entry in searching a suspect’s residence. The thrust of the judgement is nicely summarized in the following paragraph:

Neither the police nor the Crown requested the issuing judge make an endorsement authorizing a “no knock” entry. Furthermore, the issuing judge did not, on his own motion, choose to make such an endorsement. I also note there is no legislative provision which requires or permits such an endorsement. No doubt for good reason. It does not take much imagination to think of situations where circumstances change after the issuance of a warrant, which either eliminate the need for a “no knock” entry or require one which was previously thought unnecessary. Following the issuance of the warrant, police officers and judges should not be required to meet again to address the appropriate mode of entry. To impose such a requirement upon police and the judiciary would result in the micro-management of police investigations. The development of the law should not sanction the management of police operations by the judiciary except where necessary in the course of fulfilling judicial functions. I do not consider the pre-determination of the method by which police are to exercise their discretion and respond to changing circumstances in executing the search of a suspect’s premises to constitute part of the judicial function.

Based on this reasoning, the Court also held that the evidence the Crown can use in demonstrating the reasonableness of using a no knock entry is not limited to that which it put before the issuing judge.

R. v. Perry and Richard, 2009 NBCA 12 (CanLII).

CHALLENGE TO “LAWFUL ACCESS” EXEMPTION IN PRIVACY LEGISLATION DISMISSED

The Saskatchewan Provincial Court dismissed a *Charter* challenge to a provision in the Saskatchewan *Freedom of Information and Protection of Privacy Act* that allows the Saskatchewan government and its agencies to answer law enforcement requests for personal information without obtaining individual consent.

The police identified an IP address of a computer used to share child pornography on the internet and made a request, without a warrant, for subscriber records to SaskTel in order to identify the accused as being associated with the computer. SaskTel provided the information without consent based on the exemption in section 29(2)(g) of Saskatchewan *FIPPA*, a fairly typical “lawful access” provision, i.e. one that allows an entity bound by privacy legislation to answer law enforcement requests for personal information. The accused claimed that this permissive provision allowed the police to conduct a search in violation of two *Charter* rights: (1) the section 7 right not to be deprived of liberty except in accordance with the principles of fundamental justice (on the basis of the provision’s over breadth and vagueness); and (2) the section 8 right to be free from unreasonable search and seizure.

The Court dismissed both claims with little reasoning. It quoted extensively from the Crown’s factum and held that the accused person’s position was inconsistent with the Supreme Court of Canada’s judgement in *R. v. Plant* and the Saskatchewan Court of Appeal’s judgement in *R. v. Cheung*. The Court’s decision will lack authority because the Court did not fully engage in the issues, but it does show that the “lawful access” issue is very alive.

R. v. Trapp, 2009 SKPC 5 (CanLII).

ANOTHER SUBSCRIBER DATA SEARCH CHALLENGE DISMISSED

On February 18th, the Ontario Superior Court of Justice held that the police conducted a lawful search by asking an ISP for a subscriber’s name and residential address in order to link that information with a known IP address. Unlike in its February 10th decision in *Wilson* (discussed below), the Court accepted that the disclosure of a subscriber’s name and residential address is revealing of the “details of the lifestyle and personal choices of [an] individual” because it allows for the identification of an anonymous internet user. The Court nonetheless held the applicant lacked a reasonable expectation of privacy in the information given the terms of the contract his mother (and co-resident) had entered into with the ISP.

R. v. Vasic, 2009 CanLII 6842 (ON S.C.).

BCCA SAYS NON-OCCUPANT HAS STANDING TO CHALLENGE SEARCH WARRANT

In a fact-driven decision released on January 2nd, the British Columbia Court of Appeal held that an accused person who did not occupy premises

discovered to be a grow operation had standing to challenge a search of the premises.

The accused lived elsewhere, but the Court inferred possession and control from evidence showing the accused was the owner, possessed keys and was seen there on a few occasions in the two weeks before the search. It held that the trial judge erred in denying standing merely because the accused was not an occupant and that, based on possession and control and all the circumstances, the accused had a reasonable expectation of privacy that he was entitled to exercise.

R. v. Vi, 2008 BCCA 481 (CanLII).

ONT. S.C.J. OKAYS SEARCH WITHOUT WARRANT OF SUBSCRIBER DATA

On February 10th, the Ontario Superior Court of Justice dismissed a *Charter* application that challenged a letter request made by the police to an internet service provider for the name and address of an account holder associated with a specific IP address at a specific point in time.

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

R. v. Wilson, [2009] O.J. No. 1067 (S.C.J.) (QL)

The articles in this Client Update provide general information and should not be relied on as legal advice or opinion. This publication is copyrighted by Hicks Morley Hamilton Stewart Storie LLP and may not be photocopied or reproduced in any form, in whole or in part, without the express permission of Hicks Morley Hamilton Stewart Storie LLP. ©

Hicks Morley Hamilton Stewart Storie LLP www.hicksmorley.com

TORONTO
Toronto Dominion Tower
66 Wellington St. W.
30th Floor, Box 371
Toronto, ON M5K 1K8
Tel: 416.362.1011
Fax: 416.362.9680

WATERLOO
100 Regina St. S.
Suite 200
Waterloo, ON N2J 4P9
Tel: 519.746.0411
Fax: 519.746.4037

LONDON
148 Fullarton St.
Suite 1608
London, ON N6A 5P3
Tel: 519.433.7515
Fax: 519.433.8827

KINGSTON
366 King St. E.
Suite 310
Kingston, ON K7K 6Y3
Tel: 613.549.6353
Fax: 613.549.4068

OTTAWA
150 rue Metcalfe St.
Suite 2000
Ottawa, ON K2P 1P1
Tel/Tél: 613.234.0386
Fax/Télé: 613.234.0418