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Privacy and Court Production Rules: A Few Recent Decisions

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While court production rules vary from jurisdiction to jurisdiction, privacy concerns are universal. Recently, the Federal Court, the Alberta Court of Appeal and the Ontario Superior Court of Justice have all been called upon to reconcile the requirements of their particular court's production rules and the litigants' privacy concerns. While the circumstances, nature of the information, and relevant court production rules varied, the three courts were able to address the litigants' privacy concerns in three of the four cases mentioned below by relying on the *Personal Information Protection and Electronic Documents Act*¹ (*PIPEDA*) or the implied undertaking rule – or by distinguishing between relevant and irrelevant information in determining what information needed to be produced. In the fourth case, however, the court production rules governing the Ontario Superior Court of Justice left Master R. Dash little leeway in concluding that the disputed information had to be filed with the court and would be accessible by the public.

The Federal Court: *DataTreasury Corporation v. Royal Bank of Canada*

In *DataTreasury Corporation v. Royal Bank of Canada*, 2008 FC 955 (CanLII), Prothonotary Aalto was called upon

to settle the terms of a protective order. Such an order had been contemplated by the parties – DataTreasury Corporation and the members of the Banking Group – in order to maintain the confidential aspect of the patented technology at the heart of the patent infringement and patent impeachment proceedings, as well as other confidential information of the parties. The parties were unable to come to an agreement regarding the "Canada Only Clause" that would have allowed the party producing information to serve and file a notice of motion to request an order preventing disclosure of the information outside of Canada. The receiving party would not be able to send the information outside of Canada until after the final disposition of the motion, including any appeals.

DataTreasury insisted that some information would need to be sent to the United States throughout the course of the proceedings because its central document database, document management consultants, United States counsel, witnesses and experts were all centralized in the United States. The Banking Group was concerned that some of their productions would contain clients' personal information, and that sending this information across the border would run afoul of America's *PATRIOT Act* and *PIPEDA*, as well as the bank's own privacy policies.

The court acknowledged that the Banking Group had a legitimate concern and that once the information had left Canada, it could be subject to production in ways not contemplated by the parties.² However, the court also found that the Canada Only Clause would result in endless motions and could limit the ability of counsel to show relevant documentation to its client located in the United States and to receive instructions.³

The court found a number of ways to ensure the court's production rules were enforced in a manner fair to both sides, all

the while allaying the Banking Group's privacy concerns. First, while the documents in question were relevant and thus required to be produced by law, the personal information contained in the documents was not relevant and did not need to be produced and could be redacted.

The court also addressed the Banking Group's *PIPEDA* concerns. Section 7(3) of *PIPEDA* allows an organization to disclose personal information without the knowledge or consent of the individual in specific circumstances. These circumstances include disclosure required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records⁴ or otherwise required by law.⁵ This provision applied to the disclosure at issue in this case, as the documents are required to be produced to comply with provisions of the *Federal Courts Rules*⁶ and negated the Banking Group's *PIPEDA* concerns.

Finally, the court also pointed out that the party receiving the documentation was governed by the implied undertaking rule, which the court ultimately ordered to be included in the protective order.⁷

The Alberta Court of Appeal: *Innovative Health Group Inc. v. Calgary Health Region*

The dispute in *Innovative Health Group Inc. v. Calgary Health Region*, 2008 ABCA 219 (CanLII) arose out of Calgary Health Region's (CHR) attempt to conduct a spot audit of Innovative Health Group's operations. Innovative claimed to have suffered damages as a result, and CHR counterclaimed alleging breaches of contract and fiduciary duty.

CHR provided publicly funded treatment through a series of contracts with Innovative, while Innovative provided both publicly and privately funded treatment. When CHR conducted a spot audit, Innovative was concerned about the privacy implications of releasing private patient information without the patient's consent. It allowed its computer hard drives to be copied, and for these to be deposited at the Court of Queen's Bench pending an agreement or court order. The parties agreed to the release of the publicly funded files, but no agreement was reached in respect of the files for patients who received treatment that was both publicly funded and privately funded (the hybrid files). Innovative was concerned with preserving the confidentiality of its patients' personal information while producing all of the documents and records relevant and material to the litigation.

CHR obtained an order compelling Innovative to file a further and better affidavit of records. The case management judge ordered production of copies of Innovative's business hard drives being held in court along with physical and electronic copies of the hybrid files. The case management judge felt that any concerns regarding privacy and confidentiality could be protected through the solicitor's implied undertaking that the record would not be used outside the litigation.

Innovative continued to object to the imaged hard drives being produced in their entirety and appealed that decision. The Court of Appeal reversed the case management judge's decision. It found that the hard drive was not a record as defined in Rule 186 of the Alberta Rules of Court, and not producible *in specie*. Innovative's privacy concerns were resolved when the court found that the hybrid files, in particular, did not need to be produced as they were neither relevant nor material to the causes of actions alleged.

The Ontario Superior Court of Justice: *Royal Bank of Canada v. Welton and Moore v. Bertuzzi*

In *Royal Bank of Canada v. Welton*, 2008 CanLII 6648 (ON S.C.), the Applicants claimed that the Royal Bank of Canada (RBC) had violated Section 8 of the *Canadian Charter of Rights and Freedoms*⁸ while investigating an alleged mortgage fraud. RBC had relied on subsections 7(3)(d)(i) and (h.2) of *PIPEDA* in sharing information between itself and Toronto Dominion Bank – information RBC intended to use in a civil action for damages against the alleged fraudsters. Subsection 7(3)(d) permits disclosure of personal information by an organization to an investigative body where there are reasonable grounds to believe the information relates to a breach of an agreement or a contravention of the laws of Canada, a province or a foreign jurisdiction that either has been, is being or is about to be committed. Subsection 7(3)(h.2) permits the investigative body to disclose such information provided the disclosure is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province.

The applicants, among the alleged fraudsters, felt their expectation of privacy was violated and sought to have

subsections 7(3)(d) and (h.2) declared of no force and effect, and, as a result, prevent the information collected from being used in the pending civil action and cause the *Mareva* injunction previously obtained by RBC to fall away.

Justice Cumming of the Ontario Superior Court of Justice concluded that the *Charter* did not apply, and dismissed the applicants' claims.

He found that while *PIPEDA* applied to RBC, the bank was not performing an inherently government function. He also found that the fact that the fraudsters were engaged in conduct that may well have constituted a criminal offence did not transform the bank into an arm of the state. Justice Cumming's finding neutralized the applicants' claims that the information gathered should be precluded from the pending civil action for privacy reasons.

In *Moore v. Bertuzzi*, 2007 CanLII 57934 (ON S.C.), the defendants were concerned about the attention being generated by the proceedings and the impact of this attention and publicity on the defendants' right to a fair trial. The proceedings arose following an incident during a National Hockey League game. Bertuzzi, then a player with the Vancouver Canucks, allegedly struck Steve Moore, then a player with the Colorado Avalanche, from behind and drove his face onto the ice, causing Moore serious injury. Moore commenced an action for pecuniary and non-pecuniary damages as well as aggravated and punitive damages.

During the examination for discovery, Bertuzzi and another examinee refused to answer certain questions and took a number of other questions under advisement. The plaintiff served a notice of motion to amend pleadings and to compel Bertuzzi and the other examinee to reattend to answer questions they had improperly refused to answer at the initial examinations for discovery. Bertuzzi commenced a motion for an order directing the plaintiffs not to file transcripts of examinations for discovery in support of the plaintiffs' motion. He was concerned that the filing of the transcripts would increase the press coverage and compromise his right to a fair trial by tainting the jury pool.

The defendants attempted to rely on the deemed undertaking rule, enshrined in Rule 30.1.01, which would prevent the parties and counsel from using evidence or information obtained during documentary discovery and examination for discovery for any purposes other than those of the proceedings. Although Master R. Dash was concerned with the erosion of the confidentiality of the discovery process, he declined to ban the filing of the transcripts and would not order the transcripts sealed. While the rationale for the deemed undertaking is based on "recognition of the general right of privacy which a person has with respect to his or her documents"⁹ and requires balancing the public interest in discovering the truth against preserving privacy and protecting confidential information, Rule 30.1.01(5) provides an exemption to the deemed undertaking when evidence is filed with the court. Further, Rules 37.10(5) and 34.18(2) require that the transcripts be filed with the court as they are legitimately required for use on a motion to compel answers to questions refused on an examination for discovery.

McCarthy Tétrault Notes:

Privacy concerns will undoubtedly continue to plague litigants, particularly when they are faced with court production rules, but *DataTreasury*, *Innovative* and *Welton* demonstrate that there are often ways to reconcile a court's production rules and the parties' privacy concerns. Even Master R. Dash in *Moore* allowed that there were potential alternate measures available, but that none of the parties had suggested any workable and reasonable alternative.

¹ S.C. 2000, c. 5 [*PIPEDA*].

² *DataTreasury* at para 10.

³ *DataTreasury* at para 10, 16.

⁴ *PIPEDA* at s. 7(3)(g).

⁵ *PIPEDA* at s. 7(3)(i).

⁶ S.O.R./98-106.

⁷ *DataTreasury* at para 23.

⁸ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), c. 11 [*Charter*]. Section 8 protects an individual against unreasonable search and seizure by a public or governmental authority.

⁹ *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (C.A.) at p. 367 as quoted in *Moore* at para. 10.

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