

ELECTRONIC EVIDENCE AND E-DISCOVERY

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INFORMATION TECHNOLOGY LAW

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Electronic Evidence and E-Discovery

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DEDICATION

To the children in our lives.

ABOUT THE AUTHORS

Alex Cameron is a lawyer at Fasken Martineau DuMoulin LLP. He is called to the bar in British Columbia and Ontario. His practice focuses on commercial litigation and legislative compliance matters, including privacy, access to information and technology and intellectual property. He regularly acts for Canadian and international clients in litigation and in privacy matters. Published in 2008, the Office of the Privacy Commissioner of Canada commissioned Alex to write a landmark privacy report for businesses titled: *Leading by Example: Key Developments in the First Seven Years of PIPEDA*. Alex is an officer of the Canadian Bar Association's Privacy and Access Law Section and took a lead role in drafting its submissions to government on the impact of privacy law on civil litigation. He is a member of the Sedona Canada Working Group, which has developed national guidelines for electronic discovery in Canada, and is a member of the Ontario E-Discovery Implementation Committee, which is a joint committee established by the Ontario Bar Association and The Advocates' Society. A doctoral candidate in law at the University of Ottawa, Alex is a popular speaker and published author in his areas of practice and research, including electronic evidence and electronic discovery.

David Wotherspoon is a partner at Fasken Martineau DuMoulin LLP and is a member of the firm's Commercial Litigation and National Technology & Intellectual Property (IP) Groups. He is a commercial litigator who practises primarily in the areas of intellectual property, technology, and defamation. David has assisted clients in all corresponding facets including anti-counterfeiting, advertising disputes, and software and product development disputes. His prior experience as a news photographer led to his curiosity in media issues. It transferred into his legal career as he pursued matters of defamation and media issues, such as publication bans. To date, David has provided advice and expertise in more than 100 defamation matters. Many of David's cases have involved protecting businesses that have been targeted in a way that requires intense and swift action, and often injunctions, to safeguard clients' rights. David continually delivers extraordinary success in this particular area of his practice. For more than a decade, David has also been involved in technology disputes — typically more complex transactions that include meticulous contract and document reviews, and careful but aggressive pursuit of clients' rights. No matter what legal role David assumes for his clients, he always applies a business-oriented approach. David finds a business solution first, bearing in mind that the best result may ultimately include litigation. David has been a director on a number of not-for-profit organizations and currently sits on the board of governors of Emily Carr University of Art + Design.

ABOUT THE GENERAL EDITOR

Dr. Sunny Handa is a partner with the international law firm of Blake, Cassels & Graydon LLP and is co-head of the firm's national Information Technology Group. Dr. Handa deals with information technology, intellectual property, e-commerce and communication law matters, and is also Professor of Law (adj.) at McGill University where he teaches in the areas of high technology, communications and advanced corporate law. He is the author of *Copyright Law in Canada* and *Fundamentals of Information Technology* and is a co-author of *Communications Law in Canada*, *Halsbury's Laws of Canada - Communications Law* and *E-Commerce Legislation and Materials in Canada*, all published by LexisNexis Canada, as well as numerous other books and publications. Dr. Handa also is the creator/developer and General Editor of the Information Technology Law book series and in this role develops, structures and edits each title.

ABOUT THE SERIES

Information Technology Law is an exciting new series of books designed to assist lawyers and business professionals in demystifying complex information technology law issues while requiring no specific prior knowledge on the part of the reader. Each book focuses on a particular cutting edge information technology law subject. The creator and general editor of the series is Dr. Sunny Handa. Each book will be written by different leading Canadian IT jurists with expertise in the particular area. Upcoming titles will cover topics including web agreements and policies, IT outsourcing and open source software. Other titles will continue to be added to the series in coming years.

FOREWORD

I am very pleased to present this sixth volume in the IT Law series. Electronic evidence has become a hot topic and expanded its reach in terms of interest well beyond the province of specialists in information technology law. It is well accepted that the pervasiveness of digital technologies (processing, storage and communication) has forced us to reckon with the myriad of difficult issues that these technologies have foisted upon us. In the case of electronic evidence, corporations, solicitors, and of course litigators, have had to turn their mind to these novel, complicated and conceptually tricky issues often without a clear path to guide them.

This volume, authored by two good friends, David Wotherspoon and Alex Cameron, presents the range of subjects related to electronic evidence in a very easy to understand and well structured framework. The amount of information contained in this small volume is, quite simply, a testament to their ability to structure and clearly articulate complex concepts with relative ease. They have navigated difficult waters concerning a very broad range of issues involving electronic evidence and presented them so that a reasonably sophisticated reader, even one not overly familiar with the rules of evidence, will gain a profound understanding of the types of data/information and technologies involved, the issues raised by these and their treatment at law, as well as a critique of currently applicable legal principles. The book is a mix of both the legal and the practical. It begins with a discussion about managing electronic evidence prior to and outside of the context of litigation. This is followed by a discussion (over two chapters) about the law and practice concerning the preservation and disclosure of electronic evidence. The book concludes with an in-depth discussion regarding the effective use and challenge of electronic evidence in the context of litigation.

Although the law discussed throughout the book is Canadian, many of the principles and advice remain independent and untethered to any specific jurisdiction. Readers, regardless of the jurisdiction within which they are situated, will find this book to be a helpful read.

On a more personal note, I have known both David and Alex for over a decade. David and I were previously partners with the same law firm and we have remained good friends ever since. Alex, who began his career in law at the same firm, has developed into a wonderful lawyer and sophisticated academic; although he left the firm to pursue loftier academic pursuits, he soon returned home to the firm to apply his post-graduate work in law. When I was seeking expert authorities on the subject to pen this volume, it was clear, based on my experience, who the

authors should be. Working with David and Alex in producing this volume was an easy and enjoyable task and both are deserving of a good deal of praise for their hard work and dedication.

Structuring, writing and editing of this book took over two years to complete, and like any good wine, it was well worth the wait.

Sunny Handa

March 30, 2010

PREFACE

Across the pond from Darwin's famous "thinking path", the idea for this text was first discussed with Dr. Sunny Handa during a casual stroll one afternoon in Winnipeg. We are grateful to Dr. Handa for the invitation to author this book, for his insightful comments during the editing process and perhaps most of all, for never doubting that we would complete this work.

Electronic evidence and e-discovery are arguably the defining features of contemporary litigation. There is hardly a case today that does not involve the preservation and disclosure of a substantial volume of e-mails, spreadsheets, and other electronic documents. Yet, the topics of electronic evidence and e-discovery can be daunting for lawyers, litigants, and the courts. The way we deal with electronic documents is different than the way we deal with paper. They are created differently, stored differently and exchanged differently. We create vastly more electronic documents than we did with paper. Technology is constantly evolving.

This book comes as a result of a desire to provide basic, practical guidance on the fundamentals of electronic evidence and e-discovery. Recognizing that the area is rapidly changing, we have endeavoured to provide a review that was up to date at the time we submitted our manuscript while also providing general principles that will hopefully have enduring value.

Countless hours have gone into preparing this text. Many people have generously assisted along the way. Of particular assistance in the early days was Michael Schalke, and in the later days, Emmeline Morse. In the middle, and in no particular order, were Allison Blackler, Dave Iverson, Andrew Teehan, Jenny Roper, Kate Sangster-Poole, Janet Winteringham, Sebastien Kwidzinski, Daniel Urbas, Jordan Galenzoski, Nicole Melanson, Keith Perrin, Ryan Purita, Joëlle Michaud and the incredible support staff at Fasken Martineau DuMoulin LLP. We thank them all unreservedly.

David Wotherspoon

Alex Cameron

TABLE OF CASES

2000768 Ontario Inc. v. 514052 Ontario Ltd., [2006] O.J. No. 4383 (S.C.J.).....	99
336332 B.C. Ltd. v. Imperial Oil Ltd., [2002] B.C.J. No. 844, 2002 BCSC 587 (S.C.).....	33

A

A.T.U., Local 569 v. Edmonton (City), [2004] A.J. No. 419, 2004 ABQB 280 (Q.B.).....	156
Agustawestland Ltd. v. Canada (Minister of Public Works and Government Services), [2004] F.C.J. No. 1878, [2004] A.C.F. No. 1878 (F.C.).....	69
Air Canada v. Westjet Airlines Ltd., [2006] O.J. No. 1798 (S.C.J.).....	68, 69, 73, 95
Alberta (Treasury Branches) v. Leahy, [2000] A.J. No. 993 (Q.B.).....	130, 131
Alliance & Leicester Building Society v. Ghahremani and Others, [1992] R.V.R. 198 (Chancery Div.).....	7
Alvi v. YM Inc. (Sales), [2003] O.J. No. 3467 (S.C.J.)	14, 15, 63
American Cyanamid Co. v. Ethicon Ltd., [1975] 1 All E.R. 504 (H.L.)	130
Analog Devices, Inc. v. Michalski, 2006 NCBC 14, 2006 NCBC LEXIS 16 (Super. Ct. 2006).....	5
Andersen v. St. Jude, [2006] O.J. No. 3659 (S.C.J.).....	60
Anton Piller KG v. Manufacturing Processes Ltd., [1976] 1 All E.R. 779 (C.A.).....	131
Ares v. Venner, [1970] S.C.J. No. 26, [1970] S.C.R. 608 (S.C.C.).....	146
Arthur Andersen LLP v. United States, 374 F.3d 281 2004 U.S. App. LEXIS 11814 (5th Cir. 2004), revd 544 U.S. 696, 125 S. Ct. 2129 (2005).....	79
Arthur Andersen LLP v. United States, 544 U.S. 696, 125 S. Ct. 2129 (2005).....	32
Associated Economic Consultants Ltd. v. Durrani, [2007] O.J. No. 2108 (S.C.J.)	114
Autosurvey Inc. v. Prevost, [2005] O.J. No. 4291, 143 A.C.W.S. (3d) 287 (S.C.J.)	99
Axa assurances inc. c. Gestion d'Artagnan inc., [2001] J.Q. no. 2414 (S.C.).....	86

B

B.C. Building v. T&N, [1995] B.C.J. No. 620 (S.C.)	55
Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen, [2006] B.C.J. 753, 2006 BCSC 554 (S.C.)	7, 66, 67, 69, 72, 92
Bank of America Corp. v. SR International Business Insurance, 2006 NCBC 15, 2006 NCBC LEXIS 17, (Super. Ct. 2006)	5
Bank of Montreal v. 3D Properties Inc., [1993] S.J. No. 277, 111 Sask.R. 53 (Q.B.)	61
Bank of Montreal v. 3D Properties Inc., [1993] S.J. No. 279 (Q.B.)	67
Barker v. Barker, [2007] O.J. No. 1555 (S.C.J.)	61
Bell Expressvu Limited Partnership v. Rogers (Tomico Industries), [2007] O.J. No. 4569 (S.C.J.)	131
Bellaire v. Daya, [2007] O.J. No. 4819 (S.C.J.)	84
Big Pond Communications 2000 Inc. v. Kennedy, [2004] O.J. No. 820 (S.C.J.)	7
Bishop v. Minchiello, [2009] B.C.J. No. 692, 2009 BCSC 358 (S.C.)	143
Blindman Livestock Feeder Co-Op Ltd. (Receiver of) v. Snyder, [2005] A.J. No. 1183, 2005 ABQB 689 (Q.B.)	87
BMG Canada Inc. v. John Doe, [2004] F.C.J. No. 525 (F.C.)	128, 140, 145
BMG Canada Inc. v. John Doe, [2005] F.C.J. No. 858 (F.C.A.)	10, 58, 59, 84, 85, 93, 128, 140
Boxer v. Reesor, [1983] B.C.J. No. 1492, 43 B.C.L.R. 352 (S.C.)	48
Brandon Heating & Plumbing (1972) Ltd. v. Max Systems Inc., [2006] M.J. No. 149, 2006 MBQB 90 (Q.B.)	65
Brew Alliance Inc. v. Aztec Trading Ltd., [2006] A.J. No. 630, 2006 ABQB 362 (Q.B.)	133
Broccoli v. Echostar Communications Corp., 229 F.R.D. 506, 510 – 511 (D. Md. 2005)	67
Brunswick News Inc. v. Langdon, [2007] N.B.J. No. 493, 2007 NBQB 423 (Q.B.)	131

C

C.B. Constantini Ltd. v. Slozka, [2007] B.C.J. No. 914, 2007 BCSC 615 (S.C.)	130
Caldera v. Microsoft, 72 F.Supp. 2d 1295, 1999 U.S. Dist. LEXIS 21652 (D. Utah 1999)	125

Canada (Attorney General) v. Pacific International Securities Inc., [2006] B.C.J. No. 1368 (C.A.).....	61
Canada (Commissioner of Competition) v. Air Canada, [2000] F.C.J. No. 1177 (F.C.T.D.).....	62, 76
Capellupo v. FMC Corp., 126 F.R.D. 545, 1989 U.S. Dist. LEXIS 6854 (D. Minn. 1989).....	67
Carleton v. Beaverton Hotel, [2009] O.J. No. 23745/03 (S.C.J.).....	77
Catalyst Partners Inc. v. Meridian Packaging Ltd., [2007] A.J. No. 667, 2007 ABCA 201 (C.A.).....	132
Catalyst v. Hollinger, [2004] O.J. No. 3886, 48 B.L.R. (3d) 194 (S.C.J.).....	47
Celanese Canada Inc. v. Murray Demolition Corp., [2006] S.C.J. No. 35, [2006] 2 S.C.R. 189 (S.C.C.).....	3, 97, 98, 127, 132, 133
Central Trust Co. v. Rafuse, [1986] S.C.J. No. 52, [1986] 2 S.C.R. 147 C.C.L.T. 117 (S.C.C.), vard [1988] S.C.J. No. 104, [1988] 1 S.C.R. 1206 (S.C.C.).....	24
Centura Building Systems Ltd. v. Blackcomb Mountain Development Ltd., [2007] B.C.J. No. 1439, 2007 BCSC 939 (S.C.)	131
Chan v. Dynasty, [2006] O.J. No. 2877, 30 C.P.C. (6th) 270 (S.C.J.)	96
Cholakis v. Cholakis, [2000] M.J. No. 6 (Sup. Ct.)	67
CIBC World Markets Inc. v. Genuity Capital Markets, [2005] O.J. No. 614 (S.C.J.)	3, 69, 75, 94
CIBC World Markets Inc. v. Genuity Capital Markets, [2006] O.J. No. 1481 (S.C.J.)	3
Columbia Pictures Industries Inc. v. Bunnell, 245 F.R.D. 443, 2007 U.S. Dist. LEXIS 63620 (C.D. Cal. 2007).....	10, 62, 63
Commissioner of Competition v. Labatt, [2008] F.C.J. No. 79 (F.C.A.).....	51
Commonwealth Marketing Group Ltd. v. The Manitoba Securities Commission, [2009] M.J. No. 77 (C.A.), affg [2008] M.J. No. 430, 2008 MBQB 319 (Q.B.)	77
Computer Associates Int'l. Inc. v. American Fundware, Inc., 133 F.R.D. 166 1990 U.S. Dist. LEXIS 16613 (D. Colo. 1990)	67
Consorcio Minero Horizonte S.A. v. Klohn-Crippen Consultants Ltd., [2005] B.C.J. No. 768, 2005 BCSC 500 (S.C.)	61
Contour Optik Inc. v. Viva Canada Inc., [2005] F.C.J. No. 918, 2005 FC 724 (F.C.).....	76
Crookes v. De Simone, [2007] B.C.J. No. 2367, 2007 BCCA 515 (C.A.).....	145

D

Desgagne v. Yuen, [2006] B.C.J. No. 1418, 56 B.C.L.R. (4th) 157 (S.C.).....	7, 9, 55, 64, 67, 68, 69, 72, 91, 92
Dickson v. Broan-NuTone Canada Inc., [2007] O.J. No. 5114 (S.C.J.)...	79
Dominey v. Cosmetology Assn. of Nova Scotia, [2004] N.S.J. No. 236, 2004 NSSC 116 (S.C.).....	46
Doucet v. Spielo Manufacturing Inc., [2006] N.B.J. No. 299, 2006 NBQB 249 (Q.B.).....	84
Doucet v. Spielo Manufacturing Inc., [2007] N.B.J. No. 254, 2007 NBQB 245 (Q.B.).....	76
Doust v. Schatz, [2002] S.J. No. 674, 2002 SKCA 129 (C.A.).....	68, 74
Dreco Energy Services Ltd. v. Wenzel, [2006] A.J. No. 546, 2006 ABQB 356 (Q.B.).....	3, 4
Dublin v. Montessori Jewish Day School of Toronto, [2006] O.J. No. 974, 29 C.P.C. (6th) 77 (S.C.J.).....	99
Dulong v. Consumers Packaging Inc., [2000] O.J. No. 161 (S.C.J.)...	71, 75
Dyk v. Protec Automotive Repairs, [1997] B.C.J. No. 1895 (S.C.).....	81

E

Eastmond v. Canadian Pacific Railway, [2004] F.C.J. No. 1043 (F.C.)....	85
eBay Canada Ltd. v. Canada (National Revenue), [2007] F.C.J. No. 1202 (F.C.), affd [2008] F.C.J. No 1527 (F.C.A.).....	57
Ebco Metal Finishing Ltd. v. I.A.B.S.O.I., Local 712, [2004] B.C.C.A. No. 260.	157
Enbridge Gas Distribution Inc. v. Toronto Dominion Bank (TD Canada Trust), [2008] O.J. No. 1182 (S.C.J.).....	131
Endean v. Canadian Red Cross Society, [1998] B.C.J. No. 724, 157 D.L.R. (4th) 465 (C.A.)	4

F

Fareed v. Wood, [2005] O.J. No. 2610 (S.C.J.)	33
Farris v. Staubach Ontario Inc., [2006] O.J. No. 2335 (S.C.J.).....	71
Ferenczy v. MCI Medical Clinics, [2004] O.J. No. 1755, 70 O.R. (3d) 277 (S.C.J.).....	157
Fi v. Canada (Minister of Citizenship and Immigration), [2006] F.C.J. No. 1401 (F.C.).....	144
First Choice Capital Fund Ltd. v. First Canadian Capital Corp., [1999] S.J. No. 875, 1999 SKQB 235 (Q.B.).....	130
Ford v. Hopkins (1701), 1 Salk. 283, 90 E.R. 964 (K.B.).....	147

Franco v. Hackett, [2000] A.J. No. 415, 2000 ABQB 241 (Q.B.)	50
Fraser v. Houston, [1997] B.C.J. No. 1537, 36 B.C.L.R. (3d) 118 (S.C.).....	89

G

Galenzowski v. Awad, [2007] S.J. No. 648, 2007 SKQB 436 (Q.B.).....	79
GEA Group Ag v. Ventra Group Co., [2008] O.J. No. 5417 (S.C.J.)	131
Geophysical Service Inc. v. Sable Mary Seismic Inc., [2003] N.S.J. No. 118, 2003 NSSC 73 (S.C.)	132
Giroux v. Lafrance, [1993] O.J. No. 2358, 19 C.P.C. (3d) 12 (Gen. Div.).....	156
Goldman, Sachs & Co. v. Sessions, [2000] B.C.J. No. 65, 2000 BCSC 67 (S.C.).....	92
Goodman v. Rossi, [1995] O.J. No. 1906 (C.A.)	87
Goodridge v. King, [2007] O.J. No. 4611 (S.C.J.).....	56, 143
Green v. Winnipeg Police Dept., [1996] M.J. No. 219, [1996] 6 W.W.R. 378 (Q.B.)	154
Grenzservice Speditions Ges.m.b.H. v. Jans, [1995] B.C.J. No. 2481 (S.C.).....	94
Guy Chem. Co. v. Romaco AG, 243 F.R.D. 310, 2007 U.S. Dist. LEXIS 37636 (N.D. Ind. 2007)	61

H

Harris Scientific Products Ltd. v. Araujo, [2005] A.J. No. 1107, 2005 ABQB 603 (Q.B.).....	132
Heriot v. Byrne, 257 F.R.D. 645, 2009 LEXIS 22552 (N.D. Ill. 2009) ...	96
Hermes Canada Inc. v. John Doe (18 August 2005), Vancouver Registry No. S054602 (S.C.)	88
HSBC Bank Canada v. Creative Building Maintenance Inc., [2006] O.J. No. 2190 (S.C.J.)	70
Hummingbird v. Mustafa, [2007] O.J. No. 3624 (S.C.J.)	7, 55

I

Innovative Health Group Inc. v. Calgary Health Region, [2008] A.J. No. 615, 2008 ABCA 219 (C.A.)	61, 76, 84
Ireland v. Low, [2006] B.C.J. No. 1592, 2006 BCSC 393 (S.C.)	92
Irwin Toy Ltd. v. Doe, [2000] O.J. No. 3318 (S.C.J.).....	94
Isofoton S.A. v. Toronto Dominion Bank, [2007] O.J. No. 1701 (S.C.J.).....	130, 131

ITV Technologies, Inc. v. WIC Television Ltd., [2003] F.C.J. No. 1335 (F.C.).....	56, 148, 150
--	--------------

J

Jaskhs v. 1444707, [2004] O.J. No. 4062 (S.C.J.).....	76
Jay v. DHL Express (Canada), Ltd., [2009] P.E.I.J. No. 5 (C.A.).....	77
JDS Uniphase Inc. v. Metconnex Canada Inc., [2006] O.J. No. 4148 (S.C.J.).....	61, 62
John Stagliano Inc. v. Elmaleh, [2006] F.C.J. No. 752, 2006 FC 585 (F.C.).....	132
Jorgensen v. San José Mines Ltd., [2004] B.C.J. No. 2618, 2004 BCSC 1653 (S.C.).....	61
Joseph Pruner Ltd. v. Ford Motor Co. of Canada, [1992] O.J. No. 88 (Gen. Div.).....	55
Juman v. Doucette, [2008] S.C.J. No. 8, [2008] 1 S.C.R. 157 (S.C.C.)....	88

K

Kacperski v. Orozco, [2005] A.J. No. 575 (C.A.).....	4
Kairos Community Development Ltd. v. Nova Scotia (Attorney General), [2007] N.S.J. No. 462, 2007 NSSC 330 (S.C.).....	76
Kay v. Posluns, [1989] O.J. No. 1914, 71 O.R. (2d) 238 (H.C.J.)	71
Kent v. Laverdiere, [2009] O.J. No. 1522 (S.C.J.).....	143
King v. Merrill Lynch Canada Inc., [2005] O.J. No. 5028 (S.C.J.)...	131
Kourtesis v. Joris, [2007] O.J. No. 2677 (S.C.J.)	143
Kremen v. Cohen, 337 F.3d 1024 (9th Cir. 2003).....	55, 56, 91, 149
Kronisch v. United States, 150 F.3d 112, 126, 1998 U.S. App. LEXIS 15189 (2d Cir. 1998).....	79
Kunz v. Kunz Estate, [2004] S.J. No. 632, 2004 SKQB 410 (Q.B.).....	88

L

L. H. v. Caughell, [1996] O.J. No. 3331 (Gen. Div.)	88
L.S. v. Alberta (Director of Child, Youth and Family Enhancement), [2009] A.J. No. 12, 2009 ABCA 10 (C.A.)	156
Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc., [2001] S.C.J. No. 49, [2001] 2 S.C.R. 743 (S.C.C.).....	87
Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] S.C.J. No. 83, [1989] 2 S.C.R. 574 (S.C.C.)	30, 142
Landmark Legal Foundation v. Environmental Protection Agency, 272 F. Supp. 2d 70, 2003 U.S. Dist. LEXIS 12684 (D.D.C. 2003).....	4

Landolfi v. Fargione, [2006] O.J. No. 1226, 25 C.P.C. (6th) 9 (C.A.)....	156
Leduc v. Roman, [2009] O.J. No. 681 (S.C.J.)	92, 143
Letourneau v. Clearbrook Iron Works Ltd., [2003] F.C.J. No. 1213, 2003 FC 949 (F.C.).....	88
Lewy v. Remington Arms, 836 F.2d 1104, 1988 U.S. App. LEXIS 83 (8th Cir. 1988)	15, 16, 64, 65
Liquids Inc. v. Jean, [2008] O.J. No. 1424 (S.C.J.).....	114
Loblaw Companies Ltd. v. Aliant Telecom Inc., [2003] N.B.J. No. 208, 2003 NBQB 215 (Q.B.).....	131
Logan v. Harper, [2003] O.J. No. 4098, (S.C.J.).....	60, 62

M

M.(A.) v. Ryan, [1997] S.C.J. No. 13, [1997] 1 S.C.R. 157 (S.C.C.).....	89, 90, 91
Malcolm v. Transtech Holdings Ltd., [2000] B.C.J. No. 1233, 2000 BCSC 943 (S.C.), revd [2001] B.C.J. No. 413 (C.A.)	33
McCaffrey v. Paleolog, [2006] B.C.J. No. 65, 2006 BCSC 69 (S.C.).....	72
McDonald-Wright v. O'Herlihy, [2005] O.J. No. 135 (S.C.J.).....	66
McDougal v. Black & Decker Canada Inc., [2008] A.J. No. 1182, 2008 ABCA 353 (C.A.).....	77, 78
Metropolitan Opera Association Inc. v. Local 100, Hotel Employees and Restaurant Employees International Union, 212 F.R.D. 178, 2003 U.S. Dist. LEXIS 1077, 171 L.R.R.M. 2891 (S.D.N.Y. 2003).....	4
Miele v. Humber River Regional Hospital, [2004] O.J. No. 831 (S.C.J.)	66
Milsom v. Corporate Computers Inc., [2003] A.J. No. 516, 2003 ABQB 296 (Q.B.).....	27
Morgan Stanley & Co. Inc. v. Coleman (Parent) Holdings, Inc., 955 So. 2d 1124, 2007 Fla. App. LEXIS 4167 (Dist. Ct. App. 4th Dist. 2007)	63
Morgan v. Outerbridge, [1987] O.J. No. 2361, 23 C.P.C. (2d) 127 (H.C.J.).....	51
Muro v. Target Corp., 243 F.R.D. 301, 2007 U.S. Dist. LEXIS 41442 (N.D. Ill. 2007)	95

N

Nac Air, LP v. Wasaya Airways Limited Partnership, [2007] O.J. No. 4618 (S.C.J.)	132
National Bank Financial Ltd. v. Potter, [2004] N.S.J. No. 192, 2004 NSSC 100 (S.C.).....	99