



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER  
— for —  
British Columbia

Order P08-03

**IRONWOOD CHIROPRACTIC AND MASSAGE THERAPY CLINIC**

Gale L. Prestash, Adjudicator

December 5, 2008

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**Summary:** Two complainants said the \$105.00 fee charged by a chiropractor in addition to photocopy charges to provide copies of their clinical records was excessive and should be reduced or excused. The chiropractor set the fee based on his past practice that followed his professional association's fee guidelines. The adjudicator found that the fee was not reasonable. The circumstances were appropriate to order a partial refund.

**Statutes Considered:** *Personal Information Protection Act* ss. 23, 32(2) and (3), 36(2)(c), 52(3)(c); *Freedom of Information and Protection of Privacy Act*, BC Reg.323/93 s. 7 and Schedule 1.

**Authorities Considered:** **B.C.:** Order F08-11, [2008] B.C.I.P.C.D. No. 19; Order P08-02, [2002] B.C.I.P.C.D. No. 18.

**Cases Considered:** *McInerney v. MacDonald*, [1992] S.C.J. No. 57.

## 1.0 INTRODUCTION

[1] Two complainants asked their chiropractor for medical legal reports and copies of their clinical records. The chiropractor charged each complainant a fee for the copies of the records of \$105.00 plus photocopying costs of \$1.00 per page.

[2] The complainants paid the fees and got their records. They then wrote to the chiropractor complaining that the \$105.00 part of the fee was a service charge and that the *Personal Information Protection Act* ("PIPA") did not allow

him to charge that.<sup>1</sup> They wrote another letter asking that he refund them \$105.00 each and they complained that he did not have policies in place to comply with s. 5 of PIPA.<sup>2</sup>

[3] The chiropractor refused their request for refunds. They complained to this Office. Mediation through this Office resolved the complaint about the chiropractor's compliance with s. 5 but did not resolve the dispute about the fee. The complainants agreed to combine their two fee complaints and one inquiry under Part 11 of PIPA was held.<sup>3</sup>

[4] This Office invited the British Columbia College of Chiropractors ("College") and the British Columbia Chiropractors Association ("Association") to participate in this inquiry as intervenors and they did.

[5] The "organization" under PIPA is the chiropractor who is the proprietor of Ironwood Chiropractic and Massage Therapy Clinic. I will refer to the organization as the "chiropractor."<sup>4</sup>

## 2.0 ISSUE

[6] The Notice of Written Inquiry this Office sent to the parties stated that the issue to be decided is whether the fee requested by the organization is reasonable under ss. 32(2) and 36(2)(c) of PIPA.

[7] Section 51 of PIPA sets out the burden of proof for certain issues, but not the issue in this inquiry. Each party therefore provides argument and evidence to justify its position on the issue.

## 3.0 DISCUSSION

[8] **3.1 Preliminary Issue**—In their initial submission the complainants raised the issue that the chiropractor had not given them written fee estimates before providing them the records, as required by PIPA s. 32(3)(a).<sup>5</sup>

[9] I have decided not to consider whether s. 32(3)(a) applies in this case. The only issue set out in the Notice of Inquiry was whether or not the fee was reasonable. The parties were advised through the process of the complaint, mediation and the inquiry that that was the issue. One of the purposes of

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<sup>1</sup> Complainants' letter of July 4, 2006.

<sup>2</sup> Complainants' letter of July 17, 2006. Section 5 requires organizations to develop and follow policies and practices necessary for them to meet their obligations under PIPA, including a process to respond to complaints, and to make that information available on request.

<sup>3</sup> Portfolio Officer's Fact Report, para. 10.

<sup>4</sup> Chiropractor's initial submission, p. 2, College's submission, para. 4.

<sup>5</sup> Complainants' initial submission, para. 2.

mediation is to allow a complainant to raise issues for inclusion in an inquiry.<sup>6</sup> The complainants did not raise the issue of a written fee estimate until their initial submission. The chiropractor has not had an adequate opportunity to respond to the issue.

[10] **3.2 Background**—The complainants requested that the chiropractor provide each of them with the following:<sup>7</sup>

...a certified detailed narrative report. Please also provide us with a copy of our clinical records including handwritten records and X-rays, CT scan, and MRI reports, which will be used as evidence in making our case to the insurance company.

[11] Their letter advised the chiropractor that they needed the information to pursue their insurance claims, and they asked him to review their records and address certain topics in his report, such as the nature and extent of their injuries. The letter included the statement, “We will promptly remit payment for these reports upon receipt of your invoice, whether received before or after you have completed this work for us.”

[12] The chiropractor wrote the reports and provided them to the complainants with the copies of their clinical records. They accepted his fee for doing the reports. He also charged to provide the copies of their records: \$105.00 plus \$1.00 per page copied. One complainant paid \$115.00 (\$105.00 plus \$10.00 for 10 pages). The other complainant paid \$112.00 (\$105.00 plus \$7.00 for 7 pages). The complainants objected to the \$105.00 part of those charges. They said that fee was a “service charge” and that what PIPA allowed was “a minimal photocopying charge.”<sup>8</sup>

[13] The chiropractor told them he set that fee using a recommended fee guideline put out by the Association. The complainants complained to the College. Its Discipline Committee dismissed their complaints, on the basis that the chiropractor had followed the Association’s fee guideline.<sup>9</sup>

[14] **3.3 The Participants’ Positions**

*The complainants*

[15] The complainants said the \$105.00 part of the fee was not “minimal,” as required by PIPA s. 32(2). They referred to the following statements in a guide for businesses this Office published:

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<sup>6</sup> Order F08-11, [2008] B.C.I.P.C.D. No. 19, at para. 12, including reference to earlier orders.

<sup>7</sup> April 19, 2006 letter requesting access to records.

<sup>8</sup> July 4, 2006 letters from the complainants to the chiropractor.

<sup>9</sup> College initial submission, Alderson affidavit at para. 18, and Exhibit E, December 14, 2006 letter from the Discipline Committee to the complainants.

A fee could include actual, out-of-pocket, costs such as copying and postage, but not a handling or processing fee.

If the request involves only a few pages of documents that are easy to locate, the fee should be small.<sup>10</sup>

[16] They said \$105.00 was not “minimal” in the circumstances. They argued that they were current patients in the clinic, so their records were easy to locate and should not have required much review. There were few pages (10 and 7) and they picked up the records, so there was no postage cost. They argued that the charge for photocopying at \$1.00 per page should cover the handling and processing of their records.

[17] The complainants said that the chiropractor should not have used the Association’s fee guideline because “[T]his guideline is recommended by the BCCA for fees charged when records are requested by an attorney and not the individual patient.”<sup>11</sup> They described their request as “a personal request according to s. 23(1) of PIPA.”<sup>12</sup> They suggested that the fee should be comparable to the \$30.00 fee for a chiropractic treatment.<sup>13</sup>

### *The chiropractor*

[18] The chiropractor said that he followed his past practice. When a lawyer, or a patient, asks him for a report and a copy of records for legal purposes, such as an insurance claim, he follows the Association’s recommended fee guideline for producing the report, and photocopying the records. He submitted a one-page document titled “B.C. Chiropractic Association 2007 Legal Fee Guidelines” which includes the following statement:

7. **Photocopy of records** – includes, retrieval, review, copying, and forwarding of information. Fees for the copy of x-rays are not included in this guide. Fees for the copy of x-rays are determined in part by the facility providing this service.

**FEE:        \$105.00 + \$1.00 per page reviewed<sup>14</sup>**

<sup>10</sup> “A Guide for Businesses and Organizations to British Columbia’s *Personal Information Protection Act*” (February 2005) at page 33, available at [www.oipc.bc.ca/pdfs/private/a-GUIDE\\_TO\\_PIPA\(3rd\\_ed\).pdf](http://www.oipc.bc.ca/pdfs/private/a-GUIDE_TO_PIPA(3rd_ed).pdf). This document is a helpful guide. However, it is a guide and it is not binding.

<sup>11</sup> Complainants’ initial submission, para. 3.

<sup>12</sup> Complainants’ reply submission, para. 3.

<sup>13</sup> Complainants’ initial submission, para. 4.

<sup>14</sup> Chiropractor’s initial submission, attachment. Emphasis in original. There are three versions of the Association’s “Legal Fee Guidelines” in evidence. The chiropractor submitted this one. The Association submitted a 2003 version, and an April 2007 version that is updated from the 2007 version the chiropractor submitted. I will use the term “fee guideline” and note the version when referring to these documents.

[19] The chiropractor referred to the fee guidelines for physicians when they review and photocopy records.<sup>15</sup> He pointed out the higher fees for a physician's review of records suggested in that guideline, and the following note about that review:

The fee for this service can be adjusted at the physician's discretion based on the extent of physician involvement and secretarial and other direct or indirect costs.<sup>16</sup>

[20] The chiropractor said that it was clear that the complainants needed the records for a legal purpose: the pursuit of their insurance claims. He stated that when he is providing records that will be used as evidence, he reviews the records himself to ensure that he is knowledgeable about the patient's case history in the event he is called on to be a witness. He cannot therefore rely solely on administrative staff to produce those records.

[21] He stated that in his practice he stores records in three locations, and briefly explained why. He said he considers a number of factors when reviewing records for release, including the following:

These include reviewing whether the file contained communication or records from other health care providers, ensuring that the file was current, ensuring that all relevant documents were in the file, reviewing if there was a time period to consider, reviewing whether the file contained irrelevant information or whether the file contained extremely sensitive personal information.<sup>17</sup>

[22] The chiropractor estimated that it took 40 minutes per file for him and his staff combined to retrieve the records from the three locations, and review, photocopy and forward them. He estimated his total business cost per file for those 40 minutes at \$120.00, based on his professional billing rate of \$180.00 per hour. He disputed the complainants' suggestion that a \$30.00 treatment cost was a good comparison for what would be a reasonable fee because of the different services he provides in the two circumstances.

[23] The chiropractor said he responds differently when he is asked to provide records for someone's personal use as opposed to legal purposes. He gave as examples of "personal use" or "personal purpose" where a patient is transferring to another chiropractor, moving out of town or travelling. He said the records he provides in those instances are at most two pages, do not need to be reviewed by him, are copied by staff and sent out. He does not charge a fee for that.

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<sup>15</sup> He attached a copy of the section from the British Columbia Medical Association's Guide to Fees (April 1, 2007) on Medical – Legal Matters.

<sup>16</sup> At page B-4.

<sup>17</sup> Chiropractor's initial submission, p. 3.

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*The College*

[24] The College provided affidavit evidence from its Registrar, Dr. Douglas Alderson. Under the *Chiropractors Act*, the College is the governing body for the chiropractic profession in the province. The chiropractor is a member in good standing.<sup>18</sup>

[25] Dr. Alderson said when the complainants complained about the fees to the College he forwarded the complaints to the College's Ethics and Discipline Committee.<sup>19</sup> The Committee reviewed the complaints under its *Rules* and dismissed them. It found that the chiropractor had followed the Association's fee guideline recommendation of \$105.00 plus photocopying where records were produced for insurance claims or potential litigation. The Committee found that since the complainants requested the records for that purpose, the fee was not excessive.<sup>20</sup>

[26] Dr. Alderson said that "[T]he College has not established and does not enforce maximum or minimum fees for any goods or services that members provide to their patients."<sup>21</sup> He reviewed parts of the College's Professional Conduct Handbook, section 4. Those parts require that members be reasonable in the fees they charge, and discuss fees with patients when appropriate.

[27] The College's submission referred to other statements in the Professional Conduct Handbook section on Professional Fees. Those require members to consider the welfare of the patient above all else, the professional service rendered and the patient's ability to pay. Members are required to discuss fees with patients when the proposed fees exceed those customarily charged. The College argued that none of those circumstances arose in the context of these complaints.

[28] Finally, the College said that it expects members to comply with the statement in the Handbook's Introduction that reminds members of their obligation to know and abide by legislation that governs the practice of chiropractic in the province. That statement lists several statutes, including PIPA.

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<sup>18</sup> Alderson affidavit paras. 3 and 4.

<sup>19</sup> Dr. Alderson states in paragraph 6 that this was done pursuant to Division 12 of the *Rules Pursuant to the Chiropractors Act* attached as Exhibit D to his affidavit. What is attached as Exhibit D are excerpts from the British Columbia College of Chiropractors Professional Conduct Handbook (the Table of Contents, Introduction p. 2, and section 4 "Professional Fees" p. 7). Dr. Alderson and counsel for the College refer to those excerpts as Exhibit F to Dr Alderson's affidavit. There is however no Exhibit F attached.

<sup>20</sup> December 14, 2006 letter from the Committee to the complainants, Alderson affidavit Exhibit E.

<sup>21</sup> Para. 8.

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### *The Association*

[29] The Association provided affidavit evidence from its Executive Director Dr. Don Nixdorf. He said that “[T]he Association is a society which has as its purpose the promotion and advancement of the profession of chiropractic and services provided by chiropractors in British Columbia.”<sup>22</sup>

[30] Dr. Nixdorf stated that the Association developed the fee guideline as a service to the profession. The guideline suggests fees for legal reports and related activities, and photocopying records. He submitted a 2003 version of the fee guideline. He advised that the Association had revised the fee guideline in April 2007 and he also submitted that version. He submitted the section from the British Columbia Medical Association’s Guide to Fees (April 1, 2007) on Medical – Legal Matters.<sup>23</sup>

[31] Dr. Nixdorf said that the Association revised its fee guideline after considering public information from this Office about fees for production of clinical records to patients. He said the April 2007 revisions attempt to balance patients’ need for affordable access to clinical records, and the health care practitioners’ obligations to review the records to make sure that producing them would not have “a substantial adverse effect on the physical, mental or emotional health of the patient or result in harm to a third party.”<sup>24</sup>

[32] In his opinion, based on his experience, it takes a chiropractor considerable time and resources to respond to a request to produce clinical records. He described the steps that the chiropractor has to take as follows:

...first receiving the request, then locating the records, reviewing the records, considering the circumstances of the patients and providing instructions for copying and producing the records. Where x-ray and other imaging studies are requested with the clinical records, there will be extra work locating those studies and interacting with the facilities that copy them, as well as, additional copying charges. As well, it is not unusual for this process to be conducted outside of normal clinic hours.<sup>25</sup>

[33] The Association in its submission referred me to the Supreme Court of Canada decision *McInerney v. MacDonald*.<sup>26</sup> It described the Court’s ruling as obliging health care providers “to review treatment records prior to production to ensure the records do not include information that could have a substantial adverse effect on the physical, mental or emotional health of the patient or result in harm to a third party.”<sup>27</sup>

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<sup>22</sup> Nixdorf affidavit para. 3.

<sup>23</sup> Nixdorf affidavit Exhibit B.

<sup>24</sup> Nixdorf affidavit paras. 6 and 7.

<sup>25</sup> Nixdorf affidavit para. 8.

<sup>26</sup> [1992] S.C.J. No. 57.

<sup>27</sup> Association’s submission, para. 6.

[34] The Association compared its guidelines on fees and photocopying charges for producing clinical records to those of the British Columbia Medical Association. It explained some of the revisions it made to its fee guideline to comply with PIPA requirements. It suggested that the April 2007 guideline fee of \$35.00 for production of clinical records was reasonable and met the PIPA requirement that the fee be minimal.

[35] **3.4 Fees for Access**—Section 23 gives individuals a right of access to their personal information held by an organization. Section 32(2) allows an organization to charge a fee for that access, as follows:

32(2) An organization may charge an individual who makes a request under section 23 a minimal fee for access to the individual's personal information that is not employee personal information concerning the individual.

[36] A complaint can be brought to the Commissioner under s. 36(2)(c) that a fee required by an organization “is not reasonable.” Section 52(3)(c) gives the Commissioner authority to confirm, excuse or reduce a fee, or order a refund, in the appropriate circumstances.<sup>28</sup>

[37] In Order P08-02, Adjudicator Boies Parker considered the term “minimal” as follows:

[38] The term “minimal” is not defined in PIPA. In view of PIPA’s objectives, a “minimal” fee should be based on the costs which an organization necessarily incurs, viewed objectively, in providing access to requested personal information. That is, such a fee should be in aid of recovering an organization’s actual, necessarily incurred costs, rather than generating revenue.

[39] This is not to say, however, that a “minimal” fee will always cover *all* of the costs associated with responding to an access request. While PIPA does not explicitly exclude charges for activities such as severing a record, the term “minimal” in s. 32(3) suggests that the fees which an organization may charge are limited to those which cover costs incurred in actually providing access to the applicant, namely, those associated with the activities of locating, retrieving and producing a record; preparing a record for disclosure; shipping and handling the record; and providing a copy of the record.

[38] I agree with Adjudicator Boies Parker in Order P08-02 that an organization’s costs should be viewed objectively.

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<sup>28</sup> In Order P08-02, [2008] B.C.I.P.C.D. No. 18, Adjudicator Catherine Boies Parker discussed these PIPA fee provisions and related remedies.



[39] I must consider the chiropractor's costs of providing access to personal information under PIPA, without taking into account the complainants' intended use of their personal information. The right of access in s. 23 does not depend on the individual's intended use of his or her personal information.<sup>29</sup> The chiropractor's decision about how much to charge was very much influenced by the fact that the complainants wanted the records to use in their insurance claims and not for purposes that he defined as "personal use."<sup>30</sup> He followed the fee guideline, which was designed to give guidance for legal matters.

[40] I have kept in mind that the chiropractor did not have the benefit of the Association's revisions to the fee guideline done with PIPA's requirements in mind. The April 2007 fee guideline starts with the reminder that it is a guide only:

The following are **suggested** fees for legal reports and related activities. Chiropractors may charge more or less for these reports and activities as circumstances warrant. *[emphasis in the original]*

[41] The April 2007 fee guideline section on providing clinical records reads as follows:

7. **Photocopy of records** - includes, retrieval, review, copying, and forwarding of information. Fees for the copying of x-rays are not included in this guide, as they are determined in large part by the facility providing this service.

**FEE:** - review of records: **\$35.00** (see below)  
- copying of records: **\$1.25** for first 10 pages and **\$.30** for all subsequent pages

**NOTE:** Under section 32(2) of the *Personal Information Protection Act* chiropractors may only charge "a minimal fee" to produce personal records requested by a patient. The Office of the Information and Privacy Commissioner has said this fee can include "actual out-of-pocket costs such as copy charges and postage", but should not be "a barrier to access" to the records. However, the law also requires health-care professionals to review treatment records prior to their production to ensure the records do not include information that could have a substantial adverse effect on the physical, mental or emotional health of the patient or result in harm to a third party. In most cases, chiropractic treatment records will not contain information giving rise to these concerns, and therefore, extensive review should not be necessary. While the fees charged for production of treatment records may include an amount for this review, the amount should be commensurate with the actual time and effort involved and in keeping the obligation to ensure the

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<sup>29</sup> Intended use may be a factor that affects the organization's decision not to disclose information in order to comply with s. 23(4)(a) and (b).

<sup>30</sup> This distinction based on use was also the basis for the College's Discipline Committee finding.

overall fee is “minimal” and not “a barrier to access” of the records. Chiropractors should develop an office policy regarding the fees to be charged when responding to such requests, either calculating the **actual** costs for copying and delivery on each request, or adopting a “minimal” flat fee that will cover the cost of responding to most requests but not reasonably prevent patients from obtaining their records. *[emphasis in the original]*

[42] The chiropractor had to review the records for two reasons—to produce an informed medical legal narrative report and to provide access.<sup>31</sup> He also reviewed the records for factors I would describe as completeness. He also reviewed them for “extremely sensitive personal information” and for communications from third-party health care providers. There is no evidence that those factors required particular attention.

[43] In the context, the professional attention he had to spend reviewing the records to provide access could have been included in his review for the narrative report. He did not suggest he had to review the records twice. He was compensated for the medical legal report at a professional rate. In these circumstances it was not appropriate for him to include a charge in the access fee for his professional time reviewing the records for the purpose of providing access.

[44] He also reviewed the records to ensure he would be a credible witness if he was called upon to give evidence in legal proceedings. While professionally reasonable, and perhaps necessary for the purposes of the medical legal report, he was not required to do that to respond to the complainants’ access requests and it was not reasonable to include any cost for that in the fee for access.

[45] He checked to make sure all relevant documents were in the file, that there was no irrelevant information, and that the file was current. I agree that the chiropractor needed to check to make sure that the complainants got all responsive records. Any updating of records that should have been done in the ordinary course of business ought not to be included in a fee for access, although I say this noting that the evidence is not clear whether he or his staff took any time for that purpose.

[46] As regards the description of the physical steps the chiropractor likely had to take, as given by the Association’s Executive Director,<sup>32</sup> there is no evidence that those steps in this case were complex or demanding. The volume of records was small.

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<sup>31</sup> As well as ensuring its response to the access request is complete, an organization must comply with s. 23(4) of PIPA, which sets out circumstances where the organization must not disclose information.

<sup>32</sup> Nixdorf affidavit, para. 8.

[47] There is no evidence that retrieval of records from three locations in the clinic was a long or difficult job. The complainants noted that, since they were current patients, it should not have taken much time to update and review their records.<sup>33</sup> Considering all of the steps that the chiropractor and his staff had to take, including that they had to retrieve the files to do the medical legal report, the 80 minutes he estimated for the two files together was generous to say the least. I appreciate that the time was an estimate. The amount of time is in any case only one factor to consider.

[48] As set out in Order P08-02, providing access ought not to have a profit component. I assume the chiropractor's professional fee has profit built into it. The chiropractor used his professional rate for the entire task, including time he estimated his staff spent preparing the records and time he estimated he spent on his professional review of the records.

[49] The chiropractor did not give a specific cost for the copying—he included it in his estimate of what it cost him to provide the records.<sup>34</sup> The \$1.00 per page he charged for the photocopies complied with the Association's then current fee guideline. It was much higher than the \$0.25 per page that public bodies may charge under similar legislation.<sup>35</sup>

[50] The evidence as a whole supports that the chiropractor incurred more costs than the \$10.00 and \$7.00 the complainants paid for the photocopies. It does not support total fees of \$115.00 and \$112.00. Some of the review the chiropractor did was not necessary to respond to the access request, such as preparing himself in case he was called as a witness. His review for the medical legal report, for which he was paid at a professional rate, could have included the professional attention he had to spend to provide access, and the circumstances did not warrant charging for that twice. The professional rate he charged exceeded cost recovery by including a profit component and by being applied to the administrative part of the task. I agree with Adjudicator Boies Parker in Order P08-02 that a minimal fee will not always cover *all* of the costs associated with responding to an access request.

[51] I find that in all the circumstances the \$105.00 fee charged to each complainant in addition to the photocopy charges was not reasonable and that an appropriate fee would have been \$25.00 in total charged to each of them. Given the amounts they have already paid, I will order partial refunds.

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<sup>33</sup> Initial submission para. 4.

<sup>34</sup> Chiropractor's initial submission p. 4.

<sup>35</sup> B.C. Reg. 323/93 s. 7 and Schedule 1. I agree with Adjudicator Boies Parker in Order P08-02 that, while PIPA and the *Freedom of Information and Protection of Privacy Act* are separate regimes, it may be useful in some respects to consider the latter when interpreting and applying PIPA.

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#### **4.0 CONCLUSION**

[52] For the reasons set out above, I consider the circumstances are appropriate to order a partial refund. Under PIPA s. 52(3)(c), I order the chiropractor to refund \$90.00 to the complainant who paid \$115.00 and to refund \$87.00 to the complainant who paid \$112.00.

[53] I require the chiropractor to give the complainants the refunds ordered within 30 days of the date of this order, as PIPA defines "day", that is, on or before January 21, 2009 and, concurrently, to copy me on its cover letter to the complainants.

December 5, 2008

#### **ORIGINAL SIGNED BY**

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Gale L. Prestash  
Adjudicator

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