

## Public Disclosure of Private Facts

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Readers of these periodically issued Briefs will have noted that in an era marked by rapid technologically enabled social change, constrained regulatory budgets, crowded legislative agendas and mounting evidence of the widespread under-protection of sensitive personal information, Canadian courts have adopted an activist stance in response to innovative lawsuits launched by individuals seeking redress for alleged breaches of privacy rights.

Notable in this regard was the decision of the Ontario Court of Appeal<sup>1</sup> nearly four years ago to recognise an independent common law cause of action for breach of privacy in a factual situation in which the Canadian federal *Personal Information Protection and Electronic Documents Act* was the relevant "background" private sector privacy statute. In *Jones*, a case which involved repeated improper access to personal information by a "rogue" bank employee, the court expressed its intention to not "open the litigation floodgates" and stated that the following elements needed to be satisfied in order to establish a successful intrusion upon seclusion claim:

- (1) the defendant's conduct must have been intentional (which includes reckless behaviour);
- (2) the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and
- (3) a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.

Note, however, that proof of actual harm was not included as an element of this cause of action.

Subsequently, in the case of *Hopkins v. Kay*<sup>2</sup> the Ontario Court of Appeal upheld the lower court's expansion of the operation of tort of intrusion upon seclusion to claims which also fall within the scope of Ontario's *Personal Health Information Protection Act*. *Hopkins* was in turn relied upon by the Federal Court to support the certification of a class proceeding respecting loss of student loan related data by the federal Ministry of Human Resources and Skills Development<sup>3</sup>. Liability for tortious intrusion upon seclusion has fallen in the general range of \$10,000 to \$20,000, depending on the egregiousness of the facts in each particular case. When this damages range is multiplied by the number of individual plaintiffs who are often included in a class action, the overall potential monetary exposure may therefore be very significant. The tort now clearly applies in Ontario and may also apply in Alberta, Nova Scotia, New Brunswick and Prince Edward Island. A statute-based breach of privacy claim can potentially issue in British Columbia, Saskatchewan, Manitoba and Newfoundland (a similar provision is also included in the *Quebec Civil Code*).

As noted, the ambit of the new Ontario breach of privacy tort was carefully circumscribed to fit the facts that were present in the *Jones* case; however, Justice Sharp who wrote the reasons on behalf of the unanimous three judge panel also acknowledged the existence in the US of a "4 privacy tort catalogue", which included within it a tort aimed at providing a remedy in the circumstances where the defendant was responsible for the public disclosure of embarrassing private facts about the plaintiff. This second privacy tort "shoe" dropped in Canada in the summer of 2015 when the Federal Court accepted the tort of public disclosure of private facts as a basis for its certification of a class action lawsuit against the Government of Canada launched by aggrieved individuals each of whom was sent a letter by Health Canada identifying their involvement in the Marijuana Medical Access Program on the outside of the envelope.

Most recently, a decision issued by the Ontario Superior Court of Justice in the case of *Jane Doe 464533 v. X*<sup>4</sup> (the defendant's name is subject to a publication restriction) has given further weight to the view that recourse to a 2 privacy tort catalogue may now be made in Ontario. The case involved very troubling set of facts about a sexually explicit video of a woman being posted to a website by her ex-boyfriend in violation of express promises of confidentiality made by him to her<sup>5</sup>. The defendant never filed a statement of defence, ultimately elected to represent himself and did not attend to oppose the plaintiff's motion for default judgment - all of which undercuts the precedential value of this decision. Nevertheless, there is now judicial support for the proposition that, at least in Ontario, a second common law cause of action for breach of privacy exists for which the elements are:

- (1) a person publicizes the private affairs of another;
- (2) the matter(s) publicized or the act of the publication would be highly offensive to a reasonable person; and



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(3) the private affairs are not of legitimate concern to the public.

In this most recent case the plaintiff was awarded \$100,000 in damages (the maximum available procedurally) plus interest and costs on a full indemnity basis. This amount is markedly higher than the top of the damages range established for a successful action for intrusion on seclusion, perhaps because Justice Stinson also found the defendant liable for breach of confidence and intentional infliction of mental distress. It will be interesting to see how this latest development is viewed by other judges, particularly since it appears that finding the plaintiff liable for breach of confidence provided a sufficient basis for rendering justice in the case. What remains clear is the willingness of Canadian judges to extend the reach of tort law to accommodate innovative claims alleging breaches of privacy rights.

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<sup>1</sup> *Jones v. Tsige*, 2012 ONCA 32

<sup>2</sup> 2015 ONCA 112

<sup>3</sup> *Condon v. Canada*, 2014 FC 250

<sup>4</sup> 2016 ONSC 541

<sup>5</sup> In November 2015, the Province of Manitoba enacted legislation to create the tort of "non-consensual distribution of intimate images": see The *Intimate Image Protection Act*, C.C.S.M. c. 187, s. 11, which came into force on January 15, 2016. Under s. 161.1 of the *Criminal Code* anyone who publishes an intimate image of a person without that person's consent is guilty of an offence and can be sentenced to up to five years in prison.