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A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

Intrusion into Seclusion - Breach of Privacy Actions

Can you sue someone for invading your privacy? Until recently the answer was no. That has now changed and there may be implications, at least in the long term, for regulators.

Until recently, privacy was dealt with as a regulatory matter. While there exists some protections of privacy in the *Charter of Rights and Freedoms* (i.e., against unreasonable search and seizure), the federal *Personal Information Protection and Electronic Documents Act (PIPEDA)*, the Ontario *Freedom of Information and Protection of Privacy Act (FIPPA)*, and in the health care context in the Ontario *Personal Health Information Protection Act (PHIPA)*, these laws do not usually provide for private civil cause of action. They serve mainly as mechanisms to protect against unwarranted privacy violations of individuals by government, health care providers, or by commercial organizations.

But in a groundbreaking decision in privacy law earlier this month, the Ontario Court of Appeal came down with a decision that effectively opens the door to individuals who wish to sue another party for what the court called "intrusion into seclusion".

In *Jones v. Tsige*, 2012 ONCA 32, the appellant, Sandra Jones, discovered that Winnie Tsige, had been 'surreptitiously' accessing Jones' banking records. Jones and Tsige both worked for the Bank of Montreal but did not know each other and worked at different branches. Tsige was in a common-law relationship with Jones' former husband and became involved in a financial dispute with him. As a bank employee, Tsige had full access to Jones' banking information. She accessed Jones' personal bank accounts at least 174 times over a period of four years. Jones sued Tsige for invasion of privacy and breach of fiduciary duty and sought damages of $70,000 and $20,000, respectively.

The central issue before the Court of Appeal was whether Ontario law recognized the cause of action of breach of privacy.

The Court noted that the question of whether the common law should recognize a cause of action for invasion of privacy had been debated for the last 120 years without any clear answers. Justice Sharpe cited various Canadian, English and American commentators arguing for the recognition of a right of privacy to meet issues that are posed

FOR MORE INFORMATION

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Richard Steinecke
Steinecke Maciura LeBlanc
401 Bay Street, Suite 2308
Toronto, Ontario M5H 2Y4
Telephone: 416-626-6897 Facsimile: 416-593-7867
E-Mail: rsteinecke@sml-law.com

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from technological and social change. The Court reviewed the jurisprudence in Canada, Australia, New Zealand, UK, and the US, in attempt to distill the answer to this question. In the end, the court came to a conclusion that confirms the existence of a right of action for 'intrusion upon seclusion' because the common law in Ontario needs to develop in a manner consistent with the changing needs of society.

Adopting the American tort 'intrusion upon seclusion' the Ontario Court of Appeal states the new privacy cause of action is as follows:

> "One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person".

Basically, snooping through another person's private stuff, electronically or otherwise, may give that person a right to sue you.

The decision sets out that the essential elements of this cause of action are:

1) that the conduct must be intentional, including recklessness;
2) the conduct must be an invasion of a party's private affairs or concerns without lawful justification; and
3) the conduct must be reasonably regarded as highly offensive causing distress, humiliation, or anguish.

However, the court wanted to ensure that the floodgates of litigation would not be opened to those overly sensitive or unusually concerned about their personal privacy. As such, a limitation is set out that a claim for intrusion upon seclusion will only arise for deliberate and significant invasions of personal privacy that can be described as 'highly offensive'. This includes things like one's financial or health records, sexual practices and orientation, employment, diary or private correspondence.

Perhaps in attempt to also limit the reach of this cause of action for invasion of privacy, and keep an influx of frivolous lawsuits at bay, the Court of Appeal limited damages to $20,000 for the most exceptional circumstances. In this case, Jones was awarded $10,000 in damages.

What are the implications for regulators? Obviously "lawful justification" will be a complete defence. This defence would cover most information-gathering by regulators. However, where the investigative conduct is illegal, especially if it is done in bad faith, regulators might be sued. Potentially, such claims could arise in the context of investigations, inspections, quality assurance activities, the public register and the annual renewal process. The wider implication may lie in the potential for class actions against organizations, such as a regulator, that have allegedly breached the privacy of multiple individuals.

A complete copy of the decision of *Jones v. Tsige* can be found at: www.canlii.org.