FALL 2020

Privacy in the Courts: A quarterly review

ACCESSPRIVACY BY OSLER

Table of Contents

Introduction

This quarterly review of Canadian jurisprudence is intended to help busy in-house counsel, Chief Privacy Officers and compliance professionals navigate recent court decisions and gain a broad understanding of how privacy law is evolving in Canada. Through expert commentary, users can begin to see trends over time and gain insights into potential implications for their organizations. Recognizing how difficult it can be at times to keep up with developments, this review is intended to serve as a readily-accessible, efficient and practical resource to help readers stay in the know, while saving time.

Adam Kardash, National Lead of AccessPrivacy by Osler, would like to thank Professor Teresa Scassa of the University of Ottawa for her valuable contribution in authoring these case summaries. The accompanying expert commentary offers readers an enhanced understanding of the case by providing a rich scholarly analysis, discussing its practical implications for organizations and placing it within a broader policy context of evolving privacy law.

We hope users find this resource useful and we welcome feedback on how it might be improved over time. Please send comments to info@accessprivacy.com.

Dispute between neighbours results in injunction and award of damages

Lapointe c. Bois, 2020 QCCS 4051

Facts

This case involved a long-term dispute between neighbours that included allegations of breach of privacy. The plaintiff sued the defendants arguing that they had modified their property over the years in ways that intruded on her right to peaceful enjoyment of her property and that invaded her privacy. The defendants counterclaimed for what they considered abusive conduct by the plaintiff. They also alleged a breach of their privacy rights resulting from video surveillance of their property and spying by the plaintiff. They sought an injunction and damages.

Decision

The court dismissed the plaintiff's claim and granted the defendants an injunction and damages.

Discussion

Justice Gagnon found the plaintiff's allegations to be baseless. Instead, she found that the plaintiff's conduct had been abusive towards the defendants. In considering the defendants' counterclaim, she dismissed the allegations of breach of privacy related to the plaintiff's security cameras, noting that they were not pointed at the defendants' property, that they were installed to cover the plaintiff's pool and property, and that they were motion sensitive and not continually recording. However, she did find that the plaintiff had spied on the defendants by watching their activities and those of contractors on their property. She also found that the plaintiff had harassed and intimidated them. Justice Gagnon noted that while many of the incidents on their own would be tolerable, taken cumulatively, over the years, and combined with the baseless lawsuit, they amounted to actionable harassment. She awarded $8,500 in damages to the two defendants, as well as $1,000 each in punitive damages, noting in particular the impact of the intimidation and harassment on their right to privacy and to peaceful

enjoyment of their property. She also issued an injunction ordering the plaintiff to cease her harassment and intimidation of the defendants, and in particular to stop following, observing, and spying on them or on workers on their property.

Justice Gagnon also noted that the claims to breach of privacy by the plaintiff based on photographs taken by the defendants were baseless. She found that the photographs were not a breach of privacy; rather they were taken to support their counterclaims against the plaintiff.

This case is one of a growing number of cases involving privacy claims in disputes between neighbours. In this case, the court considers the context in which video cameras were placed and still photos taken in order to determine whether privacy rights were invaded.

Professor Teresa Scassa, Canada Research Chair in Information Law and Policy, University of Ottawa

Compensatory and punitive damages awarded in lawsuit for identity theft

S.G. c. K.G., 2020 QCCQ 7437

Facts

The plaintiff sued her mother for moral damages and punitive damages related to an identify theft carried out by her mother in order to defraud her. During her minority, the plaintiff's father was killed in a work-related accident. Both she and her mother were eligible for compensation under Quebec's workers' compensation regime. The mother used this money in her capacity as widow and mother of the minor children of the marriage. The daughter was unaware that she was separately entitled to a sum of just over $19,000 from the workers' compensation regime to support post-secondary education. When she began her post-secondary studies, her mother told her that she was entitled to $5,000 from the regime, and that they had to open a joint bank account in order to receive the funds. The mother told her daughter that she would look after the application for the funds and took charge of the bank account. She proceeded to apply for the funds, received the money, and eventually withdrew all of it from the account. In order to have the money directly deposited into the bank account, the mother had forged her daughter's signature. When the plaintiff inquired about the status of the application, her mother lied to her, and even provided her with false email correspondence. When the daughter asked why the amount would only be $5,000 (after checking the website and learning that it should be higher) her mother told her it was because the agency was deducting money paid for her support during her minority.

Eventually the daughter demanded that her mother provide her with one of the bank cards for the account. The daughter then learned that the account was empty, but that it had contained the deposit of over $19,000. The daughter pursued the issue with both the workers' compensation agency and her mother. She eventually named both as defendants in a lawsuit. The workers' compensation agency settled, paying her the $19,000 she had been entitled to receive. The lawsuit proceeded against her mother for moral damages in the amount of $7,500 and punitive damages in the amount of $10,000.

Decision

The court found in favour of the plaintiff.

Discussion

Judge Cameron had no difficulty in awarding $7,500 in damages sought by the plaintiff. He found that the mother had engaged in identify theft and breached her daughter's privacy rights. On the issue of moral damages, he found that the daughter had suffered from her mother's deliberate betrayal. On the issue of punitive damages, he found the nature of the fraud – committed within the parent-child relationship to be particularly odious. The mother's flagrant disregard of her daughter's dignity and privacy, as well as her economic integrity at a time when she was particularly vulnerable justified an award of punitive damages. In setting the amount, he noted that the mother had stable and well-remunerated employment and a comfortable lifestyle. He found that this justified an award of damages that was more than symbolic. However, he took into account the possibility that the mother would be pursued by the workers' compensation agency for the amount of the fraudulent payment. He awarded the $10,000 in punitive damages sought by the plaintiff.

Invasion of privacy claim dismissed

John Doe 129488 v. Canadian Broadcasting Corp., 2020 ONSC 7921

Facts

The plaintiff had been an enforcer for criminal organizations including motorcycle gangs and the mafia. In the early 1980's he became a confidential informant for the RCMP. His cooperation led to the arrest and conviction of a number of organized crime figures. In 1984, the plaintiff appeared on the CBC's Fifth Estate. In the interview, he spoke about his time as an enforcer and his involvement in organized crime. The show was aired twice – once nationally, with a blackout in the Toronto area, and a second time to include Toronto. There was some evidence that a portion of the interview was also replayed on the CBC News Hour program. All of these broadcasts were in 1984. The plaintiff was subsequently placed in a witness protection program, was given a new identity, and he and his family were relocated.

In 2015, the Fifth Estate began broadcasting highlights of past interviews as part of its celebration of 40 seasons on the air. A small clip from the interview with the plaintiff was broadcast at the end of a regular Fifth Estate episode in January 2015. The show was also made available from the CBC website. The plaintiff, who had been living with his family under a new identity, was alarmed when acquaintances told him they had recognized him from the clip and had no idea that he had once been an organized crime enforcer. The plaintiff became afraid for his personal safety. His counsel reported that he was on the run and attempting to relocate. He filed a lawsuit against the CBC, seeking damages for breach of contract, negligence and invasion of privacy. The CBC removed the clip from its website as soon as it learned there had been a problem. It moved for summary judgement.

Decision

The court issued summary judgment in favour of the defendant.

Discussion

The plaintiff maintained that he had an agreement with the CBC that the show would only be broadcast once. However, Justice McKelvey found that there was a written contract which provided that the CBC would retain all rights in the material and was entitled to use it "in any way whatsoever" (at para 3). He found no evidence of any separate oral agreement.

On the issue of invasion of privacy, Justice McKelvey noted that one of the features of the tort, established in *Jones v. Tsige*, was that any invasion of privacy must take place without lawful justification. In this case, he found that the written agreement between the plaintiff and the CBC provided the CBC with lawful justification for rebroadcasting the interview.

Privacy tort claims struck

Wakeling v. Desjardins General Insurance Group Inc., 2020 ONSC 6809

Facts

The defendants brought a motion to strike a statement of claim alleging intrusion upon seclusion. The matter arose in the context of a dispute between one of the plaintiffs (Evison) and the defendant over an accident benefit claim filed by Evison. The second plaintiff, Wakeling, joined Evision as her aide at a teleconference with Desjardins lawyers. Wakeling was also on Evison's witness list, which was provided to Costantino, the lawyer for Desjardins. This lawyer, in turn, shared the witness list with Desjardins.

Wakeling, was an employee of Desjardins. After her employer learned of her participation in the proceedings against them, she was contacted by her employer who informed her that she was under investigation. Shortly afterwards, she was fired. Wakeling sued both Desjardins and Costantino for intrusion upon seclusion. It is these claims that the defendants sought to have struck from the statement of claim.

Decision

The claims for intrusion upon seclusion against both Costantino and Desjardins were struck.

Discussion

The essence of the privacy claim was that after receiving the witness list, Costantino shared it with the management of Desjardins, which then used it for improper purposes – namely to discipline Wakeling. Justice Healey found that the plaintiff had failed to plead the necessary facts to support the elements of the tort of intrusion upon seclusion. She found that Wakeling appeared at the teleconference voluntarily, and that this did not amount to any form of intentional intrusion on the part of the defendants. She noted as well that there was simply no intrusion on the part of the defendants to obtain the information about Wakeling's participation at the teleconference or as a witness. And, although Desjardins' management was not at the teleconference, Justice Healey noted

that "it could never be successfully argued that, as a party to the proceeding, Desjardins was not entitled to have that information." (at para 59)

Justice Healey also noted that the tort of intrusion upon seclusion requires an intrusion upon "private affairs or concerns", and Wakeling's participation at the hearing or as a witness was not a private matter. She observed that the intrusion must also be without legal justification. In this case, the lawyer for Desjardin was justified in sharing the witness list with her client.

Justice Healey also observed that the tort of intrusion upon seclusion does not address the dissemination of information – just wrongful intrusion. She stated: "to the extent Costantino relayed any information to Desjardins (her client, and a party to the LAT proceeding), such conduct is of no relevance to establishing the elements of this tort." (at para 73)

The third element of the tort of intrusion upon seclusion requires establishing that the conduct in question would be considered "highly offensive, causing distress, humiliation or anguish." (at para 74) Justice Healey found that this was not addressed in the statement of claim other than to indicate that the plaintiff was distressed. She noted that the standard to be met is objective, and that a reasonable person would not consider the alleged intrusion to be highly offensive. She found that none of the elements of the tort could be established on the facts set out in the pleadings and struck the claims against both defendants. She also denied leave to amend the Statement of Claim to address these deficiencies, noting that "The facts underlying the Claim are straightforward and cannot and will not, no matter how massaged or reworded into additional allegations, become the sort of material facts necessary to support the essential elements of the tort of intrusion upon seclusion." (at para 85)

The plaintiffs sought leave to add claims of breach of confidence, essentially alleging that the appearance of Wakeling at the case conference and her name on the witness list constituted confidential information that should not have been shared. Justice Healey declined to allow these claims to be added to the statement of claim. She noted that

neither the appearance at the case conference nor the witness list had any "quality of confidentiality". (at para 108) She observed that at the time, neither plaintiff treated this information as confidential information or requested that any particular restrictions be placed on its dissemination. She also noted that the information itself had no inherent value. The only alleged misuse of the information was Costantino's sharing of the witness list with her client, which she had a legal duty to do. Thus, the elements of an action for breach of confidence could not be made out on the facts alleged.

The court in this case seems to make a distinction between the tort of intrusion upon seclusion and the more recently recognized tort of public dissemination of private facts. It is important to note that these are treated separately by courts – not as a single general tort of invasion of privacy. As a result, plaintiffs must be careful to identify the particular privacy tort they rely upon and to establish its necessary elements.

Professor Teresa Scassa, Canada Research Chair in Information Law and Policy, University of Ottawa

Small claims court actions stayed pending certification of class action proceedings

Carter v. LifeLabs, 2020 ONSC 7340

Facts

This was a motion to stay four small claims court actions launched in relation to the LifeLabs data breach. This breach was already the subject of a number of class actions making their way towards the certification stage. The four small claims court plaintiffs fall within the class definition of the Ontario class action that had prevailed in a carriage motion. The certification application for the Ontario suit was set for determination in December 2021. LifeLabs sought to have the small claims court proceedings stayed until the certification motion was decided.

Decision

The court ordered the temporary stay of proceedings.

Discussion

Justice Belobaba noted that all four claimants had "simply copied and pasted the lengthy class action claim (including typos and inapt class procedure references) and filed this as their personal small claim." (at para 6) He found that it was clear to him from a case conference that the primary mission of the four small claims court claimants "may be less about the vindication of personal damage claims than about the extraction of a quick settlement from a deep-pocketed defendant." (at para 9)

Justice Belobaba observed that under s. 13 of the *Class Proceedings Act* he had the authority to stay any proceedings related to a class proceeding. This would include the four small claims court actions. He noted that class members cannot opt out of a class proceeding until the proceeding has been certified. This is the point at which it is possible to make a full and informed decision about the advantages of remaining part of the class proceeding. Because of this, it was premature for the four claimants to opt out of the class proceedings in favour of small court proceedings. He noted that there would be no injustice to the four plaintiffs if their actions were stayed. He observed that LifeLabs

had paid the ransom demanded by the attackers and had recovered the data. There was no evidence that any of the data had been otherwise misused. He noted as well that LifeLabs had offered to provide a year of free cyber-security protection services, including dark web monitoring and identity theft insurance. He also found that there was no evidence of any compensable harm.

Settlement approved in class action

Leonard v. Manufacturers Life Insurance Co., 2020 BCSC 1840

Facts

The plaintiffs brought a motion for certification and approval of a settlement in a class action. The lawsuit involved claims relating to the manner in which life and disability insurance policies were marketed to mortgagors by the defendant company. It was argued that when applying for a mortgage, certain prospective mortgagors had their personal information shared with other companies for the purposes of marketing of related insurance products. Other claims related to the pricing of the insurance and other business practices.

The defendant had opposed certification and the application for certification was rejected in 2016. The plaintiffs filed a notice of appeal, and settlement talks proceeded. These resulted in a proposed settlement of $4.25 million. Nine hundred thousand of this was designated for legal fees. The remainder was to be paid to a variety of charities and non-profit public interest groups. Because class actions had also been commenced in other provinces, the parties to the settlement agreed that the terms of the settlement would be binding on Canadian residents outside of Quebec. Counsel for the other class actions opposed the settlement.

Decision

The action was certified as a class action proceeding, the class was defined nationally (excluding Quebec residents), and the settlement was approved.

Discussion

In reaching his decision, Justice Gomery noted that there were "formidable obstacles" to certification of this lawsuit outside of Quebec. On the issue of the privacy claims, he noted that it would be very difficult to find commonality of issues, since much would depend on whether different class members consented to the sharing of their information. He also noted that "there is no evidence that class members have suffered

significant losses resulting from the alleged breach of privacy and alleged breach of contract." (at para 80) He found that there was a "substantial risk" that the breach of contract claim would not be certified, and that it too might not give rise to a substantial claim in damages. Nevertheless, he found that if the claims were certified, the defendants faced significant exposure since the privacy tort is actionable without proof of damage and there might be a restitutionary claim available for disgorgement of profits. As a result, he was prepared to certify the proceedings and approve the negotiated settlement.

Publication ban granted to protect minor

Centre intégré universitaire de santé et de services sociaux du Centre-Sud-de l'ile-de-Montréal c. La Presse, 2020 QCCS 3524

Facts

The applicant sought a publication ban in order to protect a minor child who had been caught up in events that led to the death of another minor child and the criminal prosecution of a woman for the death of that child. The request for a publication ban was pitted against the open courts principle. The scope of the ban was contested by the Montreal newspaper *La Presse*.

Decision

Justice Babak Barin ordered the sealing of certain parts of the record of this case to protect the identity of the child. He also barred the publication of any information that might lead to the identification of the child or his/her parents.

Discussion

Although Justice Babak Barin stressed the importance of the open courts principle, he noted that the law made it clear that the protection of minor children was a matter of strong public interest. Under Quebec's *Loi sur la protection de la jeunesse*, there is strict protection for the identities of minors or their parents; this information cannot be disclosed without judicial authorization. Some of the information at issue in this case was contained in records collected by social services, and thus were strongly protected by law. Although counsel for *La Presse* argued that the public interest favoured disclosure of the information, the court considered that the vulnerability of the child in question, already traumatized by the events, favoured keeping the information confidential.

Justice Babak Barin noted that privacy is a constitutionally protected right, which includes the particular rights of children and youth. In his view, any limitation on the rights of the press, when compared to the rights of the child, were minimal.

No confidentiality order in case involving third party personal information

McCarthy v. Canada (Attorney General), 2020 FC 1100

Facts

The applicant in a judicial review proceeding filed an affidavit in response to the Attorney General's motion to strike his application for judicial review. This latter application sought to quash a Notice of Pre-Disciplinary Hearing that had been issued by the Canada Border Services Agency (CBSA). The application for judicial review was dismissed, which meant that the hearing would proceed. The issue before the court in this case was whether a confidentiality order should issue in relation to the applicant's affidavit.

The affidavit in question had an email appended in which the applicant raised with the President of the CBSA another case involving a different CBSA employee. The email identified the employee by name, referred to the file number for that case, and provided some details about the allegations that had been made against the other employee. In the email, the applicant sought an explanation for why that case had been handled differently from his own. The confidentiality order sought by the Attorney General was to protect the identity of the other employee.

Decision

The court declined to issue a confidentiality order.

Discussion

According to the Supreme Court of Canada, a confidentiality order should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings. (*Sierra Club of Canada v. Canada (Minister of Finance*), at para 53),

The Attorney General argued that the information at issue should be protected because it was "personal information" within the meaning of the *Privacy Act*. It also argued that a confidentiality order would have minimal impact on the open courts principle since the person in question was not a party, nor was his identity relevant to the proceedings. McCarthy responded by maintaining that the *Privacy Act* did not apply to him as a private individual.

Justice McHaffie agreed that the information at issue was "personal information" under the *Privacy Act*. However, he noted that while s. 8(1) of the *Privacy Act* prohibits the disclosure of personal information, the exceptions to this rule in s. 8(2) include where the information is necessary to comply with rules of court relating to the production of information or where it is used in legal proceedings involving the government.

Justice McHaffie also noted that he had "some difficulty" with McCarthy's argument that the *Privacy Act* did not apply to him because he was a private individual. He observed that the information came into McCarthy's possession as a consequence of his role as a federal government employee. He stated: "I do not believe that the application of the *Privacy Act* can be avoided simply through the assertion that Mr. McCarthy is not himself a government institution, or that he subsequently retired from the federal public service." (at para 21)

Nevertheless, Justice McHaffie noted that the real issue is whether a confidentiality order should issue, and not whether there was a breach of the *Privacy Act*. In applying the test from *Sierra Club*, he noted that "the protection of privacy can constitute an "important interest". (at para 23) The fact that the information fell within the definition of "personal information" in the *Privacy Act* supported this point. However, in order for

a confidentiality order to issue, it has to be "necessary to prevent a "serious risk" to the interest", and preventing this risk must outweigh the adverse impact on the open courts principle. Justice McHaffie noted that there has to be some evidence to support these claims, and that the Attorney General had not met the evidentiary burden. There was no information regarding the potential impact on the named individual or even their current status or position. Justice McHaffie stated:

> I am certainly sympathetic to the Attorney General's concerns regarding the exposure of personal employment details of an individual with no direct relationship with this application through the filing of a document that need not and should not have been filed. This is even more so given the sense that this individual has been unwillingly dragged into Mr. McCarthy's employment file through Mr. McCarthy's own use of his personal information, of which he came into possession through his own role as an investigator. However, the open court principle is a fundamental one, and while it recognizes exceptions, the grounds for those exceptions must be established on a convincing evidentiary record. (at para 30)

In the absence of a sufficient evidentiary record, the motion for a confidentiality order was dismissed.

Open courts principle prevails over confidentiality of tax information

Rémillard c. Canada (Ministre du Revenu National), 2020 CF 1061

Facts

Under s. 317 of the *Federal Courts Rules*, an applicant for judicial review can request "material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party". Where such a request is made, the tribunal must, under s. 318, provide a certified copy to the court Registry. Materials in the registry are, by default, open to the public. In this case, Rémillard had brought an application for judicial review regarding several requests for administrative assistance made by the Canada Revenue Agency to foreign governments in an attempt to determine Rémillard's residence for tax purposes. Rémillard relied on s. 317 to request the documentation obtained from the foreign authorities. He did not expect that the documents would, as a result, also become part of the public court record. He learned that this had happened when a journalist contacted him about the information. He brought an emergency *ex parte* motion to have the documents treated as confidential. This motion was granted. It was then followed by the current application to make the confidentiality order permanent.

Decision

The application for the confidentiality order was denied.

Discussion

Justice Pamel noted that as a general principle, documents submitted under ss. 317 and 318 of the Rules are subject to the open courts principle. They are therefore, by default, accessible to the public. Even if the documents contain personal information, a party who engages in litigation renounces, to some extent at least, privacy in relation to that information.

Justice Pamel distinguished between the situation under sections 317 and 318, and the implied undertaking rule that applies in to the disclosure stage of litigation. Essentially,

this rule requires that information shared with an opposing party during the disclosure process is subject to an implied undertaking that the material will not be used or disclosed for any purpose other than the litigation. Justice Pamel noted that Rules 317 and 318 did not apply to the discovery process; rather, they related to judicial review proceedings where the court must proceed on the basis of the record before it. This information was therefore part of the record that would be before the court. He noted that the implied undertaking rule served the purpose of a free and open exchange of information at an early stage in the litigation and required commitments of confidentiality that were simply not appropriate in the case of judicial review proceedings.

Justice Pamel also noted that as a matter of principle, everything that is part of the court record is subject to the open courts principle. Unless a confidentiality order can be justified, the information will be publicly accessible. He rejected the idea that personal income tax information is intrinsically confidential such that it maintains that status when it passes into the hands of third parties. The law imposes confidentiality obligations on the Minister of National Revenue but does not give a special status to tax information.

Rémillard argued that s. 318 of the *Rules* violated s. 8 of the *Charter* to the extent that it would automatically make personal tax information public. Justice Pamel disagreed. Although he found that Rémillard had a reasonable expectation of privacy in his personal tax information, this expectation was highly limited *vis à vis* the Minister of National Revenue. In any event, these interests are protected under the *Income Tax Act*. However, in this case the information was conveyed to the court Registry for the purposes of litigation. Once the application for judicial review was filed, the provisions of the ITA no longer fully governed the information. The Rules of the Federal Court make it clear that the relevant information must be transferred to the Registry, and documents in the Registry are, by default, open to the public. In such circumstances, Justice Pamel ruled, Rémillard could not have a reasonable expectation of privacy. However, he had the option of seeking a confidentiality order.

On the issue of the confidentiality order, Justice Pamel ruled that Rémillard's request did not meet the specificity required of the test for such an order as set out by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*. He left open the possibility that Rémillard could file another application for a confidentiality order. He also noted that the information was now in the hands of a third party – the journalist – and it was not clear that the requirements for a publication ban were the same as those for a confidentiality order. In any event, they had not been met in this case.

Confidentiality order granted in class action assessment claim

Merlo v. Canada, 2020 FC 1005

Facts

A member of a class action settlement brought a motion seeking reassessment of her claim as well as a confidentiality order to protect her identity and to seal any confidential information provided in support of the motion. The settlement related to claims of gender and sexual orientation harassment against female RCMP members and employees.

The Settlement Agreement provided for individual claims to be assessed by an Assessor in order to fix the amount of compensation due. Subject to limited rights to request a reconsideration, the assessments were meant to be final and binding, with no rights of appeal or judicial review. The applicant's claim was assessed and she was denied compensation. A request for review led to the conclusion that no error had been made in denying the claim.

Decision

The Court granted the confidentiality order but denied the request for reassessment.

Discussion

On the issue of confidentiality, Justice McDonald noted the particular nature of the class action in this case, and stated that: "Ensuring a confidential process to allow class members to come forward has been an overriding feature of the claims process." (at para 18) She easily found that "the risk of harm to the Claimant by disclosing the information she provided in support of her claim, outweighs the public interest in open and accessible court proceedings." (at para 18) However, she also concluded that the court had no jurisdiction to order the reassessment of the claim, and denied the request for reassessment.

Open courts principle prevails in lawsuit over accusations of sexual misconduct

T.M. c. Dis son nom, 2020 QCCS 3938

Facts

This case involved a request for anonymization of proceedings brought by the plaintiff against the defendant.

The defendant operates pages on Facebook and Instagram under the name "Dis son nom", as well as a website with the URL <www.dissonnom.ca>. These pages were created in the summer and fall of 2020 as part of the #MeToo movement. They allow the anonymous denunciation of individuals for sexual harassment or assault. In August 2020, the plaintiff learned that his name was on a list on these sites. He communicated with the site operators to demand the removal of his name, claiming the accusations were baseless.

On August 20, 2020, the plaintiff lost his job. He claimed that the reason for his firing was the fact that his name was featured on the sites. He argued that the defendants did nothing to verify the accuracy of the claims against him, nor did they seek out his version of events. He wished to sue the defendants for damages, but did not want to do so unless the proceedings were anonymized as he feared further damage to his reputation.

Decision

The Court denied the anonymization request.

Discussion

Justice Sheehan considered the necessary balance between privacy and the open courts principle when it comes to requests for anonymization. He noted that when victims making allegations of sexual abuse, courts are generally sympathetic to their requests for anonymization, since without the protection of anonymity, the public interest in seeing such complaints brought forward might be undermined. However, he noted that the

situation was different when it comes to alleged aggressors seeking anonymity. In such cases, anonymization does not serve the public interest.

Justice Sheehan nevertheless acknowledged the potential for great injustice faced by an innocent person accused of sexual abuse. He noted that this would be even more problematic in a situation where no effort was made to verify the facts of the accusation. However, he ruled that the plaintiff had not been able to provide any precedent in support of his claim that it was in the public interest to protect the identities of plaintiffs claiming to be wrongly accused of improper conduct. In light of this, the public interest in open courts prevailed.

> This cluster of cases shows the continuing tension between privacy interests and the open courts principle. While the courts still act as rigorous guardians of the open courts principle, they are clearly particularly attuned to the privacy interests of children because of their special vulnerabilities, and of abuse victims who might not come forward without protection for their identities.
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> *Professor Teresa Scassa, Canada Research Chair in Information Law and Policy, University of Ottawa*

Court orders disclosure of class list in abuse case

Gargari v. Toronto Catholic District School Board, 2020 ONSC 6903

Facts

The plaintiff was suing the Toronto Catholic District School Board (TCDSB) for what he alleged to be abuse suffered on multiple occasions at the hands of his grade 3 teacher and on one occasion by the school principal. These alleged incidents took place between September 1983 and January 1984. His allegations included incidents of physical abuse that occurred in the classroom in front of other students. He sought disclosure by the TCDSB of the class register as well as the last known addresses of the students in order be able to call other students as witnesses. The TCDSB opposed the motion.

Decision

The Master ordered production of the information sought by the plaintiff.

Discussion

The plaintiff had initially moved for production of the class register before Master Muir. Master Muir ruled that the motion was premature, and that the plaintiff had to first request the register under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA). The Master also required him to pursue any appeals processes available under the legislation.

Following the order by Master Muir, the plaintiff requested disclosure of the personal information and the TCDSB refused. The plaintiff then sought to bring a second order for disclosure before Master Muir, who indicated that he first needed to pursue all avenues of appeal under MFIPPA. The plaintiff then sought a review by the Information and Privacy Commissioner's office. An adjudicator for the Information and Privacy Commissioner (IPC) upheld the Board's refusal to disclose, but noted that the legislation "specifically contemplates that discovery rights in litigation are separate from access rights under MFIPPA." (at para 11) She also found that it was up to the courts, and not IPC adjudicators, to determine what should be produced in the context of litigation.

After receiving this decision, the plaintiff renewed his motion before Master Muir for production of the information. The Master ruled that the plaintiff still had not exhausted his appeal rights under MFIPPA, and dismissed the motion. The plaintiff then brought the present motion before Master Graham for disclosure of the documents at issue.

A first issue was whether the adjudicator's decision upholding the School Board's refusal to disclose the information meant that the Board could not disclose this information. Master Graham ruled that it did not, noting that MFIPPA specifically contemplates court orders for the disclosure of documents in relation to civil actions. He noted that this was also specifically acknowledged by the IPC Adjudicator. He noted as well that the Board was not obliged by the IPC decision to oppose the motion for disclosure in the context of litigation.

A second issue was whether the plaintiff was precluded from bringing the motion because of the first Master's order that he exhaust his avenues of appeal under MFIPPA. Master Graham noted that he exhausted his statutory right of appeal when he asked for a reconsideration of the Board's refusal by an IPC adjudicator. He observed that an appeal and judicial review were separate matters, and there was no obligation on the part of the plaintiff to seek judicial review of the adjudicator's decision. Having exhausted his right of appeal, he was entitled to bring the motion.

Master Graham next considered whether disclosure should be ordered. He observed that the allegations against the grade 3 teacher were not limited to an isolated incident and allegedly occurred before the entire grade 3 class. Master Graham noted that "While the Board may prefer that Gargari not call evidence that may corroborate his version of events, it has no right to prevent him from doing so or to deny him the ability to identify witnesses who may be able to give such evidence." (at para 30). Although the potential witnesses were all minors at the time of the alleged incidents, this "does not insulate them from having their identities as potential witnesses disclosed as adults." (at para 37) The court noted that the privacy of the individuals in the class register is also "at least

in part protected by the fact that Gargari's use of their names and contact information is limited to the narrow scope of this action by the deemed undertaking in rule 30.1.01(3)." (at para 44).

Master Graham found that an order to disclose the information sought by the plaintiff was proportionate to the importance and complexity of the issues. He noted that it could lead to the identification of witnesses who could "significantly assist the court in making a just decision." (at para 47).

This case highlights differing disclosure regimes as between privacy and civil procedure legislation, and the way each implements different policy objectives. It also illustrates the way this legislation interacts. While a litigant may first be required to seek disclosure under the Ontario *Municipal Freedom of Information and Protection of Privacy Act* per the terms of this Act, a denial under it will not preclude success under the Ontario Rules of Civil Procedure. Rather, this second request for disclosure will be assessed anew per the terms of the Rules.

Charles Dobson, Knowledge Management Lawyer, Litigation, Osler, Hoskin and Harcourt LLP

Court denies request for disclosure of third-party personal information

Henderson v. Quinn, 2020 NSSC 299

Facts

The defendants bought a parcel of land in 2019 and subsequently blocked access to a part of an old road that ran across their property. The plaintiffs, a group of local landowners, commenced proceedings, claiming that they have a right of way over the property to access the local beach.

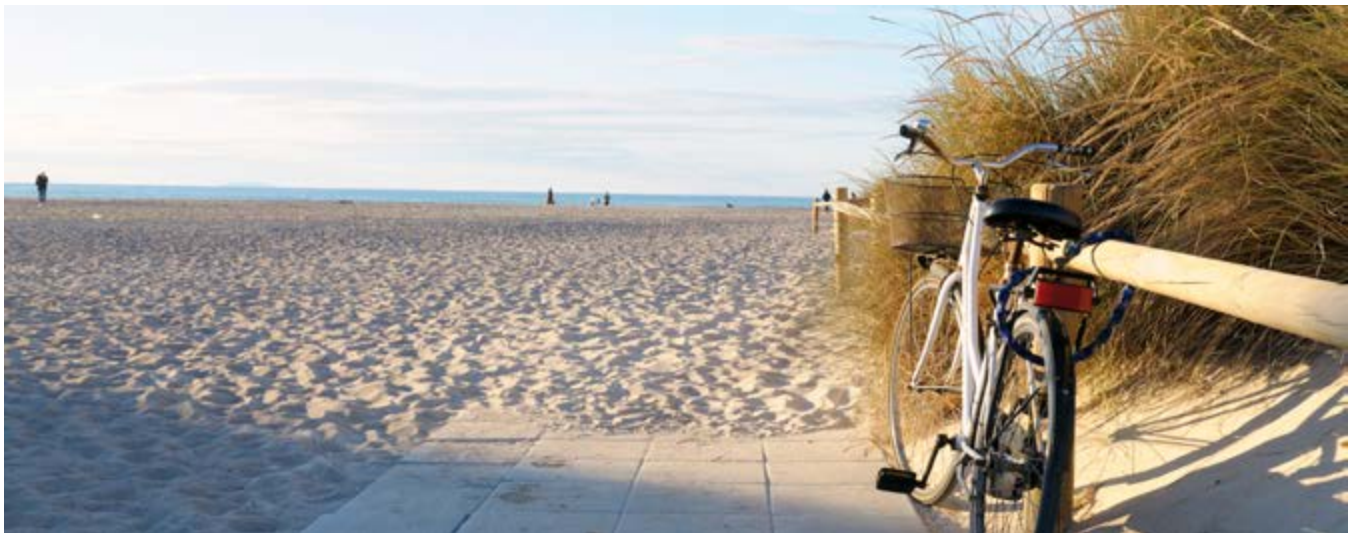
Prior to the launching of the lawsuit one or more of the plaintiffs had organized local meetings to discuss the issue and to garner support for the legal action. Many people attended the meetings, but not all of them became parties to the suit. On discovery, the defendants sought disclosure of the names and contact information for all those who attended some or all of the meetings. The plaintiffs refused to provide information about those who had decided not to become parties to the action, citing privacy interests. The issue before the court was whether this additional information should be provided to the defendants.

Decision

The court declined to order disclosure of the information.

Discussion

Justice Gabriel noted that, in principle, "privacy interests must yield to the right of the participants to this litigation to possess information relevant to it, unless that information can be shown to be privileged." (at para 35) However, he declined to order production of the information sought by the defendants on the basis that they had not demonstrated its relevance. He characterized the information as "very sensitive", and noted that the defendant had not demonstrated how the disclosure of this third-party information would lead to the discovery of relevant evidence. He stated: "Merely to say that there is



a "distinct possibility" that it will do so is to admit the corollary: there is a "distinct possibility" that it will not. Such a thesis/antithesis is the hallmark of a fishing expedition." (at para 41)

This case is a good example of a fulsome analysis of relevance where privacy interests apply to the information a litigant seeks. It underscores the fact that privacy interests will not prevail over the duty to disclose relevant information, but courts will also closely scrutinize whether this information is indeed relevant.

Charles Dobson, Knowledge Management Lawyer, Litigation, Osler, Hoskin and Harcourt LLP

Court denies complainant's request to stop disciplinary proceedings for privacy reasons

Goulet c. Ordre professional des sexologues du Québec, 2020 QCCS 3991

Facts

The applicant sought an injunction to end an inquiry into allegations of professional misconduct against his former therapist. The applicant had filed a complaint against the therapist in 2018. The investigation took much longer than anticipated, and it was not until April 2020 that the body responsible for the investigation decided to initiate proceedings against the therapist based on three charges of misconduct. While the *Professional Code* provides for the filing of complaints by individuals, nothing in the law addresses their ability to withdraw complaints. In this case, the complainant sought to withdraw his complaint to protect his privacy and personal information. He claimed that not only had he been victimized by his therapist; the long and drawn-out inquiry and disciplinary process was compounding his victimization.

Decision

The injunction was denied.

Discussion

Justice Brossard expressed some sympathy for the applicant's circumstances, but ruled that the applicant had not made out a case for an injunction to stop the proceedings. The decision of a syndic to refer a matter to a hearing was at the discretion of the syndic and was not a decision that could be made by a complainant. Justice Brossard noted that a syndic operated independently and impartially, and nothing in the law or the present circumstances justified intervention by the court. Although the statutory time limits for the investigation had not been met, it was for the disciplinary body to determine whether this warranted the termination of the complaint. He noted as well that the applicant's concerns about the use of his personal information by the therapist and her counsel were matters for the disciplinary body – and not the court – to consider.

Although sympathetic to the concerns raised by the applicant as to his privacy and his personal suffering, Justice Brossard found that these were not sufficient to satisfy the irreparable harm component of the test for an injunction. He noted that it would be possible, at the disciplinary hearing, to apply for a confidentiality order to protect his personal information – and that the syndic was already prepared to make such a motion. The applicant would be entitled to appear to also present his views, although he was not required to do so.

On the issue of the balance of convenience, Justice Brossard noted that there was a broader public interest at issue here – the protection of the public. He found that the interests of the applicant were subordinate to the broader public interest served by disciplinary proceedings. He also noted that the proceedings filed against the therapist implicated her professional reputation. To bring them to an end without resolution would adversely impact her rights.

Randomized drug and alcohol testing ruled an enforceable contractual term

Phillips v. Westcan Bulk Transport Ltd., 2020 ABQB 764

Facts

The applicant sought an injunction against his employer to stop it from randomly testing employees for drugs and alcohol. The respondent company had been carrying out random drug and alcohol testing since at least 1999. Their company policy provided for the testing of all employees in "safety sensitive" positions. On applying for a job with Westcan, all prospective employees had to sign an "expectation agreement" which indicated that there was a drug and alcohol testing policy. When offers of employment were made, such offers were subject to compliance with all corporate policies. The offer made to the applicant also specified that it was for a safety sensitive position. The applicant, who was employed twice with the company, also underwent their new employee training twice. In this training program, all employees were told that the random drug testing policy applied to all safety sensitive positions. The training program included an exam with a question about the existence of the testing policy. The applicant answered this question correctly both times that he took the exam.

Unlike other random testing cases, this one did not involve a unionized workplace. The court considered whether submitting to random drug and alcohol testing was a term of the applicant's employment contract. It also considered whether, if it was, it was enforceable; and if not, whether the company was nonetheless entitled to impose random testing on the applicant.

Decision

The court ruled that randomized drug and alcohol testing was an enforceable term of the employment contract between the applicant and his employer. It also concluded that the employer would, in any event, be justified in imposing such testing even absent a contractual clause.

Discussion

Justice Dunlop found that on accepting the offer of employment with Westcan, the applicant agreed to be bound by all of the company's policies, including the random drug testing policy. He concluded that being subject to random drug and alcohol testing was essentially a term of the contract. The applicant had argued that such a clause was unconscionable and therefore unenforceable. Justice Dunlop disagreed. He noted that "an express random drug and alcohol testing term in an employment contract for a truck driver hauling dangerous goods in remote parts of Canada is not at all divergent from community standards of commercial morality." (at para 33)

Having found that the policy was an enforceable term of the contract, it was not necessary for Justice Dunlop to consider whether the company could unilaterally impose such testing. However, for the sake of completeness, he considered this issue. He found that the circumstances justified random drug and alcohol testing. He noted that the work involved driving tractor trailers which posed risks to the public, to Westcan employees, and to the environment if mishandled. He also noted that the cargos of these trailers often consisted of hazardous materials. The company had experienced some serious incidents in the recent past. It had a large workforce spread across substantial geographic distances. The fact that drivers often drove routes of thousands of kilometres made it difficult to observe visible signs of impairment, and it also made post-incident testing complicated. The company had positive test rates from its random testing program of between .44% to 1.79%. Westcan also indicated that it had found other indications of the use of alcohol at work. Justice Dunlop found that all of these factors met the criteria set out by the Supreme Court of Canada in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.* and justified the drug-testing policy.

Condominium bylaw found to breach province's data protection law

Owners, Strata Plan BCS 435 v. Wong, 2020 BCSC 1972

Facts

The applicant sought judicial review of a decision of British Columbia's Civil Resolution Tribunal. The dispute arose in relation to a bylaw passed by the applicants (the governing body of the strata (condominium complex)). The strata had a rule prohibiting the renting of units for short-term accommodation. As part of the plan to prevent short-term rentals, the strata passed a bylaw requiring all visitors to register, and, in doing so, to provide certain personal information. The information collected from visitors under this bylaw included the duration of their stay, with whom they were staying, in which unit, whether they planned to access or use shared facilities, emergency contact information, and their car make and licence plate number. In addition, visitors had to present photo identification, which was copied and placed on file. There was no limit to how long the collected information would be retained by the strata. The respondents were owners of a property within the strata. They had guests who objected to the photocopying of their IDs and who refused to permit this. The respondents were fined three times on separate occasions when their guests refused to allow their IDs to be copied. They refused to pay the fines, and argued that the bylaw was invalid because it breached the province's *Personal Information Protection Act* (PIPA).

The dispute went before the Civil Resolution Tribunal (CRT), which was authorized to consider disputes arising in the context of strata properties. The tribunal found that it had jurisdiction to hear the dispute, even though it involved interpretating PIPA, because a complaint brought under PIPA would not resolve the issue at the heart of the dispute, which was whether the strata bylaw was valid and whether the respondents had to pay the fines. The CRT ruled that the bylaw enabled the collection of sensitive personal information and that it contravened s. 11 of PIPA. This provision allows the collection of personal information "only for purposes that a reasonable person would consider appropriate in the circumstances". The CRT ruled that it was unnecessary for the strata to photocopy ID in order to meet its objective of limiting short term rental accommodations. The tribunal also expressed concerns about the indefinite period of

data retention. The CRT noted that there was no evidence that there was a problem with fraudulent or dishonest short-term renters and that there were less invasive means to ensure compliance with the short-term rental bylaws. The CRT ruled that the part of the bylaw requiring the provision of personal information was invalid. The strata sought judicial review of the CRT decision.

Decision

The court ruled that the CRT decision was correct.

Discussion

Justice Lyster found that the CRT had jurisdiction to consider PIPA, since it was authorized to consider the "interpretation or application of the *Strata Property Act* or a regulation, bylaw or rule under that Act." (at para 74) Under section 121(1)(*a*) of the *Strata Property Act*, a bylaw is unenforceable to the extent that it violates that Act or "any other enactment or law". Justice Lyster found that PIPA was just such a law, and that the CRT therefore had the jurisdiction to consider whether the bylaw contravened PIPA. She noted that the legislature did not consider the Information and Privacy Commissioner to have exclusive jurisdiction over the application of PIPA since labour arbitrators and the Labour Relations Board both applied PIPA to matters arising within their jurisdiction.

Having decided that the CRT had jurisdiction to apply PIPA, Justice Lyster then considered whether the CRT decision was correct. She found that the tribunal applied the proper legal test, and took into account appropriate factors, including the sensitivity of the personal information and the extent to which the collection of the information was necessary to achieve the goals of the bylaw. The tribunal had also taken into account a lack of evidence of any other less intrusive means considered by the strata for enforcing the bylaw. Justice Lyster rejected an argument by the strata that the bylaw should be respected since it was passed by the strata's democratic governance body. She noted that "the Strata's democratic function is logically constrained by the provisions of s. 121(1)(*a*) of the SPA, which prevent a Strata from enacting bylaws that contravene any enactment or law." (at para 87)

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