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Evolving protection for personal privacy in Canada

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On 18 January 2012, the Ontario Court of Appeal recognised a common law tort of 'intrusion upon seclusion', a civil action for the invasion of privacy. For the first time, the courts have made an invasion of privacy actionable, independent of damages arising from another wrong such as breach of confidence, defamation, breach of copyright or nuisance. This new tort joins existing Canadian legislation and Canadian Charter of Rights and Freedoms ('Charter') jurisprudence in placing a high value on personal privacy for its own sake.

A precedent-setting decision – *Jones v Tsige*

In *Jones v Tsige*, Ms Jones and Ms Tsige worked at the same bank and had romantic connections to the same man. Tsige used her employee access to review Jones' bank account information at least 174 times. This information included account balances, deposits, stop payments, transfers, bill payments and other personal information including date of birth, marital status, language spoken and residential status. Tsige did not publish, distribute or record the information in any way. Nevertheless, Jones characterised this as a serious intrusion upon her privacy and brought a civil action against Tsige alleging invasion of privacy.

The Ontario Court of Appeal acknowledged an existing debate regarding the existence of a tort for invasion of privacy. Although various legislative measures had been passed to protect privacy rights, there was no legislation available in Ontario which provided Jones with a monetary remedy. To address what the Court of Appeal considered a gap in the law, the Court recognised a breach of privacy rights called 'intrusion upon seclusion', which requires the following conditions:

- the intruder must act intentionally or recklessly;
- the intruder must invade, without lawful justification, another's private affairs or concerns; and
- a reasonable person would regard the invasion as highly offensive, causing distress, humiliation and anguish.

The Court of Appeal characterised Tsige's actions as deliberate, prolonged and shocking, and stated that any person would be profoundly disturbed by the significant intrusion into such highly personal information. It awarded Jones CA$10,000 in damages, noting in cases where a plaintiff has not suffered pecuniary loss, damages for intrusion upon seclusion should not exceed CA$20,000.

Protection of personal privacy in Canada

The 'intrusion upon seclusion' tort is an extension of a wider Canadian recognition of the importance of privacy for its own sake. In *Jones v Tsige,* Sharpe J A framed his decision drawing on language imported from American privacy law, Canadian statutory privacy regimes and Canadian Constitutional values.

The starting point for Sharpe J A's analysis was the work of American jurists and legal commentators.[1] This line of thought identified a 'general right of the individual to be let alone' and a 'right to one's personality' as fundamental values underlying privacy law.[2] These rights found expression in the tort of 'intrusion upon seclusion' in the American Restatement (Second) of Torts (2010).[3] That tort includes intrusion into private places and listening or looking, with or without aids, into an individual's private affairs even if there is no publication of the information obtained.[4] As such, it is not the use to which private information is put that is wrongful; it is the fact the information was accessed in the first place.

Sharpe J A linked this common law value for personal privacy to section 8 of the Charter which protects against unreasonable search and seizure by government. Although the Charter does not apply to private actions between individuals, Sharpe J A observed the Supreme Court of Canada has sought to develop the common law in a manner consistent with Charter values.

According to the Supreme Court of Canada, section 8's protection from unreasonable search and seizure of private information is '[g]rounded in a man's physical and moral autonomy'. Privacy is 'essential for the well-being of the individual'[5] and its protection is in keeping with the Charter's underlying values of dignity, integrity and autonomy.[6] The wrong in impeding or observing the private life of an individual without consent is thus in limiting this physical and moral autonomy, this source of well-being.

Of particular importance is the right to informational privacy as distinct from personal (physical) and territorial (property-related) privacy. Informational privacy relates to a biographical core which reveals details of the lifestyle and personal choices of an individual. Such information includes financial, medical and personal information and even internet browsing histories which reveal our specific interests, likes and propensities.[7] In both a Charter and common law context, it is assumed all such information about a person is in a fundamental way their own, and for him or her to communicate or retain.[8]

Accordingly, for Sharpe J A and the Court of Appeal, allowing a tort for intrusion upon seclusion was the natural next step in developing the common law in a manner consistent with the changing needs of society. Indeed, he noted also that the common law, informed by Charter values, is best equipped to confront the challenges to privacy posed by rapidly evolving technology.[9]

Although Jones had no statutory cause of action in Ontario, four common law jurisdictions in Canada have already created a statutory tort of invasion of privacy when a person surveils or follows another, listens to or records conversations, or uses private documents or likenesses without consent. These actions alone, without further proof of damage, entitle the wronged individual to an award of damages. The Ontario tort of 'intrusion upon seclusion' therefore fits into a larger Canadian framework in which a sphere of personal privacy is protected from encroachment by government and private parties.

Boundaries to the right to personal privacy

While there is growing protection for personal privacy in Canadian law, the boundaries of that protection are still being established. In broad terms, accessing information will be lawful where there is no reasonable expectation of privacy. Whether a reasonable expectation of privacy exists, or whether there are competing interests which take precedence over the right to privacy, depends on the circumstances.

In the employment context, protection of personal privacy does not prevent an employer from obtaining information about an employee to meet workplace obligations. A labour arbitrator in Ontario recently stated that *Jones v Tsige* does not stand for the proposition demanding an employee disclose medical information for a legitimate purpose constitutes an actionable intrusion on the employee's privacy.[10] Similarly, in *R v Cole* the Supreme Court of Canada recently had occasion to comment on a school's entitlement to search the laptop used by one of its employees. Despite acknowledging the employee's legitimate expectation of privacy in the contents of his work laptop, his employer was nevertheless

entitled to search the computer because it had a statutory duty to maintain a safe school environment and had reasonable grounds the computer contained compromising photos of a student. As such, informational privacy in Canada can give way to the greater importance of functional and safe workplaces.

What's next?

The tort of 'intrusion upon seclusion' confirms the commitment of the Canada legal system to protecting a sphere of personal privacy previously unprotected. The tort fits into a larger framework of Constitutional values and statutory privacy regimes, all of which will be tested by new technologies and competing social priorities.

Notes

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1 *Jones v Tsige* 2012 ONCA 32 at paragraph 16–22; S D Warren & L D Brandeis, 'The Right to Privacy' (1890) 4 Harv L R 193; William L Prosser, 'Privacy' (1960), 28 Cal L R 383.

2 S D Warren & L D Brandeis, 'The Right to Privacy' (1890) 4 Harv L R 193 at p 195, 205, 207.

3 Restatement (Second) of Torts (2010) at section 652B.

4 *Jones v Tsige* 2012 ONCA 32 at paragraph 20.

5 *R v Dyment*, 2 SCR 417 at p 427.

6 *R v Plant*, [1993] 3 SCR 281 at p 293.

7 *R v Cole*, 2012 SCC 53 at paragraphs 47–48.

8 *Jones v Tsige* 2012 ONCA 32 at paragraphs 41–42; *R v Tessling*, 2004 SCC 67 at paragraph 23.

9 *Jones v. Tsige* 2012 ONCA 32 at paragraph 45, 68.

10 *Complex Services Inc v Ontario Public Service Employees Union, Local 278*, [2012] OLAA No 409 at paragraph 93.