Privacy and the Media

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A. INTRODUCTION

With some exceptions, the laws regarding privacy affect the media in the same manner as any other organization. Given that this paper is being presented as part of a daylong conference on privacy and access issues, the focus of this paper is geared towards issues that are more unique to the media.

In this paper, I will address some relevant legislation and case law affecting the media. Further, I will be addressing some of the issues that are developing with respect to privacy and the media in other jurisdictions.

B. SASKATCHEWAN LEGISLATION

In Saskatchewan, we have a statutory claim for breach of privacy. *The Privacy Act* provides that it is a tort, actionable without proof of damage, for a person to willfully and without claim of right violate the privacy of another person. There is no explicit definition in *The Privacy Act* of what constitutes a violation of privacy. However, Section 3 of the Act provides a non-exhaustive list of privacy breaches, including:

1. Auditory or visual surveillance of a person;

2. Listening to or recording of a conversation in which a person participates, other than by a person who is a party to the call or conversation;

3. Use of the name or likeness of a person for the purposes of advertising, promoting the sale of any property or service or for any other purpose of gain if the person is identified or identifiable and the user intended to exploit the name or likeness or voice of that person;

4. Use of letters, diaries or other personal documents of a person.

It is apparent from Section 3 of the Act that what constitutes a breach of privacy is reasonably expansive. Most notably, the use of someone's likeness for the purpose of gain is broad enough to include most pictures of an individual found in a newspaper or magazine. For instance, it would not be uncommon to see a picture of a child in a newspaper playing in a waterpark at the beginning of summer. Likewise, there are often pictures of criminal accused in the front section of a newspaper. Arguably, those pictures are being published for the purpose of selling newspapers and, thus, may be caught by Section 3 of the Act.

However, Section 4 of *The Privacy Act* provides additional safeguards for the media. In particular, Section 4 provides that an act, conduct or publication is not a violation of privacy, if an individual is involved in news gathering and the "act, conduct or publication was reasonable in the circumstances and was necessary for or incidental to ordinary news gathering activities".

As a result, *The Privacy Act* provides a significant defence for news gathering organizations. However, the defence is tempered by the requirement that the news gathering organization's act, conduct or publication must be "reasonable in the circumstances".

There are no reported decisions considering Section 4(1)(e) of *The Privacy Act*. As a result, we have little for guidance in terms of what constitutes reasonable acts, conduct or publication.

One possibility is importing what is commonly known as the "responsible journalism" defence in the defamation context. The Supreme Court of Canada in *Grant v. Torstar Corp.*, [2009] 3 SCR 640 and *Cusson v. Quan*, [2009] 3 SCR 712 created a defence that it labeled the "responsible communication on a matter of public interest" defence. In considering whether the defence is made out, the Supreme Court created a two-part test, set out as follows:

A. The publication is on a matter of public interest, and

B. The publisher was diligent in trying to verify the allegation, having regard to:

(a) the seriousness of the allegation;

(b) the public importance of the matter;

(c) the urgency of the matter;

(d) the status and reliability of the source;

(e) whether the plaintiff's side of the story was sought and accurately reported;

(f) whether the inclusion of the defamatory statement was justifiable;

(g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and

(h) any other relevant circumstances.

In the privacy context, the first part of the test would seemingly be an important consideration. The second part of the test may need to be modified, as the concern in privacy case would be less about ensuring accuracy, as ensuring that the conduct of the media does not unjustifiably infringe the privacy of an individual. Some of the considerations above though may be relevant, such as

the public importance of the matter and the seriousness of the issues involved. Further considerations might include whether the material at issue was a part of a public record, how the material was obtained (illegally or not) and how integral the information is to the privacy of the individual (ie. Would an individual expect a higher or lower level of privacy in all of the circumstances?).

I would anticipate that the media would be given significant deference on what constitutes "reasonable" news gathering activities. As stated by the Supreme Court of Canada in *Grant v. Torstar, supra,* "[w]hen proper weight is given to the constitutional value of free expression on matters of public interest, the balance tips in favour of broadening the defenses available to those who communicate facts it is in the public's interest to know." This quote was cited with approval, albeit in *obiter*, in *Jones v. Tsige*, 2012 ONCA 32, in the privacy context.

C. CASE LAW

There are few reported decisions in Canada where media organizations have been pursued for a statutory or common law breach of privacy claim. Perhaps the new common law claim of "intrusion upon seclusion" will open the floodgates, although it has not occurred thus far.

One relatively minor decision of some interest to media lawyers is *Pia Grillo v. Google Inc.*, 2014 QCCQ 9394. The plaintiff in that case brought a claim against Google based on an image found on Google Street View. In the still photograph on Google Street View, the plaintiff was photographed sitting on the step of her house with much of her upper torso being visible in the photograph (her face was blurred). The plaintiff was distraught and claimed that the photograph caused significant mental distress. The small claims court accepted that the publication of the plaintiff's image, without her consent and in a compromising position, violated the plaintiff's privacy and image rights under Quebec civil law. As a result, she was given $2,250 of damages. The decision is only available in French at the moment. The applicability of this decision outside of Quebec is questionable.

In the United Kingdom, privacy claims have been asserted far more widely and some case law has developed setting out the parameters of such claims. A broad-based breach of privacy tort has been rejected. However, English courts have created a tort of "misuse of private information". A summary of the two-part test involved with such a claim is:

1. Is the information private and would the disclosure of the information be contrary to the right to respect for private and family life (as provided for in Article 8 of the European Convention on Human Rights)?; and

2. In all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher?[2]

The second point essentially is a balancing exercise of whether it is more important that the information and article be published versus the harm occasioned to the individual by disclosure of their personal information.

A leading English case analyzing the tort of "misuse of private information" involves a Canadian, Loreena McKennitt. In *McKennitt v. Ash,* [2008] QB 73, Ms. McKennitt and her holding companies brought a claim against an author and publisher of a tell-all book for misusing her private information. The claim was successful and upheld on appeal; although the damages were nominal (Ms. McKennitt did obtain an injunction which was much more significant).

The misuse of private information test potentially has some application in Canada and could be used to determine the "reasonableness" of the news gathering activities, outlined above. As far as I am aware, the English case law has not been expressly considered in Canada thus far.

D. RIGHT TO BE FORGOTTEN

A developing area of law in the United States and Europe is the concept of the "right to be forgotten". Although much has been written on this topic elsewhere, for the purposes of this paper, I will just briefly outline the basic issues involved with this subject.

Essentially, concern has been raised with respect to the fact that information on the Internet can often create permanent records of the wrongdoings or embarrassing moments of a person's life. One cannot escape issues once they are published on the Internet. In response to this issue, countries in Europe formulated the concept of the "right to be forgotten". Essentially, the right to be forgotten allows an individual to request that personal information about them be removed from search engines, such as Google, after a period of time. Thus, the offending information is no longer easily accessible, even if it remains on a website.

This concept has not made its way to Canada to any great extent, but it has the potential to impact the accessibility of the media's Internet materials in the future. It also raises issues of the freedom of expression and freedom of the press, which are clearly of interest to the media.

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[2] Much of the information herein about the U.K. law on privacy is a synthesis of materials prepared by Hugh Tomlinson, Q.C. of Matrix Chambers (www.matrixlaw.co.uk) presented at the National Media Law Conference in Toronto in 2012.

E. PUBLICATION BANS AND ACCESS TO COURT RECORDS

There is a tremendous amount of case law on publication bans and access to court records, both in Saskatchewan and throughout Canada. Publication bans and privacy issues intersect when individuals request publication bans based on what they assert are "privacy" rights.

Of course, a claim of privacy in the context of requests for publication bans is rarely successful. There is a general rule of openness in our judicial system. As noted by the Supreme Court in *Toronto Star v. Ontario*, 2005 SCC 41, "[i]n any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy."

The Supreme Court also had the following to say in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General),* [1996] 3 S.C.R. 480*:*

> 40 … It must be remembered that a criminal trial often involves the production of highly offensive evidence, whether salacious, violent or grotesque. Its aim is to uncover the truth, not to provide a sanitized account of facts that will be palatable to even the most sensitive of human spirits. The criminal court is an innately tough arena.
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> 41 Bearing this in mind, mere offence or embarrassment will not likely suffice for the exclusion of the public from the courtroom. …

The fact that mere embarrassment is not a sufficient basis on which to base a publication ban was decided in Saskatchewan in the case of *R. v. Turcotte,* 2008 SKQB 491, where the Court stated:

> 20 … all judicial proceedings must be held in public. In other words, it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counter-balances the inconvenience or embarrassment to the private person whose conduct may be the subject of such proceedings. As the accused has received an adult sentence, there is no basis for a publication ban of identity and I dismiss the application.

As can be seen from the foregoing, it is rare for a court to determine that privacy interests justify a publication ban.

F. CONCLUSION

Claims against media organizations for breach of privacy are still relatively rare. Thus, much of what is covered in this paper is theoretical and borrows concepts from other jurisdictions. I anticipate that we will see more case law develop on these issues in the next several years as privacy issues become a more significant concern.