Privacy and the Media

A. INTRODUCTION

The title of this paper and the presentation addresses the issues of privacy and the media. However, many of the privacy issues that the media addresses on a frequent basis are addressed by other organizations as well, so I hope that this paper may have some benefits outside of the media realm.

For the purposes of the paper, I will be focussing on civil claims for breach of privacy, either under *The Privacy Act* or pursuant to the common law torts regarding privacy. I will not be dealing with the *Personal Information and Protection of Electronic Documents Act* or provincial legislation (outside of *The Privacy Act*) to any great extent.

B. PRIVACY ACT

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 wilfully 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 SCC 61, and *Cusson v. Quan*, 2009 SCC 62, 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 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 considering the issues at stake?).

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 defences 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

For many years, it was not clear that there was a tort for a breach of privacy. The case law was inconsistent and not well reasoned. Frequently, courts would try to shoehorn a privacy claim into the negligence or defamation framework.

This largely changed with the case of *Jones v. Tsige*, *supra*, where the Ontario Court of Appeal adopted a tort that it called "intrusion upon seclusion", which is a tort based on a breach of privacy. In that case, the defendant worked for a bank and was in a relationship with the plaintiff's ex-husband. Using her work computer over a four-year period, the defendant accessed the plaintiff's banking records 174 times. She did not publish or disseminate the information in any way. The plaintiff brought a claim for a breach of privacy. On a summary judgment motion, a chambers judge dismissed the claim on the basis that there was no common law tort for breach of privacy in Ontario. That decision was overturned by the Court of Appeal, which adopted the tort of intrusion upon seclusion. The essential elements of the tort are:

> [71] The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; second, that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.

A similar case of inappropriately accessing workplace data was addressed in Saskatchewan in the case of *Bigstone v. St. Pierre*, 2011 SKCA 34. The Court found that a claim for a breach of privacy under *The Privacy Act* could not be struck, as inappropriately accessing records could

constitute a breach of privacy as contemplated by the Act. Notably, both the employer and employee involved were kept in the lawsuit.

Certainly, this is a warning to employers to ensure that employees do not use work data in inappropriate ways. Employers should consider having policies regarding workplace data and storage.

It should be noted though that there is no real history in Saskatchewan for successful privacy claims following trial. In fact, some of the case law has arguably made it difficult to make out a successful claim under *The Privacy Act*. For instance, in *Peters-Brown v. Regina District Health Board*, 1995 CanLII 5943 (SKQB), the plaintiff brought a claim against a health board for "circulating confidential patient information implying she suffered from an infectious disease." The information was disseminated inside the hospital in a location which could be seen by individuals not employed by the hospital and was apparently copied and wound up in the plaintiff's workplace. Although the plaintiff was successful in her action against the hospital, the privacy claim failed. The Court determined that the term "wilful" in Section 3 of *The Privacy Act* required a subjective intent to breach the plaintiff's privacy. Given that the hospital did not set out to violate the privacy interests of the plaintiff, there was no wilful act which would trigger Section 3 of *The Privacy Act*. Thus, the Court adopted a subjective state of mind test into determining whether there was a willful violation of a plaintiff's privacy.

The Law Reform Commission of Saskatchewan in its report *"Renewing The Privacy Act"* from March 2012 criticized the *Peters-Brown* decision and suggested amendments to the Act to eliminate a defendant's subjective state of mind from determining liability.

Outside of the accessing of records, there has been some other recent case law regarding privacy. For instance, a related tort to "intrusion upon seclusion" was adopted by the Ontario Superior Court of Justice in the case of *Doe 464533 v N.D.*, 2016 ONSC 541. The defendant, who had been noted for default, had posted an intimate video of the plaintiff on a website without her knowledge or consent. The plaintiff brought an action claiming several torts, including a breach of privacy. The judge determined that the case did not fall within the parameters of the tort of intrusion of seclusion, but rather adopted the tort of "public disclosure of private facts". The essential elements of the tort are:

> 46 … One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of the other's privacy, if the matter publicized or the act of the publication (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

Another relatively minor decision of some interest to media lawyers from the past few years is *Pia Grillo v. Google*, 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 accepted a claim for "misuse of private information". A summary of the two-part test 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?

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.

What can be seen from the foregoing is that:

1. The area of protection of privacy is developing and seems to be of greater concerns at present than it has been in the past;
2. Workplaces should consider how they are going to address issues of accessing of data by employees, as they could be liable for inappropriate behavior;
3. The area is still in development and few successful cases have been brought under either the common law or *The Privacy Act*;

4. The media has to strongly consider the public interest of what they might publish to avail themselves of defences either under *The Privacy Act* or the common law torts.

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.

E. CONCLUSION

The area of privacy claims and torts is still very much developing. However, there appears to be a greater movement in some of the case law towards more protection for privacy than we have seen in the past, which is evidenced by the two new torts related to privacy. It is anticipated that this area will grow larger in the years to come with more data becoming publically available, whether through the traditional media or on-line.