

## Ontario Court of Appeal allows prison guard *Charter* privacy suit to proceed

In a ruling that may impact the scope of privacy rights, the Ontario Court of Appeal has ruled that prison guards can sue the federal government for breach of their rights under s. 7 of the *Canadian Charter of Rights and Freedoms*, the provision that guarantees the right to security of the person. The case, *Jackson v. Canada*, grew out of an incident at Joyceville prison. Prison inmates cleaning up after a flood in the human resources office came into possession of a list of the home addresses and telephone numbers of prison employees. The list circulated for several months and when it was recovered, some of the guards' names and addresses had been highlighted.

The guards launched a \$7.5 million class action against the government, alleging negligence, breach of statutory duty, breach of privacy rights, breach of fiduciary duty and breach of their rights under the *Charter*. Claiming on behalf of several hundred guards and their spouses, the guards alleged they had been subjected to stress and anxiety because the inmates now knew where they lived.

Before the judge, the government moved successfully to strike all but the negligence and privacy rights claims. The judge also held that the *Charter* did not apply to the relationship between the guards and the government employer. The guards appealed the decision to strike the claims based on breach of fiduciary duty and *Charter* rights.

### FLEXIBLE CONCEPT, EVOLVING LAW REQUIRE TRIAL TO RESOLVE

In a decision released on September 21, 2006, the Ontario Court of Appeal ruled that the fiduciary and *Charter* claims could proceed. Turning first to the issue of fiduciary duty, the Court stated that the fiduciary concept was flexible, and in this context required a trial to resolve:

Whether it can be established that, given all the surrounding circumstances, the employees could reasonably expect the employer to have acted in their best interests in relation to the collection, storage and safeguarding of the personal information in question, and whether that would be sufficient to ground a fiduciary relationship, and whether there was a breach of such a relationship, if it did exist, are questions that are best left to trial for resolution.

With respect to the *Charter* claim, the Court held that the guards' pleaded facts were sufficient to entitle them to a trial to ascertain whether the information at issue engaged s. 7, and whether the level of stress and anxiety engendered by the release of the information could amount to a "serious state imposed psychological stress." While acknowledging the case law seemed to say that s. 7 claims could be made only in connection with an individual's interaction with the justice system, the Court noted that this case could be different:

On its face, the decision of the Supreme Court of Canada in *New Brunswick (Minister of Health and Community Services) v. G. (J.)* ... would appear to limit resort to the s. 7 right to an individual's interaction with the justice system and its administration. However, the law with respect to s. 7 is evolving, and whether it can be said that the defendants' impugned conduct in allegedly failing to safeguard the Employee List while operating the prison, constitutes government action "in the course

of the administration of justice,” is also a matter that is better sorted out at trial.

Accordingly, the guards’ appeal against the motion dismissing the two claims was allowed.

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