

## Court rejects tort of invasion of privacy in Ontario

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In *Jones v. Tsige* (March 2011), the Ontario Superior Court of Justice considered whether the tort of invasion of privacy exists in the common law in Ontario. The case law on the existence of the tort is divided, providing a difficult decision for the newly-minted Justice Whitaker, former Chair of the Ontario Labour Relations Board. Ultimately the Judge decided not to recognize the tort. He stated that the remedies for invasion of privacy are to be found in the various statutes that deal with privacy issues.

The plaintiff, Ms. Jones, was an employee of the Bank of Montreal (“BMO”). She used BMO for her personal banking. The defendant, Ms. Tsige, was employed by BMO in a different department. The two never worked together. Prior to the lawsuit they had never met. Yet on 174 occasions over a four-year period the defendant used her work computer to access, and review, Ms. Jones’s personal accounts. Ms. Tsige had no work-related purpose for doing so.

When BMO discovered the defendant’s unauthorized access to the plaintiff’s accounts, the Bank investigated. The defendant admitted to the Bank that she had been in a financial dispute with her common law spouse. He was the former husband of the plaintiff. The defendant explained that she accessed the plaintiff’s accounts to confirm whether he was paying child support to the plaintiff.

BMO suspended the defendant for five days. It denied the defendant her yearly bonus. BMO also required her to review its privacy standards. She was advised that if she engaged in similar misconduct, she would be dismissed.

The plaintiff sued after she became aware of the unauthorized access to her accounts. She claimed that by improperly gaining access to, and reviewing, her bank accounts the defendant committed the tort of invasion of privacy.

Ms. Jones sought general, punitive and exemplary damages, as well as a permanent injunction to bar similar conduct in the future.

The defendant argued that Ontario does not recognize “invasion of privacy” as a tort. Both parties asked Justice Whitaker for summary judgment.

### **IS THERE A COMMON LAW TORT OF INVASION OF PRIVACY?**

Justice Whitaker began by listing the four statutes that structure and enforce privacy obligations in Ontario. They are:

*Personal Information Protection and Electronic Documents Act (PIPEDA);  
Personal Health Information Protection Act (PHIPA);  
Freedom of Information and Protection of Privacy Act (FIPPA); and  
Municipal Freedom of Information and Protection of Privacy Act (MFIPPA).*

The federal privacy law, PIPEDA, regulates the banking sector. Under the statute, employees can file formal complaints to the Privacy Commissioner if they believe that the employer has contravened PIPEDA requirements. The Privacy Commissioner investigates and resolves the matter. If the employee is not satisfied with the Privacy Commissioner's ruling, he or she may apply to the Federal Court for a hearing.

Justice Whitaker noted that instead of seeking recourse through the statutory process in PIPEDA, the plaintiff chose to sue for damages in court based on the common law. The plaintiff argued, based on the decision in *Somwar v. McDonald's Restaurants of Canada Ltd.* (2006) ("*Somwar*"), that there is a "free standing" tort of invasion of privacy in Ontario. In *Somwar*, the employer did a credit check on the employee without his consent. The employee sued on the basis of invasion of privacy. After reviewing the case law, the court in *Somwar* allowed the claim to proceed, stating:

In light of the trial decisions listed in this brief survey of Ontario jurisprudence, and the absence of any clear statement on the point by an Ontario appellate court, I conclude that it is not settled law in Ontario that there is no tort of invasion of privacy.

Justice Whitaker contrasted this to the Court of Appeal's decision in *Euteneier v. Lee* (2005) ("*Euteneier*"). *Euteneier* involved a lawsuit against the police following a strip search in which the prisoner was left bound and unclothed in a holding cell, visible to passers-by, for 20 minutes. Although the plaintiff's claims for damages were primarily based on breaches of his *Charter* rights, the extent to which privacy rights are protected was discussed by the Court of Appeal. The Court of Appeal noted that the plaintiff "properly conceded in oral argument before this court that there is no 'free standing' right to dignity or privacy under the Charter or at common law..."

It was this phrase by the Court of Appeal that Justice Whitaker found to be determinative and binding. Notwithstanding the decision in *Somwar*, Justice Whitaker stated:

In my view, the inescapable conclusion, put quite plainly by the Court of Appeal ... is that 'there is no "free standing" right to...privacy...at common law.'

The Judge pointed out that most Canadian jurisdictions have statutory administrative schemes that regulate privacy issues and disputes. In the plaintiff's case there was recourse available under the federal PIPEDA. Given this statutory mechanism for privacy complaints, the Judge found that the

lack of a common law remedy could not be seen to result in a “legal vacuum” that would permit invasions of privacy to go without recourse.

Justice Whitaker further noted that the statutes governing privacy issues are generally carefully designed to balance the practical needs of an industry against the privacy interests of individuals. This is not seen to be an area of law that requires “judge-made” common law rights and obligations.

### **In Our View**

Justice Whitaker’s decision may not be the final word on whether the tort of invasion of privacy exists in Ontario. The plaintiff has filed an appeal. In addition, much of Justice Whitaker’s rationale relates to his conclusion that PIPEDA provides an adequate mechanism for redressing a breach of privacy. This raises the question whether the case would have been decided differently had the employer been a provincially-regulated private-sector organization, and thus not within PIPEDA’s application. We will keep readers informed of any developments.

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