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## Snooping, Privacy and Precedent in Ontario

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## NOTES

### Snooping, Privacy and Precedent in Ontario

Employees of large organizations with access to confidential personal files sometimes succumb to the temptation to snoop on what their neighbours, friends or acquaintances are up to. They may do so for a variety of reasons ranging from a wish to expose wrongdoing to mere idle curiosity. Employers typically have policies against such activities and may discipline an employee who is caught out. In extreme cases the police may even be called in, although the criminal law is not that helpful. The misconduct may not fall neatly under the *Criminal Code*'s restrictive definition of unauthorized use of a computer,<sup>1</sup> nor amount to theft, fraud or criminal breach of trust — they all involve dealing with property or a “thing,” and confidential information is neither.<sup>2</sup>

What of the civil law? The Uniform Law Conference of Canada has issued a model *Privacy Act*<sup>3</sup> and half the provinces — British Columbia, Manitoba, Newfoundland and Labrador, Quebec, and Saskatchewan — have similar laws often modelled on it. Snooping there would allow the victim to sue in tort for invasion of privacy. So in *Bigstone v. St. Pierre*<sup>4</sup> an employee of a Saskatchewan power utility had nosed round customer billing records to gather information for an ultimately successful personal lawsuit she was engaged in. During the trial the employee admitted her snooping and was then sued by the unsuccessful defendant under Saskatchewan's *Privacy Act*.<sup>5</sup> The Saskatchewan Court of Appeal upheld a lower court ruling letting the case go to trial.

Ontario lacks such legislation and a case decided around the same time as *Bigstone* reached the opposite result. In *Jones v. Tsige*<sup>6</sup> a bank employee used her computer on 174 occasions over four years to access and look at the bank account of an employee at another branch of the bank. The snoop was living with the victim's ex-husband and apparently wanted to know what alimony he was paying. When her employer discovered her misconduct, she admitted having no legitimate reason to access the account and promised to be good in future. The bank disciplined but did not fire her. The snooper started an action for damages and an in-

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<sup>1</sup> *Criminal Code*, s. 342.1.

<sup>2</sup> *R. v. Stewart*, [1988] 1 S.C.R. 963.

<sup>3</sup> Online: <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1p3>.

<sup>4</sup> 2011 SKCA 34.

<sup>5</sup> R.S.S. 1978, c. P-24.

<sup>6</sup> 2011 ONSC 1475.

junction but quickly found out, if she hadn't known till then, that Ontario is not Saskatchewan. Her action was dismissed for disclosing no actionable wrong. Whitaker J. in the Superior Court found the snoop owed the plaintiff no fiduciary duty, and further held that no action lay for breach of privacy at common law either. In his view, the customer had an adequate administrative remedy in being able to complain to the Privacy Commissioner under the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA).<sup>7</sup> Also pointing to three Ontario statutes that dealt with various aspects of privacy, the judge thought the field was "not an area of law that requires 'judge-made' rights and obligations": "[s]tatutory schemes that govern privacy issues are, for the most part, carefully nuanced and designed to balance practical concerns and needs in an industry-specific fashion."<sup>8</sup>

This last point can cut both ways. Thus, the Supreme Court of Canada has endorsed the principle adopted by other Commonwealth courts that "the evolution of Judge-made law may be influenced by the ideas of the legislature as reflected in contemporary statutes and by other current trends."<sup>9</sup> More compendiously, "[w]here over a period of years there can be discerned a steady trend in legislation which reflects the view of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course."<sup>10</sup> The course of federal and provincial privacy legislation, including the *Privacy Acts* of other provinces, might therefore suggest that the common law should move to protect rather than repel privacy interests.

Before commenting on the privacy claim, we should note that the plaintiff, somewhat surprisingly, chose to rest her alternative claim on a breach of fiduciary duty rather than on a breach of confidence. Banks clearly owe their customers a duty of confidentiality, which includes not granting unauthorized access to a customer's account and personal information. That contractual duty is supplemented by a similar equitable duty that individual bank employees owe to customers. Although the only relationship between the snoop and the customer was through the snoop's employer, duties of confidence have been imposed even where parties had no prior relationship at all. Thus the nocturnal thief who jumps a fence to take cuttings from trees to plant on his own property, the eavesdropper who overhears and takes advantage of conversations he knows are confidential, and the industrial spy who overflies to take x-ray photographs of the building's interior are all liable to the usual injunction, damages and unjust enrichment relief at the suit of the af-

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<sup>7</sup> S.C. 2000, c. 5.

<sup>8</sup> *Supra* n 1 at [56]. The three statutes the judge mentioned (*ibid.* at [29]) were the *Personal Health Information Protection Act*, S.O. 2004, c. 3, the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, and the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56. How any of these applied to the plaintiff is not indicated.

<sup>9</sup> *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, 85 D.L.R. (4th) 129 at 151.

<sup>10</sup> *Erven Warnink BV v. J. Townend & Sons (Hull) Ltd.*, [1979] A.C. 731, 743 (H.L.), also approved in *Canson*, *ibid.*

fect property owner or speaker.<sup>11</sup> Since an employer's duty can be fulfilled only through its employees, the case for imposing a direct duty of confidence on employees is clear. An employee who accesses and looks at a customer's personal and financial information for non-banking reasons obviously breaches that duty, perhaps implicating the bank vicariously and subjecting both parties to similar remedies, including punitive damages.<sup>12</sup>

Privacy and confidentiality interests overlap, as English courts have noted when extending the breach of confidence action to protect privacy interests. Whether the creation of a whole new tort or the extension of an existing action is a better way of vindicating privacy interest is more a question of taste than substance. In creating a new tort of commercial appropriation of personality in 1973, the Ontario Court of Appeal could have anchored it in a concept of privacy but, after reviewing American and Commonwealth case law and academic writing, as well as noting the *Privacy Acts* of British Columbia and Manitoba, preferred to develop appropriation as an autonomous concept.<sup>13</sup> While recognizing that misappropriation protects economic rather than personal interests, a number of Canadian courts, including some in Ontario, similarly extended the common law to vindicate aspects of personal privacy. Quebec's civil law also protects dignity and privacy interests, as the Supreme Court of Canada demonstrated in upholding a damages award against a journal that had illustrated an article with a photograph of an ordinary member of the public going about her business on a public street.<sup>14</sup> Likewise in England, the deprivation that tabloid readers feel in not being able to peruse photographs of supermodels exiting rehab clinics, best-selling authors shopping with their children, or Formula 1 bosses partying in their basements, is thought to be outweighed by the more substantial privacy interests of the subjects involved.<sup>15</sup> The presence of PIPEDA-like legislation has not hindered the development of the English action, any more than the presence of privacy legislation that included protection against commercial appropriation of personality hindered the acceptance of the corresponding common law tort in provinces with such legislation.<sup>16</sup>

Some Ontario courts have granted remedies for invasion of privacy, and others have refused to strike such actions summarily, as Whitaker J. indeed noted in *Jones*

<sup>11</sup> *Franklin v. Giddins*, [1978] Qd. R. 72 (S.C.); *Attorney-General v. Observer Ltd.*, [1990] 1 A.C. 109, 281 (H.L.); *E. I. DuPont de Nemours & Co. v. Rolfe*, 431 F.2d 1012 (5th Cir. 1970).

<sup>12</sup> *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, allowing punitive damages to be awarded for breaches of an equitable duty.

<sup>13</sup> *Krouse v. Chrysler Canada Ltd.* (1973), 40 D.L.R. (3d) 15 (Ont. C.A.); *var'ing* (1971), 25 D.L.R. (3d) 49 (Ont. H.C.J.); see generally, D. Vaver, *Intellectual Property: Copyright, Patents, Trade-marks*, 2<sup>nd</sup> ed. (Toronto: Irwin Law, 2011), 436–444.

<sup>14</sup> *Aubry v. Vice-Versa Inc.*, [1998] 1 S.C.R. 591.

<sup>15</sup> *Campbell v. MGN Ltd.*, [2004] 2 A.C. 457, [2004] UKHL 22; *Murray v. Big Pictures (UK) Ltd.*, [2008] EWCA Civ 446; *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777.

<sup>16</sup> *Jones v. Daniels* (1986), 11 C.P.R. (3d) 544 (B.C.S.C.).

v. *Tsige*.<sup>17</sup> In such a case, the claim should not be struck out summarily but the new point of law should be left for decision at trial on “a full factual record and finding of fact made by a trier of fact on that record.”<sup>18</sup>

Why then did the judge depart from the latter cases and dismiss the case summarily? He said he was justified in doing so because of the “binding and dispositive” authority of the Ontario Court of Appeal’s decision in *Euteneier v. Lee*.<sup>19</sup> *Euteneier* involved negligence, assault and *Charter* claims against the police for intrusive handling of an arrested individual. The “binding and dispositive” language to which Whitaker J. referred was a single sentence in the Court of Appeal’s judgment, where the court said that plaintiff’s counsel “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.”<sup>20</sup> But counsel’s concession during argument about a cause of action that is neither pleaded nor in issue is not a “binding and dispositive decision” on anything, whether the concession is called “proper” or not. Is it conceivable the Court of Appeal itself would summarily dismiss a case on completely different facts from *Euteneier* that specifically pleaded a common law right to privacy, by saying that the “holding” in *Euteneier* foreclosed the point?

The weight given to reasons that are not essential to a decision has varied over the years. A century ago, in refusing to follow comments in an earlier Supreme Court judgment, Taschereau C.J.C. said:

Anything that may be found in the report of that case (and of any case) that was not necessary for the determination of the controverted points therein is obiter and not binding as authority. And the number of judges who concurred in such obiter does not make it anything else. Then a simple concurrence is nothing more than a concurrence in the conclusions, or at most in the reasons upon which exclusively the points actually determined are based.<sup>21</sup>

The Supreme Court has since softened its line on when *dicta* should be followed. All *obiter dicta* are not born equal. Some are more persuasive than others: those “obviously intended for guidance . . . should be accepted as authoritative,” at least by lower courts.<sup>22</sup> Binnie J. continued:

Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not “binding” [no matter how incidental to the main point of the case or how far they were removed from the dispositive facts and principles of law]. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the

<sup>17</sup> See particularly *Somwar v. McDonald’s Restaurants of Canada Ltd.*, 2006 CanLII 202 and *Nitsopoulos v. Wong*, 2008 CanLII 45407, both cited and discussed by Whitaker J.

<sup>18</sup> *Romano v. D’Onofrio* (2005), 77 O.R. (3d) 583 at [12] (C.A.), foll’d in *Central Sun Mining Inc. v. Vector Engineering Inc.*, 2011 ONSC 1439 at [53].

<sup>19</sup> 2005 CanLII 33024, 77 O.R. (3d) 621 (C.A.); see *Jones*, *supra* n 1 at [55].

<sup>20</sup> *Euteneier*, *ibid.* at [63].

<sup>21</sup> *Griffin v. Toronto Ry.*, 33 S.C.R. 39, 1902 CarswellNat 35 at [6].

<sup>22</sup> *R. v. Henry*, [2005] 3 S.C.R. 609 at [57].

cases and is inconsistent with the basic fundamental principle that the common law develops by experience.<sup>23</sup>

The last sentence applies to the comment in *Eutenier*: an “off-the-cuff” sentence that comes without the benefit of contested argument or on a concession by counsel, often made for tactical reasons, is no safe guide to anything.<sup>24</sup> If the power of precedent is “the power of the beaten track”,<sup>25</sup> *Eutenier* hardly creases the ground.

*Jones v. Tsige* is little better on the substantive privacy issue. This Note will not rehearse the arguments for and against remedying some or all breaches of privacy, for that is done elsewhere.<sup>26</sup> In deciding nearly 40 years ago whether or not the common law in Ontario should recognize a concept of commercial appropriation of personality, the Ontario Court of Appeal conducted a wide-ranging historical review of Commonwealth and American case law and jurisprudence and was undeterred by the absence of statutory recognition of such a right in Ontario. The Superior Court should have conducted a similar review. Instead it elevated a concession by counsel in a non-privacy case over a series of Ontario cases of co-ordinate authority affirming a privacy tort or its possibility, and chose to neglect developments in the rest of Canada, the Commonwealth,<sup>27</sup> and the United States. The result may be “binding and dispositive” for local small claims courts, but not much else. The story of privacy law in Ontario still remains to be written.

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<sup>23</sup> *Ibid.*; discussed in *R. v. Prokofiew*, 2010 ONCA 423 at [18]–[25] before declining to follow *obiter* in Supreme Court.

<sup>24</sup> *Cf. Bacon v. Automattic Inc.*, [2011] EWHC 1072 at [45] (Q.B.).

<sup>25</sup> B. Cardozo, *The Growth of the Law* (Yale U.P., 1924), 62.

<sup>26</sup> Starting over a century ago with S. Warren & L. Brandeis, “The Right to Privacy” 9 *Harv. L.R.* 193 (1890); W. Prosser, “Privacy” 48 *Calif. L. Rev.* 383 (1960); D. Solove, *Understanding Privacy* (Cambridge, Mass. & London, England: Harvard U.P. 2008); *cf.* R. Brown, “Rethinking Privacy: Exclusivity, Private Relation and Tort Law” (2006) 43 *Alta. L.Rev.* 589.

<sup>27</sup> *Dyne Holdings Ltd. v. Royal Insurance Company of Canada*, 1996 CanLII 3672 (P.E.I., A.D.); *Douglas v. Hello! Ltd.*, [2007] UKHL 21; *Hosking v. Runting*, [2005] 1 N.Z.L.R. 1 (C.A.); *Doe v. ABC*, [2007] VCC 281. The authority is not all one way: see, e.g., *Hung v. Gardiner*, 2002 BCSC 1234.