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## Civil Procedure

***Potter v. Nova Scotia (Securities Commission)*— Nova Scotia Court of Appeal [2006] NSCA 7**

The NSSC issued an investigation order directed at "the affairs of Knowledge House Inc. of which Mr. Potter is the President, CEO and Board Chair. Mr. Potter deposed that pursuant to the NSSC investigation a large number of emails and other documents have been wrongfully obtained from the server/s of Knowledge House Inc. by Messrs Parish and Awad, counsel for National Bank Financial which they then supplied to the NSSC. The latter in turn supplied a file of information to RCMP. Pending the hearing of the Potter's substantive suit at the Supreme Court, two interlocutory applications for judicial review proceedings issued. In the first application, Potter applied for orders directing NSSC to file complete Return on the investigation and for his email materials in its possession. This was accompanied by notice of examination on NSSC's Deputy Director of Compliance and Enforcement. The crux of Potter's application was that since he was seeking judicial review, "he was entitled to have all fruits of the investigation provided to him and to the court in the return which NSSC is required to file" (under relevant rules) and to discover the investigator (para. 6). In the second application, NSSC applied for order to set aside notice of examination of its Deputy Director. It also prayed the court to strike out Mr. Potter's affidavit in support of his application for judicial review.

Acceding to Potter's prayer, Richard J. ordered, *inter alia*, that compact disc (CD) containing his email box along with electronic and paper copies of the documents retrieved on behalf of NSSC by investigators shall be sealed and given to the court immediately "pending final determination of the judicial review application and any appeals thereof" (para 8). The court also ordered NSSC to file complete Return which would remain sealed "provided, however, that such sealing shall not apply to Potter and/or his counsel" (ibid). It further ordered that a full copy of detailed supplementary materials relevant to the Return shall be provided forthwith by NSSC to Potter.

In the present suit NSSC seeks leave to appeal the above order and prays the court to stay proceeding pending its appeal. The Court held that the applicable legal principle in granting of stay pending appeal is discretionary and not automatic (para 11). To succeed, NSSC must satisfy 3-part primary test set out in *Fulton Insurance Agency Ltd v. Purdy* (1990), 100 N.S.R. (2d) 341, namely NSCC must show an arguable case, irreparable harm if stay is not granted and that balance of convenience favours a stay, or show, under the secondary test, that extraordinary circumstances make granting a stay just.

After reviewing the above conditions, the court observed that there was no risk of NSSC suffering irreparable harm. No one else's privacy interest is implicated in Mr. Potter's email box but his and "there is no risk to anyone's privacy interests by failure to stay the part of the order" dealing with releasing the CD to Mr. Potter (para. 27). Failure to stay part of the order in Mr. Potter's favour does not render NSSC appeal moot because should the appeal succeed, "Mr. Potter can be ordered to return what the Commission was wrongly required to deliver to him". Moreover, he could not have been exposed to what he did not already know (para. 30). According to the court, NSSC's failure to convince it that it would suffer irreparable harm was fatal and did not warrant consideration of balance of convenience (para. 34).

# Civil Procedure and Privacy

***Somwar v. McDonald's Restaurants Canada Ltd.*—Ontario Superior Court [2006] O.J. No. 64**

The Plaintiff is under the Defendant's employment as a restaurant manager. He sues the Defendant alleging that it invaded his right of privacy. The plaintiff claims financial compensation and for the invasion of his privacy. He also asks for an award of punitive damages in order to stop the Defendant from invading other persons' privacy. The principal basis for the Plaintiff's claim is that the Defendant conducted credit bureau check on him without his permission. For its part, the Defendant brought a motion pursuant to rule 21.01(1)(b) of the Rules of Civil Procudure, R.R.O. 1990, Reg. 194 seeking an order of court to dismiss the plaintiff action on the ground that the statement of claim discloses no cause of action.

Relying on *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 (S.C.C.) and *Nash v. Ontario* (1995), 27 O.R. (3d) 1 at 6 (C.A.) D.J. Stinson, held that the test of applying rule 21.01(1)(b) is whether it is plain and obvious that the statement of claim discloses no reasonable cause of action or that it is patently ridiculous and incapable of proof. Novelty of a cause of action does not operate against a plaintiff if he has a chance of success. Courts should read the statement of claim generously and must allow for inadequacies due to drafting deficiencies. Furthermore, court must be careful so that it must not at this stage dispose of matters not fully settled in jurisprudence.

The judge framed the issue, raised by the case as follows: whether someone whose privacy has been violated by another person can pursue civil remedy in the Courts of Ontario or whether Ontario law recognizes the tort of invasion of privacy. After an elaborate analysis of both academic and judicial authorities on the subject, he acknowledges that in Ontario, the potential existence of a common law intentional tort of invasion of privacy is hot button issue in cotemporary jurisprudence. He notes that "[t]he courts of Ontario have not been unanimous concerning the existence of a common law of invasion of privacy" (para. 20). He concludes that despite "arguable uncertainty of the existence of the tort of invasion of privacy in Ontario" (para. 23), "it is not settled in law in Ontario that there is no tort of invasion of privacy" (para. 22). The court acknowledges although the Charter does not apply to dispute between private citizens, its introduction has influenced the development of jurisprudence around the tort of invasion of privacy. Thus, pursuant to incremental changes to established jurisprudence inherent in the common law process, there is sufficient evidence to hold that "time has come to recognize the invasion of privacy as a tort in its own right" (para. 31).

The court recognized that the relevant statutory regime governing the Plaintiff's claim is the *Ontario Consumer Reporting Act*, R.S.O. 1990 c. C. 33, but that the Plaintiff did not frame his claim as one based on statutory breach. Consequently, the court held that "[i]n the case at bar the Plaintiff has not pleased a breach of statute as forming the basis for his claim. Instead, he relies on the common law intentional tort of invasion of privacy…I therefore do not accept the defendant's argument that the action must be dismissed based upon the Saskatchewan Wheat Pool decision; it is by no means plain and obvious that that the principles enunciated in that case foreclose a civil remedy for an intentional tort where the conduct complained of is also a statutory breach" (para. 42). Having not satisfied *Hunt v. Carey Canada Inc.*, the court held that the Defendants motion must fail.

**Comment on the issues raised in this case at IT.CAN blog**

***McCaffrey v. Paleolog*—British Columbia Supreme Court [2006] B.C.J. No. 65**

The plaintiff and Defendant lived together as common law spouses from 1997 to 2002 during which they had two children aged 8 and 7. In 2003, they dissolved the relationship with terms of separation agreement which essentially provided that although parties would have joint custody and guardianship of the children, the latter would continue to reside with the defendant, their mother. Part of the agreement was that parties should "do everything necessary to ensure that the children are disrupted as little as possible by the separation of the parties". The defendant started a new relationship. Her partner got a job in the United States and she now wants to move to the States with the children.

The plaintiff argues that to help determine issues relating to the custody of the children in the light of defendant's intention to take them to the United States, the defendant has to disclose a whole range of information, including whether her new partner was assisting her financially in the ensuing litigation. According to the plaintiff, he had voluntarily made financial disclosures to the defendant and he expects some reciprocity on her part. Other information required of the defendant include all her recent bank, credit financial records, more school records than disclosed, cell phone records, work shift schedules and contents of previous solicitors' records.

According to the plaintiff the information requested along with other areas of inquiry in the case "come well within the purview of *Campagnie Financiere et Commercial du Pacifiqu v. Peruvian Guano Co*"., (1882), 11 Q.B.D. 55, a decision that has been followed in number of BC decisions (para. 8). According to this decision, "a document must be produced if it contains information which may directly or indirectly advance a party's case or damage an opponent's case, even if the documents leads the party on a train of inquiry to a relevant fact" (para. 8).

The court held that "a reasonable degree of privacy must attach to personal information, even in custody dispute and that without greater relevance being demonstrated, they must not be disclosed" (para. 17). For the court, it is not correct that the train of inquiry under the Peruvian Guano test is one in which the net should be cast widely without giving regard to relevancy and in a manner that will undermine expectations of privacy. The defendant is not entitled to any reciprocity in regard to his voluntarily disclosed financial position. The court ordered the defendant to disclose only information that has relevance to custody proceeding (para. 28). The defendant need not advise whether her partner was financially supporting her in the litigation, she need not produce requested financial information or credit records, cell phone account records, names of previous counsel consulted or contents of their files. However, she was to disclose specific school records and prepare supplementary list of documents but was not required to verify those by affidavit.

## Criminal Law

***R. v. Adams*—British Columbia Provincial Court, [2006] B.C.J. No. 80** (hyperlink not available)

In July 2005, the accused was driving a silver coloured Nissan 350Z with the co-accused as a passenger. The latter was a subject of no contact order *vis á vis* the accused. Meanwhile, there was an outstanding warrant for the arrest of the accused for an alleged break and enter in December 2004. At gunpoint and without resistance, members of the Vancouver Police Department identify theft task force arrested the accused and co-accused. After being advised of their arrest and *Charter* rights, both of them were taken into custody. A number of items were recovered from the car, including a wallet containing some money, court documents, unisex handbag, small billfold, keys, including star shaped safe key and several other keys and a Motorola cell phone. A police officer examined the cell phone which has the picture of the co-accused on the screen saver. He also opened and examined text messages on the phone which implicated complaints about a bad batch of methamphetamine in circulation. Also discovered was a safe on the hatch back area of the car which was of interest to the police. A police constable prepared Information to Obtain Search Warrant to search the safe. On the strength of the information, a search warrant was issued. Upon searching the safe, 3 taser/stun guns, a silver key (later found to be counterfeit postal key), a bag of crystalline substance weighing 13.9 grams (later found to be methamphetamine) and 2 boxes of clear plastic baggies.

The defence challenged the lawfulness of the warrantless search of the vehicle, its contents, including the black handbag and the text messages from the cell phone. The defence argued that the search was not a lawful search incidental to arrest. Also, it challenged the validity of the warranty for the search of the safe and argued that police relied on evidence obtained by unconstitutional means, including opinions and information outside the officer's personal knowledge.

The Court held that "when a suspect is arrested while in his vehicle, the right to conduct search incidental to arrest includes the right to search not only the accused but also his vehicle as part of his

immediate surroundings" (para. 25). According to the court, the power to search as incident of arrest is limited in regard to purpose and scope. It must be determined by need to protect police, protect evidence and to discover evidence relating to offence for which the suspect is being arrested (para. 26). The court found that none of these considerations were a factor in the arrest of the accused and search of their car and its contents. The court held that "[t]he search of the text messages on the cellular is indicative of just how fanciful the search incidental to arrest claim is. There is simply no basis upon which this search of the private messages on the cell phone can be justified as a search incidental to arrest. Officer Safety could not be secured by such a search, nor could evidence of stolen property or B & E tools discovered by such a search" (para. 33). At best "the search was conducted with the hope of locating evidence to implicate the accused for drug possession or drug dealing offence" (para. 37). Thus, the search contravened section 8 of the *Charter*. With regard to search of the safe, the court held that, a review of the ITO underlying the search warrant shows that it contravened the principle of reliability. Among many reasons, the affiant relies on his personal opinions, does not have personal knowledge of the facts alleged, the sources of the information, especially those coming from the Police Record Information Management Environment lacked specificity (PRIME). The court declared the warrant issued invalid.

The court considered whether the exclusion of the evidence will bring the administration of justice into greater disrepute than would its admission especially in relation to the *Charter* violation. It held that "an individual's expectation of privacy in a vehicle is at the lower end of the scale" (para. 80). Such reduced expectation of privacy constitutes a crucial factor to admission of evidence arising from the search of the interior of a vehicle. For the court, "[i]n the present case, the search went beyond the interior of the car. The police went inside a handbag and into the text message of the cell phone. In my view the expectation of in a handbag and in the private and personal mail stored in a cell phone is at the high end of the scale. The entry into the handbag and the entry into the private text message centre in the cell phone were both highly invasive. Similarly, although citizens may have a reduced expectation of privacy when it comes to their vehicles, the same is not true for a safe, even when the safe is carried in a vehicle" (para.80). Excluding the evidence emanating from these searches, the court came to the conclusion that "*Charter* violations (an illegal and bad faith search followed by a search pursuant to invalid warrant) is such that admission of the evidence at trial would bring the administration of justice into disrepute.

**Comment on the issues raised in this case at IT.CAN blog**

## Defamation – Use Of Internet

In *Newman v. Halstead*, [2006] B.C.J. No. 59, 2006 BCSC 65, a defamation claim, the defendant was a long-time volunteer in various community activities relating to schools and education issues. The eleven plaintiffs consisted of nine teachers, a former school board trustee, and another parent of a child in public school. Over a period of several years the defendant had created websites, chat rooms and bulletin boards on which she posted a wide variety of allegations of wrongdoing. In particular her website had a list of "Least Wanted Educators", which included a sub-category of "Bully Educators". A number of the plaintiffs had their names and sometimes photographs posted on that site, along with allegations about their behaviour. In addition the defendant made widespread use of email. Evidence presented showed that her emails to the School Board exceeded the combined total output of everyone else in the School district who wrote to the Board. Her emails were copied to the Superintendent or others within the District, the seven members of the School Board, school principals and vice principals, media outlets, and politicians such as the local MLA and the Minister of Education. One witness presented evidence of the emails he had received from the defendant, which filled 11 floppy disks. A 2-inch binder containing over 40 e-mails was said to represent about one percent of the messages received by that witness. The defendant also actively promoted her website, which received a good deal of media coverage. One witness testified that the local newspapers published an article or letter referring to the website approximately every two weeks.

The allegations she made against the various plaintiffs included quite extreme behaviour, including

assaulting students, threatening special needs students with baseball bats and mallets, abandoning classrooms, holding a school hostage, drinking while at school or being high at school events, making sexually inappropriate comments to students, having had foster children removed by the Ministry of Children and Families, professional incompetence and other claims. She also alleged that the School Board was involved in "unimaginable corruption", was covering up "child abuse" and "crimes", and was using "war-like psychological abuse" against her.

Although represented at first, the defendant ceased to be represented, although she did go through discoveries. From that point forward she ceased to be represented and did not participate in the trial. The plaintiffs were entitled to default judgment but applied to seek a judgment on the merits. Having heard the evidence of the plaintiffs, including the defendant's discovery evidence, the trial judge rejected outright the defendant's allegations against the plaintiffs. The trial judge concluded that they were completely false and motivated by malice, and that the nature of the allegations made them defamatory.

In assessing damages the trial judge noted the broad reach of the internet and the defendant's incessant use of it. He acknowledged the apprehension felt by some plaintiffs that parents of children in the school would have seen the website, or that potential employers might "google" a plaintiff's name and find these allegations. He also noted that the defendant had shown no regret for her allegations.

The trial judge awarded compensatory damages of $626,000 between the eleven plaintiffs as well as $50,000 in punitive damages. In addition the trial judge noted that there was a reasonable possibility the defendant would continue to publish her allegations on the Internet or elsewhere, and accordingly issued an injunction preventing her from repeating her claims or from publishing "whether by way of the Internet or otherwise, any statements or other communications which refer to any of the plaintiffs by name, by depiction, or by description".

This newsletter is intended to keep members of IT.Can informed about Canadian legal developments as well as about international developments that may have an impact on Canada. It will also be a vehicle for the Executive and Board of Directors of the Association to keep you informed of Association news such as upcoming conferences.

If you have comments or suggestions about this newsletter, please contact Professors Teresa Scassa, Chidi Oguamanam and Stephen Coughlan at it.law@dal.ca.



Le présent bulletin se veut un outil d'information à l'intention des membres d'IT.Can qui souhaitent être renseignés sur les développements du droit canadien et du droit international qui pourraient avoir une incidence sur le Canada. Le comité exécutif et le conseil d'administration de l'Association s'en serviront également pour vous tenir au courant des nouvelles concernant l'Association, telles que les conférences à venir.

Pour tous commentaires ou toutes suggestions concernant le présent bulletin, veuillez communiquer avec les professeurs Teresa Scassa, Chidi Oguamanam et Stephen Coughlan à l'adresse suivante : it.law@dal.ca