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PRIVACY LAW BULLETIN

New Privacy Tort to Play a Broader Role in Class Actions

Ravi Shukla, LL.B.

Ravi Shukla

Partner

t: 416.864.7626
rshukla@foglers.com

Fogler, Rubinoff LLP
Lawyers
77 King Street West
Suite 3000, PO Box 95
TD Centre North Tower
Toronto, ON M5K 1G8
t: 416.864.9700
f: 416.941.8852
foglers.com

In an era marked by rapid technologically enabled social change, constrained regulatory budgets, crowded legislative agendas and mounting evidence of the widespread under-protection of sensitive personal information, courts in Ontario have adopted an activist stance in response to innovative lawsuits launched by individuals seeking redress for alleged breaches of privacy rights. The latest example of such a response is the recent unanimous decision of the Ontario Court of Appeal in the case of *Hopkins v. Kay* (2015), 124 OR (3d) 481 (Ont. C.A.) in which the court upheld the lower court's expansion of the relatively new common law tort of intrusion upon seclusion to claims which also fall within the scope of Ontario's *Personal Health Information Protection Act* ("**PHIPA**").

Intrusion upon seclusion was first recognized as a common law cause of action for breach of privacy which co-exists with the federal *Personal Information Protection and Electronic Documents Act* ("**PIPEDA**") in 2012 by the Ontario Court of Appeal in the case of *Jones v. Tsige* 2012 ONCA 32 (CanLII). In that case, which involved improperly accessed bank-held personal information, the court stated that the following elements needed to be satisfied in order to establish a successful intrusion upon seclusion claim:

a. the defendant's conduct must have been intentional;
b. the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and
c. a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.

In Hopkins, patients of the Peterborough Regional Health Centre launched a tort-based class proceeding alleging that 280 patient records were intentionally and wrongfully accessed and then disclosed to various third parties. The hospital brought a motion to strike the claim on the basis that it did not disclose a cause of action. Although hospital officials admitted that the health records were improperly accessed, they argued that the claim was precluded by PHIPA as it was intended to be a comprehensive scheme for the protection of personal health information. Under PHIPA, a patient's claim must initially be addressed by the Information and Privacy Commissioner of Ontario. Only after a Commissioner's order is final can a person affected by that order commence a proceeding in the Superior Court claiming recovery of damages for "actual harm" he or she suffered and, in the event that the Superior Court finds there to be a causal connection between that harm and the defendant's wilful or reckless breach of PHIPA, an award of damages covering actual pecuniary losses and mental anguish - the latter capped at $10,000 - may ensue. By comparison, damages for a claim of intrusion on seclusion without pecuniary loss have been capped by the court at $20,000 and, additionally, aggravated and punitive damages may be available in exceptional cases.

Writing for the court, Sharpe J.A. (who also wrote the judgement in Jones) upheld the dismissal of the motion to strike, i.e. agreed with the lower court that it was not plain and obvious that the plaintiffs could not successfully pursue their claim. On the question of whether PHIPA was intended by the legislature to be a comprehensive scheme, the court found that its jurisdiction was not expressly ousted. The court further found that neither was it impliedly ousted, given that a PHIPA provision specifically contemplated the possibility that complaints about the misuse or disclosure of personal health information may properly be the subject of a procedure which does not fall within the ambit of PHIPA. The Commissioner intervened in the litigation at the appeal stage, and, consistent with the position taken by the Commissioner, the court found that as the informal and discretionary nature of the process established under PHIPA was designed to facilitate the investigation of systemic issues rather than to provide individual-centric compensatory remedies, it was appropriate that the resulting void be filled via the suitable expansion of tort law. Given his involvement in the creation of the intrusion on seclusion tort, it was not surprising that Justice Sharpe emphasised the limitation represented by the third element of the tort when he rejected the suggestion that, by granting potential parallel access to a tort remedy, the court would, in effect, be facilitating an inappropriate circumvention of the balance of interests established by the Ontario legislature via PHIPA.

Although, as a technical matter, the Court of Appeal in Hopkins was only dealing with a preliminary motion to strike; the decision is clearly significant and in keeping with the general trends towards increased liability risk exposure for Canadian organizations that collect, use and disclose personal information and, therefore, more numerous privacy rights based class actions. In addition to creating a new head of liability for health care providers in Ontario, Hopkins increases the risk of reputational damage arising from the publicity that usually accompanies the certification of a class action. Before Hopkins, PHIPA regulated health information custodians who had suffered a privacy related security breach were required to notify the affected individuals and to thereafter exercise their discretion

whether to also notify related third parties such as credit card providers, insurers, the Information and Privacy Commissioner of Ontario and the police. Post-Hopkins, health information custodians may no longer have much control over the manner in which members of the public become aware of a security breach which has affected patient privacy.

Another significant aspect of the decision in Hopkins is the impact it could have on actors and in sectors outside of both Ontario and healthcare. As an example, the federal Privacy Commissioner also operates under budgetary and staffing constraints and has thus far been largely unsuccessful in lobbying the federal government to amend PIPEDA in order to enhance the incentives regulated entities have to adequately protect personal information under their control. Accordingly, and given that the tort of intrusion on seclusion was formed "in the shadow" of PIPEDA (the bank in Jones was regulated under that statute), it is not hard to envision the Ontario Court of Appeal's reasoning that statutory law can be appropriately buttressed by common law tort developments being applied to PIPEDA regulated sectors such as financial services and telecommunications. In fact, there is an ongoing intrusion upon seclusion based class action involving one of Canada's major banks (*Evans v. The Bank of Nova Scotia* 2014 ONSC 2135 (CanLII)) in which the bank has not taken the position that PIPEDA provides a comprehensive code precluding tort claims. In 2014, the lower court decision in Hopkins was relied upon by the Federal Court to support the certification of a class proceeding involving the loss of a large amount of student loan related data by the Department of Human Resources and Skills Development Canada (*Condon v. Canada* 2014FC 250 (CanLII)).

Following the preparation of this Bulletin, the Ontario government announced its intention to double the fines for violations of patient's privacy to $50,000 for individuals and $500,000 for organizations, and to make it easier to prosecute offenders.

To discuss how your organization can accommodate the post-Hopkins enhanced liability risk environment or to discuss any other privacy rights related issues, please contact Ravi Shukla via 416-864-7612 or rshukla@foglers.com.