CITATION: Jones v. Tsige, 2011 ONSC 1475
COURT FILE NO.: CV-10-396101
DATE: 20110323

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
SANDRA JONES	)	Christopher Du Vernet, Carlin McGoogan, for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
WINNIE TSIGE	)	Alex Camcron, for the Defendant
	)	
Defendant	)	
	)	
	)	
	)	
	)	**HEARD:** December 10, 2010

WHITAKER J.

What is this Case About?

[1] The central issue in this case is whether there is a tort for invasion of privacy.

[2] The Plaintiff Sandra Jones and the Defendant Winnie Tsige worked at different branches of the Bank of Montreal ("BMO.")

[3] Ms. Jones did all her personal banking with BMO.

[4] Over the course of four years and on 174 occasions, Ms. Tsige accessed and reviewed on her computer screen at work, Ms. Jones' private banking records.

[5] After being caught doing this by BMO, Ms. Tsige acknowledged that she had no legitimate purpose in reviewing Ms. Jones' records. Ms. Tsige claims to have done it for personal reasons.

[6] BMO has disciplined Ms. Tsige. She has apologized and agreed not to do this again.

[7] Ms. Jones asks for summary judgment under Rule 20. She asserts that Ms. Tsige has committed a tort – invasion of privacy - and that she has breached a fiduciary obligation. Ms. Jones seeks general, punitive and exemplary damages and a permanent injunction to restrain any similar further conduct by Ms. Tsige.

[8] Ms. Tsige asks for summary judgment under Rule 20, dismissing the claim. She takes the position that there is no tort of invasion of privacy and that she did not owe fiduciary obligations to Ms. Jones. Ms. Tsige asserts that Ms. Jones has suffered no damages.

[9] For the reasons which follow, I find there is no tort of invasion of privacy at common law and there was no fiduciary obligation on Ms. Tsige at the time.

[10] The cross motion to dismiss the claim is allowed.

What Happened between Ms. Jones and Ms. Tsige?

[11] The significant facts are agreed.

[12] Ms. Jones is a Project Manager employed by BMO. She is also a customer of BMO and maintains her primary banking accounts there. Ms. Jones' pay is deposited to these accounts and all of her personal financial transactions are managed in these accounts.

[13] Ms. Tsige has been employed by BMO for twenty years. She has worked as a licensed Financial Planner for the last ten years. Prior to that she was a financial services manager for eight years and before that a customer service representative for two years.

[14] Ms. Tsige has completed the Canadian Securities Course and has received extensive training in privacy and ethical issues as they arise in the financial services sector.

[15] Prior to the events which give rise to this action, the parties did not work with or know each other.

[16] Ms. Tsige was involved in a relationship with Mr. Uton Moodie, Ms. Jones' former husband.

[17] Between August 2006 and July 2009, Ms. Tsige accessed on a computer screen in her workplace, the details of transactions in Ms. Jones' BMO personal accounts. This access occurred on at least 174 separate occasions.

[18] The information accessed by Ms. Tsige included the typical details of personal transactions such as account balances, account postings, cheques written and deposited, stop payments, transfers and bill payments. Ms. Tsige also had access to Ms. Jones' "tombstone" information such as date of birth, marital status, language spoken and residential address.

[19] Ms. Tsige was only stopped from continuing this behaviour when BMO detected her activity.

[20] When confronted by BMO, Ms. Tsige acknowledged that she had no legitimate need or interest to explain her conduct. She also confirmed that she understood that this was contrary to her professional training and contrary to BMO policies.

[21] The only explanation offered by Ms. Tsige was that she was involved in a financial dispute with Mr. Moodie (at the time Ms. Tsige's common law spouse and former husband of Ms. Jones) and wished to confirm whether he was paying child support to Ms. Jones.

[22] Ms. Tsige did not at any time print off, publish, pass on or distribute in any way the details of the personal transactions by Ms. Jones. There was no attempt to record or keep any of the information which was viewed by Ms. Tsige onscreen.

[23] Following an investigation by BMO, Ms. Tsige was disciplined with a five day suspension and denied a yearly bonus that would otherwise have been paid. She was required to review and discuss with BMO privacy principles and standards. Ms. Tsige was advised that if she engages in further similar conduct, she would be dismissed.

[24] Ms. Tsige has not accessed Ms. Jones' accounts since she was confronted by BMO.

[25] Ms. Tsige has apologized for her conduct and promised not to do this again.

[26] Ms. Jones continues to bank with BMO.

What is the Test on a Summary Judgment Motion under Rule 20?

[27] The parties agree that the test for summary judgment is whether there is an issue that requires a trial. Both parties take the position that no trial is required. It is agreed that the summary judgment motion and cross motion turn on the issues of whether there is a tort of privacy or alternatively a breach of fiduciary obligations.

Is There a Common Law Tort of the Invasion of Privacy?

[28] As counsel for Ms. Tsige points out, most provinces including Ontario have statutes which govern and regulate privacy issues. Some of these create statutory torts which deal with the protection of privacy and others do not.

[29] Ontario law includes at least four statutes which structure and enforce privacy obligations:

(a) *Personal Information Protection and Electronic Documents Act*, 2000, c. 5 ("PIPEDA");

(b) *Personal Health Information Protection Act, 2004* S.O. 2004, c. 3 ("PHIPA");

(c) *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31

(d) *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56

[30] PIPEDA applies to the banking sector and could have been engaged by Ms. Jones with a complaint to the Commissioner under that statute and ultimately recourse to the Federal Court.

[31] Ms. Jones relies on a series of Ontario trial and motions cases for the proposition that a freestanding tort of invasion of privacy exists in this province.

[32] The earliest such case is *Saccone v. Orr* (1981), Carswell Ont 586, 19C.C.L.T. 37, before the Ontario County Court. Here the defendant taped a telephone conversation with the plaintiff and later played the recording at a public meeting. A local newspaper printed the contents and commented on it. The plaintiff became ill and lost his job. He sought general damages for defamation and invasion of privacy.

[33] At trial the plaintiff abandoned a claim for defamation. The court found the plaintiff did, in fact, lose his job as a consequence of the defendant's conduct. At paragraph 26, the court decided that the plaintiff was entitled to compensation for the defendant's conduct:

> Be that as it may, it's my opinion that certainly a person must have a right to make such a claim as a result of a taping of a private conversation without his knowledge, and also as against the publication of the conversation against his will or without his consent.

[34] At paragraph 27 the court concluded that this was in fact an "invasion of privacy" and awarded $500 dollars in damages.

[35] The most significant distinction between *Saccone* and the present case is that the court there found that the plaintiff had suffered a loss – he lost his job and the communication had been published.

[36] Certainly the most extensive review of the jurisprudence on this point (and relied upon by Ms. Jones) is found in *Somwar v. McDonald's Restaurants of Canada Ltd.* (2006), CarswellOnt 48, 263 D.L.R. (4th) 752, 79 O.R. (3d) 172, a decision of this court.

[37] In *Somwar*, the defendant employer conducted a credit check on the plaintiff employee without his consent. The employee sued on the basis of invasion of privacy. The employer moved to strike the claim on the basis that no such tort existed.

[38] In addressing this question, the court began with references to academic authorities and moved on to discuss the Ontario trial courts' jurisprudence, which seemed to be split on this point. In the absence of appellate authority to the contrary, the court allowed the claim to proceed.

[39] The court in *Somwar* began its analysis by referring to a law review article by Professor William Prosser, which listed the four different types of privacy interests identified in the American jurisprudence:

(i) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;

(ii) Public disclosure of embarrassing private facts about the plaintiff;

(iii) Publicity which places the plaintiff in a false light in the public eye; and

(iv) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

[40] The court also referred to Professor G.H.L. Fridman's text "The Law of Torts in Canada" (2d) in support of the proposition that in limited circumstances, damages have been awarded in Canada for the "invasion of privacy:"

> "Acceptance by the courts ... of the possibility of liability for certain kinds of "invasion of privacy," limited though this may be suggests that the courts are groping their way towards the idea that, where one person acts in a manner that is known and intended to be injurious to another, liability should ensue, even though no nominate tort such as ... intimidation, trespass, or defamation, has been committed, unless the circumstances reveal that there was what can be accepted as a lawful reason, justification or excuse for the perpetration of the act and the infliction of the harm."

[41] The court concluded that both Prosser and Fridman would suggest that the facts alleged by the plaintiff before it could amount to an intentional tort.

[42] The court then went on to note and comment on those Ontario decisions that had either found that a pleading alleging such a cause of action should not be struck, or in limited circumstances, damages should be awarded on such a basis: *Capan v. Capan*, [1980] O.J. No. 1361 (Ont. H.C.); *Roth v. Roth* (1991), 4 O.R. (3d) 740 (Ont.Gen.Div); *Lipiec v. Borsa*, [1996] O.J. No. 3819 (Ont. Gen. Div.); *Tran v. Financial Debt Recovery Ltd.*, [2000] O.J. No. 4293 (Ont. S.C.J.) (reversed on other grounds, [2001] O.J. No. 4103 (Ont. Div. Ct.))

[43] The court also observed that there was certainly contrary authority and referred to those Ontario decisions which did not accept that such a tort exists: *Haskett v. Trans Union of Canada Inc.* (2001), 10 C.C.L.T. (3d) 128 (Ont. S.C.J.), aff'd (2003), 15 C.C.L.T. (3d) 194 (Ont. C.A.); *Weingerl v. Seo*, [2003] O.J. No. 4277 (Ont. S.C.J.) (varied on other grounds at [2005] O.J. No. 2467 (Ont. C.A.))

[44] At paragraph 22, the court concluded that it was not settled law in Ontario that there is no tort of invasion of privacy:

> 22. 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.

[45] Counsel for Ms. Tsige in the present matter suggests that the decision of the Court of Appeal in *Euteneier v. Lee* 2005 CanLII 33024, [2005] 77 O.R. (3d) 621; 260 D.L.R. (4th) 145 (Ont. C.A.), is conclusive and binding on this court. It is suggested that the decision in *Eutenier* indeed stands for the proposition that such a tort does not exist in Ontario.

[46] In *Euteneier*, the plaintiff sued the police following a strip search where she remained bound and unclothed in a cell visible to passersby for twenty minutes. The plaintiff sought damages for negligence, assault, civil conspiracy and breaches of sections 7, 9, 12 and 15 of the

Canadian Charter of Rights and Freedoms. Her claims under sections 9 and 15 were abandoned.

[47] At paragraph, 62, Cronk J.A., described what she understood to be the plaintiff's primary complaint in the appeal as a failure on the part of the trial judge to understand her privacy and dignity interests when considering the duty of care owed to her by the police:

> 62. As I understand her argument, Euteneier's real complaint is that the trial judge mischaracterized the duty of care owed to her by the police by failing to specifically discuss her privacy and dignity interest when articulating, and subsequently considering, the duties owed by the appellants to Euteneier under the *Charter*.

[48] In response to this observation being made by the court during argument, Cronk J.A. then went on to indicate the position taken by the plaintiff on this point:

> 63. But Euteneier 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...

[49] While it is certainly the case that in *Euteneier*, the plaintiff was not suing on the basis of an intentional tort, the extent to which privacy rights are enforceable at law was squarely before the court for purposes of determining the content of the duty of care owed by the police to the plaintiff while in custody. In my view, the inescapable conclusion, put quite plainly by the Court of Appeal in paragraph 63 of that decision, is that 'there is no "free standing' right to ...privacy...at common law."

[50] In *Nitsopoulos v. Wong* 2008 Carswell Ont 5257, the plaintiffs brought an action for invasion of privacy arising from the publication of a newspaper article written about them by the plaintiff. The defendants brought a motion to dismiss the claim on the basis that there was no such cause of action at common law.

[51] At paragraph 8, the court noted that Canadian courts have been reluctant to recognize a common law right to privacy and refers to the decision of the Court of Appeal in *Euteneier*:

> 8. Canadian courts have been reluctant to recognize a separate common law right to privacy. For example, in the case of *Euteneier v. Lee*, 2005 CanLII 33024 (ON C.A.), (2005), 77 O.R. (3rd) 621 (C.A.) Cronk J.A. observed that the Appellant had "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."

[52] Without any further reference to *Euteneier*, the court in *Nitsopoulos* concludes by agreeing with the decision in *Somwar* – that it is not settled law in Ontario that there is no tort of invasion of privacy and expressly adopts the reasoning in that case.

[53] Turning back now to the various statutory provisions that govern privacy issues, most Canadian jurisdictions have statutory administrative schemes that govern and regulate privacy

issues and disputes. In Ontario, it cannot be said that there is a legal vacuum that permits wrongs to go unrighted - requiring judicial intervention.

[54] More particularly here, there is no doubt that PIPEDA applies to the banking sector and Ms. Jones had the right to initiate a complaint to the Commissioner under that statute with eventual recourse to the Federal Court. For this reason I do not accept the suggestion that Ms. Jones would be without any remedy for a wrong, if I were to determine that there is no tort for the invasion of privacy.

[55] Notwithstanding the careful reasoning in *Somwar* and its adoption in *Nitsopoulos*, I conclude that the decision of the Court of Appeal in *Euteneier* is binding and dispositive of the question as to whether the tort of invasion of privacy exists at common law.

[56] I would also note that this is not an area of law that requires "judge-made" rights and obligations. Statutory 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.

[57] I conclude that there is no tort of invasion of privacy in Ontario.

Has Ms. Tsige breached any Fiduciary obligation to Ms. Jones?

[58] A relationship between two parties may be characterized as fiduciary in nature in one of two ways. Firstly, the relationship may fall into traditional categories recognized by the courts. Secondly, the relationship may not fall within the traditional categories, but may nonetheless be characterized as fiduciary in nature given the particular circumstances of the relationship between the parties. In these cases, the courts must determine whether the relationship involves a degree of trust or confidence sufficient to warrant intervention. See *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 409.

[59] Recognized traditional relationships in which a fiduciary duty is owed include director and corporation, trustee and beneficiary, solicitor and client, partners, and principal and agent. Ms. Tsige does not fall within any of the traditional categories of fiduciary.

[60] The test for a fiduciary relationship outside of the traditional categories is laid down in *Hodgkinson v. Simms*. The question to ask is whether one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject-matter at issue. The reasonable expectations of the parties depend on factors such as discretion, vulnerability, trust, confidence, complexity of subject-matter, and community or industry standards. There must be a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. *Hodgkinson v. Simms, supra,* at 409-412.

[61] Other than their personal connection through Mr. Moodie, there is no relationship at all between the parties, let alone a mutual understanding between them that Ms. Tsige had relinquished her own interests and agreed to act solely on behalf of Ms. Jones.

[62] Ms. Jones admits that she has never done any business with Ms. Tsige, that she has never emailed Ms. Tsige and did not have any investments or accounts with BMO managed by Ms. Tsige.

[63] Ms. Tsige had no authority within BMO to take any action concerning Ms Jones' account.

[64] I conclude there was no fiduciary obligation on Ms. Tsige in favour of Ms. Jones.

What is the Outcome?

[65] Ms. Jones' motion for summary judgment is dismissed. The cross motion for summary judgment by Ms. Tsige is allowed. The action is dismissed.

[66] Submissions as to costs are to be in writing within fourteen days.

[67] Order accordingly.

Whitaker J.

Released: March , 2011

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SANDRA JONES

Plaintiff

– and –

WINNIE TSIGE

Defendant

REASONS FOR JUDGMENT

Whitaker J.

Released: March 23, 2011