Defamation, Privacy & Media

# Privacy in Family Actions

## *A discussion of the "AB" Case[1] and privacy issues in family actions*

Daniel Reid
Harper Grey LLP

## Introduction

Advances in technology have fundamentally altered the way people collect, store, and disclose "personal" information. A person's phone can track a user's location history, financial information, and increasingly, personal health information such as diet, exercise and sleep habits, and can contain private photographs and videos. A single laptop in an office can contain the business or health records of thousands of customers. As the 2015 hack of the online-dating website Ashley Maddison and the subsequent release of its user information demonstrate, a company's servers can contain information on the private life of millions of its customers.

The proliferation of electronic personal information, coupled with changes to federal and provincial law and shifting judicial understanding of "public vs. private spaces" have resulted in an increase in litigation relating to the unauthorized use and disclosure of personal information. Privacy issues are often at the forefront in family matters, as jilted parties may try to use publicity concerning "private" matters to advocate extra-judicially (or simply to damage their former spouse).

This paper begins by discussing a recent case involving a transgendered youth that received significant media attention, and involved efforts by the youth's father to "publicly advocate" by drawing attention to the youth's treating medical team. It then pivots to discuss how recent Canadian cases have heightened legal protections for privacy, and discusses a number of privacy cases arising out of the family law realm.

## The Case of AB

In a recent case in which the author was involved, a father of a transgendered youth engaged in a legal and media campaign to dissuade or discourage his child from commencing hormone therapy. This case is significant for a number of reasons.

First, it suggests the analysis a court will engage in in determining whether a youth can undergo hormonal treatment for gender dysphoria despite a parent's objections.

Second, it provides a framework for protecting the privacy of litigants (in this case, health professionals) from being identified in legal proceedings or in the media where identification would cause harm.

[1] A.B. v C.D. and E.F, 2019 BCSC 254, C.D. v Provincial Health Services Authority, 2019 BCSC 603, A.B. v C.D. and E.F, 2019 BCSC 604

Third, it sets out where a "family protection order" can be made preventing a party from speaking publicly, in any way, about issues in a case.

## Background

This case concerns a child, repeatedly identified as "Maxine" in the media, who was born on October 18, 2004. He identifies as a transgender boy who was assigned female at birth. For the purposes of this paper he will be identified as "AB".

Since age 11, AB gender identified as a male. He informed his school counsellor of that when he was 12 years old and in Grade 7. At the time of the court proceedings in this matter, he was 14 years old, enrolled in Grade 9 at high school under his chosen male name and is referred to by his teachers and peers as a boy and with male pronouns.

AB's parents are separated, with both parents sharing custody. With his mother's help, A.B. sought medical assistance to allow him to begin a physical transition to a boy. He was seen a registered psychologist experienced in treating children with gender dysphoria, on a number of occasions.

The psychologist provided an assessment in February 2018 and a further assessment and treatment plan in April, 2018. He concluded that AB met the diagnostic criteria in adolescents of DSM V and diagnosed him with gender dysphoria. Simply stated, gender dysphoria is a condition where an individual experiences significant distress as a result of the gender they were assigned at birth.

Following the psychologist's recommendation that AB be seen at BC Children's Hospital ("BCCH"), the mother took AB. to his family physician and he was referred to the Gender Clinic at BCCH. AB was seen there by a number of pediatric endocrinologists, who concluded that hormone therapy appeared reasonable and in AB's best interests.

> "For over 100 years, technological change has motivated the legal protection of the individual's right to privacy. In modern times, the pace of technological change has accelerated exponentially. Legal scholars such as Peter Burns have written of the "pressing need to preserve 'privacy' which is being threatened by science and technology to the point of surrender.
>
> *Jones v. Tsige*, 2012 ONCA 32

The medical team initially deferred the initiation of testosterone therapy to allow time for the father. to be presented with information about the therapy at the Gender Clinic. In August, 2018, the father emailed the Gender Clinic and advised that he did not consent to the testosterone therapy for AB. The father refused to meet further with the health care team and took the position that the treatment could not commence without his consent.

In response, in December of 2018, one of the treating pediatric endocrinologists wrote to the father advising that it was his medical opinion that AB was a "mature minor" under the Infants Act, and accordingly parental consent was not required for medical treatment.

Section 17 of the *Infants Act*, R.S.B.C. 1996, c. 223 provides:

17. (1) In this section:

"health care" means anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health related purpose, and includes a course of health care;

"health care provider" includes a person licensed, certified or registered in British Columbia to provide health care.

(2) Subject to subsection (3), an infant may consent to health care whether or not that health care would, in the absence of consent, constitute a trespass to the infant's person, and if an infant provides that consent, the consent is effective and it is not necessary to obtain a consent to the health care from the infant's parent or guardian.

(3) A request for or consent, agreement or acquiescence to health care by an infant does not constitute consent to the health care for the purposes of subsection (2) unless the health care provider providing the health care

(a) has explained to the infant and has been satisfied that the infant understands the nature and consequences and the reasonably foreseeable benefits and risks of the health care, and

(b) has made reasonable efforts to determine and has concluded that the health care is in the infant's best interests.

In response, the father commenced proceedings in the Provincial Court of B.C. preventing treatment of AB, without notice to AB. This restraining order was extended to February.

During January and February of 2019, AB underwent further assessments, including an assessment by a psychiatrist, all of which confirmed that AB had the capacity to consent to treatment and that the proposed treatment was medically in his best interest.

In mid-February of 2019, multiple applications and proceedings were brought in the British Columbia Supreme Court. The father commenced proceedings against AB, his treating medical team and various government bodies seeking orders prohibiting treatment, including any preparative treatment, until at least April of 2019. AB brought a notice of family claim seeking an order that it was in his best interests to undergo medical treatment for gender dysphoria, including hormone treatments.

In addition, many of the parties (including medical professionals) sought orders anonymizing their names.

## *A.B. v C.D. and E.F.*, 2019 BCSC 254

This matter initially proceeded before Mr. Justice Bowden for two days in February of 2019.

Interestingly, the court's analysis with respect to hormone treatment was very straightforward – the issue for the court was simple:

1. Whether on the evidence AB was a mature minor, capable of consenting to treatment;
2. Whether the treatment was in AB's best interests;
3. Whether there would be irreparable harm in the event treatment was commenced.

In finding in favour of AB, the court ruled as follows:

> [56] Having considered the form of consent signed by A.B. and the evidence of I.J., G.H. and A.C., I am satisfied that A.B.'s health care providers have explained to A.B. the nature and consequences as well as the foreseeable benefits and risks of the treatment recommended by them, that A.B. understands those explanations and the health care providers have concluded that such health care is in A.B.'s best interests.
>
> [57] As the father is seeking injunctive relief, I have considered the principles enunciated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311.
>
> [58] In view of the established law regarding the right of a mature minor to consent to medical treatment and the assessments of a number of physicians that A.B. has capacity to consent as well as the evidence of his health care providers that the proposed treatment is in A.B.'s best interests, there is no serious question to be tried.
>
> [59] At the second stage of the RJR test, the inquiry is whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm. A.B.'s father has not demonstrated that a refusal to grant the injunction would adversely affect or irreparably harm him.
>
> [60] As to the third stage, I accept G.H.'s evidence that delaying hormone therapy for A.B. is not a neutral option as he is experiencing ongoing and unnecessary suffering from gender dysphoria. In my view the balance of convenience clearly favours A.B.

Of significance, Bowden J. also made an order preventing the father from attempting to persuade AB to abandon treatment, as follows:

> 2. It is declared under the *Family Law Act* that:
>
> Attempting to persuade A.B. to abandon treatment for gender dysphoria; addressing A.B. by his birth name; referring to A.B. as a girl or with female pronouns whether to him directly or to third parties; shall be considered to be family violence under s. 38 of the *Family Law Act*.

With respect to the publication ban, the ban sought by health care professionals was opposed by counsel for the media, which had been reporting on the case and the father's efforts for some weeks. The ban was sought on the basis of privacy and security – they provided affidavit evidence that they were worried due to strongly held views by those who oppose gender transitions especially when they involve children.

In declining to grant the ban, Bowden J. found there was no evidence of a direct harmful consequence to medical practitioners arising out of being identified (at para. 70).

The father immediately appealed the order permitting treatment to commence, and the matter is presently ongoing and will be heard by the Court of Appeal over the summer.

## The Media Campaign and *C.D. v Provincial Health Services Authority*, 2019 BCSC 603

Beginning prior to the decision of Bowden J. and increasing significantly after the decision, the father also engaged in a media campaign, both on his own and with the assistance of Culture Guard, a conservative "family values" and religious organization.

This campaign included giving interviews to numerous right-wing American media outlets, providing filed materials to Culture Guard (which were subsequently published online). Unsurprisingly, articles published by these outlets and elsewhere online resulted in numerous online comments. After Bowden J.'s decision, these comments included threats of violence and direct emails to the health care practitioners.

As a result, prior to the order of Bowden J. being entered, the health care practitioners applied to "vary or vacate" the order of Bowden J., on the basis of new evidence. Bowden J. granted short leave and indicated that, although he was not available on the hearing date, another judge could "stand in his place" on the application, which ultimately proceeded before Marzari J. on March 15. The application was again opposed by the father and counsel for the media.

As described by Marzari J., the evidence of "direct harmful consequences" was significant:

> Since the matter was heard on February 19 and 20, 2019, a number of news articles have identified two of the applicants who are named respondents in the petition, in relation to their care of AB. Specifically, two articles were published online by the Federalist, which is a popular and well-subscribed American online conservative magazine. The articles were published online on February 26, 2019 and March 1, 2019 respectively.
>
> [28] The February 26 Federalist article contains a link to a letter written to CD regarding AB's medical status and recommended treatment by AB's doctors. This letter identifies both the healthcare professionals, and the child by his chosen name.
>
> [29] Below the articles in the Federalist, the Federalist has published reader comments. A number of these comments encourage or approve of violence against AB's healthcare professionals. Some of the more egregious posts include:
>
> - All the state actors in this incident (these doctors, etc.) need to be executed for high treason as well as child abuse and child abduction. Stealing a child from his parents to perform sex change perversions on the child is demonic behaviour and must be punished by death.
> - When those in positions of power and trust abuse children, parents need to retaliate. And we will start to see that here as the current push continues. I can tell you this though; if I had a daughter who was really struggling and someone in the lab coat told me they were gonna inject her with chemical cocktails (with permanent effects) whether I wanted them to or not, well… Parents have both a right and a duty to kill those who would abuse their kids.
> - It would be wise for the dad to take his daughter and flee Canada. This would be unwise because he would not win, but the dad has the moral right to use violence to stop the doctors from administering the testosterone to his daughter. Above all, he has a moral duty to do everything possible to ensure she never gets a(nother) dose.
> - If he chooses violence and the doctor dies, that is not murder and it may very well be better than doing nothing.
>
> [30] Online posts relating to this proceeding also appeared on the online forum 4chan. Many of these posts also encourage violence against members of AB's healthcare team. Some of the more egregious comments include the following:
>
> - …massive problem and there is only one solution: kill all the enablers – kill the judge and his family – kill all those who convinced the daughter that she can be a man – torture them violently on HD video to make an example of them once this is done the enablers will be scared and they will stop.
> - If the dad murdered the judges and doctors that forced this and I was selected for jury duty in this trial I would not convict him
>
> [Emphasis added.]
>
> [31] While these are the more egregious exhortations to violence, and the 4chan comments have since been taken down, the evidence also shows substantial online commentary analogizing AB's medical treatment to child abuse, perversion and even pedophilia. While these other comments may not specifically exhort violence against these health

care professionals, they portray the professionals as criminals who hurt children, and therefore give rise to related risks of incitement of violence against them.

> [32] Furthermore, while not all of the health care professionals were named in the comments, all of the health care professionals involved in AB's care may reasonably be concerned that they are a part of the group of "enablers" or "state actors" to which these threats pertain.
>
> [33] On February 26, 2019 the two healthcare professionals specifically named as respondents in CD's petition received a direct email from an anonymous address calling them a "child abuser," stating that they should not be permitted near children, and that they belonged in prison. The emails contain a link to the February 26 Federalist article. Both have since felt compelled to make security changes at their practices and clinics, and are concerned about their safety and that of their other patients.
>
> [34] Despite working publicly for numerous years in the area of gender dysphoria, the evidence shows that these doctors had not received threats similar to those currently being directed at them prior to being named in relation to AB's healthcare in these proceedings.
>
> [35] In addition, a local organization known as Culture Guard has posted the names of a number of the healthcare professionals on its website, with comments suggesting that the doctors and respondent school employees ought to be jailed.

After reviewing the evidence, Marzari J. concluded that both AB and the treating health care providers were put at risk by the ongoing publicity:

> [46] I agree that these types of online chatrooms and comments are often ugly, rude and even threatening, and that such evidence alone may not be enough to establish evidence of harm that meets the threshold requirement for a publication ban.
>
> [47] However, in this case the evidence goes beyond mere commentary. Within days of the first Federalist article, both AB's pediatric endocrinologist and his psychologist had received anonymous emails referencing that article and calling them child abusers. While posting online threats may be so commonplace as to not give rise to a reasonable apprehension of harm, taking the step to contact the doctors directly for the purposes of intimidating them is a significant further step. In my view, the commentary and the emails together give rise to a reasonable and significant apprehension of harm.

In making this finding, the court expressly rejected the father's submission that the "public" had a right to weigh in on AB's treatment:

> [61] The father, CD, agrees with the media respondents and goes farther to say that the issues in these proceedings are ultimately for the public to decide, and that the names of the doctors are an essential part of that public decision-making process. The father says that the broader societal issues he seeks to raise in opposition to hormone therapy treatment is more compelling in the specific context of his child's story, including the names of his child's doctors.
>
> they portray the professionals as criminals who hurt children, and therefore give rise to related risks of incitement of violence against them.
>
> [62] Indeed, the father has been active in providing interviews to various media and social media sites, including the Federalist and Culture Guard, and has been keen to publicize these proceedings.
>
> [63] These latter arguments fundamentally mistake the nature of family law proceedings. While I understand that family law proceedings can and often do have broad and societal impacts, the decision in AB's case is specific to the evidence in court and AB's best interests as a child. There is no role for the public in deciding his case, and the publicity brought to his case may in fact endanger him.
>
> [64] While AB's pediatric endocrinologist and his psychologist both have significant public and online profiles, there is very little evidence that that these doctors have been publicly linked to AB's treatment (other than the coverage based on interviews with the father discussed above). Further public links between AB and AB's case and these doctors is not in AB's best interests. Finally, the threats and risk of harm to the applicant professionals have not arisen from their work generally, but from their public linkage to AB.

As a result, the court ordered anonymization orders precluding the identification of treating medical professionals in relation to AB or the case.

## *The Media Campaign Continued - A.B. v C.D. and E.F*, 2019 BCSC 604

In addition to the application brought by the health care professional, AB sought a protection order to restrain his father from publishing, speaking or giving interviews about this case or about AB's personal and medical information. He also sought an order that would restrain his father from sharing related documents or information with other persons, including media and social media organizations, who might publish that information.

This application was heard by Marzari J., who noted that "family violence" can include psychological abuse or harassment, and highlighted the father's media activities in her reasons for judgment, as follows:

> [20] Family violence can take many forms. Family violence is defined in s.1 of the *FLA*, but that definition is inclusive and not exclusive. The inclusive definition of "family violence" recognizes that the risk of harm extends beyond the infliction of physical violence: *Morgadinho* at para. 59. I note that in particular, the definition encompasses psychological abuse in the form of harassment or coercion, and unreasonable restrictions or preventions of a family member's personal autonomy. In the case of a child, both direct and indirect exposure to such harm may constitute family violence.
>
> [21] This Court has already determined that it is a form of family violence to AB for any of his family members to address him by his birth name, refer to him as a girl or with female pronouns (whether to him directly or to third parties), or to attempt to persuade him to abandon treatment for gender dysphoria. AB says that the evidence establishes that CD has done all of the above, and has continued to do so even after the Court found that these actions were contrary to AB's best interests and constitute family violence.
>
> [23] AB relies on a number of examples which he says establish CD's ongoing family violence against him.
>
> [24] CD is quoted in two articles in the well-established online conservative newspaper, the Federalist: one just before Justice Bowden's decision on February 26, 2019, and one shortly thereafter on March 1, 2019. Those articles indicate on their face that CD was interviewed for those articles, and contain quotes from CD including the following in the March 1 article:
>
> > Throughout our interview [CD] continued to refer to his daughter as a girl, "because she is a girl. Her DNA will not change through all these experiments that they do." [CD] understood that this statement might be construed as a violation of the court's interdict against "referring to [Maxine] as a girl… to third parties," but felt that he could not honestly take any other stand.
>
> [25] The Federalist articles use the pseudonym Maxine, but also originally identified AB by his chosen name. They also contain links to materials in this family law case, including a full copy (not redacted for anonymity or marked as an exhibit) of a letter sent to CD on December 1, 2018 by AB's doctor discussing AB's decision to proceed with hormone therapy.
>
> [26] The Federalist accepts and posts online comments on its website. Comments posted with respect to the February 26, 2019 article include personal and derogatory comments about AB, including statements that AB is mentally ill, and anticipating and even encouraging his suicide.

> "…"privacy," as ordinarily understood, is not an all-or-nothing concept. Furthermore, being in a public or semi-public space does not automatically negate all expectations of privacy with respect to observation or recording. Rather, these examples indicate that whether observation or recording would generally be regarded as an invasion of privacy depends on a variety of factors, which may include a person's location; the form of the alleged invasion of privacy, that is, whether it involves observation or recording; the nature of the observation or recording; the activity in which a person is engaged when observed or recorded; and the part of a person's body that is the focus of the recording.
>
> *R. v. Jarvis*, 2019 SCC 10

[27] After CD's second interview with the Federalist published after Justice Bowden's decision, the published comments included:

- …Maxine should be told she is no longer welcome in the family home.
- So apparently trannies have a high suicide rate… is this a bad thing? Having difficulty seeing a downside here.

[28] CD has also been active in providing interviews and information about AB to a Langley-based organization known as Culture Guard. Culture Guard has posted interviews online with CD about AB and this case on January 24, 2019, and March 3, 2019.

[29] In those interviews, CD refers to AB as female, and expresses both his rejection of the permanence of AB's gender identity and his opposition to AB's chosen course of treatment. He discusses in detail AB's medical history, and trivializes AB's suicide attempt. CD expresses pleasure at the breadth of attention and publication his story is getting, and expresses hope that Breitbart and Fox News might also cover his story.

[30] CD's legal counsel, Mr. Dunton, has also provided interviews about this case on the Culture Guard website, and Culture Guard has been given copies of the pleadings and reasons in this case. I can only assume these have been authorized by CD.

After reviewing the law concerning publication bans in family law cases, the court ruled that, in the circumstances, such an order could be made under Part 9 of the *Family Law Act*.

[53] In *A.T. v. L.T.H.*, 2006 BCSC 1689 (CanLII), Madam Justice Gray considered an application by a father to enjoin the mother of their children from posting allegations about him and the child on the internet. The mother had been unsuccessful at trial in establishing that the father had sexually abused the child. She nevertheless continued to believe this to be the case, and turned to the internet to garner support for her situation. She posted information which described the alleged sexual abuse by the father, providing both particulars of the alleged abuse and personal details of the child. The father objected, and applied for an injunction restraining the mother from publishing certain information in various places, including the internet.

[54] Justice Gray issued an injunction restraining the mother from posting this information. She found that the publication of the information constitutes an invasion of both the child's and the father's privacy, and the stigma and harm associated with this intrusion was likely irreparable.

[55] With respect to the effects of such an injunction on the mother's freedom of speech, Justice Gray found that the restraint resulting from an interlocutory injunction was reasonable, so long as the mother was not constrained from advancing her position lawfully in court and with governmental and health care professionals, and with adult members of her family.

[56] Justice Gray dismissed the mother's concerns that stifling her public speech would stop her from obtaining the public support that she saw as necessary to succeed in her further law suits. Justice Gray reminded the parties that "The decisions of this court concerning that relationship are based on evidence and the law, not public pressure": see para. 52.

[57] CD seems to have forgotten this fundamental nature of our family justice system. Repeatedly, he argued that his ability to speak publicly about AB was necessary to advance his position that his parental rights should not be abrogated. However, the decisions of this Court are made on the evidence before it, and the law as it stands. Making AB the public centrepiece of CD's parental rights cause will not change this Court's views of that evidence, and will not help AB. Indeed, the evidence is that CD's public campaign is harming AB.

…

[65] The protection order that AB is seeking essentially prevents CD from committing acts declared to be family violence against AB. While the existing order identifies what is in AB's best interests and identifies certain conduct as family violence, it does not expressly require CD to refrain from doing acts that cause that harm.

[66] AB also seeks protection from his father's public discussion of his case, including his gender identity and his private medical records. I have found that CD has and continues to publish and share AB's personal information. In this case, the personal information CD is sharing is related to AB's gender identity, an area of great sensitivity and vulnerability for AB. He is doing so without AB's consent, and over AB's objections.

[67] Furthermore, the people and organizations CD chooses to share his views with are those that AB views as being fundamentally opposed to his right to choose his gender identity. What is worse is that in

the course of doing so, CD has also publicly shared information and made lighthearted comments about AB's depression and suicide attempts.

[68] I find that CD's sharing of AB's private information has exposed his child to degrading and violent public commentary. CD has nevertheless continued to support the media organizations posting this commentary with additional interviews, and has expressed a desire for further opportunities to do so.

[69] I find that CD is using AB to promote his own interests above those of his child, by making AB the unwilling poster child (albeit anonymously) of CD's cause.

[70] I find that this conduct puts AB at a high risk of public exposure and acts of emotional or physical violence, in the form of bullying, harassment, threats, and physical harm, including self-harm.

[71] I find that CD's attempts at anonymizing himself and AB do not immunize AB from the harms associated with this publicity or the commentary arising from it. AB knows that his father, the public commentators, and online posters are all talking about him.

[72] AB is further harmed by the fact that it is his own father, whom he loves, who appears to be publicly rejecting his identity, perpetuating stories that reject his identity, and exposing him to degrading and violent commentary in social media.

[73] CD has not been deterred by AB's requests, or even by his litigation. While I accept that CD does not agree with AB as to what is in AB's best interests, he has been irresponsible in the manner of expressing his disagreement and the degree of publicity which he has fostered with respect to this disagreement with his child. I find that AB is highly likely to continue to be exposed to family violence if an order under s. 183 is not made with respect to his father's behaviour.

[74] In conclusion, I find that AB is an at-risk family member who is highly vulnerable. I find that his father's expressions of rejection of AB's gender identity, both publicly and privately, constitutes family violence against AB. Finally, I find that CD's conduct in this regard is persistent and unlikely to cease in the absence of a clear order to restrain it.

This final decision points to a general trend in Canadian courts – an increased recognition of "privacy rights" generally. Such a recognition is important to the practice of family law, both in the context of protection orders or publication bans and more broadly, as a stand-alone civil right.

The next portion of this paper discusses some significant developments in this area.

## The Increasing Importance of Privacy

In the *Jones v. Tsige* case, quoted at the outset of this paper, the Ontario Court of Appeal recognized for the first time the right to sue for the common-law tort of "intrusion upon seclusion", a tort which had previously been recognized in a number of American states but had not been adopted by the common-law in Canada. In *Jones*, the Ontario Court of Appeal held that a civil action can be brought where a defendant "intentionally, and without lawful justification", invades the plaintiff's private affairs or concerns and where a reasonable person would regard the invasion as "highly offensive."

The court found that the defendant in Jones had committed the tort of intrusion upon seclusion when she used her position as a bank employee to repeatedly examine private banking records of her spouse's ex wife. Moreover, the Ontario court of Appeal held that economic damage was not a required element of the tort – the plaintiff in *Jones* recovered $10,000, despite no evidence of actual damage. Prior to the *Jones* case, Ontario did not recognize an individual's right to claim for breach of privacy under the common-law.

There is no common law tort of invasion or breach of privacy in British Columbia: see *Ari v. Insurance Corporation of British Columbia*, 2013 BCSC 1308 (CanLII). Instead, British Columbia, along with Alberta and Quebec, has privacy legislation that includes the right of private individuals to sue for breach of privacy. In British Columbia, the *Privacy Act*, R.S.B.C. 1996, c. 373 states the following:

> (1) It is a tort, actionable without proof of damage, for a person, willfully and without a claim of right, to violate the privacy of another.
>
> (2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

In practice, the common-law tort recognized in Ontario and statute-based torts such as the tort present in BC are very similar – both require an intentional or willful breach of privacy which is to be interpreted "contextually" by the courts, both in relation to the nature of the breach and any lawful justification provided by the parties.

In many cases, a breach of privacy will be relatively easy to identify. For example, in a recent Ontario "Jane Doe" case, the plaintiff, a young woman, sent intimate videos and photographs to her boyfriend, the defendant. After the relationship ended, she learned that the defendant had posted the video she sent him on an Internet pornography website.

Jane Doe sued her ex-boyfriend, alleging that the dissemination was a breach of her privacy. In awarding the plaintiff $100,000 in damages, the Ontario Court recognized that the photos and videos were sent to the plaintiff on the premise that "he alone would view it" and that sharing the videos constituted "invasion of privacy" in accordance with the common law principles articulated in *Jones*:

> "*In recent years, technology has enabled predators and bullies to victimize others by releasing their nude photos or intimate videos without consent. We now understand the devastating harm that can result from these acts, ranging from suicides by teenage victims to career-ending consequences when established persons are victimized. … I have concluded that there are both established and developing legal grounds that support the proposition that the courts can and should provide civil recourse for individuals who suffer harm arising from this misconduct and should intervene to prevent its repetition.*"

Stinson J., *Doe 464533 v. xxx*, 2016 ONSC 441, at paras. 16 and 19 (default judgment set aside)

It is the "developing" legal grounds referred to by Stinson J. that are of the most interest to the author. Canadian courts are now expanding 'privacy' claims to include privacy in "quasi-public" spaces.

Recent cases now suggest that privacy is not "absolute". Essentially, a person can expect privacy even in respect of their public actions. This may be important in family law matters, where a party seeks to record or surveil their partner or to disclose details of their life to others.

There are a number of cases that suggest a civil remedy might exist for breaches of privacy even where the expectation of privacy is not absolute. For example, in *Grillo v. Google Inc.*, 2014 QCCQ[2] the plaintiff, Ms. Grillo, was recorded by a Google Streetview Car while sitting on the front steps of her house. She brought an action against Google alleging that the publication of her photograph by Google violated her right to privacy under the *Civil Code of Quebec* and the *Quebec Charter of Human Rights and Freedoms*.

Google argued that Ms. Grillo had been sitting on her front steps in plain view of her neighbors or of any passersby. Since she was in public view, it argued, she had no right to privacy. The court disagreed, rejecting the idea that there was a strict dichotomy between public and private spaces:

> [49] A person who is no longer in a private place according to the material or generally understood meaning of that expression is not necessarily or in all respects in a public place, such that, by this fact alone, his or her image may be used without restriction or limitation.
>
> [50] For example, it is difficult to conceive that people walking in the parking lot of a hospital or on the grounds of a health and wellness centre or nursing home no longer benefit from any protection of their private lives or images merely because they may be visible from a public street.

This approach to privacy was adopted by the Supreme Court of Canada in a criminal case, concerning a charge of voyeurism. In *R. v. Jarvis*, 2019 SCC 10, the accused was an English teacher at a high school. He used a camera concealed inside a pen to make surreptitious video recordings of female students while they were engaged in ordinary school-related activities in common areas of the school. Most of the videos focused on the faces, upper bodies and breasts of female students. The students were not aware that they were being recorded by the accused, nor did they consent to the recordings.

The accused was charged with voyeurism under s. 162(1)(c) of the *Criminal Code*. That offence is committed where a person surreptitiously observes or makes a visual recording of another person who is in circumstances that give rise to a reasonable expectation of privacy, if the observation or recording is done for a sexual purpose. At trial, the accused admitted he had surreptitiously made the video recordings. As a result, only two questions remained: whether the students the accused had recorded were in circumstances that give rise to a reasonable expectation of privacy, and whether the accused made the recordings for a sexual purpose.

[2] http://www.canlii.org/en/qc/qccq/doc/2014/2014qccq9394/2014qccq9394.pdf

the court emphasized that privacy "is not an all-or-nothing concept" (para 41) and whether, or the extent to which, one has a right to privacy in public depends on context. The majority emphasized that the analysis should account of the entire context, and offered a list of non-exhaustive considerations:

1. The location of the observation or recording;
2. The conduct at issue, namely whether person was observed or recorded (a recording being more intrusive);
3. Details about the observation or recording, such as whether it was fleeting or sustained, the type of technology used etc.;
4. Whether the person consented or was aware of the observation or recording;
5. The subject matter of the observation or recording, such as incidental or targeted;
6. The purpose of the observation or recording;
7. The relationship between the parties, such as a relationship of authority or trust;
8. The personal attributes of the person observed or recorded, such as whether they are a child; and
9. Any rules or policies that regulate the type of observation or recording that took place; (para 5 and 29).

As described by the court:

> [40] One can think of other examples where a person would continue to expect some degree of privacy, as that concept is ordinarily understood, while knowing that she could be viewed or even recorded by others in a public place. For example, a person lying on a blanket in a public park would expect to be observed by other users of the park or to be captured incidentally in the background of other park-goers' photographs, but would retain an expectation that no one would use a telephoto lens to take photos up her skirt (a hypothetical scenario discussed in *Rudiger*, at para. 91). The use of a cell phone to capture upskirt images of women on public transit, the use of a drone to take high-resolution photographs of unsuspecting sunbathers at a public swimming pool, and the surreptitious video recording of a woman breastfeeding in a quiet corner of a coffee shop would all raise similar privacy concerns.

Although *Jarvis* has yet to be cited in a civil or family law case, the approach taken by the Supreme Court of Canada in this criminal matter is consistent with the direction the courts have been moving.

## The Importance to Family Law

The idea that someone can expect privacy, even in a public space (or in respect of content they provide to others) is one that may be more of a factor in family law cases.

To date, there appear to be only a few reported decisions relating to privacy claims arising out of or surreptitious recordings or disclosure of personal information made in the context of intimate relationships. In *L.A.M. v. J.E.L.I.*, 2008 BCSC 1147, [2008] B.C.J. No. 1612 [*LAM*] the plaintiff in this sued her former romantic partner for violation of her privacy. During the course of their relationship, the parties began cohabitating, and did so for a number of years until the dissolution of their relationship. In an incident that precipitated the end of the relationship, the plaintiff discovered a number of VHS tapes which contained video taken by hidden cameras in the home's bedroom and bathroom. The plaintiff discovered that she had been videotaped without her knowledge in various states of undress, using the facilities, and engaging in sexual conduct.

As a result of this discovery, the plaintiff suffered from depression, displayed symptoms of post-traumatic stress disorder, and had generally been socially and romantically devastated. She also did not return to work for approximately a year. While the defendant did not appear at trial, Mr. Justice Truscott proceeded to determine the case on its merits. He awarded the plaintiff $20,000 in general damages, lost income of $5,000, and punitive damages of $35,000.

In *Nesbitt v. Neufeld*, 2010 BCSC 1605, 2010 CarswellBC 3085, the defendant counterclaimed against the plaintiff, her then husband, for defamation and breach of privacy. During the course of protracted family law litigation, the plaintiff made a number of the defendant's private communications public, and also produced a number of websites defamatory of her. In particular, the plaintiff obtained an old computer which belonged to the defendant, and accessed the defendant's personal emails. He proceeded to use those emails, and altered versions of them, as part of a malicious campaign against his former spouse and a number of her friends. This included sending multiple messages to her friend's employer, setting up a website, a Facebook group, and sending several communications to the Rotary Club, an organization with which the defendant volunteered.

Mr. Justice Crawford ultimately awarded the defendant $40,000 in general damages to cover both the violation of privacy and the successful claims of defamation. No separation was given as to the quantum awarded under each cause of action. This judgment was affirmed by the Court of Appeal in reasons indexed 2011 BCCA 529 and 9 R.F.L. (7th) 280.

Given the courts in Canada recent emphasis on "privacy", it can be anticipated more such claims will be advanced, both stand-alone and in the context of family law actions. This is particularly true in cases where one spouse has intimate or otherwise embarrassing photos of the other, or engages in "surveillance" prior to or during the dissolution of the relationship.

In addition to more claims, awards for breach of privacy appear to be creeping up, particularly in the "revenge porn" realm. The following is a table of cases involving publication of "personal information" from Commonwealth jurisdictions:

| CASE | SUMMARY | NOTES | AWARD |
|---|---|---|---|
| ONTARIO | | | |
| ***Jane Doe 464533 v. D.(N.),* 2016 ONSC 541** | • breach of confidence; intentional infliction of mental distress; invasion of privacy<br>• ex-boyfriend posted an intimate video on a pornography website without plaintiff's knowledge and consent<br>• it was online for approximately 3 weeks<br>• she consented to making the video (she sent it to him) | • no reported Canadian cases were located with similar facts<br>• judge accepts that this type of case is "in many ways analogous to sexual assault" in terms of victim impact<br>• finds that the principles underlying an award of damages for sexual battery are of assistance<br>• distinguishes *Jones v. Tsige:* the privacy right offended and the consequences to the plaintiff are much different<br>• **action brought under Simplified Procedure, limiting damages claim to $100,000**<br>• default judgment (defendant later sought leave to set aside and failed: 2016 ONSC 4920, | • **$100,000 damages** ($50,000 general; $25,000 aggravated; $25,000 punitive)<br>• **$5,500** pre-judgment interest<br>• **$36,208.76** full indemnity costs of the action and application<br>• **Injunctive relief** |

| CASE | SUMMARY | NOTES | AWARD |
|---|---|---|---|
| ONTARIO | | | |
| ***Jane Doe 72511 v. Morgan*, 2018 ONSC 6607** | • breach of privacy<br>• revenge porn video uploaded to pornography website without plaintiff's knowledge or consent<br>• it was viewed more than 60,000 times before she was able to have the website take it down<br>• her face was clearly visible<br>• video made with her consent | • accepts the reasoning in *Jane Doe* 464533 re privacy rights offended and consequences much more serious than *Jones v. Tsige* | • **$100,000 damages for breach of privacy** ($50,000 general; $25,000 aggravated; $25,000 punitive)<br>• awarded an additional $20,000 in general damages for a physical assault<br>• partial indemnity costs of the action and application $5,521.41 |
| BRITISH COLUMBIA | | | |
| ***L.(T.K.) v. P.(T.M.)*, 2016 BCSC 789** | • statutory invasion of privacy; breach of fiduciary duty<br>• defendant was the plaintiff's mother's common law spouse, with whom the plaintiff lived for seven years<br>• defendant surreptitiously videoed the plaintiff in the bathroom and her bedroom on four occasions<br>• defendant did not circulate it; he | • defendant acted as a parent to the plaintiff<br>• defendant admitted his motivation was to hurt the plaintiff and get revenge; to steal her confidence | • **$93,850 damages (total for invasion of privacy and breach of fiduciary duty)** ($60,000 general; $25,000 aggravated; $800 past income; $7,500 cost of future care; $550 special) |

| CASE | SUMMARY | NOTES | AWARD |
| --- | --- | --- | --- |
| UNITED KINGDOM | | | |
| ***Gulati & ors. v. MGN Limited*, [2015] EWHC 1482 (Ch), aff'd [2015] EWCA Civ 1291** | • eight plaintiffs were awarded "aggregate figures representing the largest awards of damages yet made by our courts for breach of a person's privacy"<br>• claims for wrongfully obtaining and using (and publishing) private information<br>• the defendant owns three newspapers and hacked the voicemails of the plaintiffs (who appear to be celebrities or public figures in the UK).<br>• The defendant was able to listen to voicemails left for the plaintiffs, as well as voicemails left by the plaintiffs for others<br>• The defendant also engaged private investigators to obtain private information about the plaintiffs.<br>• The information was used as the basis for newspaper stories: "a ruse was adopted of quoting an unnamed source said to be 'close' to the subject of the article". | • the reasons are 712 paragraphs long<br>• damages are assessed separately for each plaintiff and each publication about a plaintiff. Go to the "individual claims" link in the table of contents for details of the publications and discussion of the basis for the individual awards<br>• SEE ALSO schedule to the Court of Appeal reasons for a breakdown of the damages awards<br>• Generally, three heads of damage: compensation for the misuse of private information; damages for distress; aggravated damages for distress | **• Yentob £85,000**<br>**• Alcorn £72,500**<br>**• Ashworth £201,250**<br>**• Taggart £157,250**<br>**• Gulati £117,500**<br>**• Roche £155,000**<br>**• Gascoigne £188,250**<br>**• Frost £260,250**<br><br>In CND dollars based on today's exchange rate:<br>• Yentob $147,875<br>• Alcorn $126,128.25<br>• Ashworth $350,115<br>• Taggart $273,568<br>• Gulati $204,415<br>• Roche $269,654<br>• Gascoigne $327,498<br>• Frost $452,757 |

| CASE | SUMMARY | NOTES | AWARD |
|---|---|---|---|
| | • The defendant's journalists became privy to information they otherwise would not have been and were able to publish stories and photographs they otherwise would not have been able to obtain.<br>• Stories were published about, *inter alia*, personal relationships and personal matters<br>• There were many other actions by hundreds of other plaintiffs re the hacking, but this judgment precipitated the settlement of large numbers such that this is the only case that went to trial as of March 2018 ([2018] EWHC 708 (Ch)) | | |
| ***Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (QB)** | • Former president of the FIA and now trustee of its charitable arm sue the News of the World for an article titled "F1 BOSS HAS SICK NAZI ORGY WITH 5 HOOKERS …. Son of Hitler-loving fascist in sex shame".<br>• The article about a BDSM orgy attended by the plaintiff (but ultimately found not to be Nazi themed) was accompanied by video clandestinely taken by a female attendee in cooperation with the newspaper | • "It has to be recognised that no amount of damages can full compensate the Claimant for the damage done. He is hardly exaggerating when he says that his life was ruined. What can be achieved by a monetary award in the circumstances is limited. Any award must be proportionate to avoid the appearance of arbitrariness" (para. 236) | • **£60,000** (around $100,000CND based on today's conversion rate) |

| | | | |
|---|---|---|---|
| | • Video and photos included the plaintiff taking part in BDSM activity, but blurred private parts<br>• Videos online for about a day before taken down<br>• no claim in defamation<br>• claim was for breach of confidence and/ or unauthorized disclosure of personal information said to infringe the rights of privacy protected by the European Convention on Human rights and fundamental freedoms | | |
| • Unable to find any published cases where damages were awarded for "revenge porn". There are news reports about two cases that settled which, according to news reports, are the first civil revenge porn cases in the UK in which defendants paid compensation. There is no information available about quantum.<br>• The first was brought against Facebook and two individuals by a 14 year old girl whose naked photo was posted on Facebook. It settled in or around January 2018 (*MM v. BC, RS, and Facebook Ireland Ltd.*). The case was pleaded on the basis of negligence, misuse of private information, breach of confidence, Breach of the Protection from Harassment (Norther Ireland) Order 1997, and the Breach of Data Protection Act 1998.<br>• The second involved a YouTube star named Chrissy Chambers. It settled in June 2018. The action was pleaded on the basis of harassment, breach of confidence, and misuse of private information. | | | |

| CASE | SUMMARY | NOTES | AWARD |
|---|---|---|---|
| AUSTRALIA | | | |
| ***Giller v. Procopets*, [2008] VSC 236**<br><br>Supreme Court of Victoria, Court of Appeal | • breach of confidence<br>• ex spouse showed, or threatened to show, sex tape to others<br>• appears the plaintiff consented to the creation of the video (para. 124) | • in the context of a complicated matrimonial dispute also involving assault claims; causes of action and resulting damages awards parsed separately | • **$40,000 for breach of confidence claim** ($30,000 equitable damages; $10,000 aggravated) |
| ***Wilson v. Ferguson*, [2015] WACS 15**<br><br>Supreme Court of Western Australia | • breach of confidence<br>• ex boyfriend posted sexually explicit photographs and videos of the plaintiff on Facebook<br>• the photos had been taken with the consent of the plaintiff – both parties had shared photos and videos with each other intended for the exclusive enjoyment of the other while in the relationship | • applies Giller v. Procopets | • **$48,404** ($35,000 equitable damages; $13,404 economic loss)<br>• **injunctive relief** |

## The Challenge of Anonymity

A final issue raised by privacy claims is the challenge these claims can pose to the open-court principle. The case law is clear that a party may proceed anonymously if they can demonstrate significant privacy interests, which means the remedy of a lawsuit is available to parties who might otherwise have been unwilling to go to court in respect of embarrassing information.

The leading case in this regard is A.B. v. Bragg Communications Inc., 2012 SCC 46, where the plaintiff brought an action seeking disclosure of the identity of the author(s) of an anonymous Facebook profile, which included a photograph of the applicant and other particulars which identified her. The Facebook profile also discussed the applicant's physical appearance, weight, and allegedly included scandalous sexual commentary of a private and intimate nature.

Through her father as guardian, the plaintiff brought an application for an order requiring the Internet provider to disclose the identity of the person(s) who

In granting the plaintiff's application, the Supreme Court of Canada noted that, while the open court principle was important, the plaintiff's privacy interests and the importance of protection of children from cyberbulling were sufficiently compelling in the particular facts of the case to permit the plaintiff to proceed by way of initials:

> [14] The girl's privacy interests in this case are tied both to her age and to the nature of the victimization she seeks protection from. It is not merely a question of her privacy, but of her privacy from the relentlessly intrusive humiliation of sexualized online bullying: Carole Lucock and Michael Yeo, "Naming Names: The Pseudonym in the Name of the Law" (2006), 3 *U. Ottawa L. & Tech. J.* 53, at pp. 72-73; Karen Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011), 56 *McGill L.J.* 289, at p. 302.

This case has been cited by a number of judges in "breach of privacy" cases as authority permitting a litigant to proceed anonymously (and was considered by Bowden J. and Marzari J. in the AB case).

## Conclusion

Somewhat incongruously, as it has become easier to record and disseminate personal information about others the courts have responded by increasing legal protection for privacy – recognizing new privacy torts (in Ontario) and the right to privacy in "public."

As a result, a number of legal tools are available, including publication bans, anonymization orders, injunctions, and lawsuits for breach of privacy. Given the "personal" nature of many family actions, consideration should be given to privacy rights and whether anonymization orders or protective orders concerning publication should be made. In egregious cases of disclosure, thought should be given to whether a cause of action exists for breach of privacy. Finally, parties should be discouraged from engaging a "public campaign", which could potentially give rise to a "protection order" under the *Family Law Act* or damages for breach of privacy.

*Daniel is an Associate with Harper Grey practising with our Defamation, Privacy & Media Law, Insurance and Health Law Groups.*

*Daniel has particular experience in online defamation, breach of privacy, and professional negligence cases. Please contact him if you have any questions.*

Daniel Reid

dreid@harpergrey.com
604.895.2877

This update is not a legal opinion. Readers should not act on the basis of this update without first consulting a lawyer for analysis and advice on a specific matter.

© Harper Grey LLP, All Rights Reserved