



SMHI LEGAL NOTES

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BARRISTERS & SOLICITORS • TRADEMARK AGENTS

Volume 31

Fall 2012

Protecting Privacy in a Technological Age

Once you've lost your privacy, you realize you've lost an extremely valuable thing.

Billy Graham

We all have things that we want to keep to ourselves. In our world of ever evolving technology, however, it is becoming more of a challenge to keep our private business away from prying eyes.

Earlier this year, Ontario's Court of Appeal decided a case involving an individual's right to privacy. More importantly, they went so far as to recognize a common law tort for invasion of privacy.

Facts

The case involved two women, Jones and Tsige, who both worked for the Bank of Montreal, though at different branches. Although they did not know each other, Tsige knew of Jones because she was involved in a romantic relationship with Jones' ex-husband.

Over the course of a four year period, Tsige regularly accessed Jones' personal bank accounts. In fact, she looked at the accounts more than 174 times. The information that Tsige was able to see included transaction details and personal information such as date of birth, marital status and address. However, she did not publish, distribute or record the information in any way.

When Jones began to suspect that Tsige was looking at her accounts, she complained to their employer. When confronted,

Tsige admitted that she was involved in a financial dispute with Jones' ex husband and was attempting to confirm that he had been paying child support to Jones.

Jones made the decision to sue Tsige, claiming damages for invasion of privacy. While Jones' claim was dismissed by the lower court, she successfully appealed to the Ontario Court of Appeal. In reviewing the case law in both Canada and the U.S., the appellate court found that "it is appropriate for this court to confirm the existence of a right of action for intrusion upon seclusion. Recognition of such a cause of action would amount to an incremental step that is consistent with the role of this court to develop the common law in a manner consistent with the changing needs of society." The court further stated that "Privacy has long been recognized as an important underlying and animating value of various traditional causes of action to protect personal and territorial privacy."

The Test

The court set out the following as the key features of this cause of action (i.e. "intrusion upon seclusion"):

1. the defendant's conduct must be intentional, reckless;
2. the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns;
3. that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.

Proof of harm to a recognized economic interest is not a required element of the cause of action.

When expanding the parameters of legal protections there is always a concern that the "floodgates" will open and that there will be a plethora of similar lawsuits. With respect to this concern the court had this to say: "Claims from individuals who are sensitive or unusually concerned about their privacy are excluded: it is only intrusions into matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive."

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The articles in SMHI Legal Notes are necessarily of a general nature and cannot be regarded as legal advice. Our firm will be pleased to provide additional details on request.

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Don't Be Part of the 56%!

We have previously written on the topic of wills and powers of attorney. We felt, however, that it was time to revisit these legal issues based on the results of a recent survey by LAWPRO's Title PLUS, which showed that a significant number of Canadians continue to put off these important tasks.

Earlier this year, LAWPRO's Title PLUS program commissioned a survey that revealed that 56% of Canadian adults do not have a will and an astounding 71% do not have powers of attorney. The results are discouraging, if not surprising. The reasons for people not having these documents run the gamut, including the assumption that they are too young, that they do not know how to get started or the belief that they could not afford a will.

The importance of having a will and powers of attorney cannot be understated. Not having them can lead to serious delays when it matters most, which in turn can lead to financial problems for your family at a vulnerable time. The balance of this article explains why these documents are important and the consequences of not having them.

The Will

We will begin with the will, since this is the document that most are familiar with.

A will is a document that sets out what should happen to your estate following your death as well as who should oversee the distribution of your estate. The decision to make a will provides you with the flexibility of dealing with your assets as you see fit. In addition, it allows you to decide who you want to act as your Estate Trustee (commonly referred to as the executor).

Another important reason to make a will is if you have minor children. In your will you can name who you want to raise your children, should the worst happen. While such a declaration is not binding on the court, your wishes, as expressed in your will, are given significant weight. You can also set up a trust fund by way of your will for your minor children. You are able to choose the trustee who will oversee and administer the trust(s) as well as decide what the money should be used for and at what age your children should receive their inheritance.

A will allows you to do important estate planning so as to maximize your beneficiaries' inheritance and minimize the tax man's share. If you wish to leave money to charity, this is the best way to ensure that this happens.

Intestacy

If a person dies and does not have a will, he/she is said to

have died intestate. In this situation, the law provides for a "one size fits all" scheme. The chart on page 3 sets out this legal formula.

At first glance, this distribution scheme may not seem so bad, but there are many pitfalls.

The law of intestacy does not name a person to oversee the distribution, which means someone must apply to the court to be appointed the Estate Trustee. This will be an added expense. It will also mean delays for your family and could impair their financial well being since your assets are immediately frozen in these circumstances. Further, the Estate Trustee may not be the person you would have chosen.

If you have young children, your spouse will no doubt require the money and property from your estate to raise those children. Unfortunately, the law of intestacy may give a significant portion of your estate to your surviving children, even if they are very young. And since children under 18 cannot inherit, their share of your estate may be overseen by the public trustee until they are 18.

These rules were written decades ago and do not take into account some of today's realities, including the different types of families, living arrangements and the increasing value of real estate, particularly in the GTA. It is particularly important to know that none of the applicable legislation deals with common law spouses. While there is a portion of the law that makes provision for dependants, it is unlikely to provide a fair share to the surviving common law spouse.

These are just a few examples of the unintended results if there is no will at the time of your death.

Powers of Attorney

Property

While a will is a document that becomes effective only at the time of death, there are two other documents that every adult should have and that are effective while they are still alive. These documents are a power of attorney for property and a power of attorney for personal care.

Although we all hope to lead a long and healthy life, sometimes circumstances arise whereby we are not able to make decisions for ourselves. It is at such times that a power of attorney for property and/or a power of attorney for care can be invaluable.

A power of attorney for property is a straightforward but powerful document that gives the person(s) you appoint the legal

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authority to deal with your money and property on your behalf. The only thing this person cannot do is make a will for you.

You can give someone temporary authorization as a matter of convenience. For instance, if you winter in Florida, your attorney can pay your bills and file your tax return. You can also make a continuing power of attorney for property, which lets your attorney act on your behalf in case of your mental incapacity. If you do not have a power of attorney for property the office of the public guardian and trustee may step in to manage your affairs. In the alternative, someone must apply to either the office of the public guardian and trustee or to the court to be appointed your guardian of property. Among other things, the proposed guardian will have to present a detailed financial plan for dealing with your assets.

Personal Care

A power of attorney for personal care is a written direction authorizing someone to be your substitute decision maker in the event you cannot make decisions about your health, medical treatment and personal care. With the exception of your paid health care workers, your attorney for personal care can be anybody over the age of 16, including your spouse, a relative or a trusted friend.

Your attorney can make all decisions related to your personal care and health. The type of decisions could range from what you should eat to where you should live to whether you should see a doctor. However, your attorney will make decisions only if you become incapable of making them for yourself. This will generally be determined by an evaluator, usually a social worker.

If there is no power of attorney for personal care again someone must apply to the court to be appointed your substitute decision maker. This is an expensive and time consuming process. Although there will be instances where the public guardian and trustee will be asked to step in, the law is clear that this should be a last resort.

Making These Documents

While you can draft any or all of these documents on your own, they are legal documents that must meet the formal requirements of the law. This is one reason why it is best to seek the advice of an experienced legal professional. A lawyer will also ensure that your wishes are clear and that the distribution of your estate will occur as you intend, something that may not be as obvious as it seems.

Even if you have a will and powers of attorney, it is important to review them every few years to be sure they still reflect

your wishes and your current family situation.

Preparing a will and powers of attorney should rank high among your financial and family priorities. One of our lawyers would be pleased to sit with you to discuss your particular needs and concerns. ☞

Distribution on Intestacy

A person who dies without a will is considered to have died intestate. To deal with this situation, the provincial legislature has established rules for the management and distribution of the estate. These rules spell out who is entitled and in what proportions. The list below illustrates this formula.

Spouse only	Everything to spouse
Spouse + 1 child	\$200,000 + half of the balance to spouse Other half of the balance to child
Spouse + 2+ children	\$200,000 + one third of the balance to spouse 2/3 of the balance divided among children
Children only	Everything divided equally among children
No spouse No children	Everything divided equally among grandchildren
No grandchildren	Everything to parents of deceased
No parents	Everything divided equally among siblings of deceased
No siblings	Everything divided equally among nieces and nephews
No next of kin	Everything to government

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In light of this test, the court concluded that Tsige had committed the tort of intrusion upon seclusion when she repeatedly examined the private bank records of Jones. The court also found that the intrusion was intentional, it amounted to an unlawful invasion of Jones' private affairs, it would be viewed as highly offensive to the reasonable person and it caused distress, humiliation or anguish.

Damages

After recognizing that Jones had a legitimate legal claim, the court went on to address the issue of what damages she should be entitled to. While a plaintiff need not have suffered a financial loss, "because of the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum." In other words, damages are awarded to "vindicate rights or symbolize recognition of their infringement."

Ultimately, the court awarded Jones the sum of \$10,000. In determining the amount, the court weighed the fact that Tsige's actions were deliberate and repeated and arose from a complex web of domestic arrangements likely to provoke strong feelings and animosity against the fact that Jones, although understandably very upset, had suffered no public embarrassment or harm to her health, welfare, social, business or financial position and that Tsige had apologized for her conduct and made genuine attempts to make amends.

There was probably not much that Jones could have done to protect her privacy in this particular instance. However, there are many steps that can be taken to protect your privacy online as well as your identity. (See the box below for ideas.)

If you are an employer, you would be wise to create and enforce privacy policies in your work place. For assistance with this matter please contact our firm. We would be pleased to help. 

Protecting Your Privacy

Here are just a few ideas for protecting your privacy on the Internet as well as for safeguarding your identity.

Using the Internet

- When mailing to unknown parties, posting to newsgroups, chat rooms and other public spaces on the Net or publishing a Web page that mentions your e-mail address, it is best to create an alternate email address rather than using your main email address.
- Do not reveal personal details to strangers or just-met "friends".
- Realize that you may be monitored at work, so avoid sending highly personal e-mail to mailing lists, and keep sensitive files on your home computer.

- Do not reply to spammers, for any reason.

For more ideas go to www.eff.org/wp/effs-top-12-ways-protect-your-online-privacy

Protecting Your Identity

- Be extremely careful when you provide personal information such as your SIN, or date of birth over the phone.
- Keep your access codes, user ID, passwords, and PINs secret.
- Choose your tax preparer carefully! Make sure you choose someone you trust and check their references.

For more information, tools and resources on these topics visit the Office of the Privacy Commissioner of Canada website at www.priv.gc.ca 

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PRACTICE AREAS

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