

# **From coast to coast: The latest on privacy litigation**

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# Your panelists



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# Test for class action certification from coast to coast

# Pleadings disclose a cause of action

- BC:
  - s. 4(1)(a) the pleadings disclose a cause of action
- QC:
  - art. 575(2) the facts alleged appear to justify the conclusions sought
- ON:
  - s. 5(1)(a) the pleadings or the notice of application discloses a cause of action

# Identifiable class

- BC:
  - s. 4(1)(b) there is an identifiable class of 2 or more persons
- QC: art. 575(3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings
- ON:
  - s. 5(1)(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant

# Common issues

- BC:
  - s. 4(1)(c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members
- QC:
  - art. 575(1) the claims of the members of the class raise identical, similar or related issues of law or fact
- ON:
  - s. 5(1)(c) the claims or defences of the class members raise common issues

# Preferable procedure

- BC:
  - s. 4(1)(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues
- QC:
  - n/a
- ON:
  - s. 5(1)(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
    - (1.1)(a) it is **superior** to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant; **and**
    - (1.1)(b) the questions of fact or law common to the class members **predominate over any questions** affecting only individual class members.

# Adequacy of representative plaintiff

- BC:
  - s. 4(1)(e) there is a representative plaintiff who
    - (i) would fairly and adequately represent the interests of the class,
    - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
    - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
- QC:
  - art. 575(4) the class member appointed as representative plaintiff is in a position to properly represent the class members
- ON:
  - s. 5(1)(e) there is a representative plaintiff or defendant who,
    - (i) would fairly and adequately represent the interests of the class,
    - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
    - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

# Takeaways

- Gravitation towards BC; continued focus on QC; less in ON
- Pay close attention to regulatory environment in each province where you carry on business – e.g. Bill 64

# New privacy torts gaining ground across Canada

# Intrusion upon seclusion – Overview

## Three elements of the tort

- Intentional conduct by the defendant;
- An invasion without lawful justification of the plaintiff's private affairs or concerns; and
- An invasion that would be regarded by a reasonable person as highly offensive.

# Intrusion upon seclusion – Who and how

- Intrusion by the defendant “***is the central element of the tort***” and intrusion must be intentional or reckless
- Failure to prevent an intrusion does not constitute intrusion
- Defendant cannot ***be “passively” provided*** with the information
- Plaintiff’s failure to provide any evidence that ***Canadian users’ personal data was shared with a third party*** was enough to deny certification

# Intrusion upon seclusion – Nature of the information

- Only ***significant information*** such as financial records, health records or personal sensitive correspondence or records will meet the threshold
- Even if taking ***personal contact information*** is an intrusion, it is not one that a reasonable person would regard as offensive
- Names, phone numbers and emails are not private
- ***Uniformity of information*** required at certification

# Public disclosure of private facts

## Four-part test:

- the defendant publicized an aspect of the plaintiff's private life;
  - the plaintiff did not consent;
  - the matter publicized or its publication would be highly offensive to a reasonable person; and
  - the publication was not of legitimate concern to the public.
- Privacy interests may relate to ***financial, relationship and health information***
  - An ***inherently individualistic*** cause of action lacking commonality

# Misappropriation of personality

- Must demonstrate the defendant took advantage of the ***name, reputation, likeness*** or some other component of the plaintiff's individuality or personality which the viewer associates or identifies with the plaintiff
- Limited to cases in which the likeness of a public figure is used without permission for ***advertising or endorsement***
- Damage to the plaintiff's personality or its value is required to establish misappropriation

# Publicity placing a person in a false light

## Two-part test

- The false light in which the other was placed would be highly offensive to a reasonable person; and
  - The actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.
- 
- Unlike public disclosure of private facts this tort was needed so actors publicizing **false information** would not escape liability
  - Conduct at issue may be defamatory but **defamation is not required**

# What's the damage: The latest on damages in privacy torts

# Topics

## 1. Privacy class actions generally

- A. Quantity of damages – trends
- B. Types of damages – developments in what types of damages are being awarded/denied

## 2. Privacy torts

- A. The four traditional privacy torts

## 3. Statutory claims

- A. The changing world of damages/penalties: Bill 64, “new” PIPEDA
- B. PIPEDA
- C. Privacy Acts (BC – SK – MB – NL)

# 1. Class actions

- **Caveat:** with the exception of *Lamoureaux* case in Québec, nothing has made it to trial. So, we're largely looking at what the court is certifying or approving as settlement.
- Settlement structures reflect the unique nature of civil privacy suits and the difficulty in assessing the losses (if any) of potential class members. Common characteristics of privacy class action settlements include:
  - Compensation for losses in the case of fraud or identity theft resulting from the breach
  - Cash payments for other proven out-of-pocket losses (e.g., steps remediate fraud risk, lost time)
  - Amounts for continuing credit monitoring
  - Notice and administration costs
  - Honoraria for representative plaintiffs
  - Counsel fees

# 1A. Class actions: Quantity

*Karasik v. Yahoo! Inc*, 2021 ONSC 1063:

- Justice Perell's review of settlement agreements in prior privacy breach class actions revealed that the general (moral or symbolic) damages awards tended to be "miniscule".
- Of the 36 actions reviewed by Justice Perell, 27 had been certified and 11 had approved settlements. Justice Perell compared the settlements and found that the *per capita* value for an individual class member was modest in nearly every case...

# 1A. Class actions: Quantity

- In five decisions, the value per class member was less than \$5.00 (including amounts of \$1.00, \$2.20, \$0.64, "cents on the dollar" and \$4.00).
- In two decisions, the value per class member was \$13.78 and \$31.00 plus uncapped individual claims.
- In two decisions, the value per class member was between \$100.00-\$500.00. Notably, these cases also involved relatively small class sizes (333 class members and 8,525 class members, respectively).
- The individual per capita value could not be calculated for three of the settlements, two of which involved an uncapped claims process and the other provided for claims capped at \$2,500.
- In multiple cases, class members would only be entitled to damages for **expenses incurred** as a direct result of the cyberattack or for time spent remedying issues relating to the cyberattack, i.e. for actual costs incurred.
- An aura of "**nuisance value settlements**" or settlements designed to maintain good commercial relationships.

# 1B. Class actions: Types of damages

Three significant hurdles that plaintiffs face in proving damages in privacy breach actions:

- (1) some evidence of actual harm is required;
- (2) a proactive breach response will likely thwart an award of punitive damages; and
- (3) proof that the information was actually compromised likely required.

# 1B. Class actions: Types of damages

## 1. Some evidence of harm is required

- In defining the threshold of harm that must be proven, courts are looking at type of information concerned and the actual (rather than feared) consequences of a breach.
- Plaintiffs must show that not only that defendants were negligent in safeguarding the information, but also that legally recognizable harm was suffered.
- ***Lamoureux c. Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)***, the Superior Court of Québec dismissed the class action on the basis that there was no evidence of compensable harm (consistent with other actions across Canada where certification has been denied because of a lack of proof of harm).
  - The Court acknowledged that the negligent loss of information can ground a finding of prejudice, but it found that the anxieties flowing from such loss did not constitute compensable prejudice in this case.
  - Damages claimed for anger/stress unsupported by sufficient evidence, no lasting psychological harm.
  - The Court dismissed allegations that class members' increased monitoring of their financial accounts amounted to compensable prejudice, finding instead that this type of activity formed part of the normal expected behaviour of someone who is mindful of protecting their assets.

# 1B. Class actions: Types of damages

- Also, *Setoguchi*:
  - The Alberta Court of Queen's Bench denied certification, emphasizing that not all personal information is private information (here, info was names, phone numbers, and email addresses).
  - Court highlighted that the information accessed was no more private than that found in a typical phone directory of the past – and there was no evidence that class members had a reasonable expectation of privacy in the information.
  - *Setoguchi* suggests that the plaintiff must prove that the information was private, and that harm was suffered.

# 1B. Class actions: Types of damages

## 2. Proactive breach response may prevent punitive damages

- Breach response matters - especially in Québec, where the right to privacy is explicitly protected by the Québec Charter of Human Rights and Freedoms.
- In Québec, defendants can be liable to pay punitive damages for "intentional interference" with that right, even where no compensatory damages are awarded.
- In *Lamoureux*, the Court found that the defendant had been diligent in following best practices and promptly responding to the breach (e.g., several internal investigations to identify cause/extent of breach; took steps to minimize the impact on class)
- Punitive damages therefore not justified: prudent reaction belied any suggestion that the defendant intentionally interfered with class members' rights to a private life.
- Consistent with trend in privacy class action settlement approvals, which affirms the importance of taking proactive steps to identify the extent of lost or potentially compromised personal information, notifying relevant stakeholders, providing a forum for stakeholders to ask questions and receive information, and mitigating any potential harm (e.g., by offering services such as credit or dark web monitoring, or identity theft protection, etc.).

# 1B. Class actions: Types of damages

## 3. Proof that information was compromised is likely required

- Another key issue for class action plaintiffs is proving that the information was actually compromised.
- In *Simpson*, the Ontario Superior Court refused to certify a proposed class action against a social media platform because plaintiffs were unable to prove information had been improperly shared.
- The Court rejected the plaintiff's "peep hole" argument, which alleged that the mere fact that the social media platform made users' information accessible was sufficient to warrant a remedy, even if such access was never exploited.
- While the Court rejected this argument on procedural grounds, whether this argument can succeed on the merits remains to be seen. If successful, the "peep hole" argument could decrease the burden on plaintiffs to show provable harm.

# 2. Torts

## Four privacy torts:

- Intrusion upon seclusion
  - Public disclosure of embarrassing facts about the plaintiff
  - Publicity that places the plaintiff in a false light in the public eye
  - Appropriation of the plaintiff's name for the defendant's advantage
- 
- Not every tort is available in every province – shifting landscape

# 2. Torts

	BC	AB	ON
<b>Intrusion upon seclusion</b>	<p><b>No.</b></p> <p><i>Mohl v University of British Columbia</i>, 2009 BCCA 249, leave to appeal ref'd [2009] SCCA No 340</p>	<p><b>No.</b></p> <p><i>Al-Ghamdi v Alberta</i>, 2017 ABQB 684, aff'd 2020 ABCA 81 - no common law tort of "breach of privacy" in Alberta.</p>	<p><b>Yes</b></p> <p><i>Jones v Tsige</i>, 2012 ONCA 32 (general damages of \$10,000; no punitive damages – "range of damages for intrusion upon seclusion being up to \$20,000".</p>
<b>Public disclosure</b>	<p>?</p>	<p><b>Yes.</b></p> <p><i>ES v Shillington</i>, 2021 ABQB 739 (general damages \$80,000 for online postings without consent).</p> <p>Also - <i>LDS v SCA</i>, 2021 ABQB 818 , citing <i>Shillington</i> (general damages of \$80,000).</p>	<p><b>Yes.</b></p> <p><i>Jane Doe 464533 v N.D.</i>, 2016 ONSC 541 (general damages of \$50,000, aggravated damages of \$25,000 and punitive damages of \$25,000).</p> <p><i>Jane Doe 72511 v. N.M.</i>, 2018 ONSC 6607 (general damages of \$50,000, aggravated damages of \$25,000 and punitive damages of \$25,000).</p>
<b>False light</b>	<p>?</p>	<p>?</p>	<p><b>Yes.</b></p> <p><i>Yenovkian v. Gulian</i>, 2019 ONSC 7279 (\$100,000 damages for "the tort of invasion of privacy (public disclosure of private facts and publicity placing the plaintiff in a false light)"; punitive \$150,000).</p>
<b>Appropriation</b>	<p>?</p>	<p>?</p>	<p><b>Yes (arguably).</b></p> <p><i>Jones v. Tsige</i>, citing <i>Athans v Canadian Adventure Camps Ltd</i>, 1977 CanLII 1255 (ON SC) for the proposition.</p>

## 2. Torts cont'd

- Note: *Yenovkian*:

[188] The two Jane Doe cases have recognized that **the cap on damages for intrusion upon seclusion may not apply to the other forms of invasion of privacy**: *Jane Doe 2016* at para. 58; *Jane Doe 2018* at paras. 127-132. In this case, as is in those, the “modest conventional sum” that might vindicate the “intangible” interest at stake in *Jones v. Tsigie*, para. 71, would not do justice to the harm the plaintiff has suffered.

# 3. Statutes

## A. Damages/ Penalties (Bill 64 and “new” PIPEDA)

	Québec (Bill 64)	“New” PIPEDA*
<b>Assent</b>	Assented to Sept 22, 2021.	Not yet introduced (early 2022...?)
<b>In force</b>	In force in 2 years (most provisions; some in 1 year or 3 years).	Timing unknown
<b>Administrative monetary penalties</b>	Up to the greater of \$10,000,000 or 2% of the organization’s worldwide turnover for the preceding fiscal year.	Up to the greater of \$10,000,000 or 3% of the organization’s global gross revenues in its previous fiscal year.
<b>Penal sanctions</b>	Up to the greater of \$25,000,000 or 4% of their worldwide turnover for the preceding fiscal year.	Up to the greater of \$25,000,000, or 5% of the organization’s global gross revenues in its previous fiscal year.
<b>Private right of action</b>	For damages for infringement of privacy rights in Act or of articles 35- 40 of the Civil Code. Punitive damages of at least \$1,000 where intentional/gross negligence.	New private right of action for individuals.

# 3B. Statutes - PIPEDA

## B. PIPEDA

- **Gating mechanism:** Once the Commissioner either issues a report or discontinues the investigation, the complainant may apply to the Federal Court for a hearing with respect to the complaint (s. 14).
- **Trial *de novo*:** The hearing before the Federal Court is a hearing *de novo* with no deference to the Commissioner's report. The court reaches its own conclusions regarding the respondent's conduct and breaches of PIPEDA (*Englander v. Telus Communications Inc.*, 2004 FCA 387, paras. 47-48).
- **Practically:** As a practical matter, the Commissioner's report may serve as a basis for the court's inquiry.
- **Damages:** The court is empowered to award damages to a complainant, including "damages for any humiliation that the complainant has suffered" (s. 16).
- **Range:** On average, damages range from **zero to \$5,000**. There is one case, discussed further below, which is an anomaly with **damages of \$21,000** were awarded.

## 3B. Statutes - PIPEDA

AUTHORITY	NATURE OF BREACH	DAMAGES
<i>Stevens v. SNF Maritime Metal Inc.</i> , 2010 FC 1137	Disclosure of financial information	NIL
<i>Randall v. Nubodys Fitness Centres</i> , 2010 FC 681	Disclosure of use of fitness facility to employer	NIL
<i>Nammo v. TransUnion of Canada Inc.</i> , 2010 FC 1284	Disclosure of inaccurate personal info to a bank causing credit issues	\$5,000 + \$1,000 costs
<i>Girao v Zarek Taylor Grossman Hanrahan LLP</i> , 2011 FC 1070	Disclosure of personal info relating to medical conditions	\$1,500 + \$500 costs
<i>Landry v. Royal Bank of Canada</i> , 2011 FC 687	Disclosure of financial information in a divorce proceeding	\$4,500 + costs
<i>Townsend v. SunLife Financial</i> , 2012 FC 550	Disclosure of medical information to a third party	NIL
<i>Biron v. RBC Royal Bank</i> , 2012 FC 109	Disclosure of credit card stmt in divorce proceeding	\$2,500 + costs
<i>Blum v. Mortgage Architects Inc.</i> , 2015 FC 323	Emails from mortgage agents re non-payment by plaintiff.	\$1,000 (sought 2.6M)
<i>Bertucci v. Royal Bank of Canada</i> , 2016 FC 332	Plaintiffs requested access to their personal info	NIL
<i>Fahmy v. Bank of Montreal</i> , 2016 FC 479	Banking dispute	NIL
<i>A.T. v. Globe24h.com</i> , 2017 FC 114	Site republishing court decisions & charging removal fee	\$5,000
<i>Migliaro v. Royal Bank of Canada</i> , 2018 FC 525	One unauthorized access of bank acc't info by employee	NIL (sought: \$250,000)
<i>Montalbo v. Royal Bank of Canada</i> , 2018 FC 1155	Lost mortgage documents within bank branch	\$2,000 + \$800 costs
<i>Sibomana v. Collectcent Collection Agency</i> , 2019 FC 1257	Collection attempts	NIL. <u>Plaintiff</u> assessed costs of \$1,000.

## 3B. Statutes - PIPEDA

- **Outlier:** *Chitrakar v. Bell TV*, 2013 FC 1103
- **Complaint:** Unauthorized credit check performed without consent. After complaining directly to Bell and receiving what the court described as the “royal runaround”, Chitrakar filed a complaint with the Privacy Commissioner, followed by an application to the Federal Court. Bell did not respond to the application.
  - Justice Phelan found Bell in breach of PIPEDA and branded its conduct “reprehensible”.
- **Damages:** \$21,000 (\$10,000 general, \$10,000 exemplary, \$1,000 disbursements) - first time exemplary or punitive damages awarded under PIPEDA.
  - Award notable both for the quantum of PIPEDA damages and an affirmation of an approach to damages under PIPEDA that prioritizes the public purposes underlying the Act over a strictly compensatory approach to damages and insistence on strict proof of tangible losses.
- Justice Phelan was clearly troubled by the company’s apparent apathy towards its errors, including the failure to respond to the court application. Conversely, earlier (lower \$ value) cases involved carelessness or inadvertence rather than disregard for privacy rights.

## 3B. Statutes - PIPEDA

- But – by next year, Bell seems to have improved its response, with a corresponding reduction in damages.

*Henry v. Bell Mobility*, 2014 FC 555 (paras. 26-27) (emphasis added):

*“Chitrakar is distinguishable from the current case in that here Bell Mobility has **taken responsibility** for the breach of Mr. Henry’s privacy rights; it has put in place **steps to better train CSRs**; it has **not in any way benefited** from the breach; and has **acknowledged that Mr. Henry is entitled to damages** in keeping with the jurisprudence of this Court. Bell Mobility argued that damages in the range of \$1,500 - \$2,000 was more than adequate to compensate Mr. Henry in these circumstances.*

*Having considered all of the evidence and the jurisprudence and given the circumstances [...] and the breadth of the information disclosed it is my view that **an award of \$2,500 is appropriate.**”*

# 3C. Statutes – Privacy acts (BC-SK-MB-NL)

Typical formulation (Alberta example):

- It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.
- 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 determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

- **No damages required**
- **Mental element required**
- **Objective standard for privacy expectation**
- **Subjective standard for conduct**

## 3C. Statutes – Privacy acts

Ten years of Privacy act cases – the Acts are being increasingly used by claimants:

	2011	2012	2103	2014	2015	2016	2017	2018	2019	2020	2021
BC	1	2	2	7 (4)*	5	7	6	12	8	8	10
MB	1	2	-	2	2	1	-	-	3	1	3
SK	1	1	1	2	1	1	1	1	-	2	2
NL	-	1	-	1	-	-	-	-	1	1	-
Total	<b>3</b>	<b>6</b>	<b>3</b>	<b>12 (9)</b>	<b>8</b>	<b>8</b>	<b>9</b>	<b>13</b>	<b>12</b>	<b>12</b>	<b>15</b>

## 3C. Statutes – Privacy acts

- Damages range from \$1,000 to approximately \$25,000 (with costs)
  - Average trending upwards over time
- Generally, poorly understood by judges, who tend to do one of two things:
  - Award a **nominal amount** to satisfy a plaintiff (typically an unrepresented plaintiff who has been treated poorly by the defendant organization....though often more related to customer service issues than privacy).
  - Award a **higher amount** where facts are egregious (e.g., use of personal information to facilitate sexual harassment, misuse of personal information in divorce proceeding, etc.).
- **Takeaway:** of the 100+ cases reviewed in last ten years, probably ~40% could have been avoided with an appropriate privacy or customer service response at first instance.

# Thank you



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