



Presenting Legal News, Views and Updates from
Stillman LLP
Barristers & Solicitors

EDITOR'S NOTE

Should you have any questions, concerns or suggestions for future articles please contact Greg Bentz by phone at 930-3630, or email at gbentz@stillmanllp.com

HEADS UP

Heads Up is a column which appears in each issue of the Stillman LLP LegalEye, highlighting new or upcoming legislation and legal issues in the Province of Alberta.

"Show Me the Money!": The Importance of Full and Honest Financial Disclosure in Divorce Files

By Alison Mazoff

One of the most important factors in reaching a quick and equitable matrimonial property settlement is full financial disclosure by both parties.

It is important to carefully review any and all disclosure that you have received to ensure that all the assets that the other spouse has are accounted for, otherwise, you may end up leaving the marriage without taking your fair share of the assets.

On the other hand, it is also important that you ensure that you supply your spouse with complete and honest disclosure. Alberta law does not allow parties to with-hold information from a spouse that would cause detriment to that spouse or children of the marriage. Despite any emotional difficulties you may be having with your spouse, it is important to keep negotiations in good faith, as you will be subject to financial penalties if the Court finds that you deliberately failed to make a complete disclosure.

How the Courts treat Incomplete Disclosure

The Alberta Courts will modify an unjust settlement due to misrepresentation if the incomplete disclosure resulted in one of the parties suffering a significant detriment. However, if the misrepresentation is not significant, the complaining party will have to prove that there were other improprieties such as psychological manipulation in order to alter the settlement (*see Siegel v. Siegel*, 2011 ABQB 540, at para 14).

If a party misleads the other party by not providing full disclosure during matrimonial property negotiations, the Court can modify the settlement. The Supreme Court of Canada summed up this obligation in the case of *Rick v. Brandsema*:

"the duty to make full and honest disclosure of all relevant financial information is required to protect the integrity of the result of negotiations undertaken in these uniquely vulnerable circumstances."

Rick v. Brandsema, 2009 SCC 10, at para 47.

In this case, the Court found that the agreement between a former husband and wife was invalid because the husband had, in addition to psychologically extorting the wife during the negotiations, not provided her with complete and honest disclosure. Moreover, the Court found that some of the disclosure the husband provided was purposely incorrect.

Specifically and interestingly, the Court found that the husband had listed farm assets at various values without having an independent third party assess them. We note that having a professional third party assessment of assets is extremely important in insuring that disclosure is complete and honest. The Court further found that the husband transferred funds

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from the jointly owned farm and business to himself, without notifying the wife, subsequent to the separation, but prior to the disclosure. The Court noted that agreements based on full and honest disclosure will likely withstand judicial scrutiny (*Rick v. Brandsema*, at para 50.).

Generally, one party failing to disclose their financial information to the other with the intent to mislead is sufficient cause to alter a settlement. For example, in *Bradshaw v. Bradshaw*, a recent 2011 Court of Queen's Bench decision, the Court awarded a party an additional \$10,000.00 due to the fact that the other party had not disclosed the correct value of his RRSPs.

If a party honestly fails to disclose significant financial information in good faith, the Court will deem the disclosure incomplete and will modify the settlement. In the Alberta Court of Appeal decision of *Brown v. Silvera* 2011 ABCA 109, the Court found that even had the husband's failure to disclose various corporate shares totaling to approximately 6 million dollars was in good faith, that it still was a breach of his duty to fully disclose (*Brown v. Silvera*, at para 33). The Court further found that there is no definitional difference between "informational deficits" and "misrepresentations" (*Brown v. Silvera*, at para 30). Finally, the Court awarded the wife \$14,288,264 plus interest. We note that it may have been the significance of the information deficit that lead the Court to this conclusion.

To sum up, the best way to ensure a settlement that will withstand judicial scrutiny is to ensure full and honest financial disclosure, utilizing third party assessors when necessary and revealing all significant assets. We recommend speaking with your lawyer to assess disclosure is appropriate in your case.

FIRM NOTES

We are pleased to welcome Melissa Mackay who accepted a position as a lawyer and who will be practicing primarily civil litigation.

We are also pleased to welcome the following individuals to our support staff:

1. Tammy Cunday as a legal assistant in our Real Estate Department.
2. Mary Ellen Wynnich as a legal assistant in our Real Estate Department.
3. Diane Dellaire as a legal assistant in our Family Law Department.
4. Cecilia Scott as a legal assistant in our Litigation Department.

We are very pleased with the addition to our team of these very able and highly skilled individuals.

We are pleased to announce that our student Alison Mazoff has successfully completed her articles and will be admitted to The Bar July 6, 2012. Unfortunately, Alison will be moving to Vancouver to pursue a career there.

Jim Chronopoulos has left our offices effective April 27, 2012, to pursue a career in other areas – Good luck Jim and best wishes.

Superbowl – 2012 – Change of Venue

Our friend John Shearer of Callingwood Lanes has advised that his bowling alley will be closing down – truly a loss to the community, thank you John for all the support you've given over the past 7 years.

As a result, all you bowlers out there get ready to change your game: The 8th Annual Stillman LLP Superbowl Extravaganza is shaking it up! From 5 pin to 10 pin, and we are going to Ed's at West Edmonton Mall.

The date has been set for Friday, October 19, 2012. Monies raised at this year's Superbowl will again be donated to the SKILLS Society, a local charitable organization providing community support to children and adults with developmental disabilities and adults with acquired brain injuries.

Please contact Greg Bentz of our office to find out more.

CAUSE CÉLÈBRES

Intrusion upon Seclusion **by J. Melissa MacKay**

One of the great aspects of the common law judicial system is the fact that it is dynamic and allows our Country to keep pace with the protection of rights and freedoms as our society grows, and new issues arise that require attention. The technologies of today have introduced a whole host of new issues for the individual Canadian. With the growing popularity of social media, the internet and the global availability of one's personal and professional information, privacy concerns have certainly moved to the forefront of the minds of Canadians.

This phenomenon has not been lost on Canadian courts. While privacy issues have been a growing legal concern and have been addressed by some provinces via legislation, there has, thus far, been very little remedy for an individual who has felt that their privacy has been violated by another individual. A recent decision of the Ontario Court of Appeal (*Jones v. Tsige* 2012 ONCA 32 (CanLII) ("*Jones*")) has recognized the tort of Intrusion Upon Seclusion, and has opened the doors for persons who have fallen victim to an invasion of their privacy and may entitle them to damages.

Background

Jones and Tsige were both employees at different branches of the Bank of Montreal. Jones was also a client. In an interesting intermingling of personal lives, Tsige began a relationship with Jones' former husband. Over the course of 4 years, Tsige accessed Jones' personal banking accounts at least 174 times. When Jones



became suspicious of same, she complained to the Bank at which time Tsige was questioned about her access of the accounts.

Tsige admitted to the indiscretion and provided no legitimate reason for doing so, other than the fact that she was involved in a financial dispute with Jones' former husband and wanted to confirm that he was in fact paying child support to Jones. Jones denied that the timing and frequency of the intrusions supported Tsige's contention.

Jones brought a motion for Summary Judgment, and Tsige brought a cross-motion to dismiss the action. The motion judge found in favour of Jones and thus dismissed the claim. In doing so, the motion judge stated that Ontario law does not recognize a cause of action for invasion of privacy, and awarded \$35,000.00 in costs. Jones' appealed the decision.

Decision

The appeal of the Summary Judgment decision by the motion judge involved a significant question: Does Ontario recognize a right to bring a civil action for damages for the invasion of personal privacy?

The Court of Appeal began the analysis in *Jones* by accepting the theory that the general right to privacy embraces four distinct torts: 1. Intrusion upon the person's seclusion or solitude, or into his private affairs; 2. Public disclosure of embarrassing private facts about the person; 3. Publicity which places the person in a false light in the public eye; and 4. Appropriation, for the defendant's advantage of the person's name or likeness. (para 18, *Jones*).

In this case, the Court remained focused on the first of the four torts, as the facts of the case lend themselves to same. In its decision, the Court discussed a 2006 Ontario decision (*Somwar v. McDonald's Restaurants of Canada Ltd.* (2006) 79 O.R. (3d) 172) (S.C)) in which the Court stated that the body of case law, together with the protection of privacy under the Canadian Charter of Rights and Freedoms led him to conclude that nuisance, trespass and harassment may not provide adequate protection against the infringement of an individual's privacy interests (para 31, *Jones*).

Protection of these interests would be consistent with Charter values and would be a logical extension of the existing law. The idea of extending the laws in this area was also supported by a 1976 Alberta case (*Motherwell v. Motherwell* (1976), 73 D.L.R. (3d) 62 (Alta. S.C. App. Div.) involving harassing telephone calls, in which the court stated that "the interests of our developing jurisprudence would be better served by approaching invasion of privacy by abuse of the telephone system as a new category, rather than seeking by rationalization to enlarge" the existing categories of nuisance" (para 33, *Jones*).

The Court of Appeal canvassed various Federal and Provincial privacy legislation and concluded that the various statutes in place, should not halt the development of the common law in the area of protection of privacy interests, nor should they prevent a private right of action between individuals, given that the legislation in

this area does not typically address said right of action, nor does it allow for any right to damages.

The Court of Appeal ultimately confirms the existence of a right of action for Intrusion Upon Seclusion, the elements of which are: 1. The defendant's conduct must be intentional or reckless; 2. The defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and 3. That a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish (paras 70 and 71, *Jones*)

Limitations

The Court did include some caveats in its approval of a civil action for damages for the invasion of personal privacy. Firstly, the facts of the case will be highly instructive as to whether or not a tort of Intrusion upon Seclusion has occurred. Secondly, claims from individuals who are sensitive or unusually concerned about their privacy will be excluded. Finally, the Court warns that claims for protection of privacy may give rise to competing claims such as the protection of freedom of expression and freedom of the press.

As with most Court rulings, they are limited to the facts of the particular case. Certainly when it comes to an intentional campaign to invade the privacy of another when it could cause harm or embarrassment to another, the Court may intervene. The Court in *Jones* opens the door to a private action for invasion of privacy, although the width of the opening has yet to be seen.

AS WE SEE IT

Cyber Libel by Erik Bruveris

The internet is an important and powerful mode of communication as well as a way to express views, opinions and beliefs, to educate and to encourage social discourse. The internet is also a powerful channel through which defamatory material can be spread easily and quickly to users worldwide under a cloak of anonymity. The impact of defamatory material conveyed through the internet can be inordinately more destructive than through any other mode of communication. As quoted in a recent Supreme Court of Canada case, "a reputation can be destroyed in the click of a mouse, an anonymous email or an ill-timed Tweet". As such, defamation on the internet, commonly referred to as "cyber libel" by commentators and courts, is becoming a significant issue facing the courts.

The test for defamation remains the same in the case of defamation on the internet. The impugned words must tend to lower the reputation of the plaintiff in the eyes of a reasonable person, the words must in fact refer to the plaintiff and the words must have been communicated to at least one person other than the plaintiff. In determining whether defamation has occurred on the internet, the courts are faced with the difficulty of balancing the protection of an individual's reputation without stifling the Charter enshrined freedom of expression. Should



the courts find that content conveyed through the internet is in fact defamatory; the fact that it was conveyed through the internet has been considered an aggravating factor in determining damage awards due to the pervasiveness in the spread of material online.

In the case of *Mina Mar Group Inc. v. Divine* 2011 ONSC 1172, a Canadian investment services corporation was frequently defamed by individuals in the United States. The individuals had posted material under pseudonyms on an investment website describing the principals of the plaintiff corporation as “thieves, crooks, and sham artists, liars, dishonest, corrupt, incompetent and immoral”. General damages were awarded in the amount of \$50,000.00 and punitive damages in the amount of \$25,000.00.

In *Mudford v. Smith* 2009 CanLII 55718 (ON SC), the defendant made postings on a website stating the plaintiff lacked integrity by falsely stating that the plaintiff did not pay judgments against her. The plaintiff became aware of the postings when a potential client questioned her about it. The Court awarded \$30,000.00 in general damages and \$5,000.00 in aggravated damages.

In *Buckle v. Caswell* 2009 SKQB 363, the defendant made defamatory statements on her blog about a Saskatchewan lawyer including that the lawyer grows and uses marijuana, uses cocaine, has misappropriated funds, has been disbarred, has breached public trust and misused his office and position and is a dishonest and despicable person. The plaintiff was awarded \$50,000.00.

In *Nesbitt v. Neufeld* 2010 BCSC 1605, during the course of family law litigation, one of the litigants set up a website titled “Wicked Wendy Neufeld” and a Facebook page titled “Wendy Neufeld Support Group”. Both the website and Facebook page contained defamatory material against the former spouse under headings such as “Wendy Neufeld – Background Dirt” and “Kinky Comments”. The former spouse was awarded \$40,000.00 in damages.

As demonstrated by these cases, the courts can find that defamation has occurred through email, websites, blogs and social media sites such as Facebook. As the issue of internet defamation is relatively new, case law will likely branch out to the political blogosphere and “Twitterverse” as well. It should also be noted that the damage awards in internet defamation cases can be much higher than defamation through other modes of communication due to the aggravating characteristics of the internet. It may seem that the internet is anonymous and posting defamatory material will not have any repercussions; however, as these cases have shown, the consequences of posting ill-chosen words can be great. The best advice may be from the old adage “if you can’t say anything nice, don’t say anything at all”.

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Stillman LLP is a general law firm formed in 1993 with emphasis on Civil Litigation, Corporate and Commercial matters, Real Estate, and Wills and Estates and Family Law. The firm represents clients throughout Alberta, and has also represented clients from British Columbia, Saskatchewan, Manitoba, Yukon, Northwest Territories, Ontario, Quebec and various jurisdictions in France, Ireland the United States.

The firm has a well established network of agents in Canada, including Vancouver, Vancouver Island, Calgary, Regina, Saskatoon, Winnipeg, Toronto and Montreal. Stillman LLP also has established affiliations with various law firms throughout the United States and Great Britain.

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