Court File No. M52636

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ALINA OWSIANIK

Plaintiff
(Appellant)

and

EQUIFAX CANADA CO. and EQUIFAX, INC.

Defendants
(Respondents)

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE APPELLANT

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PART I - COURT APPEALED FROM AND RESULT

1. This is an appeal, with leave, from the majority decision of the Divisional Court (*per* McWatt ACJSCJ & J.A. Ramsay J., Swinton J. dissenting). The Divisional Court allowed the appeal and struck certified common issues relating to the tort of intrusion upon seclusion.

PART II - OVERVIEW

2. This is a class proceeding that seeks to certify claims alleging the defendants are liable to class members whose personal financial information was stolen by hackers who broke into the defendants' IT systems. The majority held that a database defendant in this scenario cannot be liable for the tort of intrusion upon seclusion, a tort first recognized by this Court in *Jones v. Tsige*.[1] The majority concluded that the criteria for the tort were not met because a defendant whose

[1] *Jones v. Tsige*, 2012 ONCA 32 ("*Jones*")

databases are hacked by third party criminals does not "intrude" or "invade"; the criminals do. The majority reached its conclusion on the basis of the "plain and obvious and beyond doubt" test for a motion to strike.

3. The claim pleads that the defendants knew that there were serious problems with their IT security, putting sensitive data at risk, but did nothing to remedy them. The tort of intrusion upon seclusion also applies to reckless conduct. Nevertheless, the majority held that the tort could not apply because there was no "intrusion" or "invasion" by the defendant.

4. Hacker data breaches are becoming prevalent and extensive. The decision immunizes all defendants from liability for intrusion upon seclusion in hacker data breach scenarios, even if the defendant egregiously and recklessly disregards and wilfully ignores its IT security, as pleaded in this case. The majority decision is contrary to privacy principles stated by the Supreme Court and this Court, as well as other decisions in Ontario, B.C., and the U.S.

PART III - SUMMARY OF FACTS

The data breach

5. The defendants provide credit reporting services and related credit services.[2] To provide these services, the defendants "obtain detailed and sensitive financial information about millions of Canadians and aggregate the information for resale for the purposes of providing credit ratings."[3] The defendants "organize, assimilate, and analyze data on more than 820 million

[2] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 49.
[3] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 52.

consumers and more than 91 million businesses worldwide."[4] It is impossible to opt-out of Equifax's collection of personal information.[5]

6. The defendants knew they held sensitive financial information and that they were a valuable target for cyber criminals. Equifax described itself as a "trusted steward of information."[6] Its CEO stated that "when you have the size database we have, it's very attractive for others to try to get into our database, so [data security] is a huge priority for us as you might guess."[7] The defendants represented that "they had advanced data protection, which included rigorous risk management programs that targeted their cybersecurity risks and was regularly reviewed and updated."[8]

7. The data breach was announced in September 2017. Equifax issued a press release, describing a cybersecurity incident potentially impacting 143 million U.S. consumers and an undisclosed number of Canadians.[9] Equifax stated that "criminals exploited a U.S. website application vulnerability" to obtain access to personal financial information between mid-May through July 2017.[10]

8. The defendants stated that the attack occurred via a software vulnerability disclosed in March 2017 by the United States Computer Emergency Readiness Team, a division of the

[4] *Agnew-Americano v. Equifax Canada Co*., 2019 ONSC 7110, para. 52.
[5] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 52.
[6] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 58.
[7] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 58.
[8] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112, para. 16 (Div. Ct.).
[9] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 34.
[10] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 34.

Department of Homeland Security.[11] The personalized warning sent to Equifax warned that the vulnerability was highly dangerous and easy to exploit.[12]

9. The solution was to apply a software patch available contemporaneously with the warning.[13] However, Equifax did nothing to patch the server for several months, by which point the hackers had already been in its systems for six weeks, siphoning out massive amounts of information.[14]

10. More details about the defendant's inadequate IT security emerged. For example, in 2016, Deloitte performed a security audit, which found that the defendants had inadequate patching systems in place.[15] These concerns were echoed one year later, in March 2017, just two months before the data breach occurred. A "top-secret project"[16] personally overseen by Equifax's CEO engaged a data breach specialist company that "investigated weaknesses in [Equifax's] data protection systems."[17] It concluded that Equifax's "data protection systems were grossly inadequate, and specifically identified the defendants' unpatched systems and misconfigured security policies as indicative of major problems."[18] The defendants disputed the findings and declined to engage in a broader review of their cybersecurity.[19]

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[11] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 34.
[12] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 16.
[13] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 66.
[14] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 66.
[15] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112, para. 16 (Div. Ct.).
[16] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 164.
[17] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 164.
[18] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 164.
[19] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 164.

11. The pleading alleges that the defendants' conduct in relation to the data breach was reckless, deliberate, intentional or wilful.[20] The class proceeding is brought on behalf of "all persons in Canada whose personal information accessed by hackers as a result of the Data Breach."[21]

Decisions below

(i) Superior Court certification motion

12. The certification motion was heard by the Superior Court of Justice (*per* Glustein J.) in 2019. The court certified the class proceeding in detailed reasons. The motion judge considered whether the law was settled "that a Database Defendant, who allegedly recklessly enables a hacker attack to occur, cannot be liable for intrusion upon seclusion."[22] He concluded that there was commentary in this Court's decision in *Jones* that supported potential liability for recklessly allowing a database breach to occur.[23] The motion judge also relied on decisions in Ontario and B.C., which certified intrusion upon seclusion claims arising out of similar or analogous hacker data breaches.

(ii) Divisional Court grants leave to appeal

13. The Divisional Court granted leave to appeal on the following question:

> Did the motion judge err in finding that the tort of intrusion upon seclusion is available against collectors and custodians of private information, such as the defendants in this case, where the private information is improperly accessed by a

[20] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 95.
[21] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 15. There are other subclasses related to claims for breach of contract, which are not relevant for the purposes of this appeal.
[22] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 112.
[23] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, paras. 111-116.

third party, including in circumstances where the defendants are alleged to have acted recklessly?[24]

(iii)Divisional Court appeal

14. The majority of the Divisional Court (*per* McWatt ACJSCJ & J.A. Ramsay J.) agreed that one element of the tort of intrusion upon seclusion was established, holding that "Equifax's actions, if proven, amount to conduct that a reasonable person could find to be highly offensive."[25] However, the majority concluded that the criteria for the tort requires an intrusion or an invasion, and in a hacker data breach, it is the hacker who is the intruder, not the defendant. The majority held that "to extend liability to a person who does not intrude, but who fails to prevent the intrusion of another, in the face of Sharpe J.A.'s advertence to the danger of opening the floodgates [in *Jones*] would, in my view, be more than an incremental change in the common law."[26] The majority held that the tort of intrusion upon seclusion "has nothing to do with a database defendant."[27] They concluded that negligence was an adequate remedy, even though the tort requires proof of harm, unlike intrusion upon seclusion.[28] The majority struck the claims for intrusion upon seclusion and related common issues, holding that it was plain and obvious and beyond doubt that they were doomed to failure.

15. The dissent (*per* Sachs J.) analyzed *Jones* and concluded that the "articulation of the necessary elements of the cause of action [in *Jones*] were not a final pronouncement about this cause of action."[29] The dissent held that "of prime concern to Sharpe J.A. was that the case before

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[24] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 14.
[25] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 55.
[26] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 54.
[27] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 54.
[28] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 57.
[29] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 42.

him was one that cried out for a remedy. The same could be said about the case at bar if the facts alleged in the pleadings are proven to be true,"[30] noting that Equifax's actions "facilitated an intrusion that a reasonable person could find to be highly offensive."[31] The dissent dismissed floodgates concerns, holding that it is only "deliberate and significant invasions of personal privacy" [32] that qualify for the tort, concepts that Sharpe J.A. recognized could include recklessness.[33] The dissent concluded:

> I agree with the certification judge that *Jones* did not require him to refuse to certify the Plaintiff's action for intrusion upon seclusion. I also reject Equifax's suggestion that certifying the claim would allow liability to attach to a victim. If the allegations against Equifax are proven, they cannot be regarded as a victim, but as the author of their own misfortune. They knew there were serious risks, they knew the nature of those risks, and they were indifferent to those risks, which did in fact end up materializing. Further, they held themselves out as being able to protect against those risks.[34]

(iv) This Court grants leave

16. This Court granted leave to appeal on October 29, 2021.[35]

PART IV - STATEMENT OF ISSUES AND ARGUMENTS

The applicable test

17. The questions in this appeal turn on s. 5(1)(a) of the *Class Proceedings Act, 1992*,[36] which asks whether "the pleadings or the notice of application discloses a cause of action."

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[30] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 43.
[31] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 43.
[32] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 44.
[33] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 44.
[34] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 45.
[35] Leave was sought pursuant to Rule 61.03.1 of the *Rules of Civil Procedure*, RRO 1990, Reg. 194 and section 6(1)(a) of the *Courts of Justice Act*, RSO 1990, c. C.43.
[36] *Class Proceedings Act, 1992*, SO 1992, c. 6.

18. The certification judge and dissenting judge at the Divisional Court correctly cited and applied the s. 5(1)(a) test, described by Justice Strathy (as he then was) in *Williams v. Canon Canada Inc.* as follows: "No evidence is admissible. All allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and assumed to be true. […] There is a very low threshold to prove the existence of a cause of action. […] The pleadings will only be struck if it is plain and obvious and beyond doubt that the plaintiff will not succeed and the action is certain to fail. The novelty of the cause of action will not militate against sustaining the plaintiff's claim. Matters of law which are not fully settled by the jurisprudence must be permitted to proceed."[37]

The standard of review is correctness

19. As this Court held in an appeal from a s. 5(1)(a) decision, "[t]he standard of review applicable to a certification judge's determination of law that a claim discloses no reasonable cause of action is correctness."[38]

***Babstock* did not change the test for striking a claim at the pleadings stage**

20. The majority held that the Supreme Court of Canada's decision in *Atlantic Lottery Corp. Inc. v. Babstock*[39] "has significant application to the case at bar."[40] They relied on *Babstock* to

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[37] *Williams v. Cannon Canada Inc.*, 2011 ONSC 6571, para. 176. To the same effect, this Court's most recent decision to consider the s. 5(1)(a) test stated as follows: "Section 5(1)(a) of the *CPA* requires that the pleadings disclose a cause of action. The certification requirement under s. 5(1)(a) is the same as r. 21.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The pleadings cannot form the basis of a claim if it is 'plain and obvious' that they do not disclose a cause of action." See *Cirillo v. Ontario*, 2021 ONCA 353, para. 32. See also a more detailed analysis of the s. 5(1)(a) test in this Court's decision in *Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337, paras. 57-59.
[38] *Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337, para. 56.
[39] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19.
[40] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 53.

strike the intrusion claims on the basis that "novel claims that are doomed to fail should be disposed of at an early stage and that courts can do so even if this requires resolving complex questions of law and policy."[41]

21. By contrast, the dissenting judge distinguished *Babstock* on the basis that the cause of action was waiver of tort, which "has never been recognized as a cause of action in Canada, unlike intrusion upon seclusion."[42] The Supreme Court cited the following factors for striking the novel tort:

(a) The law relating to waiver of tort had not been developed in the 16 years since it was first recognized. The tort had "become a hollow and internally inconsistent doctrine, leaving judges and litigants confused about how and when a cause of action" might exist.[43]

(b) While the Supreme Court had declined to strike waiver of tort in 2013, the law of restitution applicable to the tort had developed rapidly since then.[44] As a result, while the law was seen as a state of legal uncertainty in 2013, it had been "made clearer."[45]

(c) A 138-day trial involving waiver of tort occurred before the Ontario Superior Court of Justice. The parties "did not rely on any evidence […] to support or oppose

[41] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 53.
[42] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 36.
[43] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, para. 21.
[44] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, paras. 15-16.
[45] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, para. 17.

> extending the waiver of tort doctrine to a negligence case,"[46] and the plaintiffs did not "lead any policy evidence to explain why waiver of tort should be available."[47]

22. The dissenting judge cited the waiver of tort focus in *Babstock* to hold that the decision "has little application to the case at bar," concluding:

> Unlike waiver of tort, intrusion upon seclusion has been recognized as a cause of action. Further, while it does not require proof of individual loss, that is not because the tort is nothing more than a "choice between possible remedies", but because the tort is an intentional tort. Further, in this case, there are policy reasons for allowing the common law to evolve incrementally to test the limits of a tort designed [to] find liability in the case of deliberate or reckless conduct that results in significant intrusions on people's private information. In other words, this is not a case where the cause of action was certified simply because it was a novel claim.[48]

23. As recognized by the dissent, the claim is an incremental evolution of *Jones* that builds on the "reckless conduct" element and other foundational principles from the decision.

24. It is particularly inappropriate to apply *Babstock* to strike an incremental development in privacy law, in light of the exhortations of this Court regarding the need for the law to evolve to protect privacy rights on the Internet amid rapidly-changing technology. In *Jones*, the Court held: "It is within the capacity of the common law to evolve to respond to the problem posed by the routine collection and aggregation of highly personal information that is readily accessible in electronic form. Technological change poses a novel threat to a right of privacy that has been protected for hundreds of years by the common law under various guises and that, since 1982 and the *Charter*, has been recognized as a right that is integral to our social and political order."[49]

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[46] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, para. 20.
[47] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, para. 20.
[48] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 36.
[49] *Jones v. Tsige*, 2012 ONCA 32, para. 68.

25. There is no suggestion that *Babstock* intended to modify the well-known test to strike a novel claim, which has existed for over 40 years.[50] In *Hunt v. Carey*,[40] the Supreme Court refused to strike a claim at the pleadings stage that sought to extend the tort of conspiracy to a different context. This Court's most recent decision on striking novel claims applies the traditional and well-known test, which forbids resolving matters of law that are unsettled.[51]

26. The majority erred by concluding that *Babstock* had "significant application" to this case.

The dissent's interpretation of *Jones* should be preferred

27. The facts of *Jones* involved a bank employee who used her workplace computer to access the plaintiff's personal bank account at least 174 times.[52] The employee was in a common law relationship with the plaintiff's ex-husband and admitted she had no legitimate reason for viewing the plaintiff's private banking information. The plaintiff sued the employee, alleging a right to claim damages arising out of the privacy breach. The motion judge dismissed the plaintiff's claim on the basis that no invasion of privacy tort existed in Ontario.[53] This Court reversed, reviewing numerous common law and *Charter* decisions to affirm that Ontario common law recognizes a cause of action for invasion of privacy. The Court adopted criteria from the U.S. cause of action for "intrusion upon seclusion", as follows:

> The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; **second, that the defendant must have invaded, without lawful justification, the plaintiff's private affairs**

[50] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.
[51] *Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337, para. 58 ("Cases that are unique and novel, that involve matters of law that are unsettled, or that require a detailed analysis of the evidence should not be resolved without a full factual record: *Transamerica*, at paras. 57-59; *Imperial Tobacco*, at para. 21; and *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, at pp. 990-991").
[52] *Jones v. Tsige*, 2012 ONCA 32, para. 4.
[53] *Jones v. Tsige*, 2012 ONCA 32, paras. 11-13.

> **or concerns**; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.[54]

28. The debate in this case involves the second criteria underlined above. The majority held that the defendants did not invade; at most, they facilitated the invasion. While the Court of Appeal referred to "reckless **conduct**"[21] in the first part of the test, the majority of the Divisional Court did not consider whether this must permeate or inform analysis of the second part of the test, involving the "intrude" or "invade" criteria.

29. The majority stated that the tort was "defined authoritatively only nine years ago"[55] and concluded that "to extend liability to a person who does not intrude, but who fails to prevent the intrusion of another"[56] would "be more than an incremental change in the common law"[57] and open the floodgates. The Court in *Jones* referred to "routinely kept electronic databases render our most personal financial information vulnerable."[58] However, the majority of the Divisional Court summarily concluded that the tort "has nothing to do with a database defendant."[59]

30. By contrast, the certification judge found that the decision in *Jones* "does not directly address whether intrusion upon seclusion could apply to a Database Defendant who recklessly permits a hacker to access a person's private information. That issue was not before the court."[60]

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[54] *Jones v. Tsige*, 2012 ONCA 32, para. 71 (emphasis added).
[55] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 54.
[56] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 54.
[57] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 54.
[58] *Jones v. Tsige*, 2012 ONCA 32, para. 67.
[59] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 54.
[60] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 113.

The certification judge found there was commentary in *Jones* that supported the view that the tort could be extended to a hacker data breach, particularly the Court's comments that "[i]t is within the capacity of the common law to evolve to respond to the problem posed by the routine collection and aggregation of highly personal information that is readily accessible in electronic form"[61] and that "[t]echnological change poses a novel threat to a right of privacy that has been protected for hundreds of years by the common law under various guises."[62]

31. Similarly, the dissenting judge at the Divisional Court held that "Sharpe J.A.'s articulation of the necessary elements of the cause of action were not a final pronouncement about this cause of action,"[63] and that "[Sharpe J.A.] was clear in his reasons that he was seeking to establish a cause of action that would encompass the facts before the court in that case. There was nothing in those facts that raised the issue presented in the case at bar."[64] The dissent also held that "from a policy perspective, Sharpe J.A. was clearly driven by the need for the common law to be able to develop to protect the threats posed to privacy presented by the 'routine collection and aggregation of highly personal information that is readily accessible in electronic form.'"[65] There was "nothing in his reasons to indicate that that concern was limited to the third parties who actually hack the

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[61] *Jones v. Tsige*, 2012 ONCA 32, para. 68.
[62] *Jones v. Tsige*, 2012 ONCA 32, para. 68.
[63] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 42.
[64] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 42. See also para. 21 of *Jones v. Tsige*, 2012 ONCA 32: "[…] we should restrict ourselves to the particular issues posed by the facts of the case before us and not attempt to decide more than is strictly necessary to decide that case. A cause of action of any wider breadth would not only over-reach what is necessary to resolve this case, but could also amount to an unmanageable legal proposition that would, as Prosser warned, breed confusion and uncertainty."
[65] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 42.

information […] he was not presented with a case of alleged reckless storage; he was primarily seeking to find a remedy for the facts of the case before him."[66]

The dissent's reliance on *Douez v. Facebook* should be preferred

32. This Court's comments in *Jones* about the need for the common law to evolve to address technological changes that threaten privacy were echoed by the Supreme Court of Canada in *Douez v. Facebook.*[67] A majority of the Supreme Court described privacy rights as having "*quasi*-constitutional status" and stated: "This Court has emphasized the importance of privacy – and its role in protecting one's physical and moral autonomy – on multiple occasions. […] As the chambers judge noted, the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow to a person's privacy interests. In this context, it is especially important that such harms do not go without remedy."[68]

33. The majority did not cite *Douez.* The dissenting judge did and held that "[i]n a world where the threats posed to [privacy] rights are growing and changing, the limits of the tort should be allowed to develop."[69] The dissent concluded: "The rights at issue are fundamental rights that are facing unprecedented threats. The common law should be allowed to develop in an incremental way to see how far the tort should be extended to meet those threats."[70]

The BC Court of Appeal has held that privacy rights should evolve to protect personal data

34. *Tucci v. Peoples Trust Company* involved a hacker data breach class action claim brought on behalf of banking customers. The claim alleged intrusion upon seclusion. The Supreme Court

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[66] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 42.
[67] *Douez v. Facebook, Inc.*, 2017 SCC 33 ("*Douez*").
[68] *Douez v. Facebook, Inc.*, 2017 SCC 33, para. 59.
[69] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 7.
[70] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 51.

of British Columbia refused to strike the claim for intrusion upon seclusion, concluding that it "is a relatively new tort and it should be allowed to develop through full decisions."[71]

35. The certification judge based his analysis on federal common law, as opposed to provincial common law. He concluded that a provincial common law cause of action was not possible because B.C.'s privacy legislation was a comprehensive scheme that ousted all provincial common law claims. The defendant appealed on the ground that there was no claim for intrusion upon seclusion under federal common law.

36. The British Columbia Court of Appeal disagreed with the Supreme Court's conclusion that federal common law could be different from provincial common law but added that it was "unfortunate that no appeal has been taken" relating to provincial common law.[72] The Court of Appeal endorsed the increasing need for legal protection of privacy, holding that a future case may well cause the court "to reconsider (to the extent that its existing jurisprudence has already ruled upon) the issue of whether a common law tort of breach of privacy exists in British Columbia."[73] The Court of Appeal concluded: "Today, personal data has assumed a critical role in people's lives, and a failure to recognize at least some limited tort of breach of privacy may be seen by some to be anachronistic."[74]

37. These conclusions are akin to similar exhortations made in *Jones* and *Douez* about the need for the common law to keep pace with rapid technological change.

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[71] *Tucci v. Peoples Trust Company*, 2017 BCSC 1525, para. 152, rev'd 2020 BCCA 246.
[72] *Tucci v. Peoples Trust Company*, 2020 BCCA 246, para. 55.
[73] *Tucci v. Peoples Trust Company*, 2020 BCCA 246, para. 67.
[74] *Tucci v. Peoples Trust Company*, 2020 BCCA 246, para. 66.

Malicious data breaches are becoming more frequent and more serious

38. Data breaches by criminal hackers are indeed becoming more prevalent and extensive. In its 2019-2020 Annual Report to Parliament on the *Privacy Act* and *Personal Information Protection and Electronic Documents Act*, the Privacy Commissioner stated that "[…] the frequency and the magnitude of data breaches that compromise the personal information of Canadians continue to be on the rise."[75] The Commissioner reported that in 2019-2020, their office "received 678 breach reports affecting an estimated 30 million Canadian accounts, more than double the number of reports we received during the previous year and six times the amount we received the year before breach reporting became mandatory."[76] Roughly half "of reported breaches involved unauthorized access by malicious actors or insider threats, often as a result of employee snooping or social engineering attacks."[77]

39. Similarly, a journal article states that "[d]ata breaches happen more or less on a daily basis. Millions, and even billions of sensitive consumer records compromised have already affected the largest and most popular companies and their consumers."[78]

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[75] Daniel Therrien, "2019-2020 Annual Report to Parliament on the *Privacy Act* and *Personal Information Protection and Electronic Documents Act*", Office of the Privacy Commissioner of Canada (2020), online: <https://www.priv.gc.ca/en/opc-actions-and-decisions/ar_index/201920/ar_201920/>.
[76] Daniel Therrien, "2019-2020 Annual Report to Parliament on the *Privacy Act* and *Personal Information Protection and Electronic Documents Act*", Office of the Privacy Commissioner of Canada (2020), online: <https://www.priv.gc.ca/en/opc-actions-and-decisions/ar_index/201920/ar_201920/>.
[77] Daniel Therrien, "2019-2020 Annual Report to Parliament on the *Privacy Act* and *Personal Information Protection and Electronic Documents Act*", Office of the Privacy Commissioner of Canada (2020), online: <https://www.priv.gc.ca/en/opc-actions-and-decisions/ar_index/201920/ar_201920/>.
[78] I. Kilovaty, "Psychological Data Breach Harms", 23 N.C.J. L & Tech (forthcoming 2021).

40. Malicious data breaches are a growing issue of importance, impacting privacy interests of Canadians. The tort of intrusion upon seclusion should be allowed to incrementally develop to allow for a defendant who recklessly allows criminal hackers to steal private information to be potentially liable for the tort of intrusion upon seclusion.

The test for recklessness in tort

41. Justice Sharpe was inspired by U.S. law to develop the test for intrusion upon seclusion in *Jones*, but he added reckless conduct to the analysis, which was not reflected in the U.S. law. There is one reference to recklessness in *Jones* but no analysis or guidance on its meaning. Similarly, the majority decision of the Divisional Court provides no clarification of recklessness.

42. In *Piresferreira v. Ayotte*, this Court held that recklessness in tort is a "flexible term capable of different meanings in different contexts."[79] Similarly, the certification motion judge in this case held that "the concept of 'recklessness' does not have a fixed meaning in tort law," stating as follows:

> In *Economical Mutual Insurance Company v. Doherty*, 2009 BCSC 959, 76 C.C.L.I. (4th) 89 ("*Doherty*"), Myers J. cited (at para. 24) the English case of *Herrington v. British Railway Board*, [1971] 2 Q.B. 107 (C.A.), at p. 137, aff'd [1972] A.C. 877 (H.L.), for the proposition that "'reckless' is an ambiguous word which may bear different meanings in different contexts." The court concluded that "recklessness is not a term with a fixed meaning in the law of tort" (*Doherty*, at para. 40).[80]

43. The Court in *Piresferreira* held that "subjective awareness that harm of the kind that resulted was substantially certain to follow"[81] would satisfy the subjective element of recklessness.

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[79] *Piresferreira v. Ayotte*, 2010 ONCA 384, para. 75 ("*Piresferreira*").
[80] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 154.
[81] *Piresferreira v. Ayotte*, 2010 ONCA 384, para. 75.

The Court of Appeal distinguished this test from an objective approach to recklessness that "seems more consonant with negligence than with an intentional tort."[82]

44. To the same effect, the Superior Court in *Machias v. Mr. Submarine Ltd.* considered the meaning of civil "recklessness" and has been cited in subsequent decisions.[83] The court held as follows:

> […] The dividing line between negligence and recklessness is not always clear.
>
> In *Black's Law Dictionary,* 6th ed., *s.v.* "negligence" is defined as the failure to use such care as a reasonably prudent and careful person would use under similar circumstances. It is the doing of some act which a person of ordinary prudence would have done under similar circumstances.
>
> "Recklessness", on the other hand, is referred to in *Black's Law Dictionary* as being a stronger term than mere or ordinary negligence. To be reckless, the conduct must disregard or be indifferent to consequences. Recklessness is often considered in the criminal context with respect to *mens rea* and is not often considered in the civil context. *Words & Phrases,* (Toronto: Carswell, June 2001), defines "recklessness" in the civil context as more than mere negligence or inadvertence. While it is not necessarily a criminal or even morally culpable matter, it does mean the deliberate running of an unjustified risk. Recklessness contains two elements. First, it involves acting in such a manner as to create an obvious and serious risk. Second, it involves doing so without giving any thought to the possibility of there being any such risk, or having recognized that there was risk involved, nevertheless decided to take the risk.[84]

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[82] *Piresferreira v. Ayotte*, 2010 ONCA 384, para. 75.
[83] See *e.g. 1169822 Ontario Ltd. v. The Toronto-Dominion Bank*, 2018 ONSC 1631.
[84] *Machias v. Mr. Submarine Ltd.*, 2002 CanLII 49643 (Ont. Sup. Ct.), paras. 143-145 (emphasis added).

45. The certification motion judge cited *The Law of Torts* textbook, which described reckless conduct across a spectrum: "As the likelihood of consequences increases, the conduct of the defendant may be described first as grossly negligent and then as reckless."[85]

46. The principles in *Piresferreira*, *Machias*, and *The Law of Torts* are consistent with the pleaded case.[19] From a Rule 21 pleadings perspective, applying *Piresferreira*, the alleged conduct involves "subjective awareness that harm of the kind that resulted was substantially certain to follow." Applying *Machias*, the conduct alleged involves "disregard" or "indifference to consequences" or the "deliberate running of an unjustified risk." As the certification motion judge held, the pleading meets the low threshold on a Rule 21 test to establish that the defendants were aware that there was a danger that their conduct could bring about a hacker attack, but nevertheless persisted in the behaviour, despite knowledge of the risk.[86] Similarly, as the dissent held, "[i]f the allegations against Equifax are proven, they cannot be regarded as a victim, but as the author of their own misfortune. They knew there were serious risks, they knew the nature of those risks, and they were indifferent to those risks, which did in fact end up materializing. Further, they held themselves out as being able to protect against those risks."[87]

Negligence is inadequate

47. The majority held that plaintiffs who are impacted by a data breach can seek to advance claims for negligence, rather than intrusion upon seclusion. "It is not too much to ask that they

---

[85] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 155. The motion judge also cited an article that analyzed the *Jones* decision and concluded that recklessness could occur when a hacker attack, "while not desired, [is] substantially certain to result from the defendant's conduct." See *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 158; S.K. Mizrahi, "Ontario's New Invasion of Privacy Torts: Do They Offer Monetary Redress for Violations Suffered via the Internet of Things", (2018) 8:1 UWO J. Leg. Stud. 3, pp. 28-29.
[86] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, paras. 151-152.
[87] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 45.

prove their damages," the majority held. However, in *Jones*, this Court held that proof of damage is not a required element for the tort of intrusion upon seclusion, due to the intangible harm that often accompanies a privacy breach and the need to make a modest award of symbolic damages to "mark the wrong that has been done."[88]

48. It is also appropriate to make an award for damages pursuant to intrusion upon seclusion without requiring proof of harm because intrusion is an intentional tort. As this Court held in *Piresferreira*, recklessness is subsumed within an intentional tort. The Court held that "[t]he law treats intentional torts more severely, for example by not limiting the scope of damages in the same way as in a negligence case."

49. By contrast, as the dissent held, a plaintiff who seeks to advance a negligence claim for breach of privacy "may be left without a remedy as they may not be able to prove harm to a recognized economic interest. Part of the purpose of class actions is to achieve behaviour modification, which 'does not only look at the particular defendant but looks more broadly at similar defendants […].'"[89]

50. Negligence claims require "proof of a duty of care, a breach, damage, and a legal and factual causal relationship between the breach and the damage."[90] As a result, a person whose privacy is breached but who cannot prove causation between the breach and alleged harm is left without a remedy. This is contrary to *Jones* and to principles applicable to intentional torts.

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[88] *Jones v. Tsige*, 2012 ONCA 32, paras. 77, 87.
[89] *Pearson v. Inco L*td. (2005), 78 O.R. (3d) 641 (C.A.) at para. 88.
[90] *Agnew-Americano v. Equifax Canada Co.*, 2019 ONSC 7110, para. 139.

No floodgates

51. The majority referred to floodgates concerns if hacker data breach cases are allowed to proceed.

52. The dissenting judge rejected the defendants' floodgates arguments, holding that these claims will be limited to "deliberate and significant invasions of personal privacy,"[91] as described in *Jones*. As this Court held in *Hopkins v. Kay*, the requirement to prove intentional or reckless conduct by the defendant represents a "significant hurdle"[92] when seeking to advance an intrusion claim. The protection against floodgates that were established in *Jones* will not be disrupted by the intrusion claim in this case. Applying the "plain and obvious and beyond doubt" test, the pleaded claim meets the test for reckless conduct in tort and the proposed class should be allowed to prove and test their claims at trial.

The majority decision conflicts with other Ontario cases

53. The majority's decision conflicts with other decisions in Ontario. The following decisions were cited and relied on by the dissent:

- *Kaplan v. Casino Rama Services Inc.* involved a hacker data breach and the theft of personal information of some 11,000 class members. Justice Belobaba certified the claim for intrusion upon seclusion and held that "this is a new tort that is still evolving and could conceivably support liability against defendants whose alleged recklessness in the design and operation of their computer system facilitated the hacker's intrusion."[93]

[91] *Owsianik v. Equifax Canada Co.*, 2021 ONSC 4112 (Div. Ct.), para. 44.
[92] *Hopkins v. Kay*, 2015 ONCA 112, para. 48.
[93] *Kaplan v. Casino Rama*, 2019 ONSC 2025, para. 29.

- *Bennett v. Lenovo (Canada) Inc.* involved a computer manufacturer who installed defective software that made the laptops susceptible to hackers. An intrusion upon seclusion claim was advanced and the manufacturer argued it could not be liable because it had not intruded. Justice Belobaba rejected the argument on the basis that the tort is still evolving.[94]

54. The majority disagreed with *Kaplan*, while distinguishing *Bennett v. Lenovo*.

The majority decision conflicts with U.S. law

55. The majority's analysis is also contrary to certain U.S. cases. Obviously, U.S. law is not binding. However, the Court in *Jones* engaged in a thoughtful canvassing of the law in different jurisdictions to decide the proper approach to adopt in recognizing the tort of intrusion upon seclusion. Many other decisions of this Court and of the Supreme Court of Canada have done a similar canvassing of the law in different jurisdictions to ultimately rule on the proper approach to follow in Canada.

56. *Jones* cited the U.S. *Restatement of Torts*[95] several times[96] and ultimately adopted the test for intrusion upon seclusion as formulated in the *Restatement*,[97] including the "intrude" or "invade" criteria.

57. The *Restatement of Torts* refers to U.S. cases in which claims for breach of privacy are allowed to proceed against a defendant in a third-party privacy breach, even if the defendant is not the "invader" or "intruder."

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[94] *Bennett v. Lenovo*, 2017 ONSC 1082, para. 23.
[95] Restatement (Second) of Torts § 652B Intrusion Upon Seclusion (1977) (June 2021 update).
[96] *Jones v. Tsige*, 2012 ONCA 32, paras. 19, 20, 55, 56, 57, 70.
[97] *Jones v. Tsige*, 2012 ONCA 32, para. 70.

58. For example, the *Restatement* refers to *Carter v. Innisfree Hotel, Inc.*,[98] a 1995 decision in which a couple checked into a hotel room. They heard knocking and scratching sounds in the room that appeared to emanate from behind a wall near the bathroom, which was covered by a mirror.[99] The couple undressed in front of the mirror and had sex.[100] The husband scrutinized scratches in the mirror and removed it.[101] He found a large hole in the wall, leading to the adjacent room.[102] The couple believed they had been spied on by a "peeping Tom". The couple sued the hotel for invasion of privacy. The first court granted summary judgment in favour of the hotel, on the basis that the hotel had not spied on the guests and had not invaded their privacy. The appeal court reversed, holding that "even if it was proven that a third party, other than the hotel's agent, caused the holes and scratches in the walls, hotel could be held liable for invasion of plaintiffs' privacy."[103] The court cited the hotel's "affirmative duty, stemming from a guest's rights of privacy and peaceful possession, not to allow unregistered and unauthorized third parties to gain access to the rooms of its guests."[104] To the same effect, in this case, the defendants represented that they were "trusted stewards" of sensitive personal data and made extensive representations about their advanced IT security. A journal article draws a parallel between the peep holes in the mirrors to holes in cybersecurity: "As the hotel didn't close up the peep holes in its mirrors, hacked companies often haven't plugged the holes in their cybersecurity."[105]

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[98] *Carter v. Innisfree Hotel, Inc.*, 661 So.2d 1174, p. 1178.
[99] *Carter v. Innisfree Hotel, Inc.*, 661 So.2d 1174, p. 1177.
[100] *Carter v. Innisfree Hotel, Inc.*, 661 So.2d 1174, p. 1177.
[101] *Carter v. Innisfree Hotel, Inc.*, 661 So.2d 1174, p. 1177.
[102] *Carter v. Innisfree Hotel, Inc.*, 661 So.2d 1174, p. 1177.
[103] *Carter v. Innisfree Hotel, Inc.*, 661 So.2d 1174, p. 1177 (1995).
[104] *Carter v. Innisfree Hotel, Inc.*, 661 So.2d 1174, p. 1177 (1995).
[105] J. Elias, "Course Correction—Data Breach as Invasion of Privacy", 69 Baylor L. Rev. 574 (2017), p. 593.

59. The *Restatement* also refers to *Moore v. New York Elevated Railway Co.*,[106] an 1892 decision in which a railroad company built an elevated train platform beside a Manhattan apartment. The platform allowed commuters to peer into nearby apartment bedrooms. The case was decided shortly after Warren and Brandeis published their landmark "Right to Privacy" article in 1890, cited in *Jones*. The court held that the railroad could be liable for intrusion upon seclusion, even if it was not the invader: where "the [railroad] furnished the means and opportunity for the [passengers and workers] to invade the privacy of these rooms," the court could detect "[n]o reason […] why the [railroad] should not be responsible for the consequences of the loss of privacy thus occasioned[.]"[107] Similarly, the claim in this case pleads that Equifax's conduct in relation to the data breach was reckless, deliberate, intentional or wilful. These actions furnished "the means and opportunity" for the hackers in this case to breach the defendant's IT systems and invade the privacy of class members.

60. Contrary to the majority decision, it would not be an unreasonable expansion of intrusion upon seclusion to hold a defendant liable for the acts of third parties, even if the defendant is not the "invader." These principles are reflected in the same U.S. treatise the Court of Appeal relied on in *Jones*.

Impact of the majority decision

61. The majority decision immunizes all defendants from liability for intrusion upon seclusion arising out of a third-party hacker data breach. Even if the defendant egregiously and recklessly

[106] *Moore v. New York Elevated Railroad*, 130 N.Y. 523, 29 N.E. 997, p. 998 (1892).
[107] *Moore v. New York Elevated Railroad*, 130 N.Y. 523, 29 N.E. 997, p. 998 (1892).

disregards and wilfully ignores its IT security, as pleaded in this case, all claims for a modest conventional sum sought pursuant to the tort of intrusion upon seclusion will be struck.

62. For example, in *Del Guidice v. Thompson*, decided in August 2021, Justice Perell held that he was bound by the majority decision in this case regarding intrusion upon seclusion and refused to certify an intrusion upon seclusion cause of action in a hacker data breach case on the basis that the defendants were not the intruders.[108]

63. Similarly, in another hacker data breach case decided in October 2021, Justice Glustein refused to certify claims for intrusion upon seclusion, holding: "I am bound by the majority decision in *Owsianik*. The Divisional Court held that the tort of intrusion upon seclusion "has nothing to do with a database defendant."[109]

Conclusion

64. The majority's decision is contrary to long-standing principles about allowing novel claims to proceed, as well as more specific principles about the need for privacy common law to evolve to keep pace with rapidly-changing technology. It is also contrary to other cases in Ontario, B.C. and the U.S. Hacker data breach cases are becoming more frequent and more serious. The pleaded case meets the test for reckless conduct for intrusion upon seclusion and it should be allowed to proceed.

PART V - ORDER REQUESTED

65. The plaintiff respectfully requests that the order of the Divisional Court be set aside and that an order be granted:

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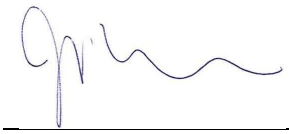
[108] *Del Giudice v. Thompson*, 2021 ONSC 5379, para. 137.
[109] *Obodo v. Trans Union of Canada, Inc.*, 2021 ONSC 7297, para. 114.

(a) Reinstating common issues 3(iii), (iv) and (v) in the Order of the Superior Court of Justice dated December 13, 2019;

(b) Awarding the plaintiff the costs of the appeal before the Divisional Court, the costs of the motion for leave to appeal to this Court, and the costs of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of December, 2021.

Adil Abdulla



Jean-Marc Leclerc

December 6, 2021

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Court File No. M52636

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ALINA OWSIANIK

Plaintiff
(Appellant)

and

EQUIFAX CANADA CO. and EQUIFAX, INC.

Defendants
(Respondents)

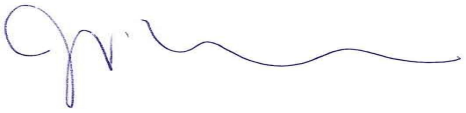
Proceeding under the *Class Proceedings Act, 1992*

CERTIFICATE

I estimate that 2.5 hours will be needed for my oral argument of the appeal, not including reply. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 6th day of December, 2021.

Adill Abdulla



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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Jones v. Tsige*, 2012 ONCA 32
2. *Williams v. Cannon Canada Inc.*, 2011 ONSC 6571
3. *Cirillo v. Ontario*, 2021 ONCA 353
4. *Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337
5. *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19
6. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959
7. *Douez v. Facebook, Inc.*, 2017 SCC 33
8. *Tucci v. Peoples Trust Company*, 2017 BCSC 1525, rev'd 2020 BCCA 246
9. *Piresferreira v. Ayotte*, 2010 ONCA 384
10. *1169822 Ontario Ltd. v. The Toronto-Dominion Bank*, 2018 ONSC 1631
11. *Machias v. Mr. Submarine Ltd.*, 2002 CanLII 49643 (Ont. Sup. Ct.)
12. S.K. Mizrahi, "Ontario's New Invasion of Privacy Torts: Do They Offer Monetary Redress for Violations Suffered via the Internet of Things", (2018) 8:1 UWO J. Leg. Stud. 3
13. *Pearson v. Inco L*td. (2005), 78 O.R. (3d) 641 (C.A.)
14. *Karasik v. Yahoo! Inc.*, 2021 ONSC 1063
15. *Hopkins v. Kay*, 2015 ONCA 112
16. *Kaplan v. Casino Rama*, 2019 ONSC 2025
17. *Bennett v. Lenovo*, 2017 ONSC 1082
18. Restatement (Second) of Torts § 652B Intrusion Upon Seclusion (1977) (June 2021 update)
19. *Carter v. Innisfree Hotel, Inc.*, 661 So.2d 1174 (1995)
20. J. Elias, "Course Correction—Data Breach as Invasion of Privacy", 69 Baylor L. Rev. 574 (2017)
21. *Moore v. New York Elevated Railroad*, 130 N.Y. 523, 29 N.E. 997, p. 998 (1892)
22. *Del Giudice v. Thompson*, 2021 ONSC 5379
23. *Obodo v. Trans Union of Canada, Inc.*, 2021 ONSC 7297

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

1. *Rules of Civil Procedure*, RRO 1990, Reg. 194, Rule 61.03

Motion for Leave to Appeal to Divisional Court
Notice of Motion for Leave

61.03 (1) Where an appeal to the Divisional Court requires the leave of that court, the notice of motion for leave shall,

(a) state that the motion will be heard on a date to be fixed by the Registrar;

(b) be served within 15 days after the making of the order or decision from which leave to appeal is sought, unless a statute provides otherwise; and

(c) be filed with proof of service in the office of the Registrar, within five days after service. R.R.O. 1990, Reg. 194, r. 61.03 (1); O. Reg. 61/96, s. 5 (2); O. Reg. 14/04, s. 29 (1).

Motion Record, Factum and Transcripts

(2) On a motion for leave to appeal to the Divisional Court, the moving party shall serve,

(a) a motion record containing, in consecutively numbered pages arranged in the following order,

(i) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter,

(ii) a copy of the notice of motion,

(iii) a copy of the order or decision from which leave to appeal is sought, as signed and entered,

(iv) a copy of the reasons of the court or tribunal from which leave to appeal is sought with a further typed or printed copy if the reasons are handwritten,

(iv.1) a copy of any order or decision that was the subject of the hearing before the court or tribunal from which leave to appeal is sought,

(iv.2) a copy of any reasons for the order or decision referred to in subclause (iv.1), with a further typed or printed copy if the reasons are handwritten,

(v) a copy of all affidavits and other material used before the court or tribunal from which leave to appeal is sought,

(vi) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves, and

(vii) a copy of any other material in the court file that is necessary for the hearing of the motion;

(b) a factum consisting of a concise argument stating the facts and law relied on by the moving party and the certificate referred to in subrule 61.16 (4.1); and

(c) relevant transcripts of evidence, if they are not included in the motion record,

and shall file three copies of the motion record, factum and transcripts, if any, with proof of service, within thirty days after the filing of the notice of motion for leave to appeal. R.R.O. 1990, Reg. 194, r. 61.03 (2); O. Reg. 61/96, s. 5 (3); O. Reg. 206/02, s. 13 (1); O. Reg. 82/17, s. 6 (1).

(2.1) Despite subrule (2), only one copy of a motion record, factum or transcript needs to be filed if the filing is done electronically. O. Reg. 689/20, s. 43.

(3) On a motion for leave to appeal to the Divisional Court, the responding party may, where he or she is of the opinion that the moving party's motion record is incomplete, serve a motion record containing, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter; and

(b) a copy of any material to be used by the responding party on the motion and not included in the motion record,

and may serve a factum consisting of a concise argument stating the facts and law relied on by the responding party and the certificate referred to in subrule 61.16 (4.1), and shall file three copies of the responding party's motion record and factum, if any, with proof of service, within fifteen days after service of the moving party's motion record, factum and transcripts, if any. R.R.O. 1990, Reg. 194, r. 61.03 (3); O. Reg. 61/96, s. 5 (4); O. Reg. 206/02, s. 13 (2); O. Reg. 82/17, s. 6 (2).

(3.1) Despite subrule (3), only one copy of a motion record or factum needs to be filed if the filing is done electronically. O. Reg. 689/20, s. 43.

Notice and Factum to State Questions on Appeal

(4) The moving party's notice of motion and factum shall, where practicable, set out the specific questions that it is proposed the Divisional Court should answer if leave to appeal is granted. R.R.O. 1990, Reg. 194, r. 61.03 (4); O. Reg. 61/96, s. 5 (5).

Date for Hearing

(5) The Registrar shall fix a date for the hearing of the motion which shall not, except with the responding party's consent, be earlier than fifteen days after the filing of the moving party's motion record, factum and transcripts, if any. R.R.O. 1990, Reg. 194, r. 61.03 (5).

Time for Delivering Notice of Appeal

(6) Where leave is granted, the notice of appeal shall be delivered within seven days after the granting of leave. R.R.O. 1990, Reg. 194, r. 61.03 (6).

Costs Appeal Joined with Appeal as of Right

(7) Where a party seeks to join an appeal under clause 133 (b) of the *Courts of Justice Act* with an appeal as of right,

(a) the request for leave to appeal shall be included in the notice of appeal or in a supplementary notice of appeal as part of the relief sought;

(b) leave to appeal shall be sought from the panel of the Divisional Court hearing the appeal as of right; and

(c) where leave is granted, the panel may then hear the appeal. O. Reg. 534/95, s. 3; O. Reg. 175/96, s. 1 (1); O. Reg. 14/04, s. 29 (2); O. Reg. 82/17, s. 18, 19.

Costs Cross-Appeal Joined with Appeal or Cross-Appeal as of Right

(8) Where a party seeks to join a cross-appeal under a statute that requires leave for an appeal with an appeal or cross-appeal as of right,

(a) the request for leave to appeal shall be included in the notice of appeal or cross-appeal or in a supplementary notice of appeal or cross-appeal as part of the relief sought;

(b) leave to appeal shall be sought from the panel of the Divisional Court hearing the appeal or cross-appeal as of right; and

(c) where leave is granted, the panel may then hear the appeal. O. Reg. 534/95, s. 3; O. Reg. 175/96, s. 1 (2); O. Reg. 206/02, s. 13 (3); O. Reg. 14/04, s. 29 (3); O. Reg. 394/09, s. 24; O. Reg. 82/17, s. 18, 19.

Application of Rules

(9) Subrules (1) to (6) do not apply where subrules (7) and (8) apply. O. Reg. 175/96, s. 1 (3).

Motion for Leave to Appeal to Court of Appeal
Motion in Writing

61.03.1 (1) Where an appeal to the Court of Appeal requires the leave of that court, the motion for leave shall be heard in writing, without the attendance of parties or lawyers. O. Reg. 333/96, s. 2 (1); O. Reg. 575/07, s. 4.

Notice of Motion

(2) The notice of motion for leave to appeal shall state that the motion will be heard on a date to be fixed by the Registrar. O. Reg. 82/17, s. 7 (1).

(3) The notice of motion,

(a) shall be served within 15 days after the making of the order or decision from which leave to appeal is sought, unless a statute provides otherwise; and

(b) shall be filed with proof of service in the office of the Registrar within five days after service. O. Reg. 61/96, s. 6; O. Reg. 14/04, s. 30 (1).

Moving Party's Motion Record, Factum and Transcripts

(4) The moving party shall serve a motion record and transcripts of evidence, if any, as provided in subrule 61.03 (2), and a factum consisting of the following elements:

1. Part I, containing a statement identifying the moving party and the court from which it is proposed to appeal, and stating the result in that court.
2. Part II, containing a concise summary of the facts relevant to the issues on the proposed appeal, with such reference to the evidence by page and line as is necessary.
3. Part III, containing the specific questions that it is proposed the court should answer if leave to appeal is granted.
4. Part IV, containing a statement of each issue raised, immediately followed by a concise statement of the law and authorities relating to that issue.
5. Schedule A, containing a list of the authorities referred to.
6. Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws. O. Reg. 61/96, s. 6; O. Reg. 333/96, s. 2 (2).

(5) Parts I to IV shall be arranged in paragraphs numbered consecutively throughout the factum. O. Reg. 61/96, s. 6.

(6) The moving party shall file three printed copies of the motion record, factum and transcripts, if any, and an electronic version of the factum, and may file three copies of a book of authorities, if any, with proof of service, within 30 days after the filing of the notice of motion for leave to appeal. O. Reg. 61/96, s. 6; O. Reg. 82/17, s. 7 (2).

Responding Party's Motion Record and Factum

(7) The responding party may, if of the opinion that the moving party's motion record is incomplete, serve a motion record as provided in subrule 61.03 (3). O. Reg. 61/96, s. 6; O. Reg. 333/96, s. 2 (3).

(8) The responding party shall serve a factum consisting of the following elements:

1. Part I, containing a statement of the facts in the moving party's summary of relevant facts that the responding party accepts as correct and those facts with which the responding party disagrees and a concise summary of any additional facts relied on, with such reference to the evidence by page and line as is necessary.

2. Part II, containing the responding party's position with respect to each issue raised by the moving party, immediately followed by a concise statement of the law and authorities relating to it.
3. Part III, containing a statement of any additional issues raised by the responding party, the statement of each issue to be followed by a concise statement of the law and authorities relating to it.
4. Schedule A, containing a list of the authorities referred to.
5. Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws. O. Reg. 61/96, s. 6.

(9) Parts I to III shall be arranged in paragraphs numbered consecutively throughout the factum. O. Reg. 61/96, s. 6.

(10) The responding party shall file three printed copies of the factum, and of the motion record, if any, and an electronic version of the factum, with proof of service, within 25 days after service of the moving party's motion record and other documents. O. Reg. 61/96, s. 6; O. Reg. 82/17, s. 7 (3).

Moving Party's Reply Factum

(11) If the responding party's factum raises an issue on which the moving party has not taken a position in the moving party's factum, that party may serve a reply factum. O. Reg. 61/96, s. 6.

(12) The reply factum shall contain consecutively numbered paragraphs setting out the moving party's position on the issue, followed by a concise statement of the law and authorities relating to it. O. Reg. 61/96, s. 6.

(13) The moving party shall file three copies of the reply factum with proof of service within 10 days after service of the responding party's factum. O. Reg. 61/96, s. 6.

Date for Hearing

(14) The Registrar shall fix a date for the hearing of the motion, which shall not be before the earlier of the filing of the moving party's reply factum, if any, and the expiry of the time for filing the moving party's reply factum. O. Reg. 82/17, s. 7 (4).

Oral Hearing

(15) If, on considering the written materials, the court determines that an oral hearing is warranted, the court shall, despite subrule (1), order an oral hearing to determine the motion, and the Registrar shall fix a date for it. O. Reg. 82/17, s. 7 (4).

Time for Delivering Notice of Appeal

(16) Where leave is granted, the notice of appeal shall be delivered within seven days after the granting of leave. O. Reg. 61/96, s. 6.

Costs Appeal Joined with Appeal as of Right

(17) Where a party seeks to join an appeal under clause 133 (b) of the *Courts of Justice Act* with an appeal as of right,

(a) the request for leave to appeal shall be included in the notice of appeal or in a supplementary notice of appeal as part of the relief sought;

(b) leave to appeal shall be sought from the panel of the Court of Appeal hearing the appeal as of right;

(c) where leave is granted, the panel may then hear the appeal. O. Reg. 175/96, s. 2; O. Reg. 14/04, s. 30 (2); O. Reg. 82/17, s. 18, 19.

Costs Cross-Appeal Joined with Appeal or Cross-Appeal as of Right

(18) Where a party seeks to join a cross-appeal under a statute that requires leave for an appeal with an appeal or cross-appeal as of right,

(a) the request for leave to appeal shall be included in the notice of appeal or cross-appeal or in a supplementary notice of appeal or cross-appeal as part of the relief sought;

(b) leave to appeal shall be sought from the panel of the Court of Appeal hearing the appeal or cross-appeal as of right;

(c) where leave is granted, the panel may then hear the appeal. O. Reg. 175/96, s. 2; O. Reg. 206/02, s. 14; O. Reg. 14/04, s. 30 (3); O. Reg. 394/09, s. 25; O. Reg. 82/17, s. 18, 19.

Application of Rules

(19) Subrules (1) to (16) do not apply where subrules (17) and (18) apply. O. Reg. 175/96, s. 2.

2. *Courts of Justice Act*, RSO 1990, c. C.43, section 6

Court of Appeal jurisdiction

6 (1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

(b) a final order of a judge of the Superior Court of Justice, except,

(i) an order referred to in clause 19 (1) (a) or (a.1), or

(ii) an order from which an appeal lies to the Divisional Court under another Act;

(c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court;

(d) an order made under section 137.1. R.S.O. 1990, c. C.43, s. 6 (1); 1994, c. 12, s. 1; 1996, c. 25, s. 9 (17); 2015, c. 23, s. 1; 2020, c. 25, Sched. 2, s. 1 (1).

Leave not required for second appeal

(1.0.1) Despite clause (1) (a), leave of the Court of Appeal is not required in the case of an order of the Divisional Court on an appeal under Part V or VIII of the *Child, Youth and Family Services Act, 2017*. 2020, c. 25, Sched. 2, s. 1 (2).

Leave required for second appeal

(1.1) Despite clause (1) (b), a final order of a judge of the Superior Court of Justice made on a first appeal from an order described in subsection (1.2) may be appealed to the Court of Appeal only with leave from the Court of Appeal, as provided in the rules of court. 2020, c. 25, Sched. 2, s. 1 (3).

Same

(1.2) The orders mentioned in subsection (1.1) are orders of the Ontario Court of Justice under any of the following statutes or statutory provisions:

1. The *Change of Name Act*.
2. The *Children's Law Reform Act*, except sections 59 and 60.
3. Section 6 of the *Marriage Act*. 2020, c. 25, Sched. 2, s. 1 (3).

Combining of appeals from other courts

(2) The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Court of Appeal. R.S.O. 1990, c. C.43, s. 6 (2); 1996, c. 25, s. 9 (17).

Same

(3) The Court of Appeal may, on motion, transfer an appeal that has already been commenced in the Divisional Court or the Superior Court of Justice to the Court of Appeal for the purpose of subsection (2). R.S.O. 1990, c. C.43, s. 6 (3); 1996, c. 25, s. 9 (17).

Transition

(4) This section, as it read immediately before the day subsection 1 (1) of Schedule 2 to the *Moving Ontario Family Law Forward Act, 2020* came into force, continues to apply to,

(a) any case in which a notice of appeal was filed before that day; and

(b) any further appeals or proceedings arising from a case described in clause (a). 2020, c. 25, Sched. 2, s. 1 (4).

3. *Class Proceedings Act, 1992*, SO 1992, c. 6, section 5

Certification

5 (1) The court shall, subject to subsection (6) and to section 5.1, certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(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. 1992, c. 6, s. 5 (1); 2020, c. 11, Sched. 4, s. 7 (1).

Same

(1.1) In the case of a motion under section 2, a class proceeding is the preferable procedure for the resolution of common issues under clause (1) (d) only if, at a minimum,

(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, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding; and

(b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members. 2020, c. 11, Sched. 4, s. 7 (2).

Idem, subclass protection

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members. 1992, c. 6, s. 5 (2); 2020, c. 11, Sched. 4, s. 7 (3).

Evidence as to size of class

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class. 1992, c. 6, s. 5 (3).

Adjournments

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence. 1992, c. 6, s. 5 (4).

Certification not a ruling on merits

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding. 1992, c. 6, s. 5 (5); 2020, c. 11, Sched. 4, s. 7 (4).

Existence of other class proceeding

(6) If a class proceeding or proposed class proceeding, including a multi-jurisdictional class proceeding or proposed multi-jurisdictional class proceeding, has been commenced in a Canadian jurisdiction other than Ontario involving the same or similar subject matter and some or all of the same class members as in a proceeding under this Act, the court shall determine whether it would be preferable for some or all of the claims of some or all of the class members, or some or all of the common issues raised by those claims, to be resolved in the proceeding commenced in the other jurisdiction instead of in the proceeding under this Act. 2020, c. 11, Sched. 4, s. 7 (2).

Same, considerations

(7) In making a determination under subsection (6), the court shall,

(a) be guided by the following objectives:

(i) ensuring that the interests of all parties in each of the applicable jurisdictions are given due consideration,

(ii) ensuring that the ends of justice are served,

(iii) avoiding irreconcilable judgments where possible,

(iv) promoting judicial economy; and

(b) consider all relevant factors, including,

(i) the alleged basis of liability in each of the proceedings, and any differences in the laws of each applicable jurisdiction respecting such liability and any available relief,

(ii) the stage each proceeding has reached,

(iii) the plan required to be produced for the purposes of each proceeding, including the viability of the plan and the available capacity and resources for advancing the proceeding on behalf of the class,

(iv) the location of class members and representative plaintiffs in each proceeding, including the ability of a representative plaintiff to participate in a proceeding and to represent the interests of class members,

(v) the location of evidence and witnesses, and

(vi) the ease of enforceability in each applicable jurisdiction. 2020, c. 11, Sched. 4, s. 7 (2).

Motion for determination under subs. (6)

(8) The court, on the motion of a party or class member made before the hearing of the motion for certification, may make a determination under subsection (6) with respect to a proceeding under this Act, and, in doing so, may make any orders it considers appropriate respecting the proceeding, including,

(a) staying the proceeding; and

(b) imposing such terms on the parties as the court considers appropriate. 2020, c. 11, Sched. 4, s. 7 (2).

Motion to certify, multi-jurisdictional class proceeding

5.1 (1) The court may make any order it considers appropriate on a motion to certify a multi-jurisdictional class proceeding, including,

(a) certifying the proceeding if,

(i) the conditions set out in subsection 5 (1) are met, and

(ii) the court determines, having regard to subsections 5 (6) and (7), that Ontario is the appropriate venue for the proceeding;

(b) refusing to certify the proceeding if the court determines that it should proceed as a multi-jurisdictional class proceeding or proposed multi-jurisdictional class proceeding in another jurisdiction; or

(c) refusing to certify the proceeding with respect to class members that the court determines may be included as class members in a class proceeding or proposed class proceeding in another Canadian jurisdiction. 2020, c. 11, Sched. 4, s. 8.

Same

(2) In making an order under clause (1) (a), the court may,

(a) divide the class into Ontario resident and non-resident subclasses;

(b) appoint a separate representative plaintiff for each subclass; and

(c) specify, for the purposes of section 9, the manner and time of opting out of the multi-jurisdictional class proceeding with respect to each subclass. 2020, c. 11, Sched. 4, s. 8.

ALINA OWSIANIK
Plaintiff (Appellant)

-and-

EQUIFAX CANADA CO. et al.
Defendants (Respondents)

Court File No. M52636

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

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