

SUPREME COURT OF NOVA SCOTIA

Citation: MacDonnell v. Halifax Herald Ltd., 2009 NSSC 187

Date: 20090608

Docket: Hfx No. 312377

Registry: Halifax

Between:

Jasmine MacDonnell

Plaintiff

v.

The Halifax Herald Limited, a body corporate,
and Stephen Maher

Defendants

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Judge: The Honourable Justice Gerald R P Moir

Heard: 8 June 2009 at Halifax

Written Decision: Oral decision edited and signed on 12 June 2009

Subject: Interim injunction; invasion of privacy; Bailment and conversion

Summary: A press secretary inadvertently recorded five hours of casual conversation with a federal minister. The recording found its ways into the hands of a reporter. The press secretary started an action and moved for an interim injunction against publishing parts of the recorded conversation.

Issue: (1) Whether the principle against prior restraint applies?
(2) If not, whether an interim injunction should be issued?

Result: (1) Doubt was expressed that the principle against prior restraint applied in cases other than defamation.
(2) However, this is not a case for exercising the discretion to grant an interim injunction. The low threshold for a “serious issue” is not met, and if it were, the balance of convenience would weigh heavily in favour of freedom of the press.

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Counsel: Ms. Michelle Awad and Ms. Jane O'Neill for the plaintiff
Mr. Robert G Grant, QC and Ms. Nancy Rubin for the
defendants
Mr. David G Coles, QC for Canadian Broadcasting
Corporation
Mr. James P Boudreau for CTV globemedia Inc.
Mr. Alan V Paris, QC for Canwest News Service and
Global International News

Moir, J (Orally):

[1] Ms. Jasmine MacDonnell started action against the Halifax Herald Limited and its reporter, Stephen Mahar, for an injunction and other relief. Ms. MacDonnell moves for an interim injunction that would prevent the Herald from publishing a story it planned to publish last Saturday. At an emergency hearing held by telephone on Friday night, the Herald agreed to hold the article for two days to give the parties time to file affidavits and briefs and to give the court time to study them.

[2] Usually, an interim injunction motion is determined in three parts involving

- a threshold analysis about whether there is a genuine issue to be determined. This threshold is quite low.
- once the threshold is met, an inquiry into whether irreparable harm would be caused to the plaintiff if the injunction was not granted.
- And then, if there would be irreparable harm, a determination of who will suffer more, the plaintiff without an interim injunction or the defendant with one.

[3] Interim injunctions in defamation cases may be subject to a more stringent threshold. It is said that the court will only grant prior restraint in the clearest of cases.

[4] The situation is different in cases of breach of confidence. See Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf ed. (Aurora: Canada Law Book, 2008), at paras. 5.130 - 5.180. The plaintiff asserts privacy rights as a basis for her request, and I am not certain whether the restriction on prior restraint would apply to a breach of privacy, the same as it would apply in defamation. I will analyse this case on the usual basis.

[5] The facts are not much in contest. I summarize them as follows.

[6] Ms. MacDonnell was the press secretary to the federal minister of Natural Resources, Ms. Raitt. Ms. MacDonnell resigned lately. The resignation was

connected to documents having been left at the Ottawa station of CTV after the minister submitted to an interview there. The documents included confidential material on the Chalk Lake reactor affair.

[7] Back in late January, the minister was interviewed by Steven Mahar of the Halifax Chronicle Herald. Ms. MacDonnell attended and she recorded the interview digitally.

[8] A little over a week later, the minister and Ms. MacDonnell travelled by car from Victoria to Vancouver Airport. They were accompanied by a driver who worked for the department. He sometimes joined in the conversation.

[9] Somehow, Ms. MacDonnell's digital recorder was in operation. Five hours and sixteen minutes of air time was inadvertently recorded.

[10] Sometime in February, Ms. MacDonnell left the digital recorder in the ladies' washroom at the Parliamentary Press Gallery. A colleague of Mr. Mahar found it, heard his voice on the recorder, and turned it over to him.

[11] Starting late in February and going into March, Mr. Mahar and Ms. MacDonnell were in communication several times about the recording. She was supposed to drop by and retrieve it from him. She never did. After that, they spoke occasionally about other things, but she said nothing more about the recorder. When the story about the documents at CTV broke earlier this month, Mr. Mahar decided, after consulting with his senior editors, that he should listen to the tape.

[12] Mr. Mahar's affidavit picks it up from there.

It was necessary to listen quite carefully to make out the import of the conversation. In the recording, Minister Raitt and Ms. MacDonnell discussed in a critical manner the political skills of the federal Health Minister, the Honourable Leona Aglukkaq and her handling of the medical isotope issue. Minister Raitt also discussed her desire to receive credit for dealing with the medical isotope crisis, and expresses the view that it is a "sexy" issue. Minister Raitt also discussed pressure placed on Liberal Leader, Michael Ignatieff, by major businesses to refrain from defeating the Conservative government on the budget. She also expressed her opinion regarding the decision of a Conservative MP to introduce a private member's bill as a career limiting move.

[13] The plaintiff relies on what may be an emerging tort, invasion of privacy, and upon a combination of the torts of conversion and breach of bailment as founding her claim to an injunction preventing the Chronicle Herald from publishing any of the remarks. She bolsters her position on this by referring to s. 193 of the *Criminal Code*.

[14] Ms. MacDonnell relies on *Somwar v. MacDonald's Restaurants of Canada Ltd.*, [2006] OJ 64, and its extensive review of authorities. *Somwar* concluded that a common law tort of invasion of privacy may be emerging in Canadian law. It is “not unheard of”. The court refused to strike a statement of claim based on the posited tort.

[15] In *Haskett v. Trans Union of Canada Inc.*, [2001] OJ 4949, the court adopted a passage from Dean Klar’s text suggesting privacy is protected only under the traditional torts and legislation. But, Justice Cumming said there is “some recognition of invasion of privacy as an embryonic tort where there is harassing behaviour or an intentional invasion of privacy”. That seems to me a sound conclusion to be drawn from most of the cases reviewed in *Somwar*.

[16] I agree with the submission for the Herald that the recorded conversation was not private because some or all of it was heard by a department driver.

[17] Also, I have difficulty seeing Mr. Mahar’s June 2009 use of the recording as an intentional invasion of privacy. Privacy was invaded in January 2009 when the conversation was recorded, in February when the record was left in a press washroom, and in March when it was not retrieved as agreed. Ms. MacDonnell’s lack of knowledge that her recording device contained a record of the conversation cannot, to my mind, put Mr. Mahar in the position of an intentional invader.

[18] Here is where I see the restriction on prior restraint having some place in laws of invasion of privacy, if such a tort is to emerge. It is wrong to deprive the press, and the public it serves, of remarks made privately, but not confidentially in the sense of trade secrets or privileged communications, after those remarks became available because of poor record keeping or management.

[19] Bailment and conversion are torts applicable to personal property rights. The digital recorder was personal property. There is no bailment, and can be no conversion, of pure information. Information is protected as intellectual property.

[20] In my view, *Criminal Code* s. 193 does not assist with this question. In context, I doubt that s. 193 should be read as applying to a communication intercepted by one of the parties to the communication, especially not when the recording is left in a public place. In any event, I agree with Mr. Grant that the *Criminal Code* is not a useful source for informing tort law on this particular subject.

[21] Ms. Awad referred me to three decisions in which injunctions were issued to protect confidentiality. *Calgary Regional Health Authority v. United Western Communications Ltd.*, [1999] AJ 805 involved a flagrant breach of a duty of confidentiality owed by nurses to other health care workers. Mr. Mahar owes no duty of confidentiality to Ms. MacDonnell.

[22] *Amherst (Town) v. Canadian Broadcasting Corp.*, [1994] NSJ 291 involved confidential information that was subject to a privilege. There is no privilege attached to communications between ministers and press secretaries.

[23] *Canada (Canadian Transportation Accident Investigation and Safety Board) v. Canadian Press*, [2000] NSJ 139 involved a breach of a specific statutory prohibition against publishing a confidential draft report. There is no statutory protection for records of conversations between ministers and press secretaries.

[24] I will dismiss the application on the ground that it does not raise a genuine issue. Had I not reached that conclusion, I would have found that the balance of convenience weighed strongly against an interim injunction.

[25] The importance of the freedom of expression and of the role of the media in providing scrutiny of the judiciary and government is made clear by the constitutional decisions of the Supreme Court of Canada starting with *Dagenais v. Canadian Broadcasting Corp.*, [1994] SCJ 104.

[26] I think that Mr. Mahar's affidavit indicates clearly the importance of his professional work to the scrutiny of government in our democracy. At paragraph 30, he testifies:

Minister Raitt is in charge of Canada's nuclear industry. She is responsible along with Minister Aglukkaq to ensure that the Canadian medical system has a secure supply of medical isotopes, which are vital to cancer testing.

The failure of the Chalk River reactor and the resultant shortage of supply of medical isotopes, the failure to protect secret government documents pertaining to this by Ms. MacDonnell, and the reaction of Minister Raitt and the Prime Minister are matters which have attracted great attention in both the news media and the public.

And he gives us references. Following those, with further references, he concludes:

The issue of the political oversight of Canada's medical isotope system is literally a matter of life and death for cancer patients. It is a matter of intense public interest. The handling of this issue by the Government and the responsible Ministers is a matter of immediate public and political interest.

[27] I allow that the harms of publication to Ms. MacDonnell are difficult to define and may be significant. However, I would have to weigh that against the public interest in reporting on government and the specific public interest in the story Mr. Mahar is following.

[28] The application is dismissed.

J.