26/04/2016 The Lawyers Weekly - April 29, 2016 - Page 4-5

THE LAWYERS WEEKLY search 4 / 33 two pages share print download

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in this issue search back issues help

News

Moves

- **Frédéric Dorion** has joined the Quebec City office of *BCF Business Law*. Dorion will be practising business law and bank financing, real estate law, and bankruptcy, insolvency and business restructuring.
- **Russel Drew** is the newest member of *DLA Piper's* corporate group in Toronto. Drew's practice focuses on mergers and acquisitions, corporate finance, securities, private equity and venture capital matters.
- **Michael Fenrick** is a new partner at *Paliare Roland Rosenberg Rothstein LLP*. Fenrick has a broad civil litigation practice, including expertise in constitutional law, corporate commercial litigation, class actions, professional discipline and labour and employment law.
- *Osler, Hoskin & Harcourt LLP* has added seven new partners. **Sarah Millar** is the new head of the firm's discovery management group and practises solely in the area of discovery. **James Brown** will advise on mergers and acquisitions, corporate finance and securities, mining and general corporate law. **Joanne Vandale** focuses on the income tax aspects of transactions entered into by corporations, partnerships and trusts. **Elliot Smith** works on major infrastructure projects, advising on project development, procurement, contract negotiation and administration issues. **Ted Liu** works on general corporate and commercial matters. **Hugo-Pierre Gagnon** works on mergers and acquisitions, corporate finance, securities, business reorganizations and other strategic transactions. **Blair Wiley** practises corporate and securities law.

School abuse victims' privacy rights upheld

KIM ARNOTT

In a case pitting society's interest in maintaining a historical record of residential school abuse against the privacy expectations of victims, the Court of Appeal for Ontario came down on the side of privacy rights.

But the split decision, which found that documents and recordings created as part of a confidential settlement process were not government records, highlights the challenging balance underlying a difficult decision, say legal observers.

As part of the 2006 Indian Residential Schools Settlement Agreement (IRSSA) which awarded a small amount of money to all former students, the Independent Assessment Process (IAP) was established as a mechanism to further compensate individuals who had suffered sexual or physical abuse or serious psychological harm in the schools.

Nearly 38,000 claimants took part in the IAP process, providing testimony about their abuse and suffering to adjudicators in closed-door hearings, who then awarded compensation in appropriate cases.

However, the settlement agreement didn't directly address what would ultimately happen to IAP documents.

The federal government argued the records were government documents to be archived and treated in accordance with privacy and access to information laws. A number of religious institutions that ran the schools sought the right to veto the archiving of records, while the chief adjudicator of the IAP argued for destruction of the records.

On behalf of the Truth and Reconciliation Commission, former chair Murray Sinclair argued that preserving the documents was fundamental to maintaining a full and complete record of residential schools.

In *Fontaine v. Canada (Attorney General)* [2016] ONCA 24, Chief Justice George Strathy authored the majority decision upholding the supervising judge's ruling that individual survivors should decide whether or not they wished to have their material archived.

Documents that are not transferred to the National Centre for Truth and Reconciliation for archiving will be destroyed after a 15-year retention period.

The decision found that survivors had told their stories with an expectation of privacy, and that the comprehensive framework established by the IRSSA was "guided by the principle that the survivors should control the fate of their own stories."

Relying on the inherent jurisdiction of the court and the implied undertaking rule, Chief Justice Strathy found the records were not in the control of the government, so were not government records for the purpose of privacy and access to information legislation.

But in dissent, Justice Robert Sharpe found the documents "fall squarely into the legal definition of government records," and should be preserved subject to the *Privacy Act*, the *Access to Information Act* and the *Library and Archives of Canada Act*.

> "It has far reaching application in the access and privacy community and I'd be surprised if the matter didn't make it to the Supreme Court – especially in light of the very strong dissent.
>
> **Kris Klein**
> Privacy law expert

University of Windsor administrative law professor Laverne Jacobs noted that Justice Sharpe considered the issue from the perspective of the federal legislation, while the majority decision viewed it through the lens of contract law, giving particular regard to pledges of confidentiality expressed in the settlement agreement.

"I think that the compelling factor for the majority is the very fact that these assurances were given," she said.

While not surprised that the "very difficult case with huge implications" has split the court, privacy law expert Kris Klein says the ruling will have an impact on the interpretation of legislation dealing with government records.

"In terms of ramifications, the majority decision takes a rather obscure older case (*Andersen Consulting v. R.*, [2001] 2 F.C. 324 (T.D.) regarding the meaning of 'under the control of government' and uses that case to open the door to whole host of other situations that might now be interpreted as creating a whole set of records that aren't under the control of government," Klein, a partner with nNovation LLP noted.

"It has far reaching application in the access and privacy community and I'd be surprised if the matter didn't make it to the Supreme Court — especially in light of the very strong dissent."

However, given the specialized context of the case, Osgoode Hall Law School professor Trevor Farrow doubts it will have a significant impact on record keeping in typical public dispute resolution processes.

"Although this is a difficult case, I think the majority got it right," he said. "I think giving agency and ultimate control over these stories back to the people who told them errs on the right side of a difficult balance in this case."

"At the end of the day, the law could have provided different answers, but my view of what justice required is what the majority found."

Noting the protections offered through the *Privacy Act*, Justice Sharpe wrote, "If the IAP documents are preserved according to the law, they will be kept from view for many years after the death of the IAP claimants but available thereafter should the need arise to revisit a terrible injustice."

As the son of a holocaust survivor, Toronto privacy lawyer Jeffrey Kaufman said the records should be preserved with appropriate redactions to ensure that crucial first-hand accounts are available to counter future skeptics, denier or conspiracy theorists.

"This is an important historical issue for all Canadians. What will happen in 50 or 100 years if we don't have a good set of records, even to the level of actual statements?"

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