

Criminal decisions on privacy rights could affect civil cases

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As interest in digital privacy issues grows, the Supreme Court's recent decision on the privacy interests of Internet subscribers could have implications for cases outside of criminal law, a Toronto lawyer says.

R. v. Spencer, which found there might be a legitimate privacy interest in online anonymity, will likely be a factor in civil matters, especially in cases dealing with cyber defamation, says Monique Jilesen, a partner at Lenczner Slaght Royce Smith Griffin LLP.

Spencer dealt with illegal search and seizure in a child pornography matter. The court established that police need a search warrant to obtain Internet subscribers' information from service providers.

"We sometimes try to get similar information in defamation cases, for example," says Jilesen.

"The Supreme Court of Canada decision deals with what if that subscriber information is in fact private," she adds.

"Recognizing that anonymity is one conception of informational privacy seems to me to be particularly important in the context of Internet usage," Supreme Court Justice Thomas Cromwell wrote in *Spencer*.

The criminal case in *Spencer* turned on the fact that police didn't have a search warrant, which isn't an issue in civil cases where lawyers are seeking a court order. Jilesen believes it will have relevance, however. "I still think the civil courts or an intervener or one of the Internet service providers may say, 'Take a look at the *Spencer* decision and the importance they place on the privacy interests.'"

"If you look at the case, the court says the nature of the privacy interest doesn't turn on whether it's legal or illegal activity. It says one aspect of privacy is privacy as anonymity, which is an interesting concept."

The top court did emphasize, however, that its findings don't establish "a right to anonymity."

"In my view, recognizing that there may be a privacy interest in anonymity depending on the circumstances falls short of recognizing any 'right' to anonymity and does not threaten the effectiveness of law enforcement in relation to offences committed on the Internet," wrote Cromwell.

"In this case, for example, it seems clear that the police had ample information to obtain a production order requiring Shaw to release the subscriber information corresponding to the IP address they had obtained."

While rigorous evidence of cyber defamation will likely compel the courts to grant Nor-



Monique Jilesen believes *R. v. Spencer* will have implications for civil matters.

wich orders for a third party to hand over information, the implication of the *Spencer* ruling is "one more thing to consider" for civil lawyers, Jilesen suggests.

Gilbertson Davis LLP partner Lee Akazaki says the civil courts may refer to *Spencer* only to emphasize the principle that there may be an expectation of anonymity on the Internet. "It's not directly on point," he says, adding that if judges consider *Spencer* in the civil context, it would be "only to express or confirm the societal interest in a particular right. In this case, it would be the expectation of anonymity or

the expectation of privacy."

In a civil case, the question becomes whether a person has the right to express an opinion online with the expectation of anonymity, Akazaki notes.

"The court might rely on the *Spencer* decision just to support the fact that this is an element of our bundle of rights as citizens that we in Canada have decided to protect. But from a legal analysis, I don't think that the *Spencer* decision does much to influence the civil context," he adds.

A recent Superior Court decision that looked at revoking permission for police to obtain subscriber information for a large pool of telephone numbers offered further guidance on the privacy issue.

In *R. v. Rogers Communications Partnership*, Peel Regional Police had originally obtained an order that allowed them to collect subscriber information regarding all calls routed through 21 cell towers during specified time periods to further a crime investigation.

But after Rogers and Telus Communications Co. applied for an order to quash the production order, police sought to revoke it and obtain a limited version of it instead. Although police wanted an *ex parte* order revoking the broader order, Rogers and Telus won their chance to present their argument in court even if their

application was moot.

"The privacy rights of the tens of thousands of cell phone users is of obvious importance," wrote Justice John Sproat on July 16.

"Production orders are typically made on an *ex parte* application so it is unlikely that the issuing justice has detailed information regarding the contractual relationship between the telecommunications provider and its customers and, therefore, the customer's reasonable expectation of privacy. Counsel for Rogers-Telus will be able to identify and argue Charter issues that might not otherwise be evident."

Jilesen says "there's little doubt" the court will consider *Spencer* in the applications under the Charter of Rights and Freedoms it will hear in this case. For Akazaki, both *Rogers Communications Partnership* and *Spencer* imply that the courts are treating the issue of privacy very seriously.

"At the end of the day, in both cases [criminal and civil], it requires lawyers to be more careful. When we say that it would make it difficult to get something, often that's a code for it would make my job more difficult to achieve the interests of my client," he says. "In that regard, yes, the *Spencer* decision might make it more difficult in the long run to get a Norwich order or any kind of pre-action disclosure orders." **LT**