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Civil claims struck due to privacy breach from unauthorized access to text messages (*McCarrell v. McCarrell*)

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Canadian law affords constitutional protection to privacy rights. In criminal matters, evidence that is obtained in violation of [section 8](#) of the [Canadian Charter of Rights and Freedoms](#) is routinely excluded. In civil matters, the right to privacy has developed as a common law value supported by the [Charter](#) and the courts may exclude evidence obtained by litigants who conduct "self help" remedies that infringe on another party's privacy rights.

In *McCarrell v. McCarrell*, [2025 ONSC 6369](#), the plaintiff and his former spouse, who had a son together, were involved in ongoing, acrimonious family court proceedings.

Between 2019 and 2023, the plaintiff's spouse exchanged private text messages with two friends discussing the plaintiff and his history of criminal charges, including assault. The communications occurred on her password-protected cellphone.

In September 2023, their 14-year-old son accessed his mother's phone, forwarded screenshots of the messages to the plaintiff, and physically delivered the phone to him without his mother's

consent. Although the police were notified, she declined to press charges because her son was involved.

The plaintiff retained the phone and reviewed its contents. In March 2024, he sued his spouse and her two friends for defamation and conspiracy, relying mainly upon the intercepted text messages. Neither his spouse nor her friends knew that he had accessed and reviewed their messages until they were served with his lawsuit.

The spouse's two friends brought motions to dismiss or stay of the action as an abuse of process under Rules [21.01\(3\)\(d\)](#) and [25.11\(c\)](#) of the Ontario [Rules of Civil Procedure](#), which confirm the court's inherent power to prevent misuse of its procedure in a way that would be manifestly unfair to a party in the litigation or that would in some other way bring the administration of justice into disrepute.

The central legal issue before the court was whether the plaintiff's reliance on evidence obtained through a deliberate invasion of privacy constituted an abuse of process. The doctrine of *ex turpi causa non oritur actio* expresses

the principle that the court will not aid a litigant who founds his or her claim on an illegal or immoral act: *Pupiec v. Dereniowski*, [1998 CanLII 2070 \(ON CA\)](#).

The motion judge noted that proceedings may be stayed in cases where an intentional unauthorized interception of private information has constituted an abuse of process: see *Autosurvey Inc. v. Prevost*, [2005 CanLII 36255 \(ON SC\)](#) and *177546 Ontario Inc. v. 2177545 Ontario Inc.*, [2023 ONCA 693](#), among other authorities.

For the motion, the parties disputed how the phone came into the plaintiff's possession. The plaintiff claimed that his son acted independently, discovered the messages, and sent screenshots via Snapchat. Conversely, the defendant spouse asserted that her son was encouraged to bring the phone to his father as it would help with "something very important."

The statement of claim and the plaintiff's motion materials were, in the judge's view, "conveniently silent" on the issue of how the messages from the spouse's cellphone came into the plaintiff's possession. There was no question, however, that the case involved a clear and deliberate invasion of privacy. In the motion judge's view, the plaintiff's conduct amounted to an abuse of process and there was no excuse for his actions in obtaining and accessing the contents of a password-protected cellphone belonging to his estranged spouse.

Referring to *Autosurvey*, decided back in 2005, the motion judge noted that with the evolution of the electronic era, courts have increasingly been asked to respond to circumstances where electronic evidence is improperly obtained. Evidence may be excluded where it has been obtained through improper and intentional invasions of privacy.

As for the remedy, the motion judge was not satisfied that the matter was one of the clearest of cases where a permanent stay of the entire action was required, notwithstanding that the court was very concerned by the plaintiff's underhanded conduct. While the public has an interest in the promotion of fair procedure, untainted by abuses of process, the public also has an interest in ensuring that legitimate complaints of defamation and conspiracy are heard on their merits.

To strike an appropriate balance, the court prevented the plaintiff from relying upon the private information he accessed and copied from his spouse's cellphone and [struck](#) the paragraphs in the defamation claims against the defendants that were entirely based on the private text messages obtained through the invasion of privacy, without leave to amend.

Without those paragraphs, no viable defamation claim remained and the plaintiff's claims for defamation were therefore dismissed insofar as they related to the text messages.

However, the plaintiff's claim against one of the spouse's friends was allowed to continue as it was based on defamatory social media videos he posted in October 2022. The allegations in support of this claim were independent of the intercepted text messages and could not be dismissed on a pleadings motion.

The plaintiff was also granted leave to amend his conspiracy claim against all defendants as it was not plain and obvious that a properly pleaded conspiracy claim might be viable if he pleaded sufficient particulars to show how the defendants engaged in a joint campaign to injure him. As there was a prospect that amending the claim would cure the defects, the motion judge exercised his discretion to

grant the plaintiff leave to amend his claim to particularize the alleged conspiracy.

This decision affirms that privacy is a fundamental value in Canadian law and that courts must discourage “self-help” tactics. The *Rules of Civil Procedure* do not provide for any form of self-help remedy with respect to documentary disclosure. As noted by the court, it is simply not open to a litigant to obtain access to documentary information from an adversarial party other than within the limitations imposed by the *Rules*. Truth-seeking cannot justify tactics that compromise privacy and fairness.

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If you have a litigation matter and are in need of legal advice, please do not hesitate to contact James Cook, at 416.865.6628 or jcook@grllp.com.

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