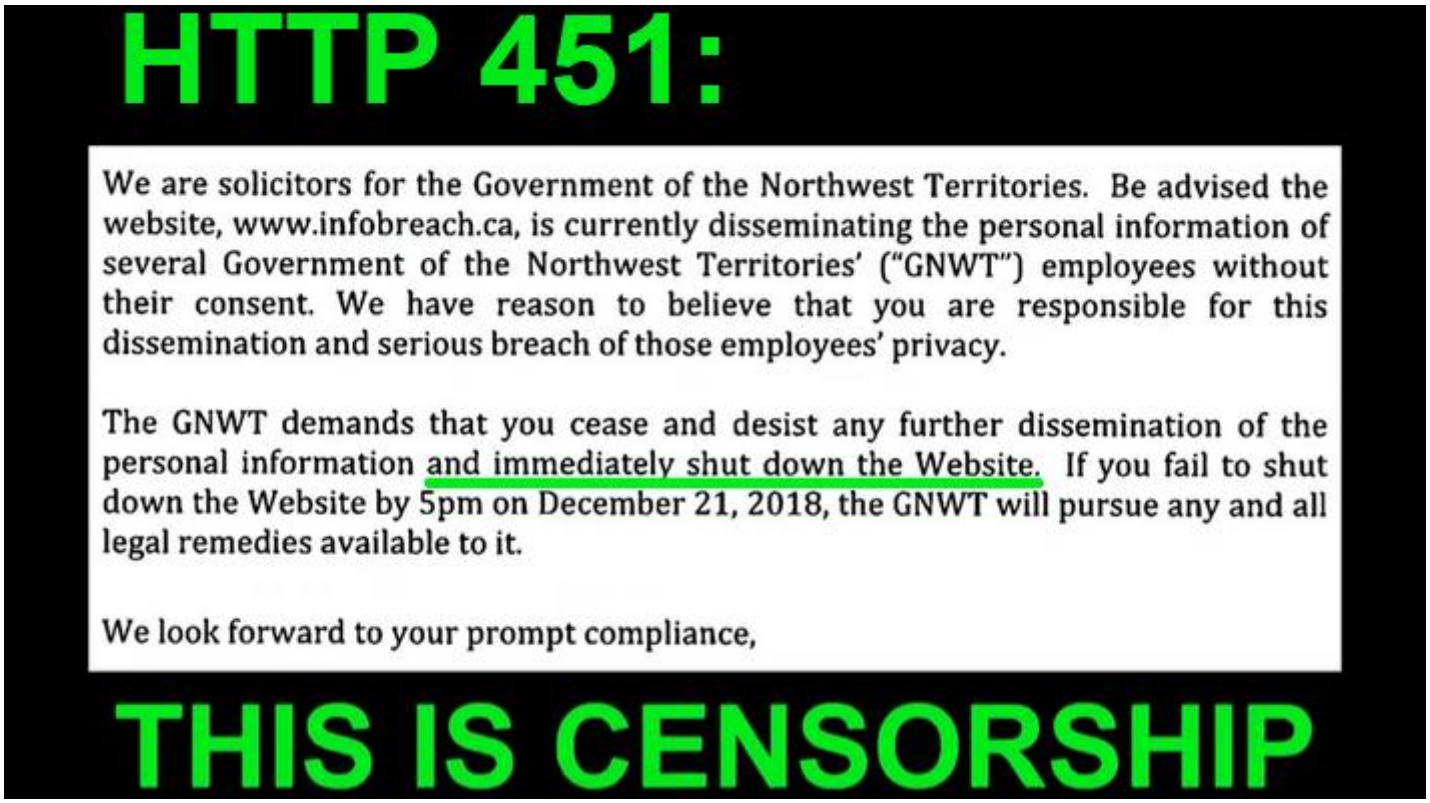
CASE STUDY: How the Government of the Northwest Territories took an alleged information breach and made it into a full-blown violation of the ***Canadian Charter of Rights and Freedoms***



All references in this document refer to materials filed in

the Alberta Court of Queen's Bench Action Number 1903 00779

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FACTS:

1. I never swore an Oath of Office and Secrecy.
2. I ceased having a professional relationship with the Government of the Northwest Territories (GNWT) on March 12, 2014.
3. On December 18, 2014, I discovered that I continued to have access to Peoplesoft, and all my former rights and access as a manager remained intact—including access to information of certain employees of the GNWT.
4. By contract, I continued to be paid until February 13, 2015.
5. All information posted to the website Infobreach.ca in December 2018 was obtained following the end of my professional relationship with the GNWT on March 12, 2014.
6. On December 20, 2018, the GNWT demanded that I shut down the website Infobreach.ca under threat of legal action.[1]

ISSUES:

7. There is one threshold issue in this Case Study:
    a. Does confidentiality, or some other legal basis of protection, attach to the information I had access to following the end of my professional relationship with the GNWT?

LAW:

8. Unless otherwise protected by law, privacy is lost where adequate protections were not taken to protect it.[2]

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[1] Affidavit of Denise Anderson, Exhibit H

[2] *Victoria Park Racing v. Taylor* (1937) 58 CLR 479, at page 494, para. 2 [Tab 1]

9. The *Access to Information and Protection of Privacy Act* of the Northwest Territories applies to the GNWT[3] and to the personal information received by employees in the performance of services for the GNWT.[4]

10. In the Northwest Territories, an oath required for the taking of an office may be provided in the form of an oath or a solemn affirmation.[5]

11. Professional responsibilities and fiduciary duties, such as a duty of confidentiality, apply to information received in the course of a professional relationship.[6, 7]

ANALYSIS:

I. Privacy is Lost When not Protected

12. In *Victoria Park Racing v. Taylor* (1937) 58 CLR 479, a decision of the High Court of Justice of Australia, Chief Justice Latham, speaking for the Majority, stated:

> "I am unable to see that any right of the plaintiff has been violated or any wrong done to him. Any person is entitled to look over the plaintiff's fences and to see what goes on in the plaintiff's land. If the plaintiff desires to prevent this, the plaintiff can erect a higher fence."[8]

13. Chief Justice Latham further opined:

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[3] *Access to Information and Protection of Privacy Act* (ATIPP) S.N.W.T. 1994, c.20, s. 3(3) [Tab 2]
[4] ATIPP [Tab 2]
[5] *Evidence Act* R.S.N.W.T. 1988, c.E-8, s.23(3) [Tab 3]
[6] *Code of Professional Conduct,* Law Society of the Northwest Territories, April 2015, Part 3, Rule 5 "Confidentiality" [Tab 4]
[7] *Code of Conduct*, Law Society of Alberta, December 1, 2016, Ch 3.3-1 "Confidential Information" [Tab 5]
[8] *Victoria Park Racing v. Taylor* (1937) 58 CLR 479, at page 494, para. 2 [Tab 1]

"In my opinion, the law cannot by an injunction in effect erect fences which the plaintiff is not prepared to provide."[9]

14. The extent of my continuing access to Peoplesoft after March 12, 2014 was determined by the Human Resources Department of the GNWT through action that was described as requiring that my "manager powers" in Peoplesoft be "manually overridden ***and extended***" [emphasis added], which, I suggest, would lead to the conclusion that the access I retained was deliberate and intentional.[10]

II. Access to Information and Protection of Privacy Act

15. Section 3 of the *Access to Information and Protection of Privacy Act* (ATIPP) provides that ATIPP applies to all records in the custody or under the control of a public body, and that the Act binds the GNWT[11].

16. If the coming into force of ATIPP on December 31, 1996 created any ambiguity regarding the obligations of employees, and by extension, former employees, I would suggest that this ambiguity was resolved with the introduction of s. 47.1 in 2005. Section 47.1 provides as follows:

"Duty of Employees

47.1. An employee shall not, without authorization, employees disclose any personal information received by the employee in the performance of services for a public body. S.N.W.T. 2005, c.10, s.3."[12]

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[9] *Ibid*.
[10] Affidavit of Donn MacDougall, Exhibit R
[11] ATIPP, s. 3 and s. 3(3) [Tab 2]
[12] ATIPP, s. 47.1 [Tab 2]

17. Section 47.1 has been interpreted by the Information and Privacy Commissioner in the Review Report that she made in response to my complaint in this matter. That interpretation reads:

> "Section 47.1 prohibits employees from disclosing any personal information received by the employee in the performance of services for a public body, except as authorized." [13]

18. Following my departure from the GNWT on March 12, 2014, I no longer performed services for a public body, but I continued to receive personal information by email and had access to personal information in Peoplesoft.

19. I sent an email to my former Deputy Head and the Director of Legal Division for the Department of Justice where I asserted that my continuing access to Peoplesoft was not covered by any type of confidentiality, and the only response provided by the GNWT reads as follows:

> "You are not an employee but you are being paid, which means Peoplesoft is used, which in turn means you still have to still be attached to a position number. That position number has manager powers attached to it that have to be manually overridden and extended, if necessary, which is what HR did when the initial manager delegation expired December 12." [14]

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[13] Northwest Territories Information and Privacy Commissioner, Review Report 18-184, 2018 NTIPC 12, page 7, 2nd full paragraph, Affidavit of Denise Anderson, Exhibit D

[14] Affidavit of Donn MacDougall, Exhibit R

20. This explanation, which has never been contradicted, asserts that I had access to Peoplesoft because:

    a. I was getting paid; and

    b. My manager powers remained intact.

21. Section 48 of ATIPP provides the following relevant provisions:

> "48. A public body may disclose personal information […]
>
> (d) for the purpose of […]
>
> (ii) making a ***payment*** owed to an individual by the Government of the Northwest Territories or a public body" […]
>
> (g) for the purpose of hiring, ***managing or administering personnel*** of the Government of the Northwest Territories or a public body"[15]
>
> [Emphasis added]

23. The clear evidence is that my continuing access to information in Peoplesoft was due to my continuing to be paid, and, or in the alternative, the fact that my management rights remained intact, but delegated[16]. Either of these reasons constitute an exception to ATIPP, and with information having been disclosed as such, the information no longer enjoys the protections afforded by ATIPP.

[15] ATIPP, s. 48 [Tab 2]

[16] "Delegation Request Details", Affidavit of Donn MacDougall, Exhibit S

III. Oath of Office and Secrecy

22. The Oath of Office and Secrecy is a prescribed oath under the *Public Service Act*[17] and appears as Form 1 of the *Public Service Regulations*.[18]

23. The *Evidence Act* of the Northwest Territories requires an oath to take office to be sworn or affirmed.[19]

24. The GNWT has provided no credible evidence that I have sworn or affirmed the prescribed Oath of Office and Secrecy, instead the GNWT has produced a document that purports to be a statutory declaration.[20]

25. Notwithstanding the fact that the GNWT has not provided the sworn Oath of Office and Secrecy that is the subject matter of paragraph 2 of the basis for this claim,[21] should such a document exist (which under oath I asserted it does not[22]), we would still be at odds as to the proper interpretation to give the prescribed Oath of Office and Secrecy.[23]

26. The question here is whether to prefer an interpretation that limits the operation and duties of the Oath of Office and Secrecy just to matters learned while employed, or if a broader interpretation, that the operation and duties under the Oath of Office and Secrecy also apply to matters learned following active employment into perpetuity, is to be preferred.

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[17] *Public Service Act*, RSNWT 1988, c P-16, version in force February 21, 2006, s. 39 [Tab 6]
[18] *Public Service Regulations*, RRNWT 1990, c P-28 version in force February 21, 2006, s. 51(1) and Form 1 [Tab 7]
[19] *Evidence Act* R.S.N.W.T. 1988, c.E-8, s.23(3) [Tab 3]
[20] Affidavit of Denise Anderson, Exhibit B
[21] Originating Application in this matter, Basis for this claim, paragraph 2
[22] Cross Examination of Donn MacDougall, 22:2
[23] Public Service Regulations, RRNWT 1990, c P-28 version in force February 21, 2006, Form 1 [Tab 7]

27. In this situation, the prescribed Oath of Office and Secrecy seeks to limit freedom of expression, a fundamental freedom enshrined by section 2 of the *Canadian Charter of Rights and Freedoms* (the Charter).[24]

28. The actions of Government are subject to limits under the Charter, and the possibility of exceeding these limits have been addressed by the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, where Dickson, J., pointed out:

> "Principles will have to be developed for recognizing which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom. Once a sufficiently significant government interest is recognized then it must be decided if the means chosen to achieve this interest are reasonable—a form of proportionality test. The court may wish to ask ***whether the means adopted to achieve the end sought do so by impairing as little as possible the right or freedom in question***."[25]
>
> [emphasis added]

29. The analysis of the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd., Supra* was adopted and rephrased by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103, by Chief Justice Dickson:

> " the means, even if rationally connected to the objective [...] should impair 'as little as possible' the right or freedom in question"[26]

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[24] Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Tab 8]
[25] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (at page 352) [Tab 9]
[26] *R. v. Oakes*, [1986] 1 S.C.R. 103 (at page 139) [Tab 10]

30. Finally, it is a principle of legislative interpretation, recognized by Chief Justice Lamer of the Supreme Court of Canada, that:

> "if there is any scope for interpretation, the interpretation that does not offend the Charter is the one that should be adopted.'"[27]

31. The right in question here, which should be minimally impaired, is the right to freedom of expression. Interpreting the wording of the prescribed Oath of Office and Secrecy in such a way that it only applies to matters learned while holding office/being engaged in active employment is the interpretation that impairs the right to freedom of expression as little as possible.

32. Further, or in the alternative, when the Legislative Assembly of the Northwest Territories debated and approved s. 47.1 of ATIPP, they must surely have known of the prescribed Oath of Office and Secrecy. The interpretation that I am suggesting be preferred regarding the Oath of Office and Secrecy accords almost exactly with plain language wording of s. 47.1 of ATIPP as well as the plain language interpretation of s. 47.1 of ATIPP that has been adopted by the Information and Privacy Commissioner of the Northwest Territories.[28]

IV. Professional Responsibilities and Fiduciary Duties

33. The relationship between lawyer and client is a fiduciary relationship and in the case of former clients, commentary to the Law Society of Alberta's *Code of Conduct* at Ch 3.4 Conflicts, commentary [4], states that:

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[27] *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 SCR 1065 (at p. 1067) [Tab 11]
[28] Northwest Territories Information and Privacy Commissioner, Review Report 18-184, 2018 NTIPC 12, page 7, 2nd full paragraph, Affidavit of Denise Anderson, Exhibit D

"Lawyers' duties to former clients are primarily concerned with protecting confidential information."[29]

34. Rule 3.3-1 of the Law Society of Alberta's *Code of Conduct* provides that confidential information is:

"[…] all information concerning the business and affairs of a client ***acquired in the course of the professional relationship*** […]"[30]

[Emphasis added]

35. In the result, any information that I received following the cessation of my professional relationship with the GNWT on March 12, 2014 is not subject to professional responsibilities and fiduciary duties.

V. Copyright

36. While the topic of Copyright does not form part of the Originating Application or the sworn affidavits in this matter, the GNWT did elicit evidence regarding Copyright in their cross-examination of me on my affidavit.[31]

37. In *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13, Chief Justice McLachlin of the Supreme Court of Canada (SCC) has summarized the law of Copyright as follows:

"For a work to be 'original' within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. ***What is required to attract copyright protection in the***

[29] *Code of Conduct*, Law Society of Alberta, December 1, 2016, Ch 3.4 "Conflicts", commentary [4], p. 30 [Tab 5]
[30] *Code of Conduct*, Law Society of Alberta, December 1, 2016, Ch 3.3-1 "Confidential Information", p. 24 [Tab 5]
[31] Cross examination of Donn MacDougall, pages 40 to 46

> ***expression of an idea is an exercise of skill and judgment***. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce 'another' work would be too trivial to merit copyright protection as an 'original' work."[32]
>
> [Emphasis added]

38. In an application for summary judgement, the Federal Court of Canada, in *Davydiuk v. Internet Archive Canada and Internet Archive* 2016 FC 1313, has found that the question of whether a screenshot can attract Copyright protection is a genuine issue for trial:

> "He submits that the decision as to which particular screenshots were taken from the video represents an exercise of skill and judgment capable of supporting copyright protection. I find these arguments sufficiently compelling that the Defendants have not satisfied me there is no genuine issue for trial surrounding the claim for copyright protection of these images."[33]

39. My evidence on the point of Peoplesoft screenshots and the possibility of Copyright protection was elicited on cross-examination:

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[32] *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 2004 SCC 13 (at paragraph 16) [Tab 12]
[33] *Davydiuk v. Internet Archive Canada and Internet Archive*, 2016 FC 1313 (at paragraph 66) [Tab 13]

> "When I took those documents and I put them into a Word document, when I selected certain documents, and presented them in a certain way, when I took screen shots and then reduced the field of view of those screen shots what I did was I created a work which I believe is subject to copyright."[34]

40. The work in question here, my website[35], as a mix of words and screenshots selected and produced in such a way as to tell a story, is the very essence of what Copyright law was meant to protect.

VI. Censorship

41. The GNWT demanded the complete shutdown of my website infobreach.ca using legal threat by reason that my website contained the personal information of employees of the GNWT.[36]

42. My website, while containing some personal information of employees of the GNWT, was primarily focused on being critical of the actions of the GNWT and to seek improvements in that regard.

43. In this context, the demand for complete shutdown of my website is excessive, and not in keeping with a line of cases from the Supreme Court of Canada regarding minimal impairment where a Charter right exists.[37]

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[34] Cross examination of Donn MacDougall, 40:25 to 41:4
[35] infobreach.ca, as it existed on December 20, 2018: Affidavit of Denise Anderson, sealed Exhibit M
[36] Affidavit of Denise Anderson, Exhibit H
[37] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (at page 352) [Tab 9], *R. v. Oakes*, [1986] 1 S.C.R. 103 (at page 139) [Tab 10], and *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 SCR 1065 (at p. 1101) [Tab 11], as discussed earlier in this Written Submission.

44. An analysis of the requirement of minimal impairment in the context of freedom of expression was undertaken by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (AG)*, and the judgement, as *per* Sopinka, McLachlin and Major JJ stated:

> "A complete ban on a form of expression is more difficult to justify than a partial ban. The government must show that only a full prohibition will enable it to achieve its objective. Where, as here, no evidence is adduced to show that a partial ban would be less effective than a total ban, the justification required by s. 1 to save the violation of free speech is not established."[38]

45. The demand of the GNWT to "immediately shut down the Website"[39] was not a means that minimally impaired my right to freedom of expression.

CONCLUSION:

46. As my analysis above indicates, the information I had access to following the end of my professional relationship with the GNWT was not protected by confidentiality, or any other legal basis of protection.

[38] *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 S.C.R. 199 [Tab 14]
[39] Affidavit of Denise Anderson, Exhibit H