COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ari v. Insurance Corporation of British Columbia,* 2015 BCCA 468

Date: 20151117
Docket: CA41125

Between:

Ufuk Ari

Appellant
Respondent on Cross-Appeal
(Plaintiff)

And

Insurance Corporation of British Columbia

Respondent
Appellant on Cross-Appeal
(Defendant)

Before: The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Garson

On appeal from: An order of the Supreme Court of British Columbia, dated July 22, 2013 (*Ari v. Insurance Corporation of British Columbia*, 2013 BCSC 1308, Vancouver Docket S123976).

Counsel for the Appellant:	G.J. Collette
Counsel for the Respondent:	R.R. Hira, Q.C. P.E. Waldkirch
Place and Date of Hearing:	Vancouver, British Columbia October 13, 2015
Place and Date of Judgment:	Vancouver, British Columbia November 17, 2015

Written Reasons by:
The Honourable Madam Justice Garson

Concurred in by:
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Groberman

Summary:

The appellant appeals and the respondent cross-appeals an order of the chambers judge striking certain portions of the appellant's proposed class action. The chambers judge allowed the appellant's claim for vicarious liability for breach of privacy to go forward, but struck his claim for negligent breach of a statutory duty. Held: the appeal and cross-appeal are dismissed. The chambers judge did not err in concluding that the claim for vicarious liability for breach of privacy was not bound to fail. It is not clear that the statute upon which the alleged breach of privacy is based is incompatible with vicarious liability. Other arguments against allowing the claim to proceed cannot be resolved on a pleadings motion. The chambers judge did not err in striking the claim for negligent breach of statutory duty. To succeed on the claim, the appellant was required to show that a new common law duty of care could be recognized. Under the circumstances, no such duty could be established for policy reasons. These policy reasons to not require consideration of a factual matrix beyond that disclosed in the pleadings.

Reasons for Judgment of the Honourable Madam Justice Garson:

I. Introduction

[1] This is an appeal and cross-appeal of a chambers judge's order striking certain portions of the plaintiff's proposed class action. The chambers judge's reasons are indexed at 2013 BCSC 1308. The underlying claim arises from a breach of privacy by an ICBC employee. The employee improperly accessed the personal information of about 65 ICBC customers. The appellant, one of these customers, commenced a proposed class action for damages for breach of privacy. ICBC applied to strike out the action pursuant to R. 9-5(1)(a) of the *Supreme Court Civil Rules* on the grounds that the action failed to disclose a justiciable cause of action.

[2] The proposed class action is based on two causes of action. The first is a claim for a violation of privacy based on the employee's conduct, for which ICBC is said to be vicariously liable. This claim is brought pursuant to the *Privacy Act*, R.S.B.C. 1996, c. 373. The second cause of action is based on a claim that ICBC breached s. 30 of *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165. Section 30 requires a public body to protect personal information in its custody. The appellant contends that ICBC negligently performed the duty imposed on it by statute, and is liable in damages for that breach.

[3] The chambers judge dismissed all of the appellant's claims against ICBC, except for his claim for breach of privacy. She ordered that the pleadings be amended to reflect the narrowed scope of the claim.

[4] The appellant appeals the dismissal of the claim founded on the *Freedom of Information and Protection of Privacy Act*. ICBC cross-appeals the dismissal of its application to strike the *Privacy Act* claim.

[5] The pleadings provide a sparse account of the facts. No further discussion of the facts is necessary for the disposition of this appeal.

II. Standard of Review

[6] The chambers judge's decision to permit the vicarious liability question to proceed to trial and her decision to strike the claim based on s. 30 of the *Freedom of Information and Protection of Privacy Act* are not discretionary, they are based on extricable questions of law. Accordingly, the standard of review applicable to this appeal is correctness: *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163 at paras. 19-23; *Tangerine Financial Products Limited Partnership v. Reeves Family Trust*, 2015 BCCA 359 at para. 41.

III. Statutory Regime

[7] It is helpful to begin by briefly addressing the statutes at play in this appeal.

(a) Privacy Act

[8] The *Privacy Act* creates a statutory cause of action for breach of privacy. Section 1 of the *Act* provides as follows:

> 1 (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.
>
> (2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.
>
> (3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

> (4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.

[9] It is common ground that in British Columbia there is no common law cause of action for breach of privacy: *Mohl v. University of British Columbia*, 2009 BCCA 249 at para. 13; *Hung v. Gardiner*, 2002 BCSC 1234, aff'd 2003 BCCA 257. The appellant's claim for vicarious liability therefore depends entirely on the statutory cause of action. As noted, the breach of privacy claim is the only claim that the chambers judge did not strike.

(b) Freedom of Information and Protection of Privacy Act

[10] The *Freedom of Information and Protection of Privacy Act* regulates the collection, protection, and disclosure of information held by public bodies.

[11] Section 30 of this *Act* requires a public body to make reasonable arrangements to protect personal information in its possession:

> 30 A public body must protect personal information in its custody or under its control by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal.

[12] As noted, the appellant advances a claim that ICBC (a public body under the *Act*) negligently breached s. 30.

IV. Reasons of the Chambers Judge

[13] She began her analysis by correctly noting that the legal test for striking a claim is whether it is plain and obvious, assuming the facts pleaded are true, that the pleadings disclose no reasonable cause of action. In support of this proposition, she relied on the well-known cases of *Hunt v. Carey Canada Inc*., [1990] 2 SCR 959 at 980 and *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42 at para. 17. She also relied on *Imperial Tobacco* for the proposition that the approach to striking pleadings "must be generous and err on the side of permitting a novel but arguable claim to proceed to trial."

[14] After reviewing the submissions of both parties the chambers judge turned to the appellant's *Privacy Act* claim. The pleading supporting this claim reads as follows:

> The Employee, wilfully and without claim of right, breached the Plaintiff's right to privacy pursuant to the common law, the *Privacy Act*, R.S.B.C. 1996, c. [373] and the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165. At all material times hereto, the Defendant was the employer of individuals the Employee who, as a function of her employment duties, had access to its data bases containing the private information of its customers including the Plaintiff, and is therefore vicariously liable for the breaches of privacy committed by it's the Employee or agents, while employed by the Defendant.

[15] The chambers judge concluded that it was not plain and obvious that there is no reasonable claim in breach of privacy against the employee. This conclusion is not challenged on appeal.

[16] After making this determination, the chambers judge considered whether the pleadings disclosed a reasonable claim against ICBC for vicarious liability for the employee's misconduct. She concluded that an employer is vicariously liable for acts it has authorized and "for unauthorized acts so connected with the authorized acts that they may be regarded as modes of doing an authorized act" (at para. 68). These two bases of liability are referred to as the "Salmond test", endorsed by the Supreme Court of Canada in *Bazley v. Curry*, [1999] 2 S.C.R. 534.

[17] *Bazley* directs the courts to apply a two-step approach where an unauthorized act is pleaded as a basis for vicarious liability. In the first part, the court asks whether there are precedents that unambiguously determine the issue. In the second part, the court asks whether vicarious liability should be imposed in the circumstances in light of the broader policy rationales behind it (at para. 15). Where the first part is inconclusive, *Bazley* sets out several guiding principles for considering the policy rationale. An employer's role in the creation or enhancement of the risk of wrongdoing features prominently in these principles (see *Bazley* at para. 41).

[18] Applying the *Bazley* approach, the chambers judge concluded that it was not plain and obvious that the claim was bound to fail. She determined that there were

no precedents that unambiguously settled whether vicarious liability should be imposed (at para. 74). With respect to policy considerations, the chambers judge considered that the facts pleaded a sufficient connection between ICBC and the alleged wrongdoing, taking into account ICBC's alleged role in the creation or enhancement of the risk of the unauthorized act (at para. 78):

> …it is not plain and obvious that the Amended Claim fails to disclose a reasonable claim in vicarious liability. Accepting the facts pleaded as true, the Employee as part of her employment duties was required to access the personal information of ICBC's customers. Certainly, this authorization created an opportunity for the Employee to abuse her position of power.

[19] Next, the chambers judge considered the appellant's claim for negligent protection of privacy. Relying on *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at 225, she concluded that there is no tort of breach of a statute under Canadian law. She held that the plaintiff's claim "[came] squarely within the rule in *Saskatchewan Wheat Pool* that the law has not recognized an action for negligent breach of statutory duty" at para. 84.

[20] The chambers judge rejected an argument that the appellant's claim was similar to *K.L.B. v. British Columbia*, 2003 SCC 51. *K.L.B.* concerned the abuse of foster children in government care. The appellant submitted his case was analogous to *K.L.B.* insofar as it involved liability for breach of a statutory duty (in that case, imposed by the *Protection of Children Act*, R.S.B.C. 1960, c. 303). The chambers judge considered *K.L.B.* inapplicable, holding that it dealt with negligence arising out of the operational acts of government (at para. 85).

V. Analysis

(a) Vicarious Liability for Breach of Privacy

[21] ICBC contends on appeal that as a matter of statutory interpretation, the tort of breach of privacy created by s. 1 of the *Privacy Act* is not subject to the doctrine of vicarious liability. ICBC says that this Court's decision in *Nelson v. Byron Price & Associates* (1981), 122 D.L.R. (3d), 340, 1981 CanLII 415 (B.C.C.A.) is authority for

the proposition that vicarious liability cannot be imposed where the underlying wrong created by the statute is expressed in terms of intentional conduct.

[22] In *Nelson*, the appellants filed a complaint under the *Human Rights Code*, R.S.B.C. 1979, c. 186, alleging that they had been unlawfully denied the right to rent certain premises. The complaint was filed against the manager of the premises, and the rental agent employed by the owner. The Board convened under the *Code* found that the manager had knowingly contravened the *Code*, and was therefore liable for aggravated damages under s. 17(2). The Board also found the rental agent vicariously liable for the manager's discrimination. On appeal, the Court determined that based on the language of the legislation, an award of aggravated damages could only be made against "a person who contravened" the *Code*. Craig J.A. held that such language precluded an aggravated damages award based on vicarious liability. The Board had found, as a matter of fact, that the rental agent had not contravened the *Code*. At paras. 17-18, Craig J.A. observed:

> …I think that there is much to be said for the view that an employer should bear responsibility, in some form, for discriminatory conduct of an employee in the course of his employment but that is a decision for the legislature, not for a court. … The operative phrase throughout s. 17 is "person who contravened this Act". …The board may order the person to pay aggravated damages under s. 17(2)(c) only if a person contravenes the Act "knowingly or with a wanton disregard" - that is, if he personally contravenes the Act. The board found that the respondent did not personally contravene the Act…
>
> ...If the legislature had intended that an individual in the position of the respondent should be amenable to any of the orders which may be made under s. 17 it would have been a simple matter for the legislature to have enacted words to the effect that any employers whose servant contravened the Act in the course of his employment would be deemed to have contravened the Act.
>
> [Emphasis added.]

[23] ICBC says that a similar argument may be made respecting s. 1 of the *Privacy Act* arguing that s. 1 requires that the violation of privacy be "wilful". ICBC says that "wilful" must be understood to import a *mens rea* type requirement that could not be ascribed to an employer through the mechanism of vicarious liability. Vicarious liability is a form of strict liability, which (ICBC says) is incompatible with

the intentional conduct that s. 1 requires. It follows, ICBC says, that the chambers judge erred in dismissing its application to strike this aspect of the claim.

[24] In *Nelson*, the "operative language" was "person who contravened this *Act*". The wording of the applicable provision directly limited the class of persons from whom the appellant could recover aggravated damages to those who had personally contravened the statute. The requirement that such a contravention be done "knowingly" or with "wanton disregard" did not itself dictate the availability of vicarious liability; rather, it acted to support an interpretation of the provision that necessitated a personal breach of the *Human Rights Code* as a precondition for recovery.

[25] It is not clear that s. 1 of the *Privacy Act* should be interpreted as limited in the same fashion as the relevant provisions in *Nelson*. Section 1(1) states that "[i]t is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another". There is no language (as there was in *Nelson*) that clearly limits a plaintiff to recovery of damages from the person identified in s. 1(1). While, as the chambers judge observed, vicarious liability for acts of intentional and deliberate wrongdoing has generally been rejected, it is not unheard of (see: Lewis Klar, *Tort Law*, 5th ed. (Toronto: Carswell, 2012) at 682). To the extent that s. 1(1) of the *Privacy Act* requires deliberate wrongdoing, it is not *per se* incompatible with vicarious liability.

[26] Although *Nelson* may provide, by analogy, a basis for denying the availability of vicarious liability, I cannot conclude that the chambers judge erred in finding the appellant's claim is on this basis, not bound to fail.

[27] Alternatively, ICBC says that there is a policy argument which supports its position that there is no cause of action in vicarious liability. For policy reasons ICBC says, employers should not be held vicariously liable for wilful breaches of privacy under the *Privacy Act*.

[28] ICBC also contends that the question before the chambers judge was whether vicarious liability should be imposed due to policy considerations. It says that the appropriate question to ask is: should liability lie against a public body for the wrongful conduct of its employee, in these circumstances? The question necessarily demands some exploration of the evidence about the connection between ICBC's security procedures and the security lapse that occurred, as well as a weighing of the policy considerations involved. It is reasonable to conclude that a factual matrix is necessary in order to fairly address whether ICBC's conduct materially enhanced the possibility of committing the breach of privacy, and to determine the connection between the impugned conduct and ICBC's conduct. In other words, to clearly determine how public policy considerations affect the viability of the vicarious liability claim, some evidence is required.

[29] ICBC submits in the further alternative that ss. 73 and 79 of the *Freedom of Information and Protection of Privacy Act* bar recovery for vicarious liability. Section 79 provides that the *Act* prevails where it conflicts with the provisions of other legislation. Section 73(a) prohibits proceedings against a public body for damages resulting from good faith disclosure or non-disclosure of all or part of a record under the *Act*.

[30] As the disclosure alleged was not a good faith disclosure, s. 73 has no application to the circumstances of this case.

[31] I am of the view that the question of vicarious liability on the facts of this case cannot be resolved on a pleadings motion. It is not plain and obvious the claim would fail. The chambers judge considered that the appellant ought to have the opportunity to develop and argue this aspect of his claim. I see no error in her conclusion.

[32] For these reasons I would dismiss ICBC's cross-appeal.

(b) Section 30 of the Freedom of Information and Protection of Privacy Act

[33] The appellant characterizes his claim as one based on ICBC's negligence in the implementation and supervision of its statutorily mandated security arrangements under s. 30. The appellant asserts that ICBC's alleged failure to comply with s. 30 creates a private law duty of care.

[34] The Amended Notice of Civil Claim states that ICBC breached this alleged duty in the following ways (at Part 3, para. 5):

> a. In failing to have any or adequate system in place to prevent unauthorized access to personal information;
>
> b. In failing to have any or adequate training for employees or agents to prevent unauthorized access to personal information;
>
> c. In failing to have any or adequate system in place for detecting unauthorized access to private information;
>
> d. In failing to have any or any adequate security in place to protect from unauthorized access to private information;
>
> e. In failing to correct or improve failures of the Defendant's systems and policies in the past which have failed to prevent unauthorized access to personal information. [sic]
>
> f. In failing to reasonably investigate, or investigate at all, the character, background and qualifications of the Employee who had access to its customers [sic] private information;
>
> g. In failing to investigate reports of breaches of privacy by the Employees when it knew or ought to have know [sic] that such breaches were occurring;
>
> h. In failing to prevent the breaches of privacy by the Employee when it knew or ought to have known that the breaches of privacy would occur;
>
> i. In failing to exercise reasonable or any supervision over the Employee, or in the alternative, in failing to implement reasonable or any programs or procedures for such supervision, which would have disclosed or prevented the privacy breaches;
>
> j. In failing to inform the Plaintiff promptly upon learning of the privacy breaches that his privacy had been breached thus exposing him to additional, unnecessary risks of harm.

[35] I agree with the chambers judge that the starting point in this analysis is the Supreme Court of Canada's decision in *Saskatchewan Wheat Pool.*

[36] In *Saskatchewan Wheat Pool*, the plaintiff Wheat Board sued the defendant Wheat Pool for delivering infested grain out of a grain elevator, contrary to s. 86(c) of the *Canada Grain Act*, 1970-71-72 (Can.), c. 7. Significantly, the Wheat Board did not advance a claim in negligence; its claim was framed only as a claim for breach of a statute.

[37] Writing for the Court, Dickson J. (as he then was) declined to recognize a nominate tort of statutory breach, holding that "[b]reach of statute, where it has an effect upon civil liability, should be considered in the context of the general law of negligence" (at 225). Dickson J summarized the principles arising out of the case at 227 to 228 of the decision:

> 1. Civil consequences of breach of statute should be subsumed in the law of negligence.
>
> 2. The notion of a nominate tort of statutory breach giving a right to recovery merely on proof of breach and damages should be rejected, as should the view that unexcused breach constitutes negligence *per se* giving rise to absolute liability.
>
> 3. Proof of statutory breach, causative of damages, may be evidence of negligence.
>
> 4. The statutory formulation of the duty may afford a specific, and useful, standard of reasonable conduct.
>
> 5. In the case at bar negligence is neither pleaded nor proven. The action must fail.

[38] In summary, *Saskatchewan Wheat Pool* is authority for the proposition that there is no nominate tort of breach of statutory duty, and that generally, any civil liability arising as a result of a breach of statute should be considered in the context of the law of negligence.

[39] I note parenthetically that unlike *K.L.B.*, upon which the appellant relies, there is no pre-existing private law duty of care or underlying tort analogous to s. 30 of the *Freedom of Information and Protection of Privacy Act*. It was not argued in *K.L.B.* that recovery at common law was precluded on the basis of *Saskatchewan Wheat Pool*.

[40] The chambers judge also relied on *Holland v. Saskatchewan*, 2008 SCC 42. *Holland* involved a group of farmers who had refused to execute an indemnification and release clause required by the Saskatchewan Minister of Agriculture as a precondition to registering for a program. As a result, the Minister downgraded the farmers' herd certification level, devaluing their herds. The farmers successfully sought judicial review, and it was determined that the Minister lacked the authority to require acceptance of the indemnities. However, despite this judicial decree, the Minister took no steps to upgrade the farmers' herd certification level or compensate them for their losses. As a result, the farmers initiated a class action, alleging (among other things) negligence. That negligence claim was struck by the Saskatchewan Court of Appeal as disclosing no cause of action (see: *Holland v. Saskatchewan*, 2007 SKCA 18).

[41] The Supreme Court of Canada allowed the appeal in part, although agreeing with the Saskatchewan Court of Appeal insofar as it is relevant to this appeal. In so doing, it agreed with that Court's characterization of the claim in negligence as a claim for "negligently acting outside the law", describing the imputed wrong as a breach of statutory duty.

[42] McLachlin C.J., speaking for the Court, outlined the alleged acts of negligence at para. 7 as follows:

> The statement of claim, read generously as required in an application to strike, focused mainly on two alleged acts of negligence: requiring the game farmers to enter into the broad indemnification agreement, and down-grading the status of those who refused to do so. In both cases, the alleged fault may be described as failing to act in accordance with the authorizing acts and regulations.

[43] The statement of claim in *Holland* explicitly alleged a duty of care to ensure the legislative framework at issue was "administered in accordance with the law".

[44] McLachlin C.J. emphasized that the law recognizes no action for negligent breach of a statutory duty, and (relying on *Saskatchewan Wheat Pool*), that a mere breach of statute does not constitute negligence (at para. 9). In the absence of a recognized duty of care of government bodies to avoid breaching statutes by acting

outside or contrary to the law, the Court held that the question of the existence of a new duty of care fell to be determined by application of the analysis in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) as refined in *Cooper v. Hobart*, 2001 SCC 79. *Holland* therefore directs courts to apply the *Anns/Cooper* analysis where a negligent breach of a statute is alleged.

[45] McLachlin C.J. upheld the Saskatchewan Court of Appeal's application of the *Anns/Cooper* test to the facts of the case. Richards J.A. (now Chief Justice of Saskatchewan) first concluded that there was no recognized duty of care analogous to that being advanced by the appellants. He then asked whether, under the circumstances, a new duty of care ought to be recognized. Richards J.A. resolved this question with reference to the residual policy concerns addressed at the second stage of the *Anns/Cooper* analysis, finding it unnecessary to consider the facts as they related to foreseeability/proximity.

[46] Strong policy considerations militated against recognition of a duty of care in *Holland*. At para. 43 of the Court of Appeal's judgment (endorsed by the Supreme Court of Canada), Richards J.A. said the following:

> …the respondent's theory of liability would fundamentally shift the way in which the public and private spheres historically have carried the consequences or burden of governmental action which is shown to be ultra vires. I see no policy reason which would warrant such a dramatic revision in the shape of the law and, as indicated above, see much which cuts tellingly against shaping the law in the manner sought by the respondent.

[47] The appellant, like the farmers in *Holland*, alleges a negligent breach of a statute. In my view, this case (like *Holland*) may be disposed of with reference to only the second stage of the *Anns/Cooper* test, without explicit consideration of the first stage of the *Anns/Cooper* analysis. (It is not disputed that there is no recognized duty of care analogous to the duty asserted here.)

[48] At the second stage, the court asks whether, notwithstanding foreseeability of harm and proximity, there exist residual policy considerations that would negate recognition of a duty of care. These policy considerations include factors such as the spectre of indeterminate liability; questions concerning the distinction between

liability for “policy” or “operational” decisions; and consideration of statutory remedies contained in the legislation (*Cooper* at para. 38; *Scheuneman v. Canada (Human Resources Development)*, 2005 FCA 254 at paras. 45-47).

[49] Assuming (without deciding) that foreseeability and proximity could be established in this case, it is my view that no duty of care could be recognized because of residual policy concerns.

[50] First, as ICBC submits, recognition of a duty in these circumstances raises the spectre of indeterminate liability. Because the source of the alleged duty or obligation arises solely out of *Freedom of Information and Protection of Privacy Act*, s. 30, every public body collecting personal information could be subject to the same private law duty of care.

[51] Other reasons arise out of the broad and purposive manner in which s. 30 is drafted. Section 30 does not legislate a specific standard of care. The duty is to “make reasonable security arrangements”. “Reasonableness” denotes a range of acceptable conduct. This suggests a public body may make its own policy decisions as to the manner in which it fulfills this statutory obligation. The duty is therefore a contextual one, and would no doubt vary depending on the nature of the business of the particular body. Furthermore, there is nothing in the broad wording of the section that suggests it should found a new private law duty of care to an individual, as opposed to the public at large.

[52] Third, a review of the pleading indicates that the core of the appellant’s claim in negligence is the imposition of liability based on the adequacy of security measures that ICBC undertook, as a matter of policy, pursuant to s. 30. The appellant describes the duty imposed on ICBC as one which “obligated [ICBC] to make reasonable security arrangements against unauthorized access, use and disclosure of the Plaintiff’s private information,” borrowing directly from the language of s. 30. He argues that ICBC breached that duty in a variety of ways, as set out above. His objections appear to rest chiefly with the reasonableness of the measures themselves, rather than the manner or extent to which such “reasonable”

security measures were actually carried out. The policy decisions of public bodies are not actionable in negligence: *Cooper* at para. 38.

[53] Finally, the availability of administrative remedies under *Freedom of Information and Protection of Privacy Act* militates against the recognition of a duty of care. As ICBC submits, the *Freedom of Information and Protection of Privacy Act* provides a comprehensive complaint and remedy scheme for violations of s. 30 (or violations of a public body's duty to make reasonable security arrangements to protect personal information). Where a statute comprehensively regulates the matter at issue by, for example, establishing an institution or office administering and enforcing a regulatory program, it is proper to infer that the legislature did not intend parallel common law remedies to exist: at Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markam: Butterworths, 2002) at 350.

[54] Section 37 of the *Freedom of Information and Protection of Privacy Act* creates the office of the Information and Privacy Commissioner, who (under s. 42(1)) is responsible for monitoring how the *Act* is administered to ensure its purposes are achieved. An examination of the specific measures contained in the *Act* points to an inference of legislative intention that the Commissioner, not the courts in the context of a private law civil suit, has supervisory responsibility over the adequacy of a public body's informational security arrangements.

[55] Section 42(2) specifically empowers the Commissioner to investigate and attempt to resolve complaints that a public body is not fulfilling a statutory duty:

> (2) Without limiting subsection (1), the commissioner may investigate and attempt to resolve complaints that
>
> (a) a duty imposed under this Act has not been performed

[56] Section 44 of the *Act* accords the Commissioner broad powers to conduct investigations or audits pursuant to s. 42.

[57] Section 58 sets out the orders that the Commissioner may make following an inquiry. Specifically, ss. 58(3) and (4) read as follows:

> (3) If the inquiry is into any other matter, the commissioner may, by order, do one or more of the following:
>
> > (a) confirm that a duty imposed under this Act has been performed or require that a duty imposed under this Act be performed;
> >
> > (b) confirm or reduce the extension of a time limit under section 10 (1);
> >
> > (c) confirm, excuse or reduce a fee, or order a refund, in the appropriate circumstances, including if a time limit is not met;
> >
> > (d) confirm a decision not to correct personal information or specify how personal information is to be corrected;
> >
> > (e) require a public body or service provider to stop collecting, using or disclosing personal information in contravention of this Act, or confirm a decision of a public body or service provider to collect, use or disclose personal information;
> >
> > (f) require the head of a public body to destroy personal information collected in contravention of this Act.
>
> (4) The commissioner may specify any terms or conditions in an order made under this section.
>
> [Emphasis added.]

[58] Section 58(3)(a) responds directly to contraventions of statutory duties under the *Act*, such as the duty in s. 30.

[59] Under s. 59(1), the head of a public body must comply with an order of the Commissioner within 30 days, unless an application for judicial review is brought. Section 59.01 allows orders made under s. 58 to be filed with the Supreme Court and provides that it is of the same force and effect as a Supreme Court judgment. Deliberate failure to comply with an order is designated an offence under s. 74(2).

[60] Additionally, the *Act* creates a number of "privacy protection offences" under s. 74.1, enforceable against a corporation with a fine of up to $500,000. These include disclosure by an employee of a public body of personal information in a manner not authorized under the *Act* (see s. 30.4).

[61] It is noteworthy that the *Act* does not create a cause of action in damages for breach of its provisions. The absence of such a provision may be contrasted with its presence in s. 57 of the *Personal Information and Protection Act*, S.B.C. 2003, c. 63

which regulates the collection and disclosure of personal information by private actors, as opposed to public bodies.

[62] I agree with ICBC's submission that the foregoing constitutes a comprehensive statutory framework for dealing with conduct breaching s. 30 of the *Freedom of Information and Protection of Privacy Act*.

[63] It is therefore my view that a duty of care should not be recognized for public policy reasons. The determination that there is no private law duty of care rests on policy considerations that do not require consideration at trial of the factual matrix beyond that disclosed in the pleadings.

VI. Disposition

[64] I would dismiss the appeal and the cross-appeal.

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Mr. Justice Groberman"