**“It Shouldn’t be Small Potatoes: The Future of Civil Damage Awards under** **Canada’s Personal Information Protection Legislation**”

By Professor Shannon O’Byrne[[1]](#footnote-2)\* and Professor Avner Levin[[2]](#footnote-3)\*\*

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*The Personal Information Protection and Electronic Document Act (PIPEDA) is well known as federal legislation governing the protection of personal information in the private sector. This article, published over two parts, focusses on a lesser explored but particularly concerning aspect of PIPEDA, namely the low damage awards (averaging between $3,000 to $5,000) granted by courts to applicants who establish a breach of the Act and the low number of actual applications (24 applications in 20 years). Chronically low monetary awards threaten PIPEDA’s legislative objective of recognizing the individual’s right of privacy in their personal information. As the low number of applications reflect, when it makes no economic sense to do so, otherwise deserving complainants will be discouraged from seeking damages or simply driven to pursue solutions such as class actions. PIPEDA’s damage provision thereby stands to wither away from disuse.*

*This article offers a three-fold solution to insufficient quantum and is inspired more generally by the functional approach to monetary damages presented by Justice Cromwell in an Isaac Pitblado lecture. First, damage quanta under PIPEDA must more rigorously reflect the status of personal information protection legislation, including its constitutional overlay and link to what have been termed “dignitary” torts such as the common law privacy torts and defamation. Second, courts should measure quantum based on insights from torts closely related to breach of privacy under PIPEDA which reflect a higher quantum. Third, courts must firmly reject the Federal Court’s 2010 decision in Randall v Nubody’s Fitness Centres which held that damages under PIPEDA are only recoverable in “the most egregious situations.” Egregiousness is not an ingredient required by the Act and wrongly reduces its scope.*

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\*\*Part Two of this article is forthcoming in the June 2022 issue of the Advocates’ Quarterly.

**Part One: The Nature and Enforcement of the Privacy Interest under PIPEDA**

**Introduction**

On April 19, 2021, the federal government’s Bill C-11 (the *Digital Charter Implementation Act*, 2020[[3]](#footnote-4)) received second reading[[4]](#footnote-5) and, *inter alia,* proposed a significant new piece of private-sector data privacy legislation called the *Consumer Privacy Protection Act* (*CPPA*).[[5]](#footnote-6) *CPPA* included substantive changes[[6]](#footnote-7) to the *Personal Information Protection and Electronic Document Act (PIPEDA),*[[7]](#footnote-8)the legislation which currently governs the protection of personal information in the private sector, and was in response to almost two decades of repeated calls for reform. [[8]](#footnote-9) Though *CPPA* died on the order paper, its introduction provides a timely opportunity to assess whether *PIPEDA* is meeting its expressed legislative purpose of recognizing “the right of privacy of individuals with respect to their personal information”[[9]](#footnote-10) in the context of damages. The following article offers just such an assessment. Coming some 20 years after the enactment of *PIPEDA*, we hope that this article will prove to be useful on its own footing but also in the pressing context of future legislative reform.

This article focusses on how courts under *PIPEDA* quantify monetary awards for privacy breaches in a commercial context. As will be discussed, these awards are regrettably deficient for being unduly low – estimated at an average of $3,000 to $5,000 per claim[[10]](#footnote-11) – and thereby undermine *PIPEDA’s* legislative efficacy. Though a low damage award may be eminently justifiable in any given case, chronically low quanta threaten the policy goals and interests of *PIPEDA* as well as, presumably, the policy goals and interests of any successor legislation seeking to protect personal information. Put another way, when it makes no economic sense to do so, otherwise deserving complainants will be discouraged from seeking damages[[11]](#footnote-12) or simply driven to pursue solutions such as class actions.[[12]](#footnote-13)

This article offers a three-fold solution to the problem of insufficient quantum. First, damage quanta must more rigorously reflect the goals and status of personal information protection legislation including its constitutional overlay and link to what have been termed “dignitary” torts such as the common law privacy torts and defamation. Second, courts should measure quantum based on insights from torts closely related to breach of privacy under *PIPEDA*. In these areas, damage awards are noticeably higher. Third, courts must firmly reject the Federal Court’s 2010 decision in *Randall v Nubody’s Fitness Centres* which held that damages under section 16 of *PIPEDA* are only recoverable in “the most egregious situations”[[13]](#footnote-14) and “where the breach has been one of a very serious and violatingnature.”[[14]](#footnote-15) In requiring egregious circumstances, the court inappropriately adds criteria to what the governing legislation requires and sets such a stunningly high bar for recovery, it trenches on the test for punitive damages.[[15]](#footnote-16)

This article is published in two parts. Part One, which follows, discusses *PIPEDA* damages in light of the functions and interests they are intended to serve. It is divided into several sections. Section I provides overall context by offering a primer on dispute resolution and damage claims under *PIPEDA*. Section II sets the stage for critiquing *PIPEDA* damage awards by describing the functional approach to monetary damages offered by Justice Cromwell in a 2010 Isaac Pitblado lecture.[[16]](#footnote-17) This same section offers an analysis of the judicially recognized values and interests protected by *PIPEDA* as these are the goals and interests to which a damage award must respond. For the same reason, it assesses the statutory claim as part and parcel of what are called dignitary torts, an area where damage awards tend to be more significant. Section III provides some brief conclusions.

Part Two of this article, forthcoming in the June 2022 issue of The Advocates’ Quarterly, offers a critique of *PIPEDA* damages in light of Part One. It begins, in Section I, by assessing case law under *PIPEDA* and concludes that its low quanta compromise privacy values and interests by discouraging their enforcement. Section IIsummarizes the major deficiencies of *CPPA* in relation to damages. Section III offers some brief overall conclusions. Note that it is beyond the scope of this article to consider class action proceedings in relation to alleged *PIPEDA* breaches, except to observe that they have developed in response to the low quanta awarded over the years.[[17]](#footnote-18) In this way, they have been a tactical response to the principled issue of inadequately low quanta discussed in this article.

**Section I: A Primer to Dispute Resolution and Damage Claims under *PIPEDA***

1. ***PIPEDA*’s Legislative Process**

In 1998, Canada’s federal government created the Industry Canada Task Force on Electronic Commerce, a central objective of which included the development of “a national policy for protecting the privacy of personal information while still allowing for the flow of information necessary to participate in the global information economy.”[[18]](#footnote-19) An important result in 2000 was the creation of private-sector data privacy legislation,[[19]](#footnote-20) the afore-mentioned *PIPEDA.*[[20]](#footnote-21)

*PIPEDA* is detailed and beyond the scope of this article to comprehensively assess. Most relevant to our purposes is that *PIPEDA* sets rules governing private information in a commercial context. Those who believe that their personal information has been wrongfully collected or handled by an organization can make a complaint to the privacy commissioner[[21]](#footnote-22) who has the power under *PIPEDA* to prepare a report in response but no jurisdiction to award damages or other form of relief. Upon receipt of the Commissioner’s report or notification that the investigation has been discontinued, the complainant can seek a court hearing under section14(1) “in respect of any matter in respect of which the complaint was made, or that is referred to in the Commissioner’s report”, as long as the matter is covered by the relevant clauses. The court conducts the hearing on a *de novo* basis[[22]](#footnote-23) and is statutorily empowered to award civil damages, “including damages for any humiliation that the complainant has suffered” under section 16(c).[[23]](#footnote-24)

1. **Critique of *PIPEDA***

There have been calls to reform aspects of *PIPEDA* over the years,[[24]](#footnote-25) which future legislation will presumably seek to address. For instance, unlike *PIPEDA, CPPA* no longer refers to personal information protection principles governing commercial activity in a separate, mostly non-binding schedule.[[25]](#footnote-26) The updated principles (plus a few new principles) have been incorporated into *CPPA* explicitly as organizational obligations, and form a direct part of the proposed legislation.[[26]](#footnote-27) Such an approach provides better recognition and enforcement of the right of privacy because it moves beyond a mostly non-binding schedule to requiring compliance with specific rules.

Another critique of *PIPEDA* concerns the relative powerlessness of the Privacy Commissioner.[[27]](#footnote-28) Indeed, the bulk of Privacy Commissioner’s authority is to hear a complaint[[28]](#footnote-29) as well as issue a report containing findings and recommendations.[[29]](#footnote-30) Under *CPPA*, by way of contrast, the reach of the Privacy Commissioner’s authority is markedly broadened to include the power to issue decisions,[[30]](#footnote-31) compliance orders,[[31]](#footnote-32) and recommendations on penalties.[[32]](#footnote-33)

Yet another critique of *PIPEDA* is that it lacks teeth on the enforcement front. A good example has been the lack of regard to *PIPEDA* shown by Facebook over the years.[[33]](#footnote-34) In response, and though similar to *PIPEDA* in providing a mechanism whereby complaints can be brought before the Privacy Commissioner of Canada,[[34]](#footnote-35) *CPPA* also proposes a new tribunal, the Personal Information and Data Protection Tribunal (Tribunal),[[35]](#footnote-36) with notable powers. This Tribunal is to act as an appeal level for decisions and orders made by the Privacy Commissioner in response to a complaint[[36]](#footnote-37) and can impose considerable monetary penalties and fines.[[37]](#footnote-38) Penalties can rise to the higher amount of either CAD $10 million or 3% of revenue.[[38]](#footnote-39) Fines could reach the higher amount of either CAD $25 million or 5% of revenue.[[39]](#footnote-40)

Given these particularly significant financial consequences for breach, *CPPA* appears to manifest a contemporary and heightened concern with accountability and enforcement of personal information protection. We expect future legislation to do the same, and transform the regulation of personal information from the informal, ombudsperson complaint resolution model of *PIPEDA*,[[40]](#footnote-41) to a more formal, administrative dispute resolution model with considerable enforcement powers. In this way, the privacy interest is more effectively recognized.

The focus of this article, as noted, is on the damages awarded by a court under *PIPEDA*. Under *PIPEDA*, courts have ruled that applications for damages proceed *de novo,[[41]](#footnote-42)* with the applicant carrying the burden to “present evidence of a breach of the Act.”[[42]](#footnote-43) As the court in *Biron v RBC Royal Bank* succinctly observes in relation to *PIPEDA*:

The report of the Assistant Privacy Commissioner does not bind the Court. The Federal Court of Appeal explained at paragraph 71 of *Englander* that “[t]he Commissioner… is not a tribunal and has no decision-making power under the Act. At best, the Commissioner can form an opinion on the issue and include it in his report. As the report is not a ‘decision,’ there can be no conflict with the decision of a court or tribunal found to have exclusive, concurrent or overlapping jurisdiction to determine the issue”. The Court must examine the conduct of… [the respondent] against which the complaint was filed… Since this is a *de novo* review of the Commissioner’s findings, the Court is not bound by the report of the Privacy Commissioner….[[43]](#footnote-44)

Accordingly, and as the court in *Blum* observed, “the report of the Commissioner, if put in evidence, may be challenged or contradicted like any other document adduced in evidence.”[[44]](#footnote-45)

Whether this approach will be followed in future legislation is an open question, however. For example, section 106(1) of *CPPA* provides for a “cause of action against the organization for damages for loss or injury that the individual has suffered as a result of the contravention.” Such an action can proceed when the Commissioner has made a finding that the organization has contravened the Act (and that finding has not been appealed or the time for appealing has expired) or that the Tribunal has dismissed an appeal of the Commissioner’s finding of contravention or has itself made such a finding.[[45]](#footnote-46)

The difficulty is that *CPPA* does not specify whether this cause of action refers to a full trial of the matter (a trial *de novo*) or instead, refers to a judicial assessment of quantum alone. There is an argument that the action under *CPPA* is not *de novo* on the basis that – reverse engineering from *Englander* quoted above – the process under *CPPA* can produce a final finding of legislative contravention which findings can be treated as *res judicata*. However, such a theory is no replacement for legislative clarity and *CPPA* stumbles on this front. Commentators have observed that there is no explicit provision in *CPPA* that limits the court or addresses “the weight, if any, to be given to the findings of the Commissioner or the Tribunal in any such proceedings….”[[46]](#footnote-47)

1. **Comparable Provincial Acts**

As summarized in Table 1 (*infra*), several provinces have passed personal information privacy protection legislation. Such legislation functions as the provincial equivalent of *PIPEDA* for the protection of personal information in the private sector[[47]](#footnote-48) and is not to be confused with provincial legislation creating the statutory privacy torts discussed in Section II(B). For ease of reference, the article will refer to the provincial acts protecting personal information as *PIPA* (Personal Information Protection Acts) versus *PIPEDA* (which is reserved for the federal legislation alone). Alberta’s *PIPA* provides as follows:

60(1) If the Commissioner has made an order under [section 52](https://www.canlii.org/en/ab/laws/stat/sa-2003-c-p-6.5/latest/sa-2003-c-p-6.5.html?autocompleteStr=persona&autocompletePos=1#sec52_smooth) against an organization and the order has become final as a result of there being no further right of appeal, an individual affected by the order **has a cause of action against the organization for damages for loss or injury that the individual has suffered as a result of the** breach by the organization of obligations under this Act or the regulations [emphasis added].[[48]](#footnote-49)

British Columbia’s *PIPA*, by way of possible contrast, requires “actual harm” (versus Alberta’s “loss or injury”). It states:

57(1) If the commissioner has made an order under this Act against an organization and the order has become final as a result of there being no further right of appeal, an individual affected by the order **has a cause of action against the organization for damages for actual harm that the individual has suffered as a result of the breach** by the organization of obligations under this Act [emphasis added].[[49]](#footnote-50)

Neither British Columbia nor Alberta’s *PIPA* provides a definition of ‘loss’, ‘injury’ or ‘actual harm’.

However, in the context of an application for security for costs, the court in *Kugler v Newman* confirmed what would seem to be non-controversial, namely that “loss or injury” under *PIPA* is not limited to claims where “specific monetary loss” can be established.[[50]](#footnote-51) Minimally, if the individual can prove pecuniary and/or non-pecuniary harm as part of their action, an award of damages would seem to follow. *Kugler* also notes that a finding of a breach of privacy is “*res judicata* under the order issued pursuant to section 52 of *PIPA*.”[[51]](#footnote-52) But beyond this, the court appears to suggest – albeit without amplification – that breach of *PIPA* is actionable *per se*, given its statement that Kugler would likely be awarded “some damages simply due to the violation of his privacy rights.”[[52]](#footnote-53) *Kugler*’s *obiter* view that moral or symbolic damages are seemingly recoverable under *PIPA* has not been judicially considered elsewhere and is arguably too expansive given the express legislative requirement of “loss or injury.”

We return to the broader question of moral or symbolic damages in Part Two of this article but observe that what is compensable under both PIPAs remains unlitigated and uncharted. Indeed, while both *PIPAs* were passed in 2003, there is virtually no case law concerning them and, to the best of our knowledge, no instance of a case wherein damages were actually awarded. This absence of case law – over a more than 20-year period – may reflect a general conclusion by counsel that the *PIPAs* require pecuniary and/or non-pecuniary loss as the foundation for recovery. If our conclusion is correct, the wording of *PIPA*s make them an even less attractive vehicle for litigation than *PIPEDA*, a serious deficiency that future federal legislation should very much avoid.

One final point with respect to *PIPEDA’*s statutory application for damages is that it does not preclude private actions, including under one of the common law privacy torts*[[53]](#footnote-54)* depending on the facts and subject to the principle against double recovery and duplicative proceedings.[[54]](#footnote-55)Private actions might potentially be more expeditious[[55]](#footnote-56) but the plaintiff would also have the burden of proving that an organization is liable for the relevant tort, which might be more onerous than simply proving a violation of *PIPEDA.*[[56]](#footnote-57) There are also statutory privacy torts in several provinces that could be a basis for immediate action. These common law and statutory options are discussed in more detail below. The point is that such options are important because access to the statutory right of action under *PIPEDA* is postponed until there is a report by the Commissioner.[[57]](#footnote-58)

What drives analysis in this two-part article is whether precedents under *PIPEDA* have been true to their purpose in relation to damage quantification. This is an important enquiry given the role of Canada’s private legal action framework and in anticipation of successor legislation which presumably will be required to cover similar terrain. Clearly, if the precedents have not been true to their purpose – and we contend that in important ways, they have not – then future courts should decline to follow them to that extent,[[58]](#footnote-59) and successor legislation should ensure that its purpose is properly reflected in the right of action that it creates.

**Section II: Enforcing the Privacy Interest**

1. **The Functional Approach to Damages and the Interests Protected by *PIPEDA***

Writing extra-judicially in 2010, Justice Cromwell described a “functional” approach to awarding money remedies.[[59]](#footnote-60) Following this method, the court is required to examine the nature of the harm at issue[[60]](#footnote-61) as well as the interest which the substantive law protects.[[61]](#footnote-62) It is then to provide a monetary remedy that address these matters “in a way that furthers the purposes of the underlying substantive law.”[[62]](#footnote-63) This is both a salutary and non-controversial strategy.[[63]](#footnote-64)

As one example of the functional approach in action, Cromwell J relied on *Ward v City of Vancouver*,[[64]](#footnote-65) a case which offers a detailed analysis of damages under Section 24 of the *Canadian Charter of Rights and Freedoms.*[[65]](#footnote-66) *Ward* is particularly significant to the law of privacy protection and is a case to which this article returns in Part Two, forthcoming in the June 2022 issue of The Advocates’ Quarterly. For now it is sufficient to observe that, as summarized by Cromwell J, *Ward* includes the insight that the claimant seeking *Charter* damages must show that they would "serve a useful function or purpose … and in particular that they further the general objects of the *Charter*.”[[66]](#footnote-67) In this way, the judicial focus is “first on the nature of the harm suffered or the interest sought to be protected, and then on the ways in which a money remedy may respond to that harm to serve to protect that interest.”[[67]](#footnote-68)

The functional approach to damages is an outgrowth of several legal developments including that compensatory damages can also have broad purposes in relation to deterrence and punishment.[[68]](#footnote-69) On a related front, it absorbs the insight that, as summarized by Cromwell J, courts are to take a “broad and flexible view of the capacity of the monetary award to do more than simply restore the plaintiff to his or her pre-breach economic position”[[69]](#footnote-70) and that monetary damages “may be appropriate even where it does not, in any meaningful sense, related to an economic loss suffered by the plaintiff.”[[70]](#footnote-71) Deploying such insights in the context of non-pecuniary claims in defamation as an example, Cromwell J observes that a general damages award should attempt to restore “the victim’s personal privacy and dignity, demonstrating at least symbolically, that those rights are deeply valued by the community and have been vindicated.”[[71]](#footnote-72)

Applying the model described by Cromwell J, one can easily identify the bifurcated goals that are safeguarded by *PIPEDA* because they are self-declared: protection of the individual’s privacy rights in relation to personal information, on the one hand, and the organization’s need to collect, use, or disclose the individual’s personal information, on the other.[[72]](#footnote-73) In this regard, the Act recognizes the organization’s interest to conduct itself freely while constraining that conduct in relation to personal information by what “a reasonable person would consider appropriate in the circumstances.”[[73]](#footnote-74)

To define appropriate parameters, the court in *Nammo v TransUnion of Canada Inc* held that *PIPEDA*’s reasonableness obligations are “independent obligations”[[74]](#footnote-75) which cannot be discharged by the enterprise simply complying with relevant industry standards[[75]](#footnote-76) or consumer protection legislation,[[76]](#footnote-77) to name two ex­­­­amples. In this way, the court protects how an organization chooses to govern itself while shutting down defenses that would undermine the Act’s purview. In *Townsend v Sun Life Financial,* the court also protected organizational self-governance by refusing to hold a business “to the standard of perfection,”[[77]](#footnote-78) particularly where, on the facts, the mishandling of the complainant’s information resulted in only minimal unauthorized disclosure[[78]](#footnote-79) and the business “already had a detailed protocol before the occurrence of what can only be considered as a human error.”[[79]](#footnote-80) At the same time, *PIPEDA* exacts accountability from organizations on several fronts, including through one of its “central objects”[[80]](#footnote-81) which is to “encourage those who collect, use and disclose personal information to do so with a degree of accuracy appropriate to the use to which the information is to be put and to correct errors quickly and effectively.”[[81]](#footnote-82) Another judicially observed objective of *PIPEDA* is that organizations “are diligent in retaining, as secure, personal information.”[[82]](#footnote-83)

There is considerable case law to assist in defining the protection of privacy rights in the private law sphere, including under *PIPEDA*. At bottom, the rights are quasi-constitutional, as postulated in the 2006 ground-breaking decision of *Somwar v McDonald’s Restaurants of Canada Ltd*.[[83]](#footnote-84) While there are many cases which discuss the nature of the privacy interest at large, *Somwar* is particularly relevant to this article because it considers privacy in the context of a complaint that bears many of the hallmarks of a *PIPEDA* breach. Indeed, at issue in *Somwar* was an unauthorized credit bureau check,[[84]](#footnote-85) similar or identical to complaints about credit checks that have since formed the basis of successful applications under *PIPEDA,* including in *Nammo* and in *Chitrakar v Bell TV*.[[85]](#footnote-86)The key difference, however, which took the *Somwar* matter out of *PIPEDA* is this: Whereas Chitrakar’s complaint involved a customer-business relationship, the relationship in *Somwar* was employer-employee. Breaches of privacy in employment relationships are also caught by *PIPEDA* but only when the employer is in a federally regulated industry,[[86]](#footnote-87) which was not the case here.

With *PIPEDA* off the table, the plaintiff in *Somwar* presumably had to follow a different tack and sought to establish a new tort of invasion of privacy to ground his complaint. Justice Stinson denied the defendant’s application to strike the statement of claim as disclosing no reasonable cause of action, concluding that it was not plain and obvious it would fail.[[87]](#footnote-88) In discussing the contours of the as-yet-unrecognized action for invasion of privacy in a commercial context, the court relied on constitutional law pronouncements from the Supreme Court of Canada. Significantly, Justice Stinson relied on the Supreme Court decision in *R v Dyment*[[88]](#footnote-89) as affirming the “importance of privacy as a value worthy of constitutional protection”[[89]](#footnote-90) and that privacy is based “on the notion of dignity and integrity of the individual.”[[90]](#footnote-91) He also relied on the Supreme Court of Canada in *Hunter v Southam[[91]](#footnote-92)* regarding Section 8 of the *Charter[[92]](#footnote-93)* (the right against unreasonable search and seizure) as constitutionally embodying “the right to be let alone by other people.”[[93]](#footnote-94)

The Ontario Court of Appeal in the 2012 decision of *Jones v Tsige* has justifiably singled out *Somwar* as containing “perhaps the most coherent and definitive pronouncement in Ontario jurisprudence of the existence of a common law tort of invasion of privacy….”[[94]](#footnote-95) And *Tsige* – which recognized for the first time in Canada the privacy tort of intrusion on seclusion[[95]](#footnote-96) – is itself illuminating in describing the nature of privacy in the private sector. It observed that “*Charter* jurisprudence identifies privacy as being worthy of constitutional protection and integral to an individual's relationship with the rest of society and the state.”[[96]](#footnote-97) It also quoted with approval Justice Binnie’s definition of informational privacy – which forms an important core of *PIPEDA* – as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[[97]](#footnote-98) *Tsige* went on to observe how *Charter* jurisprudence identifies a right to information privacy “as worthy of protection.”[[98]](#footnote-99)

More recently, the majority judgment of the Supreme Court of Canada in the 2017 decision of *Douez v Facebook* confirmed that statutory privacy rights have “been accorded quasi-constitutional status;”[[99]](#footnote-100) reiterated the importance of privacy and its “role protecting one’s physical and moral autonomy”[[100]](#footnote-101) and, in the context of a forum selection clause, emphasized its adjudication as a matter of public policy.[[101]](#footnote-102) Following a similar tack, Justice Abella’s concurring judgment in *Douez* stressed the quasi-constitutional quality of privacy legislation which protects personal information by quoting with approval the following passage from *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*:[[102]](#footnote-103)

The ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy. These are fundamental values that lie at the heart of a democracy. As this Court has previously recognized, legislation which aims to protect control over personal information should be characterized as “quasi-constitutional” because of the fundamental role privacy plays in the preservation of a free and democratic society….[[103]](#footnote-104)

In all these ways, privacy interests advanced in a purely private law context, including through *PIPEDA*, invoke and reflect constitutional values even though, ironically, the *Charter* does not directly apply to such disputes[[104]](#footnote-105) and even though a privacy right is not expressly recognized by the *Charter*.[[105]](#footnote-106) On this front, *Somwar* aptly quoted the following analysis penned by Robyn Ryan Bell (now a judge of the Superior Court of Justice) as follows:

The introduction of the [*Charter*](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html) has impacted upon the development of the tort of invasion of privacy in two ways. First, the values underlying the [*Charter*](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html) include respect for an individual's dignity and autonomy, values which are, in turn, closely tied to respect for and protection of an individual's privacy. Second, the Supreme Court has made it clear in cases [such] as M. (A.) v. Ryan, [1997 CanLII 403 (SCC)](https://www.canlii.org/en/ca/scc/doc/1997/1997canlii403/1997canlii403.html), [1997] 1 S.C.R. 157, that the common law must develop in accordance with [*Charter*](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html) values.[[106]](#footnote-107)

Returning to Justice Cromwell’s functional approach to monetary damages, an important factor in relation to *PIPEDA* awards is this: both the privacy interest of the claimant and the legislation protecting it are quasi-constitutional.[[107]](#footnote-108) These qualities mandate that, generally speaking, *PIPEDA* damages be more than nominal so as to provide effective redress for privacy violations. At the same time, a judicial balancing act is involved since *PIPEDA* damages cannot be unmerited or excessive. Writing from a more generalized, constitutional vantage point, Robert J Sharpe and Kent Roach are quoted with approval by the Ontario Superior Court as follows:

The rights and freedoms guaranteed by the [*Charter*](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-12/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-12.html) are abstract and intangible and thus assessment of the extent of the injury in monetary terms will often be difficult. Low awards for the violation of a [*Charter*](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-12/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-12.html)right might trivialize the right while high awards may create an unjustified windfall for the applicant.[[108]](#footnote-109)

In the very first case to award damages under *PIPEDA*, Justice Zinn in *Nammo* easily recognized its quasi-constitutional quality[[109]](#footnote-110) and that *PIPEDA* must accordingly “be interpreted with its special purposes in mind.”[[110]](#footnote-111) He also carefully and cogently established the relevance of *Charter* cases to awarding *PIPEDA* damages, relying in particular on the Supreme Court of Canada’s analysis in *Vancouver (City) v Ward.[[111]](#footnote-112)*  As Justice Zinn understood the matter, and by extrapolation to *Ward*, an award of damages under *PIPEDA* “must represent a meaningful response to the seriousness of the breach and the objectives of compensation, upholding *Charter* values, and deterring future breaches.”[[112]](#footnote-113) In this way, he emphasized *Ward*’s functional approach to the question of monetary damages and broke new trail. *Nammo* and *Ward* are cases to which this article returns in Part Two, forthcoming in the June 2022 issue of The Advocates’ Quarterly.

Thus far, we have emphasized the constitutional overlay to both *PIPEDA* and the privacy interest, recognition of which is essential to proper compensation. As discussed in the next section, a further, related step is to assess privacy’s intersection with the dignitary torts themselves, both long established and more recently recognized.

1. ***PIPEDA*’s link to dignitary torts**
2. **The Nature of Dignitary Torts**

While the term “dignitary tort” is not widely defined, Kenneth Abraham and Edward White persuasively argue that it protects the dignity interests, such as “freedom from embarrassment, humiliation, ridicule, inaccurate characterization, interference with ‘peace of mind.’"[[113]](#footnote-114) Certainly the link between dignity and privacy is recognized by the Supreme Court of Canada, including in the recent decision of *R v Jarvis*.[[114]](#footnote-115) In *Jarvis*, the Supreme Court observed that while “all aspects of privacy – both from the state and from other individuals – serve to foster the values of dignity, integrity and autonomy in our society, the connection between personal privacy and human dignity is especially palpable.”[[115]](#footnote-116)

Traditional dignitary torts include defamation,[[116]](#footnote-117) battery,[[117]](#footnote-118) intentional infliction of emotional distress[[118]](#footnote-119) and, as argued by Abraham and White, false imprisonment.[[119]](#footnote-120) Using slightly different nomenclature and writing from the perspective of Canadian tort law, John Craig identified such torts under the banner of “the personal torts” (e.g.: assault, battery, false imprisonment and mental distress) and as “premised on the notion that the individual has the right to be free from interference from third parties and to live in security and safety.”[[120]](#footnote-121) Beyond this, he emphasized that the personal torts must generally be understood as “relating to personal interests of a spiritual nature, such as autonomy, liberty, security and dignity.”[[121]](#footnote-122) Jason Varuhas offers a third moniker for these kinds of actions, calling them “vindicatory torts.”[[122]](#footnote-123) He describes such torts as intended “to protect the most fundamental of human and proprietary interests from outside interference, creating zones of protection, and to vindicate these interests in the sense of affirming and reinforcing their importance and that they ought to be maintained inviolate.”[[123]](#footnote-124)

Note, however, that in the context of *PIPEDA* (or the *Charter* for that matter)[[124]](#footnote-125) the privacy interest is not inviolate in the sense of being absolute. As the court observed in *Canadian Civil Liberties Association v Canada*, *PIPEDA* “is an attempt to regulate and balance the many competing rights and duties of individuals and private businesses.”[[125]](#footnote-126) Setting these caveats to the side, there is every reason to add invasion of privacy to the list of dignitary torts. Favouring such a classification,[[126]](#footnote-127) Edward Bloustein observes that privacy intrusions – like assault, battery, or wrongful imprisonments – are offenses to “the reasonable sense of personal dignity”[[127]](#footnote-128) and what “distinguishes the invasion of privacy as a tort from the other torts which involve insults to human dignity and individuality is merely the means used to perpetrate the wrong.”[[128]](#footnote-129)

Accordingly, the following sub-section provides a very brief account of provincial privacy tort legislation and the recently emerging common law torts. The goal is to provide a general sense of the protection of privacy landscape, to emphasize the broad significance of privacy as a dignitary interest, to illuminate the ways in which these torts overlap with and are distinct from claims under PIPEDA, and to consider judicial approaches to quantum for comparative purposes.

1. **The Privacy Torts as Dignitary Torts**

Further instances of privacy taking the form of a dignitary tort are created by statute in British Columbia, Manitoba, Saskatchewan as well as Newfoundland and Labrador.[[129]](#footnote-130) We refer to these statutes as “privacy tort legislation” to distinguish them from *PIPA* legislation which, as discussed in Section 1(C) of this Part, concerns protection of personal information at the provincial level. There are four common law torts protecting the privacy interest from various perspectives. Titled the *Privacy Act* in each instance, privacy tort legislation is similar across the board, with the central provision in the Newfoundland and Labrador Act (for example) stating as follows: “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.”[[130]](#footnote-131) What constitutes the violation of the “privacy of another” is not statutorily defined but examples of conduct that could amount to a privacy tort include eavesdropping, surveillance, or the use of an intimate image and in fact, such conduct establishes a presumption that privacy has been violated under the relevant Act.[[131]](#footnote-132)

Further, the provincial statutory torts do not require proof of damage. They are dignitary, *per* se torts, with the nature of *per se* torts being further developed in Part Two, forthcoming in the June 2022 issue of The Advocates’ Quarterly. Note that, in most cases, individuals are entitled to privacy only if it is reasonable in the circumstances.[[132]](#footnote-133) Significantly, the torts require wilful action (intention), and consent is a defence against such claims,[[133]](#footnote-134) whereas under *PIPEDA*, the issue of consent will already have been dealt with administratively before legal action commences.

Cases brought under privacy tort legislation have largely concerned the respective Privacy Acts tangentially, as part of a larger issue, such as a contested insurance claim,[[134]](#footnote-135) and so the quanta for the breach of privacy piece can not always be easily broken out.[[135]](#footnote-136) However, some cases are free standing, including *Hollinsworth v BCTV*.[[136]](#footnote-137) In this case, the plaintiff successfully sued those responsible for releasing, without permission, a video of the plaintiff undergoing a surgical procedure to have a hair piece attached to his head. He had given permission to his surgeon to take the video but it was only to be used for medical instructional purposes only.[[137]](#footnote-138) Instead, it ended up in the hands of BCTV. The court awarded $15,000 in damages which was affirmed on appeal.[[138]](#footnote-139)

While the court did not expressly address the question of the plaintiff’s dignity in its judgment, it did describe how the plaintiff’s face appeared clearly and unmistakeably on a 6:00 pm newscast aired by BCTV, during a feature on baldness.[[139]](#footnote-140) That this would compromise one’s dignity is implicit. It would also seem that if this event had occurred when *PIPEDA* (or provincial equivalent) were in place, the plaintiff also could have proceeded under those legislative banners as it concerned his personal information collected by a business which was being held for specific purposes only. Additionally, the matter might well have also been actionable under the Appropriation of Name or Likeness tort, discussed *infra*.

More generally speaking, however, the privacy tort legislation is not seen as “applicable” to handling data breach privacy claims according to the British Columbia Court of Appeal in *Tucci v Peoples Trust Company*.[[140]](#footnote-141) Though not explained why by the court, this is presumably because, as noted above, the privacy torts require proof of intention, and a typical data breach claim will argue that the defendant organization had conducted itself negligently, but not intentionally, in its deficient protection of personal information.[[141]](#footnote-142) The appellate court expressed implicit concern over such a gap in statutory coverage and wondered, without deciding, if BC should recognize a common law tort of breach of privacy.[[142]](#footnote-143) Note that though the data breach claim in *Tucci* could presumably have been pursued under *PIPEDA*, this was not a path available to the plaintiffs because the action would have been “time-barred.”[[143]](#footnote-144)

Turning to the common law privacy torts, there are now four in number, having been recognized in some Canadian provinces, most significantly in Ontario.[[144]](#footnote-145) They are all American in origin and follow Dean Prosser’s highly influential article on privacy torts published in 1960.[[145]](#footnote-146) These four common law privacy torts are: Intrusion upon Seclusion; Appropriation of Name or Likeness; Public Disclosure of Private Facts; and Publicity Placing Person in False Light.[[146]](#footnote-147) Like the statutory torts discussed above, the common law privacy torts do not require proof of actual loss or injury. They are *per* se torts in which the harm that requires compensation is found in the invasion of privacy itself.

The tort of Intrusion upon Seclusion traditionally dealt with paradigmatic “invasion of privacy” situations such as covert surveillance or eavesdropping (similar to the statutory torts above)[[147]](#footnote-148) and was first adopted in Canada by the Ontario Court of Appeal case of *Tsige*, noted above.[[148]](#footnote-149) At issue in *Tsige* was the defendant bank employee repeatedly and persistently reviewing – without authorization – the bank records of the plaintiff who was also an employee at the same bank.[[149]](#footnote-150) The connection between the parties was this: the plaintiff was in a common law relationship with the defendant’s ex-husband. In response to the defendant’s misconduct, the Court of Appeal recognized the tort of Intrusion upon Seclusion and defined its “key features” as follows:

[F]irst, that the defendant's conduct must be intentional, within which I would include reckless; second, that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.[[150]](#footnote-151)

The court went on to emphasize that “proof of harm to a recognized economic interest is not an element of the cause of action”[[151]](#footnote-152) and that damages should ordinarily be “modest” due to the “intangible nature of the interest protected.”[[152]](#footnote-153) Seemingly skittish around the notion of intangible loss, the court awarded damages it described as “symbolic”, serving “to vindicate rights or symbolize recognition of their infringement.”[[153]](#footnote-154) Significantly, the court decided that the range of damages should be “conventional” and set a cap for damages for such intangible claims, of no more than $20,000.[[154]](#footnote-155)

Intrusion upon Seclusion seems to be the common law privacy tort that, of the four, is most likely to intersect with *PIPEDA* including, as it turns out, in *Tsige* itself. As the Court of Appeal itself acknowledged, Jones (the plaintiff) could have pursued her matter under *PIPEDA* but such an option was not palatable on the facts for a number of reasons. As the court stated: “[f]irst, Jones would be forced to lodge a complaint against her own employer rather than against Tsige, the wrongdoer. Second, Tsige acted as a rogue employee contrary to BMO's policy and that may provide BMO with a complete answer to the complaint. Third, the remedies available under PIPEDA do not include damages, and it is difficult to see what Jones would gain from such a complaint.”[[155]](#footnote-156) Note that the court on this third point could have stated matters more clearly. Jones would not have been able to immediately seek damages under *PIPEDA* but certainly could do so once the Privacy Commissioner had concluded its investigation.

The second of the common law privacy torts is the Appropriation of Name or Likeness tort, described by the court in *Wiseau Studio, LLC v Harper*, as “well recognized in Canada” but “relatively undeveloped.”[[156]](#footnote-157) According to *Krouse v Chrysler,* the tort involves appropriation of personality "amounting to an invasion of his right to exploit his personality by the use of his image, voice or otherwise with damage to the plaintiff."[[157]](#footnote-158) An example of such a tort, *Krouse v Chrysler* observes, would be using a photo of a celebrity to advertise a product. The tort protects the individual’s dignity and interest in the exclusive use of their own identity by compensating for economic loss and mental distress caused, but it also recognizes a property right that can be licensed and a right of publicity. Indeed, most disputes have been resolved through contract and intellectual property mechanisms, rather than by the privacy tort.[[158]](#footnote-159) This tort also touches upon the foundation of personal information protection, including its core notions of personal control and consent to its uses. For this reason, the tort is also germane to *PIPEDA* but we are unaware of a *PIPEDA* case which actually overlaps with it. Given the sparse number of *PIPEDA* cases to begin with, this is not perhaps surprising.

While there are no recent common law award decisions for this tort to compare with *PIPEDA* awards, a notable statutory tort decision out of British Columbia, *Poirier v Wal-Mart Canada,*[[159]](#footnote-160) is helpful because it covers similar terrain. In this case, Poirier was terminated from his position as a store manager by Wal-Mart, which then proceeded to use his image on flyers for the location he no longer managed.[[160]](#footnote-161) The court found this to a misappropriation of the plaintiff’s personality and image under BC’s statutory privacy tort.[[161]](#footnote-162) The court found that in previous cases, damages ranged from $300 to $35,000 and that the quantum depended primarily on the gravity of the injury to the plaintiff and the conduct of the defendant.[[162]](#footnote-163) Taking this into account, the court awarded Poirier $15,000[[163]](#footnote-164) – an amount higher than in *Tsige* – but it should be noted that in such cases there is almost always compensation for the commercial exploitation of the image, in this case by Wal-Mart.

The third common law tort is known as Public Disclosure of Private Facts and deals with circumstances in which a person reveals personal information about an individual against their wishes,[[164]](#footnote-165) such as, for example, their sexual preferences. In relation to the ingredients for the tort, *Jane Doe 72511 v NM* [*Jane Doe 2018*] states as follows:

To establish liability, the plaintiff must therefore prove that:

(a)        the defendant publicized an aspect of the plaintiff’s private life;

(b)        the plaintiff did not consent to the publication;

(c)        the matter publicized or its publication would be highly offensive to a reasonable person; and

(d)        the publication was not of legitimate concern to the public.[[165]](#footnote-166)

*Jane Doe 2018* dealt with a “revenge porn” scenario whereby the plaintiff’s former intimate partner published sexual images of her without her consent. The defendant’s goal was to cause her humiliation and anguish through their broad publication and dissemination. As a result of such egregious misconduct, the court awarded $100,000 in damages.[[166]](#footnote-167) Likewise, and in another revenge porn case, *Jane Doe 464533 v ND* (*Jane Doe 2016*),[[167]](#footnote-168) damages of $100,000 were awarded. Both these cases involved default judgments, but as the court in *Yenovkian v Gulian* observed, “because the default judgment was set aside in Jane Doe, 2016, the cause of action was recognized anew in Jane Doe 2018.”[[168]](#footnote-169) Certainly, the discrepancy with the award and cap set in *Tsige* is significant and appropriate.

Though such highly personal cases are unlikely to arise under *PIPEDA* (given its focus on private sector businesses), there has been at least one very well publicized data breach case which possibly could have done so. The Ashley Madison data breach concerned a website service for those seeking to have discreet affairs. In 2015, a person or group hacked into the website and then threated to publish the names and other private information of its users. The person or persons apparently went on to fulfill this threat[[169]](#footnote-170) with subsequent suicides by some of those affected.[[170]](#footnote-171)

In response to the data breach, the Privacy Commission of Canada initiated a Commissioner-led complaint along with the Australian Privacy Commission against the company which operated Ashley Madison, namely Avid Life Media Inc (ALM). Together, the Commissions produced “*PIPEDA* Report of Findings #2016-005, August 22, 2016.”[[171]](#footnote-172) While the report issued a series of recommendations and other content that are beyond the scope of this article to explore, our point here is that a customer affected by the Ashley Madison data breach could most certainly have pursued a complaint under *PIPEDA* against ALM and sought damages.[[172]](#footnote-173) In short, while *PIPEDA* and the Public Disclosure of Private Facts tort are unlikely to intersect, it is nonetheless possible.

The last of the four privacy torts is the tort of Publicity Placing Person in False Light or the False Light Tort. This tort was recently recognized in Ontario in *Yenovkian*, which dealt with highly objectionable and reprehensible online posts made by the defendant concerning his ex-wife.[[173]](#footnote-174) More specifically, the court adopted the definition of the tort offered in an American source, namely section 652E of the *Restatement* as follows:

*Publicity Placing Person in False Light*

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.[[174]](#footnote-175)

As the court went on to explain:

while the publicity giving rise to this cause of action will often be defamatory, defamation is not required. It is enough for the plaintiff to show that a reasonable person would find it highly offensive to be publicly misrepresented as they have been. The wrong is in publicly representing someone, not as worse than they are, but as other than they are. The value at stake is respect for a person’s privacy right to control the way they present themselves to the world.[[175]](#footnote-176)

The court also clarified a key difference between the False Light tort and the Public Disclosure of Private Facts tort as follows: “public disclosure of private facts involves true statements, while “false light” publicity involves false or misleading claims.”[[176]](#footnote-177) Given his outrageous misconduct, the defendant in *Yenovkian* was ordered to pay $50,000 in damages for the tort of intentional infliction of mental suffering, $100,000 damages for the tort of invasion of privacy (which referred, according to the judgment, not only to publicity placing the plaintiff in a false light but to public disclosure of private facts), and punitive damages of $150,000.[[177]](#footnote-178)

It would seem that the False Light tort would not easily intersect with a *PIPEDA* scenario. This is because a business or other private sector organization would be highly unlikely make “false or misleading” claims based on personal information they held as opposed to simply mishandling otherwise accurate information in some way. And yet, the very significant *Nammo* case under *PIPEDA* has facts that come close to establishing the False Light tort. *Nammo* concerned a claim for damages under *PIPEDA* and will be discussed in depth in Part Two. For now, it is sufficient to know that Nammo was refused a loan due to an erroneous credit report supplied by the defendant credit agency.[[178]](#footnote-179) Nammo immediately brought to the defendant’s attention that they had mistaken him for someone else but inexplicably, the defendant failed to correct the record with the bank in a prompt and effective way.[[179]](#footnote-180)

In relation to the ingredients for the False Light tort, the argument is this: the credit agency placed Nammo in a false light (stating that he had a bad credit rating when he did not) which would be highly offensive to a reasonable person. Offensiveness is present in the facts since a bad credit rating is a serious mark against a person and is also found in the defendant’s failure to correct its own mistake promptly and properly. As to the second ingredient in the tort, the credit agency had knowledge or acted in reckless disregard as to the falsity of the publicized matter – perhaps in making the mistake itself – but certainly when it failed to promptly and properly alert the bank to its mistake. However, there arguably was insufficient “publicity” to found the cause of action.[[180]](#footnote-181)

As the foregoing seeks to illustrate, the common law privacy torts share links with the privacy interests protected by *PIPEDA*. The shared core is a concern over personal dignity, including who has access to one’s personal information (e.g.: the Intrusion upon Seclusion tort, the Appropriation of Name and Likeness tort, and the Public Disclosure of Private Facts tort) as well as how one is presented to the world (e.g.: the False Light tort). Also pointing to common ground is the extent to which the privacy torts overlap with *PIPEDA* and could equally be pursued as a *PIPEDA* claim. And yet, the damage quanta associated with the common law privacy torts is higher than is found under *PIPEDA* and sometimes dramatically so.

Part of the explanation for a higher quantum is simply this: the privacy torts generally require more extreme misconduct to found the cause of action and this flows naturally into the damages component. But, as will be discussed in detail in Part Two, forthcoming in the June 2022 issue of The Advocates’ Quarterly, the other piece of the explanation is that *PIPEDA* courts are undervaluing breach of privacy claims. Fortunately, the higher awards pursuant to the common law privacy torts leave enough scope for *PIPEDA* quanta to rise accordingly and still be relatively proportionate.

1. **Defamation as a Dignitary Tort**

While it is beyond the scope of this article to discuss the dignitary tort of defamation in any detail, it too has been closely associated with the informational privacy interest and merits some analysis, especially given that its awards are significantly higher than awards under *PIPEDA*. The dignitary foundation that defamation shares with *PIPEDA* offers another argument why higher awards under *PIPEDA* are warranted.

One traditional (English)[[181]](#footnote-182) explanation for the difference in quantum between defamation and invasion of privacy claims (traditionally pursued in England via the breach of confidence action),[[182]](#footnote-183) has been the failure of damages for invasion of privacy to compensate for the loss of privacy.[[183]](#footnote-184) There was no sense, according to this line of thought, in awarding high quantum when in principle the loss of privacy was irremediable.[[184]](#footnote-185) This is an odd argument, considering that it could be applied to almost every instance of monetary compensation for loss or injury (such as the loss of a limb or bodily function). Nevertheless, reputation was considered, in contrast with privacy, to be remediable. It was possible to rebuild one’s reputation, providing that sufficient monetary compensation was provided.[[185]](#footnote-186) Entangled in this compensatory function was a symbolic, vindicatory one. A significant monetary amount symbolized the importance of reputation, vindicated the unjust harm suffered to a reputation by defamation, and restored reputation consequently to its original, pre-harm state.[[186]](#footnote-187)

None of this was possible with privacy. Once invaded, it was lost, and no amount could restore it to its original state. As the court stated in *Mosley*: “Judges cannot achieve what is, in the nature of things, impossible.”[[187]](#footnote-188) This judicial characterization of reputation is increasingly inaccurate, and probably never was accurate to begin with.[[188]](#footnote-189) Reputation, too, risks being irrevocably harmed.[[189]](#footnote-190) In a digital era, it can be impossible to undo the effects of a defamatory statement, just as it is impossible to restore privacy. Damages can seek to make the plaintiff whole in relation to the interests of reputation and privacy, but monetary recognition of the dignity interest itself is also crucial.

There is perhaps no clearer authority for the link between defamation, privacy and dignity than *Hill v Church of Scientology of Toronto*.[[190]](#footnote-191) Cory J, writing for the majority, explained first that reputation protects and reflects dignity:

… the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society.[[191]](#footnote-192)

Cory J went on to directly describe the link between reputation and privacy:

Further, reputation is intimately related to the right to privacy which has been accorded constitutional protection. As La Forest J. wrote in R. v. Dyment, [1988] 2 S.C.R. 417, at p. 427, privacy, including informational privacy, is "[g]rounded in man's physical and moral autonomy" and "is essential for the well-being of the individual". **The publication of defamatory comments constitutes an invasion of the individual's personal privacy and is an affront to that person's dignity.**[[192]](#footnote-193)

*Hill* establishes therefore that reputation and privacy both protect dignity, and furthermore, that dignity is at the foundation of all *Charter* rights.[[193]](#footnote-194) These are therefore immediately strong arguments why damages for defamation and for privacy harms should not only be of comparable range, but also that damages for both should be symbolic or vindicatory of the rights breached in each situation.[[194]](#footnote-195) Indeed, in quite a few cases in which both torts were claimed, courts tended to focus on defamation and argue that it subsumed invasion of privacy arguments.[[195]](#footnote-196)

*Hill* further established that defamation is not subject to the cap on non-pecuniary losses related to physical damages established in *Andrews v Grand & Toy*.[[196]](#footnote-197) Among the reasons for declining to extend the cap to defamation, the *Hill* court noted: “In these cases, **special damages for pecuniary loss are rarely claimed and often exceedingly difficult to prove**. Rather, the whole basis for recovery for loss of reputation usually lies in the general damages award.”[[197]](#footnote-198) The court is speaking of libel cases, but the *ratio* easily and equally applies to invasion of privacy cases.[[198]](#footnote-199) Of course, the harm at issue includes damage done to a person’s dignity, either to a person’s reputation, or through an invasion of privacy, with there being no requirement to prove actual damages, pecuniary or not.[[199]](#footnote-200) Since privacy and reputation protect the same foundational interests,[[200]](#footnote-201) it would be suitably consistent for *PIPEDA* to follow defamation law by continuing to eschew damage caps as well as increasing quantum.[[201]](#footnote-202)

Interestingly, the new statutory tort established in Nova Scotia for cyber-bullying, the *Intimate Images and Cyber-protection Act*,[[202]](#footnote-203) appears to combine within it both defamatory and privacy elements – yet another indication of the closer links established between the two torts in this day and age. Damages under this Act were discussed in *Candelora v Feser.**[[203]](#footnote-204)* The court found that Feser engaged in a “campaign of cyber-bullying” against Candelora, his ex-wife, in the form of “venomous Facebook postings.”[[204]](#footnote-205) The court found similarities between this conduct and the conduct in *Yenovkian,* and specific similarity between the statutory remedy provided in the Act (which allows for “general, special, aggravated or punitive damages”)[[205]](#footnote-206) and the remedies of both defamation and privacy torts.[[206]](#footnote-207) Similar to both, the harm is found in the cyber-bullying itself, and proof of loss or injury (pecuniary, or not) is not required.[[207]](#footnote-208) The court also noted that only the tort of intrusion upon seclusion is subject to a cap, while the other three privacy torts (and defamation) are not.[[208]](#footnote-209)

Following a review of quanta case-law in both defamation and invasion of privacy, the court awarded Candelora $50,000 in general damages, $20,000 in aggravated damages, and $15,000 in punitive damages (for a total of $85,000.)[[209]](#footnote-210) This relatively high quantum demonstrates the influence of the defamation analysis on privacy damages, and supports the argument that PIPEDA quanta should be increased.

**Section III: Brief Conclusion to Part One**

Part One of this article has argued that privacy under *PIPEDA* (like its common law and provincial statutory counterparts) incorporates a constitutional interest, and on a related front, a dignitary one. These important interests must be reflected in *PIPEDA* damage awards, including an openness to enhanced awards as seen in related areas of law such as defamation and cyber-bullying (where there is no ceiling on damages), the privacy torts of Appropriation of Name or Likeness, Public Disclosure of Private Facts and False Light (to which a cap does not apply), and Intrusion upon Seclusion (where the cap, while arguably too low, at least exceeds the average *PIPEDA* award). Otherwise, the remedy fails to advance an important policy aspect of *PIPEDA* thereby running afoul of Justice Cromwell’s functional approach to awarding monetary damages. In Part Two, forthcoming in the June 2022 issue of The Advocates’ Quarterly, we apply the insights of Part One to *PIPEDA* case law to support our call for increased damage awards.

**Table 1: Personal Information Protection Legislation in Canada**

|  |  |  |
| --- | --- | --- |
| Title | Jurisdiction | Citation |
| *Personal Information Protection Act* | Alberta | SA 2003 cP-6.5 |
| *Personal Information Protection Act* | British Columbia | SBC 2003, c 63 |
| *An Act respecting the protection of personal information in the private sector* | Quebec | CQLR cP-39.1 |
| *Personal Information Protection and Electronic Documents Act* | Federal (all provinces not listed above) | SC 2000, c 5 |

[See next page for appendices]

**Appendix A: Successful Applications for Damages under *PIPEDA* in a Commercial Context \*\***

**(\*\*as at May 2, 2021)**

| **Case** | **Facts** | **Judicial Analysis** | **Quantum** |
| --- | --- | --- | --- |
| ***1.Montalbo v Royal Bank of Canada*, 2018 FC 1155**  [cites Randall at para 60] | Applicant alleged that the Royal Bank failed to safeguard her personal information disclosed in relation to her residential property mortgage application. | Court agreed that the Royal Bank’s safeguards were inadequate, at para 47 and that the financial information was “highly sensitive” at para 45 | **$2,000** in “nominal” damages for “some anxiety and stress” at para 62  plus $800 costs to the self-represented litigant, at para 63. |
| ***2. AT v Globe24H.com*,2017 FC 114** | The respondent was a Romanian website that published Canadian court and tribunal decisions. The website, unlike similar Canadian counterparts, allowed the decisions to be located via search engines like Google, at para 10. Further, the respondent indexed decisions such that “Googling” an individual’s name would show decisions concerning them, including those involving highly personal information like HIV status, divorce proceedings and personal bankruptcy, at para 13. The respondent would then demand payment to remove the information from its website, at para 15. The Applicant claimed his privacy rights were violated when the Respondent published a labour board decision in which the complainant was a party. | Respondent's breach was egregious because its business was to exploit the privacy of individuals for profit. Damages were appropriate remedy because: “the respondent has commercially benefited from the breach through targeted advertising and by requiring a fee for removing the personal information of individuals contained in the decisions. The respondent has also acted in bad faith in failing to take responsibility and rectify the problem” at para 103. | **$5,000** in damages, at para 103, plus $300 in costs to self-represented litigant, at para 104. |
| ***3. Cote v Day & Ross Inc.*, 2015 FC 1283** | Applicant’s employer was in possession of correspondence related to the applicant’s personal medical information and refused to properly disclose such correspondence to her on three occasions, at para 21. | Court awarded damages, noting such an award may make the respondent “more alert and sensitive to its obligations in the future” at para 21. | **$5,000** in damages, at para 25, plus $1,000 in costs to self-represented litigant, at para 25. |
| ***4. Blum v Mortgage Architects Inc.*, 2015 FC 323**  [*cites Girao/Randall with approval, at para 15*] | Applicant engaged in several transactions with the Mortgage Architects Inc (the respondent mortgage broker) but later defaulted under certain mortgages. Without the Applicant’s consent, Mortgage Architects Inc sent emails to third parties mentioning applicant’s default and anticipated legal action against him, at paras 41 and 55. Applicant complained that the purpose in releasing the personal information was “to foment trouble” and “encourage” the foreclosures, at para 57. | While *PIPEDA* was violated, the applicant suffered no losses as a result. The mortgages would have been foreclosed upon in any event, at para 56. | **$1,000** in “nominal” damages, at para 64.  No costs awarded to the respondent nor to the self-represented applicant, at para 65. |
| ***5. H******enry v Bell Mobility*, 2014 FC 555** | Bell Mobility revealed certain information about Henry’s mobile telephone account to an imposter who called a Bell Mobility representative, claiming to be the account holder, at paras 7 and 16. | Court agreed that Bell had breached *PIPEDA* but that it caused no loss, at para 17. Court awarded damages, however, to “further the general objects of *PIPEDA*” at para 19. | **$2,500** in damages, at para 27 plus  $1,000 costs for the self-represented litigant, at para 27. |
| ***6. Chitrakar v Bell* *TV*, 2013 FC 1103**  [Appears to implicitly criticize *Randall* at para 24, without naming the case.] | The applicant ordered satellite television services from Bell TV and provided his signature on a “proof of delivery” device when the service was installed at para 5. Without Chitrakar’s permission, Bell went on to wrongfully embed the plaintiff’s signature from that device onto a TV rental agreement, which, in turn, permitted Bell to conduct credit checks, at paras 6-7. Applicant found out that Bell had ordered a credit check on him without his permission, at para 8.  Bell did not appear in proceedings before the privacy commissioner, though served, at para 15, nor respond to Chitrakar’s concerns nor even appear at the court hearing, at para 18. | Court described Bell TV’s behaviour as “reprehensible” in relation to the applicant’s privacy rights, at para 18, including in its failure to appear in the subject proceedings or follow the Privacy Commissioners recommendations in this matter, at para 18. It acknowledged that Bell’s “hard check” on the applicant’s credit rating had an adverse effect on that rating, at para 20.  Court emphasized the importance of a damage award that would provide, at para 26, “meaningful compensation, deterrence and vindication”, particularly in relation to a large company like Bell, at para 27.  Without expressly mentioning the decision of *Randall v Nubodys Fitness Centres*, 2010 FC 681 (summarized in Appendix B of this article), the court indirectly criticized it, stating at para 24:“there is no reason to require that the violation be egregious before damages will be awarded. To do so would undermine the legislative intent of paragraph 16(c) which provides that damages be awarded for privacy violations including but not limited to damages for humiliation.”  In addition to damages, court awarded exemplary damages, at para 28 “for Bell's conduct at the time of the breach of the privacy rights and thereafter. I take account of Bell's dealings with Chitrakar as well as its reactions to the Privacy Commissioner and her recommendations and its failure to take these proceedings seriously.” | **$10,000** in damages, at para 28, plus  **$10,000** in exemplary damages plus, $1,000 in costs for self-represented litigant, at para 29. |
| ***7. Biron v RBC Royal Bank,***[**2012 FC 1095**](http://www.canlii.org/en/ca/fct/doc/2012/2012fc1095/2012fc1095.html)  [Cites *Randall* with approval, at para 37] | RBC disclosed Biron’s credit card statements, on a card she held jointly with her husband, to counsel for her husband’s ex-wife, at para 4 and following. | RBC violated *PIPEDA* in this disclosure, at para 34. Of note in determining quantum of damages was that Biron had asked RBC on two occasions to stop disclosing her information, at para 40. | **$2,500** in damages, plus unquantified  “costs” to self-represented litigant at para 43. |
| ***8. Girao v Zarek Taylor Grossman Hanrahan LLP*, 2011 FC 1070**  Cites *Randall* with approval, at para 42 (same judge in both cases) | Respondent law firm posted a report by the Privacy Commissioner on its website under “recent decisions” category which contained the personal medical information of the Applicant, at paras 1 and 29. Applicant claimed a breach of privacy under *PIPEDA* even though this information was already made public via other proceedings, at para 30-31. | Court rejected respondent’s argument that the Privacy Commissioner of Canada (PCC) reports should be publicly available in an unredacted way, ruling that the law firm should have taken steps to ensure that applicant was not identifiable in the posting, at para 38.  Even though no evidence of pecuniary harm nor of humiliation, at para 55, damages are appropriate because:  “Parliament has ensured that Canadians have the right to file complaints with the PCC for investigation without fear of having their personal information disclosed other than in certain constrained circumstances…. To that end, an award of damages would further the general objects of PIPEDA and uphold the values it embodies. A damage award would also send the message to lawyers and individuals with increased public responsibility that they must proceed prudently when dealing with private information” at para 50.  Court awarded damages in the factual context that the respondent “was careless in posting but did not act in bad faith” and took the posting down promptly, at para 61. | **$1,500** in damages, at para 61, plus  $500 in costs to the self-represented litigant, at para 63. |
| ***9. Landry v Royal Bank of Canada,* 2011 FC 687**  *[Cites* *Randall* with approval, at para 28] | Bank improperly disclosed bank records to the applicant’s ex-husband during a separate divorce trial, at para 4. This led to her being humiliated including on the stand when her denial of having a personal bank account was refuted by these records, at para 19 | The court observed that *PIPEDA* was violated because the Bank’s employee made a “major error” and even tried to “cover up her wrongful conduct” at para 28. It also recognized that the applicant “contributed to her own misfortune by attempting to conceal under oath the existence of her personal accounts even though she was obliged to disclose their existence” at para 29. Court assessed damages in the context of the applicant’s “contributory fault” at para 32. | **$4500** in damages, at para 32, plus costs to the self-represented applicant. |
| ***10. Nammo v TransUnion of Canada Inc.,* 2010 FC 1284**  *[Cites Randall with approval, at para 71]* | Nammo pursued a business opportunity to become a 50% partner in a proposed trucking business in “exchange for using his name, financial history, and expertise to secure the necessary business loan” at para 5. When the applicant applied for a loan from RBC, it was denied on the basis of a negative and false credit report provided by TransUnion of Canada Inc, at para 7. This ended the business opportunity. Beyond this, TransUnion did not take steps to clearly correct the record with RBC, at para 50. Nammo claimed damages including for humiliation and lost profits. | Court ruled that the respondent had breached *PIPEDA* by supplying false credit information, at para 43, and for failing to correct the record appropriately, at para 50.  The applicant could not prove any business loss, at para 65, but the court ruled that it had jurisdiction to award damages under section 16 of *PIPEDA* “even when no actual financial loss is proven” at para 71. This was particularly the case because TransUnion’s “was a serious breach involving financial information of high personal and professional importance” at para 71.  Court relied on Ward where the SCC, in the context of a *Charter* breach, awarded damages absent financial loss. This was because it identified several goals in awarding damages: “these include compensation, for which loss is relevant, but also vindication and deterrence, for which loss is not a  for which loss is not a determinative factor,” at para 72.  Following *Ward*, the court awarded damages for the humiliation of the dissemination of false credit information, at para 79. | **$5,000** in damages, at para 79, plus  $1,000 in costs for the self-represented litigant, at para 81. |

**Appendix B: Unsuccessful Applications for Damages under *PIPEDA* in a Commercial Context\*\***

**(\*\*as at May 2, 2021)**

| **Case** | **Facts** | **Judicial Analysis** |
| --- | --- | --- |
| ***1.Kwan v Amex Bank of Canada,* 2019 FC 968** | Applicant applied for a credit card from Amex, later alleging that Amex wrongfully used her information beyond its intended purposes, failed to keep accurate records, and fabricated records of her phone conversations with its representatives, at para 1. | No damages awarded because applicant failed to prove her case, at para 20. Court found that Amex lawfully collected information for a valid purpose and kept accurate records, at paras 13, 15, and 18. |
| ***2.Miglialo v Royal Bank of Canada*, 2018 FC 525**  *[cites Randall with approval, at para 41]* | An RBC employee accessed the applicant’s financial information without authorization, at para 2. Applicant alleged that the employee further disclosed this information to family members, causing “irreconcilable damage” to applicant’s relationships with family members and causing her “a great deal of humiliation and embarrassment” at para 32. | While the *PIPEDA* violation (wrongful access) was acknowledged, the applicant was not awarded damages, at para 52. This is because the applicant failed to prove that the financial information was disclosed to others to begin with, at paras 27 and 43.  Instead, the court emphasized that “[v]indication is to be found in the respondent’s acknowledgement of the breach, which resulted in appropriate disciplinary measures [of its employee], as well as the finding of the Privacy Commissioner that a violation of Principle 4.5 occurred” at para 52. |
| ***3. Fahmy v Bank of Montreal, 2016 FC 479*** | Bank terminated relationship with applicant who sought disclosure of documents signed by applicant. Applicant challenged produced documents as an incomplete list. Privacy Commissioner concluded that BMO had responded to applicant’s access request, albeit late, at para 21. Applicant sought judicial review and damages under *PIPEDA*. | Application dismissed. "The applicant has failed to demonstrate that he is entitled to a remedy under section 16 of the Act. In this, I agree with the OPC that BMO responded to the access requests" at para 70. |
| ***4. Bertucci v Royal Bank of Canada,* 2016 FC 332** | The Royal Bank closed the applicants’ bank accounts, orally explaining that it was no longer comfortable doing business with them, at para 6. The applicants requested the Royal Bank to produce the personal information it held on them, pursuant to *PIPEDA*, including why their accounts were to be closed. The bank refused the request for various reasons, including that the information was confidential commercial information, at para 7. The applicants eventually brought this matter to the federal court, seeking disclosure of that personal information and damages under *PIPEDA*. | The court ordered production of the requested documents but declined to award damages. This is because there was little evidence that the applicants “suffered hardship or difficulties in having to make alternative banking arrangements, other than a feeling of humiliation” at para 47.  *Author’s Note*: The basis for the damages claim and the court’s analysis of same would appear to be problematic since *PIPEDA* does not contain rules as to when a bank can terminate its relationship with a customer. It would seem that damages under *PIPEDA* in this case would be recoverable only if related to the bank’s wrongful failure to produce the applicant’s personal information. |
| ***5. Townsend v Sun Life Financial*, 2012 FC 550**  *[cites Randall with approval at para 23]* | Applicant had been dealing with Sun Life in a long-term care insurance matter, at para 4. Sun Life mishandled some of the complainant’s medical information by sending it to the wrong address, at para 17. | No damages awarded because Sun Life’s wrongful disclosure was minimal and caused the applicant no injury, at para 38. Organizations are not held “to a standard of perfection” at para 34, particularly in the context of Sun Life already have “a detailed protocol before the occurrence of what can only be considered as a human error” at para 34. |
| ***6. Stevens v SNF Maritime Metal Inc,* 2010 FC 1137** | Stevens was an employee of Alscott, a company that sold metal to SNF Maritime Metal Inc (SNF). Part of Stevens’ job was to deliver metal to SNF and remit cash proceeds to his foreman, at para 4. Stevens opened a personal account with SNF, delivered metal, and had proceeds deposited to his account, at para 5. Stevens knew that some of the money that was deposited to his account belonged to Alscott but took no steps to correct that error, at para 24. Responding to decreased metal sales to SNF, Alscott made inquiries of SNF who disclosed the fact of Steven’s personal account, at para 6. Stevens was dismissed from his employment at para 8. Stevens saught damages under *PIPEDA* for losses related to termination. | Court found a breach of *PIPEDA* because SNF’s disclosure of the personal account was wrongful, at para 18. However, Stevens also misconducted himself by taking not steps to correct SNF records, at para 24. As well, Stevens’s loss was caused by his termination for cause, at para 28. In declining to award damages, court observed:  “To the extent (if any) that privacy is involved, it is minimal and the Applicant has put forward no other evidence of impact on his standing or community perception or similar features of a breach of privacy claim” at para 31. |
| **7. Banuelos v TD Bank Financial Group, 2010 FC 934** | Applicant claimed that TD disclosed his information to his mother, who was in divorce proceedings with his father, at para 7. The Privacy Commissioner found there was no breach of *PIPEDA.* | No damages awarded because no breach of *PIPEDA*, at para 42. |
| ***8. Randall v Nubody’s Fitness Centres*, 2010 FC 681** | Applicant enrolled at the respondent’s fitness gym. The membership was partially subsidized by the applicant’s employer. The respondent released information to employer disclosing how many times the applicant frequented the gym, at para 36.  Applicant claimed that “the disclosure of information on his fitness centre usage caused him embarrassment and created an atmosphere of competition amongst co-workers that he was unwillingly forced into. The applicant also stated that he believes that he was reprimanded by his superiors for his communications with the respondent” at para 18. | Court found a breach of *PIPEDA* because Nubody’s disclosed personal information concerning usage of the facility, at para 36 but would not award damages. This is, in part, because Nubody’s had adopted the Privacy Commissioner’s to improve its systems, at para 46-47. Furthermore, “an award of damages is not be made lightly. Such an award should only be made in the most egregious situations. I do not find the instant case to be an egregious situation” at para 55, such as video-taping and phone-line tapping, at para 56. Here, the information released was of low sensitivity, at para 42, and caused no loss, at para 49.  *Author’s Note:* Court’s requirement that damages are only available in the most egregious situation is problematic as this requirement is not found in *PIPEDA*.  No costs awarded to either side, at para 59. |
| **9. Privacy Commissioner of Canada v Air Canada, 2010 FC 429** | Mr. Dankwort complained to Air Canada about the conduct of one of its employees, at para 7, and demanded to see the file that Air Canada had on him. When Air Canada refused, Dankwort complained to the Privacy Commissioner which instituted these proceedings for disclosure and damages. | The Court found that Air Canada was not required to disclose its file, at para 61 and so no damages were awarded to Dankwort, at para 62. |
| **10. Waxer v JJ Barnicke Limited, 2009 FC 169** | Applicant complained that the Respondent collected his information. | No damages awarded because no information had been collected, at para 38. *PIPEDA* does not apply to unsuccessful attempts to collect personal information, at para 46. |
| **11. Johnson v. Bell Canada, 2008 FC 1086** | Applicant alleged, inter alia, that Bell failed to comply with *PIPEDA* in relation to his access request, at para 5. | No damages awarded because Bell Canada had complied with *PIPEDA*, at para 54. |
| **12. Wansink v Telus Communications Inc, 2007 FCA 21** | Several employees of Telus objected to its institution of “speaker verification technology” for identity verification purposes as impinging on privacy, contrary to *PIPEDA,* at paras 6 and 7. | No damages awarded because Telus had complied with *PIPEDA*, at para 32. |
| **13. Morgan v Alta Flights (*Charter*s) Inc., 2005 FC 421, affirmed Morgan v. Alta Flights (*Charter*s) Inc., 2006 FCA 121** | The applicant complained that her employed attempted to collect her personal information by hiding a voice recorder underneath a coffee table in the break room, at para 4. Her manager “admitted she personally hid the recorder in the smoke room on the night in question with the intention of recording the conversations in that room of Ms. Morgan…” at para 5. | No damages awarded because no information had been collected, at para 22. *PIPEDA* does not apply to unsuccessful attempts to collect personal information, at para 20. |
| ***14. Englander v Telus Communications Inc*, 2004 FCA 387** | Applicant alleged that Telus failed to obtained valid consent to publish customers’ personal information in its directories and objected, *inter alia*, to a fee charged by Telus to customers to keep their phone number confidential, at para 2. | Telus violated then section 5 of *PIPEDA* because it failed to advise first time customers “of the primary and secondary purposes for which the information was collected and of the availability of non-published number service” at para 89. The court would not award damages remedy however, because complainant had not “been personally aggrieved” at para 90 and had not personally incurred any charges. Applicant, who was self-represented, was awarded reasonable costs for being successful in part, at para 87. |

*Arcand v Abiwyn Co-Operative Inc*, 2010 FC 529 is not included in the Chart above because the *PIPEDA* damage claim was denied not on the merits but including on the basis that Applicant had signed a release, at para 63.

1. \* Faculty of Law, University of Alberta. [↑](#footnote-ref-2)
2. \*\* Lincoln Alexander School of Law, Ryerson University.

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3. Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess, 43rd Parl, 2020. Online: <<https://parl.ca/DocumentViewer/en/43-2/bill/C-11/first-reading#ID0E0XB0BA>>. This article relies on the wording of the bill as of June 16, 2021. [↑](#footnote-ref-4)
4. Parliament of Canada, Legis*info*, House Government Bill, C-11, Status of the Bill, online: <<https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=en&Mode=1&billId=10950130&View=0>> [↑](#footnote-ref-5)
5. Bill C-11, Part 1. For a clear and comprehensive review of Bill C-11, see Kirsten Thompson et al, *Dentons Data CPPA In-Depth Guide*, (28 January 2021), online: <[https://www.dentons.com/en/insights/guides-reports-and-whitepapers/2021/january/28/dentons-*CPPA*-in-depth-guide-a-detailed-review-of-key-provisions-in-canadas-proposed-new-privacy-law?utm\_source=email&utm\_medium=email&utm\_campaign=vuture](https://www.dentons.com/en/insights/guides-reports-and-whitepapers/2021/january/28/dentons-cppa-in-depth-guide-a-detailed-review-of-key-provisions-in-canadas-proposed-new-privacy-law?utm_source=email&utm_medium=email&utm_campaign=vuture)> [↑](#footnote-ref-6)
6. Note that in May of 2021, *CPPA* was subject to considerable criticism by Federal Privacy Commissioner, Daniel Therrien, in submissions to the House of Commons Standing Committee on Access to Information, Privacy and Ethics. See Office of the Privacy Commission of Canada (OPC), “Reform bill ‘a step back overall’ for privacy”, News Release (11 May 2021), online: <<https://www.priv.gc.ca/en/opc-news/news-and-announcements/2021/nr-c_210511/>>. [↑](#footnote-ref-7)
7. *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [*PIPEDA*]. [↑](#footnote-ref-8)
8. The history of the repeated calls to reform since 2005 is summarized on the website of the Office of the Privacy Commissioner of Canada in *PIPEDA Reform: Submissions, Recommendations and Research*, (no date) online: <<https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda_r/?Page=7>>. See also Standing Committee on Access to Information, Privacy and Ethics, *Statutory Review of the Personal Information Protection and Electronic Documents Act (PIPEDA)*, 1st Sess, 39th Parl, 2007; Standing Committee on Access to Information, Privacy and Ethics, *Towards Privacy by design: Review of the Personal Information Protection and Electronic Documents Act*, 1st Sess, 42 Parl, 2018. [↑](#footnote-ref-9)
9. *PIPEDA*, s 3 states in its entirety as follows:

   The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances. [↑](#footnote-ref-10)
10. See Appendix A: “Successful Applications for Damages under *PIPEDA* in a Commercial Context”, and Appendix B: “Unsuccessful Applications for Damages under *PIPEDA* in a Commercial Context”, as well as related discussion in Part Two, forthcoming in the June 2022 issue of The Advocates’ Quarterly. [↑](#footnote-ref-11)
11. ## Accord Teresa Scassa, “How do new data protection enforcement provisions in Canada's Bill C-11 measure up?” (4 January 2021), online: <<http://www.teresascassa.ca/index.php?option=com_k2&view=item&id=337:how-do-new-data-protection-enforcement-provisions-in-canadas-bill-c-11-measure-up?&Itemid=80>>. For a similar view in the context of health information, see Liam O’Reilly, “Getting to Damages in the Health Information Privacy Context: Is the Cost Worth the Damage?” (11 April 2016) CanLII Connects, online: <<https://canliiconnects-prod.s3.amazonaws.com/uploads/opinion/file/42318/Liam_O_Reilly__Getting_to_Damages_in_the_Health_Information_Privacy_Context__Is_the_Cost_Worth_the_Damages.pdf>> at 37.

    In the context of class action settlement proceedings, *Haikola v. The Personal Insurance Company*, 2019 ONSC 5982 [*Haikola*] described the considerable inconvenience of pursuing a complaint under *PIPEDA*, at para 86, concluding that: “The hurdles associated with obtaining a report [from the Privacy Commissioner], including submitting a full privacy complaint to the Privacy Commissioner, do not justify the likely modest amounts that Class Members would have obtained in compensation after a Federal Court action (assuming that after receiving a report, an individual complainant would choose to incur the time and legal fees associated with a Federal Court proceeding).” [↑](#footnote-ref-12)
12. *Haikola*, *ibid,* also illustrates that class actions do not necessarily produce a high payout either. The approved settlement in *Haikola* was between $150.00 to $180.00 per claimant, at para 32. At issue in *Haikola* was the insurer’s systematic practice of collecting “credit score information from its insureds during its automobile insurance claims adjusting process” at para 2. For discussion of this case, see Teresa Scassa, *A Troubling New Twist on Privacy Class Action Lawsuits in Canada*, (03 December 2019), online: <<https://www.teresascassa.ca/index.php?option=com_k2&view=item&id=318:a-troubling-new-twist-on-privacy-class-action-lawsuits-in-canada&Itemid=80>> [↑](#footnote-ref-13)
13. *Randall v Nubody’s Fitness Centres*, 2010 FC 681 at para 55 [*Randall*]. [↑](#footnote-ref-14)
14. *Ibid* at para 56. [↑](#footnote-ref-15)
15. Cory J in *Hill v Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 SCR 1130 at para 196 [*Hill*], states that punitive damages are “the means by which the jury or judge expresses its outrage at the **egregious** conduct” [emphasis added]. [↑](#footnote-ref-16)
16. Justice Thomas Cromwell, “Money Remedies: Towards a Functional Approach” in *Remedies: From Dollars to Sense* (2010 Isaac Pitblado Lectures) (Winnipeg: Law Society of Manitoba, 2010) at I-20. [↑](#footnote-ref-17)
17. Scassa, *supra* notes 9 and 10. We do discuss briefly below the impact that future legislation may have on class actions, in Part Two, forthcoming in the June 2022 issue of The Advocates’ Quarterly. [↑](#footnote-ref-18)
18. Mr. Justice Frank Iacobucci, “Recent Developments Concerning Freedom of Speech and Privacy in the Context of Global Communications Technology” (1999) 48 UNBLJ 189 at 203. [↑](#footnote-ref-19)
19. Alexandra Savoie, Maxime-Oliver Thibodeau et al (revisers), Canada’s Federal Privacy Laws, Publication No. 2007-44-E17 (revised 17 November 2020), Library of Parliament, online: <[https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2007-44-e.pdf](https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2007-44-e.pdf%20) > at 4. [↑](#footnote-ref-20)
20. Note that *PIPEDA*, s 26(2)(b) states that “The Governor in Council may, by order… if satisfied that legislation of a province that is substantially similar to this Part applies to an organization, a class of organizations, an activity or a class of activities, exempt the organization, activity or class from the application of this Part in respect of the collection, use or disclosure of personal information that occurs within that province.” Accordingly, Alberta, British Columbia and Quebec have been exempted with respect to their private sector privacy legislation. The statutes and exemption orders are as follows: *Personal Information Protection Act*, SA 2003 cP-6.5 [Alberta PIPA] – Organizations in the Province of Alberta Exemption Order, SOR/2004-219; *Personal Information Protection Act*, SBC 2003, c 63 [BC PIPA] – Organizations in the Province of British Columbia Exemption Order, SOR/2004-220 and *An Act respecting the protection of personal information in the private sector*, CQLR cP-39.1 [Quebec Act] – Organizations in the Province of Quebec Exemption Order, SOR/2003-374. For a detailed account of *PIPEDA*, provincial regimes, and related case law, see [Barbara McIsaac,](https://store.thomsonreuters.ca/en-ca/products/the-law-of-privacy-in-canada-30843657) Rick Shields and [Kris Klein](https://store.thomsonreuters.ca/en-ca/products/the-law-of-privacy-in-canada-30843657), *The Law of Privacy in Canada* Binder/loose-leaf Subscription (Toronto: Thomson Reuters, 2000). For another comprehensive account, see Barbara von Tigerstrom, *Information & Privacy Law in Canada* (Toronto: Irwin Law, 2020). [↑](#footnote-ref-21)
21. *PIPEDA*, s 11(1). [↑](#footnote-ref-22)
22. See, for example, *Englander v Telus Communications Inc*, 2004 FCA 387at para 48 [*Englander*] wherein the Federal Court of Appeal states that “the hearing under subsection 14(1) of the Act is a proceeding *de novo* akin to an action…” [↑](#footnote-ref-23)
23. Note the court’s assessment in *Blum v Mortgage Architects Inc*, 2015 FC 323 [*Blum*] that “*PIPEDA*’s right of action is not an end run on existing rights to damages; it is a right to a different kind of damage claim arising from a breach of a right to privacy” at para 14, citing *Stevens v SNF Maritime Metal Inc*, 2010 FC 1137. The court’s reference to a ‘right to privacy’ is itself very broad, as evidenced by the emerging common law privacy torts that are discussed below. *PIPEDA* and the proposed *CPPA* engage the private sector’s failure to protect personal information. [↑](#footnote-ref-24)
24. *Supra* note 6 [↑](#footnote-ref-25)
25. *PIPEDA*, Schedule 1. *PIPEDA*, s 5(2) provides that “the word *should*, when used in Schedule 1, indicates a recommendation and does not impose an obligation.” See von Tigerstrom, *supra* note 18 at 295. As observed by the court in *Montalbo v Royal Bank of Canada*, 2018 FC 1155 at para 17 [*Montalbo*], Schedule 1 incorporates:

    the Principles Set Out in the National Standard of Canada Entitled Model Code for the Protection of Personal Information, CAN/CSA-Q830-96. These principles contain both obligations and recommendations relating to: (1) ensuring accountability; (2) identifying the purpose for which the personal information is being collected; (3) requiring the knowledge and consent of the individual whose information is collected, used or disclosed; (4) limiting collection to that which is necessary for the purposes identified by the organization; (5) limiting use and disclosure to the purposes of collection and limiting retention for only as long as necessary to fulfill those purposes; (6) ensuring the accuracy of the personal information; (7) providing appropriate security safeguards for the personal information; (8) making information concerning management policies and practices readily available; (9) providing individuals access to information regarding the existence, use and disclosure of their personal information; and finally (10) giving individuals the right to challenge an organization’s compliance with these principles through the establishment of complaint mechanisms. [↑](#footnote-ref-26)
26. *CPPA*, Part 1. [↑](#footnote-ref-27)
27. See e.g., OPC, “The Case for Reforming the *Personal Information Protection and Electronic Documents Act*”(May 2013), online: <<https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda_r/pipeda_r_201305/>>. [↑](#footnote-ref-28)
28. *PIPEDA,* s 12. [↑](#footnote-ref-29)
29. *PIPEDA*, s 13. [↑](#footnote-ref-30)
30. *CPPA*, s 92(1). [↑](#footnote-ref-31)
31. *CPPA*, s 92. [↑](#footnote-ref-32)
32. *CPPA*, s 92. [↑](#footnote-ref-33)
33. Facebook has been disregarding the Privacy Commissioner’s findings since 2009. See most recently *Canada (Privacy Commissioner) v Facebook*, 2021 FC 599; Liz Denham, “Report of Findings into the Complaint Filed by the Canadian Internet Policy and Public Interest Clinic (CIPPIC) against Facebook Inc. under the *Personal Information Protection and Electronic Documents Act*” (2009), online:

    <<https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2009/pipeda-2009-008/>>; Michael Geist, “Thank Facebook for Reminding Us Canada’s Privacy Protection is Utterly Inadequate”, *The Globe and Mail* (26 April 2019), online: <<https://www.theglobeandmail.com/business/commentary/article-thank-facebook-for-reminding-us-canadas-privacy-protection-is-utterly/>>; OPC, “Notice of Application with the Federal Court against Facebook” (6 February 2020) online: <<https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda-complaints-and-enforcement-process/court_p/na_fb_20200206/>>. [↑](#footnote-ref-34)
34. *CPPA*, s 82. [↑](#footnote-ref-35)
35. Bill C-11, Part 2. [↑](#footnote-ref-36)
36. Bill C-11,Part 2, s 5. [↑](#footnote-ref-37)
37. *CPPA,* s 93. [↑](#footnote-ref-38)
38. *CPPA*, s 94. [↑](#footnote-ref-39)
39. *CPPA*, s 125. As an example of high fines levied in foreign jurisdiction, note that a recent Israeli court verdict imposed fines of roughly $225,000 on a local cellular service provider for what were described as quite egregious violates of privacy in personal information. See The Jerusalem Post, *Rami Levi mobile officials suspected of privacy invasion for personal gain*, (2019), online: <<https://www.jpost.com/israel-news/rami-levi-mobile-officials-suspected-of-privacy-invasion-for-personal-gain-612431>>. [↑](#footnote-ref-40)
40. France Houle & Lorne Sossin, *Powers and Functions of the Ombudsman in the Personal Information Protection and Electronic Documents Act: An Effectiveness Study* (2010), online: <[https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2010/*PIPEDA*\_h\_s/](https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2010/PIPEDA_h_s/)>. [↑](#footnote-ref-41)
41. *Englander, supra* note 20, at para 48. An important reason for the hearing being *de novo,* *Englander* observes, is that were it otherwise, the Commissioner would have an improper “head start” when acting as a party and thereby jeopardizing “the fairness of the hearing” at para 48. [↑](#footnote-ref-42)
42. *Blum, supra* note 21,at 13. [↑](#footnote-ref-43)
43. 2012 FC 1095 at para 33 [*Biron*]. [↑](#footnote-ref-44)
44. *Blum*, *supra* note 21, at para 12. [↑](#footnote-ref-45)
45. *CPPA*, s 106*.* [↑](#footnote-ref-46)
46. Sookman et al, “The *CPPA*’s Privacy Law Enforcement Regime” (27 January 2021), online: <[https://www.mccarthy.ca/en/insights/blogs/techlex/*CPPA*s-privacy-law-enforcement-regime](https://www.mccarthy.ca/en/insights/blogs/techlex/CPPAs-privacy-law-enforcement-regime)>. [↑](#footnote-ref-47)
47. *Supra* note 18. [↑](#footnote-ref-48)
48. *Alberta PIPA, supra* note 18. [↑](#footnote-ref-49)
49. *BC PIPA, supra* note 18. [↑](#footnote-ref-50)
50. *Kugler v Newman*, 2017 ABQB 536 at para 25 [*Kugler*]. [↑](#footnote-ref-51)
51. *Ibid* at para 25. [↑](#footnote-ref-52)
52. *Ibid.* [↑](#footnote-ref-53)
53. Note as well that the British Columbia Court of Appeal in *Tucci v Peoples Trust Company*, 2020 BCCA 246 [*Tucci*] confirms in relation to a data breach that common law actions can and do survive *PIPEDA*, stating: “Nothing in the [*PIPEDA*](https://www.canlii.org/en/ca/laws/stat/sc-2000-c-5/latest/sc-2000-c-5.html) suggests that it is intended to abolish existing private law duties or to eliminate the ability of aggrieved parties to pursue common law causes of action” at para 39. See, too, *Jones v Tsige*, 2012 ONCA 32 at para 50 [*Tsige*]. [↑](#footnote-ref-54)
54. For helpful analysis, see Barbara von Tigerstrom, “Direct and Vicarious Liability for Tort Claims Involving Violation of Privacy” (2019) 96 Can Bar Rev 539 at 545-549. [↑](#footnote-ref-55)
55. *Tsige, supra* note 51, at para 50 [↑](#footnote-ref-56)
56. See discussion *infra*. For example, under the tort of intrusion upon seclusion, the plaintiff has to prove that “a reasonable person would regard the invasion as highly offensive….” See *Tsige, ibid* at para 71. [↑](#footnote-ref-57)
57. PIPEDA, s 14(4). [↑](#footnote-ref-58)
58. Note that the *CPPA*, in s 106 (4), proposed a right of action that could have been pursued not only in federal court, but in provincial courts as well. *PIPEDA* decisions would therefore not be binding on provincial courts, and if future legislation extends a similar right, then our hope is that provincial courts would be receptive to our argument that increased quantum is needed. We thank Professor Scassa for bringing this point to our attention. [↑](#footnote-ref-59)
59. Cromwell, *supra* note 14. [↑](#footnote-ref-60)
60. *Ibid* at I-1. [↑](#footnote-ref-61)
61. *Ibid* at I-2. [↑](#footnote-ref-62)
62. *Ibid* at I-26. [↑](#footnote-ref-63)
63. Referencing privacy law in particular, Jason N E Varuhas and N A Moreham, conclude that the common law “continues to observe the connection between right and remedy as fundamental reasons of principle and pragmatism. If remedies were informed by policies with no connection to the normative concerns unpinning recognition of a law of privacy in the first place, the law’s goals would be frustrated.” See Jason N E Varuhas and N A Moreham, “Remedies for Breach of Privacy” in Jason N E Varuhas and N A Moreham, eds, *Remedies for Breach of Privacy* (London: Hart, 2018) 1 at 5. [↑](#footnote-ref-64)
64. *Vancouver (City) v Ward*, 2010 SCC 27 [*Ward*]. [↑](#footnote-ref-65)
65. Section 24(1) provides as follows: “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.” See *Canadian Charter of Rights and Freedoms, s 24 (1), Part 1 of the Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Charter*]. [↑](#footnote-ref-66)
66. Cromwell, *supra* note 14, at I-23. [↑](#footnote-ref-67)
67. *Ibid* at I-24. [↑](#footnote-ref-68)
68. *Ibid* at I-17. [↑](#footnote-ref-69)
69. *Ibid* at I-26. [↑](#footnote-ref-70)
70. *Ibid* at I-17. [↑](#footnote-ref-71)
71. *Ibid* at I-20. [↑](#footnote-ref-72)
72. *PIPEDA*, s 3. [↑](#footnote-ref-73)
73. *PIPEDA*, s 3. [↑](#footnote-ref-74)
74. *Nammo v TransUnion of Canada Inc*, 2010 FC 1284 at para 34 [*Nammo*]*,* quoting the Privacy Commissioner of Canada (PCC) in its Report with approval. [↑](#footnote-ref-75)
75. As the court in *Nammo* observes, *ibid* at para 33, were it otherwise, industry would be setting standards for *PIPEDA* and Canadians would effectively be deprived “of the ability to challenge industry standards as violating *PIPEDA*.” [↑](#footnote-ref-76)
76. *Ibid* at para 34, quoting the PCC in its Report with approval. [↑](#footnote-ref-77)
77. *Townsend v Sun Life Financial,* [2012 FC 550](https://www.canlii.org/en/ca/fct/doc/2012/2012fc550/2012fc550.html) at para 34 [*Townsend*]. [↑](#footnote-ref-78)
78. *Ibid* at para 38. [↑](#footnote-ref-79)
79. *Ibid* at para 34. [↑](#footnote-ref-80)
80. *Nammo,* *supra* note 72, at para 77. [↑](#footnote-ref-81)
81. *Ibid*. [↑](#footnote-ref-82)
82. *Blum, supra* note 21, at para 60. [↑](#footnote-ref-83)
83. *Somwar v McDonald’s Restaurants of Canada Ltd*, 2006 CanLII 202 (ON SC); 2006 79 OR (3d) 172 [*Somwar*]. [↑](#footnote-ref-84)
84. *Ibid* at para 3. [↑](#footnote-ref-85)
85. *Chitrakar v Bell TV*, 2013 FC 1103 [*Chitrakar*]. For discussion, see *infra* as well as Appendix A. [↑](#footnote-ref-86)
86. See *PIPEDA* s 4(1)(b) and von Tigerstrom, *supra* note 18 at 308. As von Tigerstrom notes, “[g]iven the limits of the federal government’s constitutional authority, *PIPEDA* applies to personal information about employees…only where it is collected, used, or disclosed in connection with a federal work, undertaking, or business.” [↑](#footnote-ref-87)
87. *Somwar*, *supra* note 81, at para 31. [↑](#footnote-ref-88)
88. 1988 CanLII 10 (SCC); [1988] 2 SCR 417. [↑](#footnote-ref-89)
89. *Somwar*, supra note 81, at para 24. [↑](#footnote-ref-90)
90. *Somwar, ibid* at para 24, quoting *Dyment* at para 22. [↑](#footnote-ref-91)
91. *Hunter v Southam*, 1984 CanLII 33 (SCC); [1984] 2 SCR 145. [↑](#footnote-ref-92)
92. *Supra* note 63. [↑](#footnote-ref-93)
93. *Somwar, supra* note 81, at para 23. [↑](#footnote-ref-94)
94. *Tsige, supra* note 51, at para 30. See also Chris Hunt, "Privacy in the Common Law: A Critical Appraisal of the Ontario Court of Appeal's Decision in Jones v. Tsige" (2012) 37:2 Queen's LJ 665 as well as Chris Hunt, "Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada's Fledgling Privacy Tort" (2011) 37:1 Queen's LJ 167 [↑](#footnote-ref-95)
95. This tort is discussed in Section II B(2) of this Part of the article. [↑](#footnote-ref-96)
96. *Tsige, supra* note 51, at para 39. [↑](#footnote-ref-97)
97. *Ibid* at para 41, quoting AF Westin. [↑](#footnote-ref-98)
98. *Ibid* at para 66. [↑](#footnote-ref-99)
99. *Douez v Facebook Inc*, 2017 SCC 33 at para 59 [*Douez*], per Karakatsanis, Wagner and Gascon JJ, in the context of *Privacy Act*, RSBC 1996, c 373. [↑](#footnote-ref-100)
100. *Ibid* at para 59. For further discussion, see Andrea Slane, "There Is a There: Forum Selection Clauses, Consumer Protection and the Quasi-Constitutional Right to Privacy in Douez v. Facebook." (2019) The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference 88. [↑](#footnote-ref-101)
101. *Douez, supra* note 97 at para 4 [↑](#footnote-ref-102)
102. 2013 SCC 62 [↑](#footnote-ref-103)
103. *Douez, supra* note 97, at para 105. [↑](#footnote-ref-104)
104. See, for example, Justice Sharpe who notes in *Tsige,* *supra* note 51, at para 45, that “[w]hile the Charter does not apply to common law disputes between private individuals, the Supreme Court has acted on several occasions to develop the common law in a manner consistent with *Charter* values. See too *Somwar, supra* note 81, at para 27. [↑](#footnote-ref-105)
105. See, for example, von Tigerstrom, *supra* note 18, at 7. [↑](#footnote-ref-106)
106. *Somwar, supra* note 81, at para 27, quoting Robyn M. Ryan Bell, "Tort of Invasion of Privacy – Has its Time Finally Come?" in Todd Archibald & Michael Cochrane, Annual Review of Civil Litigation (Toronto: Thomson Carswell, 2005) at 225. See too Chris Hunt, "Privacy in the Common Law: A Critical Appraisal of the Ontario Court of Appeal's Decision in Jones v. Tsige" (2012) 37:2 Queen's LJ 665. [↑](#footnote-ref-107)
107. Indeed, the quasi-constitutional nature of *CPPA* is even more express because it was brought forward though the *Digital* ***Charter*** *Implementation Act*, 2020 [emphasis added] mentioned in the introduction to this article. The word “Charter” naturally brings to mind the *Canadian* *Charter of Rights and Freedoms* and leads to the conclusion that the government chose the words “*Digital Charter*” as signalling a constitutional backdrop to its legislative and policy agenda. [↑](#footnote-ref-108)
108. *Francis v Ontario*, 2020 ONSC 1644 at para 605, aff’d 2021 ONCA 197. [↑](#footnote-ref-109)
109. *Nammo, supra* note 72, at paras 74 – 75. [↑](#footnote-ref-110)
110. *Ibid* at para 75, citing *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53. [↑](#footnote-ref-111)
111. *Ward,* *supra* note 62. This case involved a strip search conducted contrary to Section 8 of the *Charter*. [↑](#footnote-ref-112)
112. *Nammo, supra* note 72, at para 74, quoting *Ward, ibid.* [↑](#footnote-ref-113)
113. Kenneth Abraham & G Edward White*,* “The *Puzzle of the Dignitary Torts*”, (2019) 104 Cornell L Rev 317 at 373. [↑](#footnote-ref-114)
114. R v Jarvis, 2019 SCC 10. This case concerned the charge of voyeurism under section 162(1)(c) of the *Criminal Code of Canada*. [↑](#footnote-ref-115)
115. *Ibid* at para 65. [↑](#footnote-ref-116)
116. Abraham & White, *supra* note 111, at 335. [↑](#footnote-ref-117)
117. *Ibid* at 336. [↑](#footnote-ref-118)
118. *Ibid* at 337. [↑](#footnote-ref-119)
119. *Ibid* at 336. [↑](#footnote-ref-120)
120. John DR Craig, “Invasion of Privacy and *Charter* Values: The Common-Law Tort Awakens” (1997) 42 McGill LJ 355 at 372. [↑](#footnote-ref-121)
121. *Ibid* at 373, his footnote 83. [↑](#footnote-ref-122)
122. Jason NE Varuhas, “Varieties of Damages for Breach of Privacy” in Jason NE Varuhas and NA Moreham, *supra* note 61, 55 at 59. [↑](#footnote-ref-123)
123. *Ibid*. [↑](#footnote-ref-124)
124. *Charter* rights are not absolute and are subject to Section 1 which states: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” *Supra* note 63. [↑](#footnote-ref-125)
125. *Canadian Civil Liberties Association v Canada* 2016 ONSC 4172 at para 4 [↑](#footnote-ref-126)
126. Edward Bloustein, “Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser” (1964) 39 NYU L Rev 962 at 1002-03, quoted by NA Moreham, “Compensating for Loss of Dignity and Autonomy” in Jason Varuhas & NA Moreham, *supra* note 61, 125 at 134. [↑](#footnote-ref-127)
127. Bloustein, *ibid* at 1002, quoting Restatement, Torts § 18 (1934). [↑](#footnote-ref-128)
128. Bloustein, *ibid* at 1003. [↑](#footnote-ref-129)
129. RSBC 1996, c 373; CCSM 2008, c P125; RSS 1978, c P24; RSNL 1990, c P22. [↑](#footnote-ref-130)
130. *Privacy Act*, RSNL 1990, s 3(1) [↑](#footnote-ref-131)
131. *Privacy Act*, RSNL 1990, s 4. [↑](#footnote-ref-132)
132. *Privacy Act*, RSNL 1990, s 3(2). See Chris Hunt, "Reasonable Expectations of Privacy under Canada's Statutory Privacy Torts" (2018) 84 Sup Ct L Rev 269 [↑](#footnote-ref-133)
133. *Privacy Act*, RSNL 1990, s 5. [↑](#footnote-ref-134)
134. *Cam v Hood*, 2006 BCSC 842. [↑](#footnote-ref-135)
135. A table of key awards is included as Appendix B to *Tsige, supra* note 51. [↑](#footnote-ref-136)
136. *Hollinsworth v BCTV* (1998) CanLII 6527 BC CA [*Hollinsworth*]. [↑](#footnote-ref-137)
137. *Ibid* at para 4. [↑](#footnote-ref-138)
138. *Ibid* at para 32. [↑](#footnote-ref-139)
139. *Ibid* at para 13. [↑](#footnote-ref-140)
140. *Tucci, supra* note 51 at para 53 (in *obiter*). [↑](#footnote-ref-141)
141. The data ‘hackers’ would have acted intentionally, but presumably would be difficult to locate for litigation purposes and likely impecunious. [↑](#footnote-ref-142)
142. *Tucci, supra* note 51, at para 55. [↑](#footnote-ref-143)
143. *Ibid* at para 93. [↑](#footnote-ref-144)
144. Chris Hunt, "The Common Law’s Hodgepodge Protection of Privacy" (2015) 66 UNBLJ 161 [↑](#footnote-ref-145)
145. William Prosser, “Privacy” (1960) 48 Cal L Rev 383. See also Chris Hunt, “From Right to Wrong: Grounding a ‘Right’ to Privacy in the ‘Wrongs’ of Tort” (2015) 52 Alta L Rev 635. [↑](#footnote-ref-146)
146. *Ibid* at 389. [↑](#footnote-ref-147)
147. *Ibid* at 389-390. [↑](#footnote-ref-148)
148. *Tsige*, *supra* note 51. [↑](#footnote-ref-149)
149. *Ibid* at para 2. [↑](#footnote-ref-150)
150. *Ibid* at para 71. [↑](#footnote-ref-151)
151. *Ibid* at para 71. [↑](#footnote-ref-152)
152. *Ibid* at para 71. [↑](#footnote-ref-153)
153. *Ibid* at para 75. [↑](#footnote-ref-154)
154. *Ibid* at para 87. [↑](#footnote-ref-155)
155. *Ibid* at para 50. [↑](#footnote-ref-156)
156. *Wiseau Studio, LLC v Harper*, 2020 ONSC 2504 at para 211. [↑](#footnote-ref-157)
157. *Krouse v Chrysler*, [1973] OJ No 2157 at para 43. [↑](#footnote-ref-158)
158. George Smith, "The Extent of Protection of the Individual's Personality Against Commercial Use: Toward a New Property Right," (2002) 54 SCL Rev 1. [↑](#footnote-ref-159)
159. 2006 BCSC 1138 [*Poirier*]. [↑](#footnote-ref-160)
160. *Ibid* at para 18-19. [↑](#footnote-ref-161)
161. *Ibid* at para 11. We return to this case in Part Two. [↑](#footnote-ref-162)
162. *Ibid* at para 105. [↑](#footnote-ref-163)
163. *Ibid* at para 109. [↑](#footnote-ref-164)
164. Prosser, *supra* note 143, at 392. [↑](#footnote-ref-165)
165. *Jane Doe 72511 v NM*, 2018 ONSC 6607 at 99 [*Jane Doe 2018*]. [↑](#footnote-ref-166)
166. *Jane Doe 2018.*  [↑](#footnote-ref-167)
167. 2016 ONSC 541 [*Jane Doe 2016*]. This decision to set this judgment aside was upheld in *Jane Doe 464533 v ND*, 2017 ONSC 127. [↑](#footnote-ref-168)
168. 2019 ONSC 7279 at para 168 [*Yenovkian*]. [↑](#footnote-ref-169)
169. Kim Zetter, “Hackers Finally Post Stolen Ashley Madison Data” *Wired* (18 August 2015), online: <<https://www.wired.com/2015/08/happened-hackers-posted-stolen-ashley-madison-data/>>. [↑](#footnote-ref-170)
170. Sakinah N Jones, “Having an Affair May Shorten Your Life: The Ashley Madison Suicides” (2017) 33 Ga St U L Rev 455. [↑](#footnote-ref-171)
171. “Joint investigation of Ashley Madison by the Privacy Commissioner of Canada and the Australian Privacy Commissioner/Acting Australian Information Commissioner”, (22 August 2016), online: <<https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2016/pipeda-2016-005/>>. [↑](#footnote-ref-172)
172. Likewise, the tort of Public Disclosure of Private Facts would also lie, albeit not against ALM because it was not the party who “publicized an aspect of the plaintiff’s private life” as the tort requires. Rather, the action would lie against the hackers who effected such publicity, including when they released the stolen personal data online. Of course, since the hackers are anonymous and, even if found, are likely judgment proof, the cause of action against them is almost certainly worthless. [↑](#footnote-ref-173)
173. *Yenovkian,* *supra* note 166 at para 2. [↑](#footnote-ref-174)
174. *Ibid* at para 170-171. [↑](#footnote-ref-175)
175. *Ibid* at para 171. [↑](#footnote-ref-176)
176. *Ibid* at para 172. [↑](#footnote-ref-177)
177. *Ibid* at para 206. [↑](#footnote-ref-178)
178. *Nammo* at para 7. [↑](#footnote-ref-179)
179. *Ibid* at para 50. [↑](#footnote-ref-180)
180. There is no Canadian case which discusses the publicity ingredient in depth but for broad and illustrative discussion of what publicity means in American case law, see Fraser Duncan, “Illuminating False Light: Assessing the Case for the False Light Tort in Canada Tort” 43:2 (2020) Dalhousie Law Journal 1 at 9-10. Note that the False Light tort was not yet recognized in Ontario at the time of the *Nammo* litigation. [↑](#footnote-ref-181)
181. Though beyond the scope of this article to discuss the civil law on point, Joseph Kary has observed that the parallels between defamation and the right to private life (roughly equivalent to the common law notion of privacy) have traditionally been closely connected in a civil context. See Joseph Kary, "The Constitutionalization of Quebec Libel Law, 1848-2004." (2004) 42 (2) Osgoode Hall LJ 229 at 238. [↑](#footnote-ref-182)
182. Neil Richards and Daniel Solove, “Privacy's Other Path: Recovering the Law of Confidentiality” (2007) 96 Geo LJ 123. [↑](#footnote-ref-183)
183. *Mosley v News Group Newspapers Ltd*, [2008] EWHC 1777 (QB) [*Mosley*] [↑](#footnote-ref-184)
184. *Ibid* at para 231. [↑](#footnote-ref-185)
185. *Ibid* at para 230. [↑](#footnote-ref-186)
186. *Ibid* at para 230. [↑](#footnote-ref-187)
187. *Ibid* at para 231. [↑](#footnote-ref-188)
188. David Rolph, “Vindicating Reputation and Privacy” in A Kenyon, (ed.) *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press, 2016) 291 at 297. [↑](#footnote-ref-189)
189. *Ibid* at 299. [↑](#footnote-ref-190)
190. *Supra* note 13. [↑](#footnote-ref-191)
191. *Hill, supra* note 13, atpara 120. [↑](#footnote-ref-192)
192. *Ibid* (emphasis added). [↑](#footnote-ref-193)
193. For more on dignity as a common basis see Hunt *supra* note 143 at 660. [↑](#footnote-ref-194)
194. See also Rolph, *supra* note 186, at 305-306. [↑](#footnote-ref-195)
195. See e.g., *Warman v Grosvenor*, (2008) 92 OR (3d) 663 (Sup.Ct.J); *Marson v Nova Scotia,* 2017 NSCA 17 [↑](#footnote-ref-196)
196. *Hill, supra* note 13, atpara 168. *Andrews v. Grand & Toy Alberta Ltd*. [1978] 2 SCR 229 at 265. Indexed for inflation, this cap now stands at $380,000. Hill's high quantum came as a result of a jury trial which may have been a factor in its size. This, however, is an unknown given the lack of empirical studies on juries more generally. See the British Columbia Law Institute ,"Civil Juries in British Columbia: Anachronism or Cornerstone of the Civil Justice Process" (2021) at 2, online: <<https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/current-reviews/civil-jury-trials>>. The British Columbia Law Institute does highlight, however, that there is “considerable judicial dicta" which lauds the jury trial for allowing "community values and a general sense of proportionality to be reflected in the resolution of private disputes" at 34. Accordingly, we observe that the higher quanta in defamation actions arising from a jury trial be given their due by judges in a privacy claim context. [↑](#footnote-ref-197)
197. *Ibid* atpara 169 (emphasis added) [↑](#footnote-ref-198)
198. See also Rolph, *supra* note 186, at 307-308. [↑](#footnote-ref-199)
199. Slander does require proof of damage, due to its transient nature. [↑](#footnote-ref-200)
200. The torts and their elements are not identical of course, but the purpose of both is to remedy harm suffered to an individual’s dignity. [↑](#footnote-ref-201)
201. It should be noted that the tort of Intrusion upon Seclusion (which has a cap) may overlap with the statutory right of action, but that they are not identical. At times, such as arguably was the case in *Nammo*, the statutory remedy resembles the tort of defamation more, since the focus of that case was over the *accuracy* of the information provided to the bank. As we discuss below with respect to future legislation, a statutory right of action should be based on a foundation of dignity which is as broad as possible, and encompasses both defamation and privacy. [↑](#footnote-ref-202)
202. SNS 2017, c 7. [↑](#footnote-ref-203)
203. 2020 NSSC 177 [*Candelora*] [↑](#footnote-ref-204)
204. *Ibid* at para 5. [↑](#footnote-ref-205)
205. SNS 2017, c 7, s 6. [↑](#footnote-ref-206)
206. *Candelora, supra* note 201 at para 13-14. [↑](#footnote-ref-207)
207. *Ibid* at para 15 [↑](#footnote-ref-208)
208. *Ibid* at para 28 [↑](#footnote-ref-209)
209. *Ibid* at para 76-81. [↑](#footnote-ref-210)