The Common Law Right to Privacy

by

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Abstract

This paper justifies and delineates a common law right to privacy. The first part of the paper reviews the current state of the law of privacy.

The second part defines privacy by distinguishing privacy rights from those otherwise protected by the common law. The paper argues that the appropriate organizing principle behind the legal concept of privacy is the idea of control over one’s interactions with others.

The third part argues that protection of privacy at common law is justified both pursuant to the demands of the Charter and with a theoretical understanding of private law based on a Kantian notion of Right.

The final part argues that such an analysis determines the substantive nature of the protection that should be afforded at common law, namely that privacy should be protected from both intentional and negligent interference.
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The Common Law Right to Privacy

I. Introduction

If I read your diary without your consent, have I wronged you? This is the question this paper seeks to answer.

This paper presupposes a particular understanding of private law. A conception of private law based on an idea that rights are the starting point of any analysis. Such an understanding is necessary to answer the question why it is that certain “rights” are recognized by the common law and other “interests” remain solely that: interests. How is it possible to say that I have a public law right to privacy, but not one in private law? It is puzzling that I have the right to demand the state respect my privacy, but not other individual citizens.

At the outset, it is necessary to define the parameters of this paper. Jurisdictionally, the paper is focused on the Province of Ontario. However, it draws for its analysis on the common law as developed in all of the Provinces of Canada, and from other common law jurisdictions, although I in no way purport to offer a comprehensive analysis of these other jurisdictions. In addition, reference is made to the legislative developments in Ontario, other Canadian provinces and federally. There has been considerable legislative activity in what could be broadly called the area of privacy rights in the last decade, the vast majority of which deals with the protection of individual privacy interests from the power of the state. Some legislation, in provinces other than Ontario has regulated the use of private information between private actors, and even gone so far as to create a private statutory cause of action for invasion of privacy. Such legislation will be referred to as offering insight into the nature of the subject matter at the heart of this
analysis. This is not a paper about the collection, dissemination and use of private or confidential information, the regulation of which is the primary purpose of, for instance, privacy legislation in Ontario. The subject matter of this paper is something else: privacy as a private law right. If I own a piece of land, I have an absolute right to exclude you from that land. Moreover, I have an enforceable right: a right which the state recognizes through a cause of action in trespass. Do I have a similar right in respect of my privacy?

While the private law right to privacy is the specific subject of analysis. The goal of the paper is to attempt to understand on a broader level the manner in which the common law evolves to recognize new causes of action. The right to privacy provides an interesting opportunity to analyze this issue, both because it is an evolution that is in process, but also because of the unique divide between the public law recognition of a “right to privacy” and the curious failure of the common law to recognize the violation of such a right as actionable.

The ultimate point of this paper is to argue first that a private law cause of action for invasion of privacy should be recognized in Canada. In this sense it is normative. However, its starting point is a descriptive analysis of the current status of the tort of invasion of privacy and the public law right to privacy. It is through an analysis of the reasoning used in judicial decisions that I hope to arrive at a definition of privacy and the beginnings of a justification for the recognition of a common law cause of action. Finally, I rely on one of the dominant modes of theorizing about private law to demonstrate that the right to privacy is consistent with, and confirmed by legal theory, and moreover leads to certain conclusions about the substantive elements of the proposed cause of action.
In the first part of the paper I examine the idea of privacy generally, and developments in the law of privacy in public law. I then turn to the current status of privacy in private law: both as a statutory tort and at common law. The purpose of this part is to outline the current state of the law and to establish the importance privacy interests have already been afforded by the legal system. Privacy as a concept is well-developed and frequently applied in the public law context. The developments in this area of the law are foundational for the second part of the paper which seeks to build on attempts to define privacy in the legal context and to arrive at a definition which is both appropriately limited, in excluding what many have sought to include under the rubric of privacy, and general enough to capture what I argue is the essence of privacy, and which lies unprotected in the common law as it has developed in Ontario. In short, I argue that privacy is properly conceived of as the ability to control a certain aspect of one’s interactions with others: it is the freedom to choose what information about oneself is shared with others.

In the third part of the paper, I seek to analyse the potential justifications for a tort of invasion of privacy. I argue that two significant modes of argumentation support protection of privacy at common law. The first is what I term the public law reasoning approach. The common law must evolve in a manner consistent with Charter values. Privacy is an established Charter value and therefore some form of protection is demanded. I also argue however, that there are limits to reliance on the concepts and analytical tools that have been developed in the public law context which prevent the wholesale adoption of the public law analysis of privacy. In order to complete the argument, and to properly define the limits of private law protection, protection of privacy must be consistent with private law reasoning. I argue that defined appropriately, the right to privacy fits within a Kantian conception of private law. That is to say
recognizing a right to privacy at private law is entirely consistent with the dominant theoretical model for understanding private law from within.

In the final part of the paper I incorporate the arguments made about the definition of privacy, and the theoretical justification for it in private law, into a comprehensive view of how it should be protected at common law. I argue that the shape of the cause of action is a function of those arguments. In this way I hope to present an integrated vision of the tort of invasion of privacy at common law.

II: The Current State of the Law of Privacy

1. Privacy as a Legal Concept

What is privacy? In 1890 Brandeis and Warren made a case for the idea that the common law should recognize a “right to be let alone.”¹ Surprisingly, in their pioneering article, the concept of privacy as a concept was given little attention. It was to be self-evident what was meant by the notion of privacy. Not unexpectedly it was clearly tied to the “inner life” of the individual. In their reasoning they relied on the existence of various other causes of action such as breach of confidence and libel and slander and even property rights to suggest that the extension of the common law to these actions are the manifestation of a broader principle, namely privacy. Given the development of the common law in this fashion, and the link that is drawn between private thoughts and feelings as manifested in a document or thing, the concept of privacy as a distinct concept has been difficult to disentangle. Brandeis and Warren, in their

opening passage do however offer a more theoretical concept of privacy as a notion that is tied intimately to liberty. They state:

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses vi et armis. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, -- the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession -- intangible, as well as tangible.\(^2\)

The Supreme Court of Canada has repeatedly commented on the importance of privacy in the abstract. Section 8 of the *Charter of Rights and Freedoms* has been interpreted broadly to explicitly grant not only protection from unreasonable search and seizure in the criminal context but as a right to privacy more generally. The Court has not been shy about elaborating on the central role privacy plays as a value in a free and democratic society. Justice L’Hereux-Dube in a lengthy passage from *R v. O’Connor*,\(^3\) a third party records case, eloquently sets out the various grounds of a broad right to privacy:

\[110\] This Court has on many occasions recognized the great value of privacy in our society. It has expressed sympathy for the proposition that s. 7 of the *Charter* includes a right to privacy. On numerous other occasions, it has spoken of privacy in terms of s. 8 of the *Charter*. On still other occasions, it has underlined the importance of privacy in the common law.

\[111\] On no occasion has the relationship between "liberty", "security of the person", and essential human dignity been more carefully canvassed by this Court than in the reasons of Wilson J. in *R. v. Morgentaler*, [1988] 1 S.C.R. 30. In her judgment, she notes that the *Charter* and the right to individual liberty guaranteed therein are tied inextricably to the concept of human dignity. She urges that both "liberty" and "security of the person" are capable of a broad range of meaning and that a purposive interpretation of the *Charter* requires that the right to liberty contained in s. 7 be read to "guarantee[] to every individual a degree of personal autonomy over important decisions intimately affecting their private lives" (p. 171). Concurring on this point


with the majority, she notes, as well, that "security of the person" is sufficiently broad to include protection for the psychological integrity of the individual.

[112] Equally relevant, for our purposes, is Lamer J.'s recognition in Mills, supra, at p. 920, that the right to security of the person encompasses the right to be protected against psychological trauma. In the context of his discussion of the effects on an individual of unreasonable delay contrary to s. 11(b) of the Charter, he noted that such trauma could take the form of stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.

[113] In the same way that this Court recognized in Re B.C. Motor Vehicle Act, supra, that the "principles of fundamental justice" in s. 7 are informed by fundamental tenets of our common law system and by ss. 8 to 14 of the Charter, I think that the terms "liberty" and "security of the person" must, as essential aspects of a free and democratic society, be animated by the rights and values embodied in the common law, the civil law and the Charter. In my view, it is not without significance that one of those rights, s. 8, has been identified as having as its fundamental purpose "to protect individuals from unjustified state intrusions upon their privacy" (Hunter, supra, at p. 160). The right to be secure from unreasonable search and seizure plays a pivotal role in a document that purports to contain the blueprint of the Canadian vision of what constitutes a free and democratic society. Respect for individual privacy is an essential component of what it means to be "free". As a corollary, the infringement of this right undeniably impinges upon an individual's "liberty" in our free and democratic society.

... 

[115] Privacy has traditionally also been protected by the common law, through causes of action such as trespass and defamation. In Hill, supra, which dealt with a Charter challenge to the common law tort of defamation, Cory J. reiterates the constitutional significance of the right to privacy (at para. 121):

...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. The protection of a person's reputation is indeed worthy of protection in our democratic society and must be carefully balanced against the equally important right of freedom of expression. [Emphasis added.]

Thus, privacy is “an essential component of what it means to be “free”, and is grounded in the physical and moral autonomy of persons and is essential for the well-being of the

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individual. The elevation of privacy to a fundamental element of human dignity is significant but the Court is silent as to the specific link between privacy and autonomy.

2. Privacy and the Charter

As the above excerpt makes clear, the “right to privacy” as guaranteed by the Charter is well-established. Despite Justice L’Hereux-Dube’s rooting of the right to privacy in the right to liberty and security of the person, almost all of the development of the law of privacy has been through the Supreme Court’s jurisprudence on section 8 of the Charter and the guarantee of freedom from unreasonable search and seizure. From the watershed case of Hunter v. Southam, which framed the protection of s.8 as protection of a broader right to privacy, the Supreme Court has held that individuals have a reasonable expectation of privacy in a broad range of situations. The Supreme Court recently summarized its own findings:

[21] Privacy of the person perhaps has the strongest claim to constitutional shelter because it protects bodily integrity, and in particular the right not to have our bodies touched or explored to disclose objects or matters we wish to conceal. The state cannot conduct warrantless strip searches unless they are incident to a lawful arrest and performed in a reasonable manner (R. v. Golden, [2001] 3 S.C.R. 679, 2001 SCC 83, at paras. 90-92) in circumstances where the police have reasonable and probable grounds for concluding that a strip search is necessary in the particular circumstances of the arrest (para. 98). Nor may the police take bodily samples without authorization: R. v. Stillman, [1997] 1 S.C.R. 607.

the notion of place as an analytical tool to evaluate the reasonableness of a person’s expectation of privacy.

[23] Beyond our bodies and the places where we live and work, however, lies the thorny question of how much information about ourselves and activities we are entitled to shield from the curious eyes of the state (R. v. S.A.B., [2003] 2 S.C.R. 678, 2003 SCC 60). This includes commercial information locked in a safe kept in a restaurant owned by the accused (R. v. Law, [2002] 1 S.C.R. 227, 2002 SCC 10, at para. 16).5

In R. v. Dyment, one of the Court’s most influential decisions on the concept of privacy, LaForest J. attempted to summarize the various kinds of privacy that could be at stake, dividing the content of a right to privacy into three zones, territorial, personal, and informational:

[19] The first challenge, then, is to find some means of identifying those situations where we should be most alert to privacy considerations. Those who have reflected on the matter have spoken of zones or realms of privacy; see, for example, Privacy and Computers, the Report of the Task Force established by the Department of Communications/Department of Justice (1972), especially at pp. 12-14. The report classifies these claims to privacy as those involving territorial or spatial aspects, those related to the person, and those that arise in the information context. All three, it seems to me, are directly implicated in the present case.

[20] As noted previously, territorial claims were originally legally and conceptually tied to property, which meant that legal claims to privacy in this sense were largely confined to the home. But as Westin, supra, at p. 363, has observed, "[t]o protect privacy only in the home ... is to shelter what has become, in modern society, only a small part of the individual's daily environmental need for privacy". Hunter v. Southam Inc. ruptured the shackles that confined these claims to property. Dickson J., at p. 159, rightly adopted the view originally put forward by Stewart J. in Katz v. United States, 389 U.S. 347 (1967), at p. 351, that what is protected is people, not places. This is not to say that some places, because of the nature of the social interactions that occur there, should not prompt us to be especially alert to the need to protect individual privacy.

[21] This Court has recently dealt with privacy of the person in R. v. Pohoretsky, [1987] 1 S.C.R. 945. The case bears some resemblance to the present one, but there the doctor had taken the blood sample from a patient, who was in an incoherent and delirious state, at the request of a police officer. In holding this action to constitute an unreasonable search and seizure, my colleague Lamer J. underlined the seriousness of a violation of the sanctity of a person's body. It constitutes a serious affront to human dignity. As the Task Force on Privacy and Computers, supra, put it, at p. 13:

... this sense of privacy transcends the physical and is aimed essentially at protecting the dignity of the human person. Our persons are protected not so much against the physical search (the law gives physical protection in other ways) as against the indignity of the search, its invasion of the person in a moral sense.

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Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force put it (p. 13): “This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit.” In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. Governments at all levels have in recent years recognized this and have devised rules and regulations to restrict the uses of information collected by them to those for which it was obtained; see, for example, the Privacy Act, S.C. 1980-81-82-83, c. 111.6

In describing the three “zones” of privacy, LaForest J. is careful to insist that all three zones of privacy are related in that they are all grounded in the concept of human dignity – a concept that itself does not form part of the text of the Charter but which the Supreme Court has repeatedly recognized as fundamental to its underlying architecture. Binnie, J. writing for the Supreme Court in R. v. Tessling, reiterated the appropriateness of LaForest’s categories and traced the roots of the various forms of protection to trespass and assault. However, Binnie J. emphasized that privacy was something more than any of those existing rights, and that the categories themselves were convenient analytical tools, but that in any given case, the categories may overlap:

Much of the law in this area betrays its early roots in the law of trespass. In an earlier era, privacy was associated with private property, whose possession protected against intruders. If the rights of private property were respected, and the curtains of the home (or the drawbridge of the castle) were pulled, the King’s agents could watch from a distance but would have no way of finding out what was going on inside. As technology developed, the protection offered by property rights diminished. Wiretaps, for example, require no physical intrusion, but can be implemented at a distance. FLIR images can be taken from an airplane. The courts were reluctant to accept the idea that, as technology developed, the sphere of protection for private life must shrink. Instead, it was recognized that the rights of private property were to some extent a proxy for the privacy that ownership of property originally conferred, and therefore, as the state’s technical capacity for peeking and snooping increased, the idea of a protected sphere of privacy was refined and developed. The perspective adopted by the Court in Hunter v. Southam, supra,

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accordingly, is that s. 8 “protects people, not places” (p. 159). See also R. v. Thompson, [1990] 2 S.C.R. 1111, at p. 1142.⁷

The Supreme Court has been reluctant to attempt a comprehensive definition of privacy, instead calling the concept a “protean notion”.⁸ However, in its recent jurisprudence, the Court, has begun to speak frequently in the language of control, as a means of defining the essence of privacy. Binnie, J. in Tessling attempted to summarize the notion of informational privacy in the following terms:

Informational privacy has been defined 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”: A. F. Westin, Privacy and Freedom (1970), at p. 7. Its protection is predicated on

the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain . . . as he sees fit.

(Report of a Task Force established jointly by Department of Communications/Department of Justice, Privacy and Computers (1972), at p. 13)⁹

In the Supreme Court’s most recent discussion of the scope of 8 rights, R. v. Patrick⁴⁰, the language of control assumes even greater significance as the central issue in the case, abandonment, became a question of the extent to which the accused objectively retained control over the information contained in his trash. Binnie J., again writing for the majority, states: “when the garbage is placed at the lot line for collection, I believe the householder has sufficiently abandoned his interest and control to eliminate any objectively reasonable privacy interest.”¹¹

⁷ R. v. Tessling, supra, at para. 16.
⁹ R. v. Tessling, supra at para. 23.
¹¹ R. v. Patrick, supra, at para. 63
The existence of a right to privacy is not in the public law context however unlimited. The right is internally limited in two fundamental ways. First, in determining whether an individual’s section 8 rights are triggered at all, the Court determines whether in the totality of the circumstances the individual had a reasonable expectation of privacy. The analysis involves an examination of the subjective belief of the individual and an objective assessment of that claim. In determining whether a claim to a reasonable expectation of privacy is objectively reasonable the Court considers the entire factual context and the competing interests at stake, including the state interests in law enforcement. As Justice Binnie, puts it in *Patrick*:

Privacy analysis is laden with value judgments which are made from the independent perspective of the reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy. This is inherent in the “assessment” called for by Dickson J. (as he then was) in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60:

> This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from “unreasonable” search and seizure, or positively as an entitlement to a “reasonable” expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public’s interest in being left alone by government must give way to the government’s interest in intruding on the individual’s privacy in order to advance its goals, notably those of law enforcement.\(^{12}\)

Second, even if there exists a reasonable expectation of privacy, the search must still be “unreasonable”. An invasion into privacy is not unreasonable if it is judicially or otherwise authorized by law.

Thus, in the criminal context, the right to privacy is increasingly defined in terms of control over decisions about what information is communicated to “the public”. The existence of a right to privacy in any given situation is determined on an objective basis: was there a

reasonable expectation of privacy. In making the determination of a reasonable expectation of privacy, the court considers and balances against the individual’s interest the competing interests of the state in law enforcement. Finally, an invasion of privacy (a “search or seizure”) is not necessarily unreasonable simply because of the existence of a reasonable expectation: if the invasion has been judicially authorized by a warrant or is otherwise permissible at common law the constitutional right to privacy has not been violated.

3. The Legislative Regime

There has been considerable legislative activity in the field of privacy in the last two decades in most provinces of Canada and federally. In Ontario a patchwork of privacy legislation now exists dealing with various discrete aspects of privacy.\textsuperscript{13} The Federal Government has enacted the \textit{Privacy Act} and the \textit{Personal Information Protection and Electronic Documents Act}.\textsuperscript{14} The Federal government and many Provincial ones have established Privacy Commissioner’s or Offices for dealing with disputes arising out of or under these kinds of legislation. For the most part, this legislation is aimed at tackling two the problem of the collection, use and disclosure of private information by the state.

Consider for instance, the stated purposes of the \textit{Privacy Act} and the \textit{Personal Information Protection and Electronic Documents Act}:

\begin{quote}
\textit{Privacy Act}:
\end{quote}

\begin{quote}
\textit{Personal Information Protection and Electronic Documents Act}:
\end{quote}

\begin{quote}
\end{quote}

\begin{quote}
\end{quote}
2. The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.\(^{15}\)

*Personal Information Protection and Electronic Documents Act:*

3. 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.\(^{16}\)

Both Acts are aimed at regulating the collection, use and disclosure of personal information in a recorded form of individuals. The latter Act explicitly recognizes “the right of privacy of individuals with respect to their personal information.” This right, for the purposes of the legislation, is defined narrowly as relating to personal information, particularly information recorded in electronic format. The *Personal Information Protection and Electronic Documents Act* seeks to extend the protections afforded under the *Privacy Act* to private actors. In so doing it represents an important extension of a notion of a right to privacy to one that pertains not only between the state and individuals but as between private actors.

Provincially, some legislation has gone further. Some provinces have enacted more comprehensive privacy legislation that includes a statutory cause of action for invasion of privacy.\(^{17}\) Ontario, has not created a statutory cause of action, but has extended the field of legislation to include legislation aimed at regulating more than simply the conduct of the state in its interactions with individuals. Through the *Freedom of Information and Protection of Privacy Act*.

\(^{15}\) *Privacy Act*, s. 2

\(^{16}\) *Personal Information Protection and Electronic Documents Act*, s. 3.

Act\(^{18}\), corporations are subject to duties with respect to private information, and as a result of the Personal Health Information Protection Act 2004\(^{19}\), the province has imposed certain duties on physicians in respect of health information obtained from patients. Through these incursions into the realm of private law the legislature has begun the process of regulating privacy concerns between what would normally be considered private citizens.

The effect of this legislation, although not creating private law rights, is to recognize that there exists certain personal information, which the state, or other private actors, may come into possession of, which is worthy of special protection. Moreover, the legislation recognizes that the provision of such private information under certain circumstances does not render that information any less private. In other words the legislation ensures that the individual retains control over the use and dissemination of that information.

4. The Statutory Cause of Action

As indicated, some provincial legislatures have gone further than regulating only the collection and use of information by private organizations and recognized a broader right to privacy that obtains between private individuals.\(^{20}\) British Columbia’s short Privacy Act\(^{21}\) in five sections creates causes of action “in tort” for invasion of privacy. The key provision is as follows:

Violation of privacy actionable

\(^{18}\) R.S.O. 1990 c. F.31  
\(^{19}\) S.O. 2004, c3 Sch. A.  
\(^{20}\) See note 16, supra, and Appendix 1.  
\(^{21}\) Privacy Act, R.S.B.C. 1996, c.373.
1 (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

(2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

(3) In determining whether the act or conduct of a person is a violation of another’s privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

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

The British Columbia Privacy Act is silent as to the definition of privacy. It has delegated the function to the courts in interpreting the scope of the action for invasion of privacy. However, in including a non-exhaustive list of the examples of invasion of privacy, namely, eavesdropping or surveillance, the legislature signaled the scope of the intended protection.

In the case of L.A.M. v. J.E.L.\textsuperscript{22}, the Court awarded damages for the surreptitious spying and videotaping of the plaintiff in a washroom. The Court readily concluded that there was a violation of the plaintiff’s right to privacy and awarded general damages and punitive damages.

In St. Pierre v. Pacific Newspaper Group\textsuperscript{23}, the Vancouver Sun published an article on a suspected terrorist. The story was accompanied by a photograph of a man identified as the subject of the piece. The photograph however, was erroneously, one of the Plaintiff, Mr. St. Pierre a lawyer. St. Pierre sued for among other things, a violation of privacy under the Privacy Act. The Court in analyzing the claim, had occasion to posit a definition of privacy, and elaborate on the mental element of the tort of invasion of privacy.

\textsuperscript{22} 2008 BSSC 1147 (CanLii) (B.C.S.C.).
In defining privacy, the court adopted a broad definition from American caselaw in stating as follows:

[40] As to what is meant by “privacy”, in *Davis v. McArthur* (1969), 10 D.L.R. (3d) 250, 72 W.W.R. 69 (B.C.S.C.), Seaton J. cited definitions from American case law and the *Shorter Oxford English Dictionary*, at p. 1586, which defined privacy as “[t]he state or condition of being withdrawn from the society of others, or from public interest; seclusion.”

[41] Although the judgment was reversed in the result at the Court of Appeal [(1970), 17 D.L.R. (3d) 760, [1971] 2 W.W.R. 142 (B.C.C.A.)], Seaton J.’s approach to this issue was approved. The Court of Appeal found that the definition of the "Right of Privacy" in *Black's Law Dictionary*, 4th ed., (St. Paul: West Pub Co., 1951), was “useful” and “largely consonant” with the provisions of the *Privacy Act*. *Black’s* provides as follows:

The right to be let alone, the right of a person to be free from unwarranted publicity. *Holloman v. Life Ins. Co. of Virginia*, 192 S.C. 454, 7 S.E. 2d 169, 171, 127 A.L.R. 110. The right of an individual (or corporation) to withhold himself and his property from public scrutiny, if he so chooses. It is said to exist only as far as its assertion is consistent with law or public policy, and in a proper case equity will interfere, if there is no remedy at law, to prevent an injury threatened by the invasion of, or infringement upon, this right from motives of curiosity, gain or malice. *Federal Trade Commission v. American Tobacco Co.*, 44 S.Ct. 336, 264 U.S. 298, 68 L.Ed. 696, 32 A.L.R. 786.24

In discussing the meaning of the terms “wilfully” and “without claim of right” the British Columbia Supreme Court adopted a definition of “wilfully” that did not necessarily include malice, but referred merely to the intentional nature of the act. The Court largely adopted the British Columbia court of Appeals definition as set out in *Hollinsworth v. BCTV*25:

… In my opinion the word "wilfully" does not apply broadly to any intentional act that has the effect of violating privacy but more narrowly to an intention to do an act which the person doing the act knew or should have known would violate the privacy of another person. That was not established in this case.

I move now to the phrase, "without a claim of right". I adopt the meaning given by Mr. Justice Seaton to that very phrase, "without a claim of right" in *Davis v. McArthur* (1969), 10 D.L.R. (3d) 250:

… an honest belief in a state of facts which, if it existed, would be a legal justification or excuse...

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25 59 B.C.L.R. (3d) 121 (B.C.C.A.) at paras. 29-30.
However, the Court in *St. Pierre* interpreted the phrase without claim of right to include claims based on “gross negligence” or recklessness. In this case however, the Court found that the paper had acted merely through inadvertence, a level of culpability insufficient to attract liability under the statute.  

Thus the statutory tort as developed in British Columbia can be said to be an intentional tort, in the sense that the conduct in question must have been with the intention of committing the acts that violate the plaintiff’s privacy, while leaving open the possibility of liability for acts that are recklessly or even negligently committed. Moreover, to be actionable there is no need to prove damage.

The Manitoba and Newfoundland statutory torts go further than the British Columbia Act in listing a greater number of specific examples of violations of privacy, including the appropriation of personality or likeness and the non-consensual use of one’s diaries or letters. In addition the Manitoba and Newfoundland statutes specifically enumerate the available remedies including, an injunction.

In all provinces the statutory torts afford protection for intentional acts done in violation of an individual’s privacy.

5. Privacy and the Common Law

The common law in respect of privacy is, by contrast, underdeveloped. In Ontario, the existence of a private law cause of action for a tort of invasion of privacy has not been firmly established. At most, it has withstood a pleadings motion. The Courts have held that it is not

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27 Manitoba Privacy Act, s. 3-4.
plain and obvious that a claim in tort for the invasion of privacy could not succeed. The relative
dearth of developed case law is perhaps to some degree a function of history. As Brandeis and
Warren noted in their article a hundred years ago, the common law developed to protect privacy
interests through other means: trespass, breach of confidence, libel and slander. Moreover, the
nature of damages in cases of invasion of privacy as a historical reality has likely hindered the
development of the law in this area.

The most recent statement of the state of the law in this area is best stated (albeit in the
negative) by Justice Stinson in Somwar v. McDonalds:

In light of the trial decisions listed in this brief survey of Ontario jurisprudence, and the absence
of any clear statement on the point by an Ontario appellate court, I conclude that it is not settled
law in Ontario that there is no tort of invasion of privacy.\textsuperscript{28}

In arriving at this decision Justice Stinson reviewed a number of Ontario decisions some
of which permitted the tort of invasion of privacy to advance past the pleadings stage, and some
which concluded that it was indeed plain and obvious that claim could not succeed. The most
definitive statement of the latter position was made by Justice Cumming in Haskett v. Equifax,
citing with approval the following passage from Klar on Torts:

Despite some encouraging suggestions from a few courts, it would be fair to say that the
Canadian tort law does not yet recognize a tort action for invasion of privacy \textit{per se}. Rather “privacy” rights have been protected under the umbrella of other traditional tort
actions, and by legislative interventions.\textsuperscript{29}

There has been no definitive statement to date from the Ontario Courts on this issue,
although the issue continues to attract judicial attention.

In Ontario cases involving allegations of the tort of invasion of privacy began to appear in the 1980’s. Various claims have withstood pleadings motions including claims for invasion of privacy based on the harassment, interception and publication of private telephone communications; and installation of a video camera to conduct surveillance on a neighbour’s property. Justice Stinson in Somwar, summarizes the history of the cause of action in Ontario:

In Capan v. Capan, [1980] O.J. No. 1361 (H.C.J.), the plaintiff commenced an action against her husband for damages for continuing mental and physical harassment and invasion of privacy. The defendant allegedly stalked the plaintiff during a separation, harassed her with persistent telephone calls at home and at her work place, and forced his way into her apartment. The defendant moved to strike out the plaintiff’s statement of claim based on the absence of a reasonable cause of action. Osler J. dismissed the motion …

In Saccone v. Orr (1981), 34 O.R. (2d) 317 (Co. Ct.), the defendant recorded a private telephone conversation with the plaintiff without the plaintiff’s consent. The defendant then played the tape at a municipal council meeting. A transcript of the tape was subsequently published in a local newspaper. The court rejected the defendant’s argument that no tort of invasion of privacy existed in Ontario common law…

In Roth v. Roth, (1991), 4 O.R. (3d) 740 (Gen. Div.), the court held that the defendants’ acts such as locking a gate on an access road, interfering with and blocking the use of the road by the plaintiffs in getting to and from their cottage, and removing a shed, pump and dock with the concomitant shutting off of electricity in the plaintiffs’ cottage at a time when they were not there constituted a harassment of the plaintiffs in the enjoyment of their property …

In Lipiec v. Borsa, [1996] O.J. No. 3819 (Gen. Div.), the defendants’ counterclaim against the plaintiffs was based on nuisance and trespass. The plaintiffs and the defendants were owners of adjoining residential properties. The court found that the plaintiffs had greatly reduced the defendants’ enjoyment of their property by removing the fence between the two properties and erecting a commercial type surveillance camera aimed at the defendants’ yard. McRae J. noted that intentional invasion of privacy had been recognized as actionable in Ontario in several cases. He found that there was intentional invasion of the defendants’ right to privacy and awarded damages to the defendants.

In Tran v. Financial Debt Recovery Ltd., [2000] O.J. No. 4293 (S.C.J.) (reversed on other grounds, [2001] O.J. No. 4103 (Div. Ct.)), the plaintiff had outstanding student loans. Employees of the defendant debt collection agency began calling the plaintiff about the loan, several times an hour, at work. The plaintiff disputed the amount outstanding, but he was never provided with particulars. Despite the plaintiff’s request to be contacted at home, the defendant’s employees continued to call him at work. The court found that the defendant had invaded the plaintiff’s privacy by placing repeated and vexatious calls to the plaintiff’s place of employment. Molloy J. awarded damages to the plaintiff for the torts of defamation, intentional interference with economic interests, intentional infliction of emotional suffering, and invasion of privacy.

…
[20] The courts of Ontario have not been unanimous concerning the existence of a common law tort of invasion of privacy. In Haskett v. Trans Union of Canada Inc. (2001), 10 C.C.L.T. (3d) 128 (Ont. S.C.J.), aff'd 15 C.C.L.T. (3d) 194, (Ont. C.A.), the plaintiff alleged that the defendant credit-reporting agencies had unlawfully included his pre-bankruptcy debts in consumer reports and incorrectly reported them as collectible debts. He sought to bring a class proceeding against the defendants for damages based on breach of fiduciary duty, invasion of privacy, and negligence. The defendants moved to strike the statement of claim on the ground that it did not disclose a reasonable cause of action. With respect to invasion of privacy, Cumming J. found that it was plain and obvious that the complaint of wrongful inclusion of inaccurate information in a credit report did not amount to a reasonable cause of action in tort.30

The case law in Ontario is clearly at odds on the issue, although the scales are tipping towards at least recognition that a tort might, or possibly could exist. Since, Somwar, recent decisions have, arguably continued the general trajectory towards recognition of a tort, without actually doing so.

In the recent decision of Justice Aston in Nitsopolous v Wong31, Justice Aston concluded that it would be premature to strike a claim based on a tort of invasion of privacy given the need for the common law to evolve consistently with the Charter. In Nitsopolous, Globe and Mail columnist Jan Wong entered the Plaintiffs home under the pretense of being a house cleaner. The real purpose of her visit was to obtain material for a print series to be published in the newspaper entitled “Maid for a Month.” The Nitsopolous claimed that in misrepresenting her true purpose and subsequently publishing an article about her experience Wong invaded their privacy: the Plaintiffs never would have agreed to have Wong enter the house had they known her true identity and true purpose.

In the 2008 decision of Warman v. Grosvenor32, Justice Ratushny acknowledged that Justice Aston in Nitsopolous may be correct, in that the law as to the existence of a cause of action for invasion of privacy is not settled, damages for invasion or privacy “would have to flow

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30 Somwar, supra at paras. 16-20.
from harm that is not subsumed by the torts of defamation and assault.”33 She elaborates: “in the present case there is no tortious conduct amounting to an invasion of privacy that is separate from the conduct making the defendant liable for damages for defamation and assault. The result is that while the defendant’s conduct amounting to defamation and assault have caused injury to the plaintiff’s reputation and to his right to “mental security” and the plaintiff is able to recover damages for these injuries there is no separate injury to any common-law right to privacy that the plaintiff may enjoy. . . In other words the conduct causing the harm is recoverable in damages for defamation and assault and there is no separate tortious conduct resulting in separate harm, in my view, that is recoverable by the plaintiff for a tort of invasion of privacy.”34

The reasoning in Warman is based on the notion that the same conduct cannot amount to two distinct torts, or more, that there must be “separate damage” as a result of invasion of privacy. Thus, in dismissing the claim for invasion of privacy, Justice Ratushny implicitly did so on the basis of a conception of the tort that includes the necessity of a distinct head of damages. How would Justice Ratushny have dealt with the claim were it framed only in invasion of privacy? Moreover the need for distinct damage, or damage at all presupposes a notion of the understanding of the nature of the tort. In trespass for instance, it is not necessary to show damage to the property in order to succeed. The right at stake is a right of exclusion. To require damages as a component of the tort of invasion of privacy is to demand an element of the cause of action without an analysis of the justification for it.

Justice Stinson in Somwar concluded after his analysis that the possibility existed for an intentional tort of invasion of privacy to exist. He states:

33 Warman v. Grosvenor, supra, at para. 66.
34 Warman v. Grosvenor, supra, at paras. 69-70.
Based on Prosser’s description of intrusion of privacy interests and Fridman’s observations on treatment of “invasion of privacy” by courts, I conclude that the plaintiff’s complaint concerning the invasion of his privacy could be categorized as an intentional tort.\textsuperscript{35}

It is not at all clear from Justice Stinson’s reasons what precisely he meant by the term “intentional tort”. The difficulty the courts face in attempting to come to terms with the elements of a cause of action for invasion of privacy is a result of their failure to come to terms with the nature of the right at stake. Without greater clarity in this regard, it is impossible to define the cause of action in any principled way.

\textbf{III: Redefining Privacy}

1. \textit{What Privacy is Not}

In \textit{Haskett}, Justice Cumming cited from Klar’s textbook on torts, in which a commonly held position was summarized:

Several established torts protect privacy interests. The dignity of one's person is protected by several torts, such as assault, battery, the intentional infliction of emotional distress, and false imprisonment. One's right to be left alone to use and enjoy property is protected by trespass, and nuisance. One's reputation is protected by defamation. The right to the commercial exploitation of one's "personality" and "goodwill" also has received protection. In \textit{Krouse v. Chrysler Ltd.}, the tort of "appropriation of one's personality", fashioned from an action on the case, was recognized by the court. Another area of growing importance which protects privacy interests is the law relating to liability for breach of confidence.

In view of these alternatives, is a separate tort of "invasion of privacy" necessary? It is arguable that it is not. The concept of privacy is too ambiguous and broad to be able to be covered adequately in one cause of action. It is desirable to have the different aspects of privacy protection dealt with in separate torts which more clearly can focus on the interests at hand. Gaps in the law which cannot be filled by extending traditional principles can be dealt with as they arise, either through the expansion of the common law or by legislative intervention.\textsuperscript{36}

Professor Klar’s view that there is no need for a tort of invasion of privacy is based on two fundamental points: first, aspects of privacy are adequately covered by recognized causes of

\footnotesize{\textsuperscript{35} Somwar, supra at para. 12.  
\textsuperscript{36} Haskett, supra at para. 19, citing L. Klar, \textit{Tort Law}, 3\textsuperscript{rd} ed. (Toronto: Thomson Carswell, 2003) at 77, 79-80.}
action; and two, the concept of privacy is too “ambiguous and broad” to be workably defined. In support of his position he divides the existing case law into three distinct areas: those protecting “dignity”, those protecting use of property, those protecting personality and reputation, and breach of confidence.

First, it is not clear that any of these causes of action are sufficient to provide a legal remedy for the alleged wrongs in a number of the cases where a tort of invasion of privacy has been proposed. Assault and Battery are aimed at protecting physical integrity, even arguably with the extension of the tort of assault to the threat of imposing physical or psychological harm. The interest protected is not “the right to be let alone with one’s thoughts” but the right to be free from physical harm. The torts of nuisance and trespass are property based rights, that likewise in many of the fact situations already discussed, provide no remedy. This is so precisely because the right at stake, the right being protected pursuant to these causes of action are property rights. Defamation, and the tort of appropriation of personality, referred to by Klar, likewise protect a very specific aspect of reputation, and do not themselves fit readily together. Defamation protects reputation by prohibiting the dissemination of untrue statements. It is not aimed at protecting private communications or thoughts: defamation does not prohibit the disclosure of information, only the disclosure of untrue information. The tort of appropriation of personality, is one that developed as a result of a desire to protect the commercial interest a celebrity may have in their name and or likeness. Like breach of confidence, the right at stake is an economic interest.

Indeed, contrary to Klar, an analysis of the causes of action that do exist demonstrate a lacuna in the common law: the right to privacy is something other than a physical, economic, or property interest: a point made repeatedly by the Supreme Court in its Charter jurisprudence.
And yet, Klar’s commentary is useful in that it indicates, and hence the confusion, that the right to privacy is in some way akin to, or related to interests in physical integrity and property. While it may be that in certain circumstances, an action for nuisance may be sufficient to incidentally protect a privacy interest, this is no justification for saying that no tort of invasion of privacy should exist. Indeed, as I shall argue, recognizing the actual interest at stake provides much needed clarity in thinking about and defining the nature of the right, and hence the wrong, and moreover, prevents existing causes of action from being improperly stretched to accommodate interests that they were not designed to protect. To suggest the law should develop in such a manner leads only to greater incoherence and indeed injustice.

(a) The English Approach: A Cautionary Tale

To demonstrate the perils of following the Klar approach and attempting to protect privacy by way of existing torts one need only look at the condition of the law of privacy in England. In the famous case of Douglas v. Hello! Ltd. the Court of Appeal concluded that no separate action for invasion of privacy was needed as the Douglases’ privacy could be adequately protected under the rubric of the existing action for breach of confidence. In Douglas, an interloper surreptitiously attended the celebrity wedding of the plaintiffs and sold unauthorized photos taken during the event to a tabloid magazine. The Douglases had made contractual arrangements for the publication of authorized photographs with a rival magazine. The Douglases sued in their own right as did the magazine with whom they had contracted. In respect of the individual claims, the trial judge found the defendant liable for breach of

37 [2005] 4 All E.R. 128 (C.A.). The trial involved claims on behalf of the Douglases personally for invasion of privacy as well as claims between the rival tabloid magazines. The personal claim of the Douglases for invasion of privacy was allowed by the trial judge and the Douglases were awarded nominal damages ([2003] 3 All E.R. 996). The Court of Appeal upheld the decision on this issue, and it was not appealed to the House of Lords. The House of Lords decision, [2007] 4 All E.R. 545, dealt strictly with the claims between the corporate entities.
confidence and awarded a relatively modest £3750 pounds in damages for the distress occasioned by the publication of the unauthorized photographs.

On the law generally, the Court of Appeal stated as follows: “To summarise our conclusion at this stage: disregarding the effect of the OK! contract, we are satisfied that the Douglasses’ claim for invasion of their privacy falls to be determined according to the English law of confidence. That law, as extended to cover private and personal information, protected information about the Douglasses’ wedding”.38

As the court states in its reasons, the tort of breach of confidence traditionally involved three elements: 1. confidential information; 2. imparted with confidence; and 3. misused by the recipient to the detriment of the plaintiff. The Court further acknowledged that the original purpose of the tort was primarily a commercial one: protecting trade secrets and other information imparted during the course of a transaction or special relationship. In order to extend the law of breach of confidence to the fact situation of the Douglasses the Court had to manipulate all three of the criteria to the point that the remodeled action for confidence bears little resemblance to the original.

The Court redefined confidential information as any information in which one might have a reasonable expectation of privacy. As the nature of the information took on greater significance, the circumstances of transmission of the information became more or less irrelevant. Finally, the issue of misuse and detriment were relegated to non-issues: if the information was confidential, publication or use thereof automatically became detrimental. The

The Common Law Right to Privacy

Court in shifting the entire focus of the tort from the “misuse” of the information to the nature of the information dramatically reshaped the tort and indeed created a new one.

The difficulty with such an approach is that the cause of action which had evolved to protect the misuse of confidential information, breach of confidence, had a particular design that served the right it was intended to protect. The Court in treating the elements of the tort as entirely malleable, even disposable, violated the balance those elements struck in defining and protecting the right at stake. In its traditional context of a commercial dispute, what now is the status of the law of breach of confidence? The English experience indeed demonstrates the inaptness of the tort of breach of confidence in accommodating privacy rights. And this is apparent from the Court’s own shift in focusing on the nature of the information from appropriate versus inappropriate uses. In Douglas, the wrong of Mr. Thorpe was not that he obtained information on the condition that it be used in one manner and violated that confidence, but rather he surreptitiously obtained information in the first place. This fundamental distinction between the rights at stake is one that the English Court of Appeal elides: the result is a cause of action that is both ill suited for its new purpose and so altered that it can no longer serve its original.

2. A Reexamination of Prosser’s Four Categories

Most discussions of the right to privacy in the legal context begin with Prosser’s classification of the four aspects of the tort of invasion or privacy in the Second Restatement of Torts:
The right of privacy is invaded by:

(a) unreasonable intrusion upon the seclusion of another, as stated in 652B; or
(b) appropriation of the other's name or likeness, as stated in 652C; or
(c) unreasonable publicity given to the other's private life, as stated in 652D; or
(d) publicity that unreasonably places the other in a false light before the public.\(^{39}\)

Indeed, in a review of the cases in Ontario and British Columbia that have felt the need to advance a claim for invasion of privacy, the vast majority can be fit into these categories. Prosser himself, however, conceded that it was difficult to discover the underlying idea unifying these categories, stating that “The law of privacy comprises four distinct kinds of invasions of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common . . .”\(^{40}\) Indeed, the very fact that these categories are difficult to reconcile conceptually is a strong indication that the categorization may be flawed. In Canada, as stated by Klar, category (b) as discussed above may indeed already be covered by the tort of appropriate of personality (at least in some jurisdictions), and as I argued above, really protects an interest that is distinct from privacy as a dignity interest.

The final category identified by Prosser seems to fit more neatly under the rubric of libel and slander. It is the falseness of the information that is wrongful, not the publication itself. That leaves categories (a) and (c). Indeed, all of the cases discussed above fit within one of these categories. The question arises whether there are indeed two separate wrongs or whether these are manifestations of the same wrong. If I read your diary without your consent – is that wrongful in itself? Or is it only wrongful if I publish the information contained therein. It would

\(^{39}\) Second Restatement of Torts, S. 652
\(^{40}\) W. Prosser, "Privacy", (1960) 48 California L.R. 383 at 389
appear that the vast majority of invasion of privacy claims really fall into these two categories: the unauthorized intrusion upon privacy, and the publication of private information.

Consider the facts of *Watts v. Klaemt*\(^{41}\) in light of this question. The Court held that Klaemt, in intercepting and then disclosing private communications between the plaintiff and her daughter committed the tort of invasion of privacy. What is not clear from the reasoning in the decision is whether it was the interception (and recording) of the telephone conversations or the disclosure, either or both together that constituted the invasion of privacy. Would the Plaintiff have succeeded had the disclosure not been made but the interception discovered (leaving aside the quantum of damages)?

If it is only the former, then it is not difficult to imagine situations where private information was lawfully or consensually obtained but then non-consensually disclosed. Does such an act amount constitute an invasion of privacy? If we are to make sense of the cases then it seems to me that a definition of privacy must strive towards something more general, along the lines proposed by LaForest J. and by Brandeis and Warren. It is a right to be let alone rooted in human dignity which manifests itself in various specific instances: including the right to be free from unwarranted or unreasonable violations of one’s seclusion, and to be free from the non-consensual publication of private or personal information. In this way, a definition of privacy remains determined but flexible enough to adapt to future situations.

Moreover, the unifying concept behind the right to be let alone and the right to be free from the non-consensual publication of private information is the idea, nascent in the Supreme Court’s jurisprudence, of control. This is also the fundamental insight to be gleaned from the

\(^{41}\) *Supra*, note 25.
proliferation of legislation in respect of privacy, the dominant theme of which is protecting individual’s control over their information. More specifically, the organizing principle is the idea of control over one’s interactions with others. In spying on someone, or reading their diary, or broadcasting information that another does not want broadcast deprives the individual of their ability to choose the terms upon which they interact with the world. A right to privacy merely protects the ability of the individual to determine for him or herself how or what about themselves, their body or their thoughts, is transferred from the private realm to the public.

If privacy is conceived of in this manner it is possible to eliminate the categorical approach to a definition of privacy with a principled one. Indeed, in *Douglas v. Hello!* the English Court of Appeal labored considerably over the issue of whether, in permitting some access to their wedding (both to invited guests, and contractually to OK) they had ceded control such that the event could no longer be considered “private”. Their analysis demonstrates the definitional centrality of the notion of control. If this definition of privacy is applied to the array of cases in which privacy claims have been advanced it provides a means of distinguishing whether a privacy right is truly at issue. From this organizing principle also flows a definition of private: that which is private is that information over which one maintains control. The paradigmatic examples of this are one’s thoughts and one’s body. However, other information such as banking information, or other personal information, which are intuitively associated with privacy claims are also captured by such a definition.

It must be noted that defining privacy in terms of control is common in academic literature on privacy, and has a long history in the debate over the appropriate definition of privacy. As one recent scholar summarizes it:
One of the most predominant theories of privacy is that of control over personal information. According to Alan Westin: "Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." Numerous other scholars have articulated similar theories. Arthur Miller declares that "the basic attribute of an effective right of privacy is the individual's ability to control the circulation of information relating to him." According to Charles Fried, "Privacy is not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves." President Clinton's Information Infrastructure Task Force has defined privacy as "an individual's claim to control the terms under which personal information - information identifiable to the individual - is acquired, disclosed, and used." The Supreme Court has even stated that privacy is "control over information concerning his or her person."

The definitional debate over privacy in the United States is complicated by the entrenchment of Prosser’s four categories, and a jurisprudence that has included under the rubric of protection of privacy a vast array of conduct that is not a matter of concern for private law, a complete discussion of which is beyond the scope of this paper. If, as I have argued, Prosser’s categories should be pruned, then the variant of the control definition of privacy proposed here is one that is consistent with the dominant analytical approach, however latent, in the Canadian jurisprudence, and most importantly, as I argue below consistent with a theory of private law that treats private law as private law.

IV: Justifying a Common Law Remedy

1. Public Law Reasoning and Private Law Rights

The conundrum then for private law is the idea that the Supreme Court has unequivocally stated that there exists a fundamental right to privacy - a right that is tied to the liberty and

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42 Daniel Solove, "Conceptualizing Privacy", (2002) 90 California L.R. 1087 at 1110-1111. Solove discusses and ultimately rejects the control definition of privacy and a number of others proposing instead a "pragmatic approach" to understanding privacy. Solove’s reasons for rejecting the control definition are rooted deeply in the American constitutional jurisprudence a review of which he argues demonstrates a definition based on control to be both under and over inclusive. Such an analysis may be appropriate in the United States, but as I argue below, in Canada where the common law of privacy is underdeveloped, in developing and defining privacy for the purposes of private law there are limits to applying public law reasoning and public law principles. As the aim of this paper is to develop an understanding of privacy for the purposes of private law the Solove’s criticism of the various control based definitions of privacy is not applicable.
dignity of individuals in a free and democratic society – and yet when such a right is invaded by private individuals the common law provides no remedy.

The most significant impediment to the development of the private law in this area is the decision of the Supreme Court in *RWDSU v. Dolphin Delivery*. The Court unequivocally stated that the *Charter* governs solely interactions between the state and the individual, not between individuals. In other words, the *Charter* does not apply to disputes between individuals.

Notwithstanding the holding in *Dolphin Delivery*, the Supreme Court has also stated that even though the *Charter* does not apply directly to private interactions, *Charter* values inform the common law and the common law must evolve in a manner that is consistent with them. The Supreme Court recently summarized its jurisprudence in this area:

[19] This Court first considered the relationship between the common law and the *Charter* in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, where McIntyre J. concluded, at p. 603:

Where, however, private party “A” sues private party “B” relying on the common law and where no act of government is relied upon to support the action, the *Charter* will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the *Charter* is far from irrelevant to private litigants whose disputes fall to be decided at common law.

The reasons of McIntyre J. emphasize that the common law does not exist in a vacuum. The common law reflects the experience of the past, the reality of modern social concerns and a sensitivity to the future. As such, it does not grow in isolation from the *Charter*, but rather with it.

…

[21] At the same time, it must be recognized that the common law addresses a myriad of very diverse relationships and seeks to protect a host of legitimate interests not engaged by the *Charter*. Salient among these are the life of the economy and individual economic interests. Common law rules ensure the protection of property interests and contractual relationships. Nevertheless, where these laws implicate *Charter* values, these values may be considered.

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In Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, at para. 97, the Court adopted a flexible balancing approach to addressing alleged inconsistencies between the common law and Charter values:

Charter values framed in general terms, should be weighed against the principles which underlie the common law. The Charter values will then provide the guidelines for any modification to the common law which the court feels is necessary.

The Court also cautioned that: “Far-reaching changes to the common law must be left to the legislature” (para. 96). Finally, the Court determined that the party alleging an inconsistency between the common law and the Charter bears the onus of proving “that the common law fails to comply with Charter values and that, when these values are balanced, the common law should be modified” (para. 98). It is upon this basis that we proceed to balance the values at stake in the present appeal.  

Earlier, in R. v. Salituro, the Court framed the obligation of the Court in respect of ensuring the harmonious development of the common law with the Charter as a duty:

These cases reflect the flexible approach that this Court has taken to the development of the common law. Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in Watkins, supra, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

… In particular, the rule making an irreconcilably separated spouse an incompetent witness is inconsistent with the values enshrined in the Canadian Charter of Rights and Freedoms, and preserving the rule would be contrary to this Court's duty to see that the common law develops in accordance with the values of the Charter.  

It is this form of extending Charter values that has proved persuasive in those cases which have refused to strike claims for the invasion of privacy. Justice Stinson in Somwar relied heavily on

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Charter jurisprudence to support the idea that a claim for the invasion of privacy may indeed be recognized. He states:

I turn to this aspect of the rule 21.01(1)(b) test in light of arguable uncertainty of the existence of the tort of invasion of privacy in Ontario. In seeking an answer to this question (apart from the jurisprudence discussed above) it is useful to address a more fundamental one: is there a right to privacy in Canada and how is it protected? In Hunter v. Southam Inc., [1984] 2 S.C.R. 145 (S.C.C.), the Supreme Court of Canada acknowledged the existence of such a right. Dickson J. (as he then was) held that the purpose of the right against unreasonable search or seizure contained in s. 8 of the Canadian Charter of Rights and Freedoms was the protection of the privacy of the individual. In effect, s. 8 is the constitutional embodiment of the “right to be let alone by other people”.47

Given the pronouncements by the Supreme Court on the importance of privacy, and the explicit characterization of privacy as a Charter value, this is a powerful argument for the recognition of a private law cause of action. Indeed, for some commentators the public law developments are sufficient to justify the existence of private law tort.48 The difficulty however, is in reconciling the specific public law context in which comments about the importance of privacy have arisen, namely search and seizure by the police, with the claims made in private law cases.49

A public law right is after all not a private law right and in creating, elaborating and defining a public law right different considerations apply. Public law rights have, as a starting point a very different purpose: the regulation of the interactions between the state and individuals. It makes not sense to speak of a private law right to vote, although there exists under the Charter such a right. Charter rights are often viewed as necessary to protect the individual from the power of the state, most often its police powers. In this sense, public law rights can be viewed as stronger, in the sense that greater rights are required for individuals in

47 Somwar, at para. 23.
this context. Yet, in another sense, in evaluating the scope of public law rights, considerations that can play no role in the private law context mitigate the depth of the protection afforded, for instance, the state’s interest in detecting and prosecuting crime.

To elaborate the divide between a private and a public law conception of privacy, consider again the recent Supreme Court decision in *R. v. Patrick*. The accused was suspected of operating an ecstasy lab from his home in Vancouver. The police, without a warrant reached over the accused’s fence, onto his property, and searched through a garbage bag the accused had placed there for pick up by the municipal waste collectors. The question for the Supreme Court was whether the police conduct violated the accused’s section 8 right to be free from unreasonable search and seizure. The analysis turned on the question of whether the accused had a reasonable expectation of privacy in the trash. The Court stated:

> There is always, as *Hunter v. Southam* established, a realistic balance that must be struck between privacy and the legitimate demands of law enforcement and criminal investigation. In this case, the appellant’s conduct was, in my view, inconsistent with preservation of the former and tipped the balance in favour of the latter.⁵⁰

The Court concluded that the accused had abandoned any privacy interest in the trash, and therefore his section 8 rights were not triggered. In doing everything he had to do to dispose of the garbage, the accused could not objectively said to have retained a privacy interest in the information contained in the garbage bag. In the course of his reasons, Binnie J. however extended the notion of abandonment to one that pertained not only as between the individual and the state but the individual and other private citizens:

> Here, I believe, abandonment occurred when the appellant placed his garbage bags for collection in the open container at the back of his property adjacent to the lot line. He had done everything required of him to commit his rubbish to the municipal collection system. The bags were

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⁵⁰ *R. v. Patrick*, *supra*, at para. 70.
unprotected and within easy reach of anyone walking by in a public alleyway, including street people, bottle pickers, urban foragers, nosey neighbours and mischievous children, not to mention dogs and assorted wildlife, as well as the garbage collectors and the police. This conclusion is in general accord with the jurisprudence.\footnote{R. v. Patrick, supra, at para. 55.}

How would such a situation be analysed in the private law context? What if in \textit{Patrick}, rather than police officers it was a private citizen who intercepted Mr. Patrick’s trash: Justice Binnie’s “nosey neighbor”. Would the analysis of the existence of a reasonable expectation of privacy (or lack thereof) be different in the private law context where the interests of the state in law enforcement have no role in the analysis? As set out above, on the one hand, there is an argument that there would be less justification for permitting the intrusion because of the absence of any competing societal value, however, absent the extraordinary powers of the state (and the potential peril of a private citizen discovering illegal activity) there is less justification for a broad concept of privacy. The problem is not resolvable on the basis of public law reasoning alone. While the common law must evolve in accordance with \textit{Charter} values, in borrowing from constitutional jurisprudence the different considerations involved must be borne in mind and limit the wholesale applicability of public law reasoning. The resolution of how we define and protect the right to privacy in private law requires a consideration of the principles that animate private law itself.

It is also worth noting, that for some a more significant impediment to an argument that the common law should recognize a cause of action for invasion of privacy lies in the notion of incremental change emphasized \textit{R.W.D.S.U. v. Pepsi} and \textit{R. v. Salituro}. The difficulty, in the courts’ eyes, with recognizing a cause of action for invasion of privacy may be viewed as the creation from whole cloth, of a new cause of action, a task better suited to the legislatures.
Given the growing jurisprudence, and in light of the attempts to expand existing causes of action to cover situations that might be better classified as privacy cases, however, the Court could readily conclude that recognition of the principle underlying a number of currents already present in the common law.

2. Privacy and Private Law Theory

To fully justify, and articulate a right to privacy, it is necessary to reconcile public law notions of a right to privacy with the structure of private law. How do I know if I have a right in private law? For instance, we have property rights, and a right to bodily integrity, and contractual rights. These rights are protected through various causes of action recognized by the courts. Yet not all injuries amount to a violation of one’s rights: as the numerous claims for economic loss denied by the courts make clear, harming is not necessarily wronging. How then do we determine what counts as a right?

Generally speaking, theorizing about rights can be divided into two broad strains, with significant variations within each that it is not the purpose of this paper to explore. The first I will call the “internal” rights perspective. By this I mean to include those theorists who seek to understand the nature of rights as internally coherent and internally justified. Rights are justified not by recourse to a political or moral theory of what is important at any given time, but are defined by an internal essence. In one way or another internal theories of rights rely heavily on Kantian notions of freedom as the starting point. The second mode of thinking about rights, in contrast, is often referred to as instrumentalist. Such theorists justify or advocate for the existence of a given right through recourse, either explicitly or implicitly to a discipline or scheme of justification outside of the law. For such theorists, rights are merely a special species
of interests that gain recognition, or special status, as a result of the dominant political or moral thinking that happens to prevail, or because having that particular right furthers a goal other than the law, or the right itself. For these theorists whether any given interest merits the special status reserved for rights is a political, social, or economic, not a legal matter.

This paper is concerned with justifying a common law right to privacy from an internal perspective. On the Kantian theory of rights, we have a duty to treat each other as ends not means. In doing so we have an obligation not to interfere with another’s external freedom both to choose their own ends, and to pursue those ends. From this conception flows rights in property and personal integrity (and indeed contractual rights). For by interfering with my property or my person you interfere with my ability to choose and pursue my own ends. In Kantian terms, the universal principle of right is as follows:

Any action is right if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.

If then my action or my condition generally can coexist with the freedom of everyone in accordance with a universal law, whoever hinders me in it does me wrong; for this hindrance (resistance) cannot coexist with freedom in accordance with a universal law.

As Professor Ernest Weinrib puts it in his work *The Idea of Private Law*:

Understood as a manifestation of Kantian right, private law protects rights, not welfare. The normative focus of private law is on welfare only inasmuch as it is crystallized in the holding of a right. Under the Kantian principle of right, private law is concerned not with whether an act has increased or diminished welfare, but with whether that act can coexist with the freedom of another in accordance with practical reason. . . .

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52 It is not the intention of this paper to engage in the debate between instrumental and non-instrumental views about the nature of private law rights. The project of this paper is to demonstrate that a right to privacy is consistent with a Kantian theory of right in private law.

As a matter of legal analysis, the fact that one person’s action has made another worse off can never in itself be a basis for restoring the status quo ante. The injury must be fitted into the normative structure of right and correlative duty. And the task of the courts is to articulate that normative structure into legal categories, concepts, standards and principles, and to apply the normative structure thus articulated in the adjudication of the transactions that come before them.\textsuperscript{54}

For Weinrib, there are two kinds of rights that are relevant to private law: the right to bodily integrity, and the “right to external objects of the will”, such as property and contractual rights. He states:

The first is the right to one’s bodily integrity. The body houses the free will and is the organ of its purposes. Thus every human being has an immediate—or, as Kant puts it, an “innate” right to the security of his or her physical constitution against injury and constraint by another, except, as in the case of legal punishment, where such constraint is itself a vindication of right. Correspondingly, everyone is under a duty to abstain from coercing or doing violence to another. A breach of this duty is incompatible with the equality of the interacting parties as free purposive beings. For by such a breach one actor treats another not as a self-determining being but as the instrument of an extrinsic purpose.

The second kind of right is to external objects of the free will. Rights to external objects, including rights to property and to contractual performance, are not innate to the actor but are acquired through the execution of a juridically effective act. The will’s need to express itself in particular purposes entails the moral possibility of the will’s realizing itself in an external sphere. For if no such external sphere were morally available, the capacity for purposiveness would be incapable of actualization—a consequence that would involve free will in the contradiction of having as its defining feature an unrealizable capacity. The external sphere into which the will may realize itself is comprised of everything that is devoid of, and thus categorically different from the will. Because external objects are categorically different from free will, they can be owned without contravening the freedom of other under the principle of right.

…the principle of right allows the free will to realize itself in anything that is not already the locus of another free will. Conversely, agents are barred from interfering with things—the bodies and property of other agents—that are the embodiments of someone else’s free will.\textsuperscript{55}

As he states later, summarizing the concept of rights: “rights are juridical manifestations of the will’s freedom.”\textsuperscript{56}

\textsuperscript{55} *The Idea of Private Law*, at 128.
\textsuperscript{56} *The Idea of Private Law*, at 157.
How then does privacy fit into this conception of private law rights. One the one hand privacy may be construed, not as a different right, but as a right derivative of personal integrity and property. Indeed, for many situations which one may intuitively describe as an invasion of privacy, this may seem fitting. For instance, instances of surreptitious surveillance in the home may be conceived as merely an incident of property rights. But as I have characterized the right to privacy above, it matters not if the peeping tom is trespassing on my property, and indeed, I have an equal right to be free from a peeping tom in the stall of a public washroom as I do in the washroom of my own home. Likewise, my right to physical privacy is not an incident of my right to bodily integrity, for whether observed or not, my body is no less capable of fulfilling the purposes of my will. To return to my initial example, if someone reads my diary without my consent, it is not a proprietary claim I am making. It is not that they have handled the physical property that constitutes the wrong – for it is possible to imagine scenarios where no such property issue arises. Even in *Patrick* the Supreme Court stressed that the trespass issue was a minor consideration in the totality of the circumstances: the violation of privacy consisted in something else. It is that they have without my consent intruded upon the inner space of my thoughts which I had chosen not to disclose. In so doing they deprive me of the ability to choose the terms upon which I control my interactions with others. In Kantian terms, in depriving me of such a choice they have interfered with my freedom and treated me as an ends, “an instrument of an extrinsic purpose” – whether it be gratification, curiosity, revenge-- rather than as a freely choosing means. If rights are the “juridical manifestations of the will’s freedom” than it must be the case that in depriving one of his ability to determine what information about him is disclosed to others– about his body, or his thoughts, or his identity – there is an interference with the freedom of that individual’s will.
Conceived of in this manner, privacy is not, to return to a theme implicit in Klar’s criticism, somehow derivative of those rights traditionally acknowledged by the common law, but in a sense *sui generis* – another category of Kantian right, that shares the features of property and bodily integrity, but that is not reducible to them. Indeed it is in some sense prior to them, and a violation of one’s privacy results in a violation to Kantian freedom that is more profound, fundamental and direct. It is a direct usurpation of the decision making rather than an instrument of the will. It more aptly fits within the category of right described by Kant as “innate right.”

*Freedom* (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.—This principle of innate freedom already involves the following authorizations, which are not really distinct from it (as if they were members of the division of some higher concept of a right): innate equality, that is, independence from being bound by others to more than one can in turn bind them; hence a human being’s quality of being *his own master* (*sui iuris*), as well as being a human being *beyond reproach* (*iusti*), since before he performs any act affecting rights he has done no wrong to anyone; and finally, his being authorized to do to others anything that does not in itself diminish what is theirs, so long as they do not want to accept it – such things as merely communicating his thoughts to them, telling or promising them something, whether what he says is true and sincere or untrue and insincere (*veriloquium aut falsiloquium*); for it is entirely up to them whether they want to believe him or not.57

If innate right is really a function of independence from being constrained from another’s choice, then depriving one of their ability to choose what information about themselves (their thoughts or their body) are made public, is easily conceived of a violation of that right. If one has an innate right to communicate one’s thoughts, the converse must be that one’s freedom is constrained when the choice as to what gets communicated is usurped by another.

This notion of the distinctness of the right to privacy is precisely what the Supreme Court has repeatedly strained to articulate in its jurisprudence on privacy. Property and bodily integrity have provided “useful analytical tools” for instances in which privacy issues arise, but privacy is

simply not reducible to those concepts, it is as the Supreme Court suggests, profoundly linked to the concepts of liberty and autonomy, in precisely this way.

**V: The Cause of Action**

If privacy is worthy of protection, how then should the common law go about doing so? Is liability for invasion of privacy strict? Is intention required or is negligent conduct sufficient. Should it matter whether the invasion was the product of malice or mere accident? The answer to these questions flows directly from the definition of privacy and the theoretical justification for acknowledging privacy as a right. As Professor Weinrib points out, legal doctrine is not an accidental or arbitrary event, it is a process by which concepts of Right are given force. “And the task of the courts is to articulate that normative structure into legal categories, concepts, standards, and principles, and to apply the normative structure thus articulated in the adjudication of the transactions that come before them.”

As a starting point, it would seem clear that there are two fundamental elements to any alleged violation of privacy: first, there must be a legitimate claim to privacy in the situation; and second, conduct on the part of another which violates that privacy. It is necessary to examine both of these elements to understand how one should determine the legitimacy of any privacy claim; and second to attempt to devise some criteria for determining what conduct amounts to a violation of that privacy, or to put it conversely what duty or burden are we placing on others to respect that privacy?

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1. The Reasonableness of a “Reasonable Expectation of Privacy”

Both the statutory torts and the public law context rely on the concept of a “reasonable expectation of privacy” as the threshold element that must be satisfied to establish a violation of privacy. The concept of a reasonable expectation of privacy is an objective standard. As seen in the public law context, it involves both a subjective belief in privacy, and objective confirmation of the appropriateness of that belief. The tool the courts have developed to analyse this legitimacy of a claim to a reasonable expectation of privacy is the “totality of the circumstances”. If the right to privacy is conceived of as a right to control one’s interactions with others, then some limits must be placed on claims to privacy. Individuals choose to enter into public spaces, and the capacity for control cannot be unlimited. We cannot demand that others avert their eyes, or impose duties on all individuals to restrain from observing others, or being present on a street or in a shop at the same time as any other individual. Granting such a right, and conversely imposing such a duty would interfere with the equal freedom of the will of each other individual. Thus a subjective claim to an expectation of privacy must be limited, and measured against what is reasonable. In so doing, considerations about the behavior of the individual claiming the right to privacy must also be factored in. If I choose to leave all of my windows uncovered, has my right to privacy been violated if a passer by on the street observes me undressing? Even if I subjectively believe my privacy has been violated, a reasonable observer would respond that it is some sense my own fault. I have not taken the steps to control my interactions which it is in my power to do so.

Considerations at this stage in the private law context, must not, however, include considerations that are at play in the public law context. In assessing the reasonableness of a
claim to privacy the interests of the state, or law enforcement or other public goods carry no weight.

The line between public and private, moreover, can be difficult to draw. When I step out to walk to the store, in some sense I am relinquishing some control over my interactions with others. Yet, the division between public and private is not a bright one. If, for instance, rather than walking to the store to buy milk, I am instead walking to a doctor’s appointment, have I implicitly forfeited any privacy right I have in that information. If, out of malice, or curiosity, or some other reason, someone chose to conduct surveillance on my activity, is it open to them to say that by entering the public domain they are entitled access to that information. What if they follow me into my doctor’s office and obtain the name of my doctor, or overhear some other information? Or what if they surreptitiously videotape my “public” activities over the course of several weeks?

In England, the line between private and public was recently debated by the House of Lords in the decision of *Campbell v. MGN Group Ltd.* The famous model Naomi Campbell complained of a photo taken of her upon her exit from a rehabilitation centre where she was undergoing treatment for drug abuse and subsequently published in a tabloid magazine. Campbell’s complaint was not that the information about her drug abuse was untrue (it was not contested) but that the publication of the specific details of her treatment and the photograph violated her privacy. The majority in a divided court stated that some information about her drug abuse had ceased to be private as a result of Campbell’s previous public denials, but that the publication of the location, duration and frequency of treatment remained private information. Moreover, the majority held that although Campbell could not stop observers on the street from

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seeing her, there was something about the taking of a photograph and its publication that violated her privacy. Lord Hope of Craighead, writing one of the majority opinions, summarized his conclusion as follows:

123. … Miss Campbell could not have complained if the photographs had been taken to show the scene in the street by a passer-by and later published simply as street scenes. But these were not just pictures of a street scene where she happened to be when the photographs were taken. They were taken deliberately, in secret and with a view to their publication in conjunction with the article. The zoom lens was directed at the doorway of the place where the meeting had been taking place. The faces of others in the doorway were pixilated so as not to reveal their identity. Hers was not, the photographs were published and her privacy was invaded. The argument that the publication of the photograph added credibility to the story has little weight. The photograph was not self-explanatory. Neither the place nor the person were instantly recognisable. The reader only had the editor’s word as to the truth of these details.

124. Any person in Miss Campbell’s position, assuming her to be of ordinary sensibilities but assuming also that she had been photographed surreptitiously outside the place where she been receiving therapy for drug addiction, would have known what they were and would have been distressed on seeing the photographs. She would have seen their publication, in conjunction with the article which revealed what she had been doing when she was photographed and other details about her engagement in the therapy, as a gross interference with her right to respect for her private life. In my opinion this additional element in the publication is more than enough to outweigh the right to freedom of expression which the defendants are asserting in this case.60

Indeed, there is considerable information that is publicly accessible, but that may, if used in a particular matter, become offensive. For instance, it may be possible through surveillance or some other technique to discover the home address of a prominent politician or businessman recently in the news, who had arranged his affairs deliberately to ensure that her address was not reflected on any public documents. Does the fact of that information being “publicly available,” mean that a newspaper can publish the information on its front page with a photo?

The answer of course lies in the specificity of each situation. However, the above examples demonstrate, what is, I believe reflected already in the public law jurisprudence,

60 Campbell v. MGN Group Ltd., supra at paras. 123-24.
privacy is not an all or nothing proposition: it is a sliding scale. As Binnie J. puts it in *Patrick*, a great deal turns on how we describe the issue in question: as garbage or information; as a casual observance or as a systematic attempt to monitor and record an individual’s activities. To recast the issue in Kantian terms, we accept that in walking to the store that some information will be available to others, and we accept that loss of control over certain information. However, we do not accept losing control over the cumulative effect of our encounters, or in the case of Campbell, the recording and publication of that encounter.

Moreover, given that the existence of a right imposes upon others a duty not to violate that right, a subjective claim to privacy alone imposes an impossible burden because the contours of the right become unknowable. Thus the imposition of a fact specific consideration of the totality of the circumstances that includes an objective assessment of the reasonableness of the claim to privacy not only accords with common sense, but with a Kantian notion of right.

2. The Level of Culpability: Intentional or Negligent

As to the conduct of the defendant, what is the scope of the duty placed upon her? The legislature in British Columbia has deemed it appropriate to include a requirement that the violation be made “wilfully and without colour of right”. As explained earlier, the British Columbia Courts have interpreted this to require a mental element short of malice, but which includes conduct that the is aimed at violating the plaintiff’s privacy, but that may include recklessness. Imposing a mental element that demands “intention” as opposed to mere inadvertence constricts the limits of the right to privacy and diminishes the burden placed on the defendant. Is this appropriate?
It is somewhat difficult to conceive of situations in which someone’s privacy is violated through negligence in many of the cases examined thus far, particularly in instances of surveillance or observation. The very conduct satisfies the requisite intention. However, it is much easier to imagine situations in which private information is disclosed through negligence. If information is gathered by a corporation or entity, either required or voluntarily on the condition that it not be disclosed, and then through negligence such conduct could be described as a negligent violation of privacy. Indeed there is no reason in theory to limit recovery to circumstances of intentional wrongdoing. Once it is accepted that privacy is a private law right, then a defendant has an obligation to refrain from intentionally interfering with that right and from acting in a manner that falls below the required standard and causing damage. This is not to say that a claim for intentional invasion of privacy and negligently doing so consist in precisely the same elements. Our right to bodily integrity is protected both through assault and through negligence – in precisely the same manner, once it is recognized that a plaintiff has a private law right there is no theoretical justification for maintaining that only intentional conduct is sufficient for liability.

Consider briefly, by way of illustration the tort of intentional interference with contractual relations. The requirement that the interference be intentional is justified in that it is theoretically impossible to negligently interfere with another’s contractual right in a wrongful way. This is so because of the nature of the right at issue: a contractual right which involves the voluntary creation of rights and duties as between a prescribed set of parties; and also because to impose a duty not risk interfering with another’s contract would unduly restrict the freedom of other individuals. It is often the foreseeable result of conduct that another’s business enterprise
will suffer, to impose a duty to refrain from doing so would conflict with the equal right of all other individuals to pursue their own economic ends.

However, all other private law rights are protected both from intentional wrongdoing and through negligence. The right to personal integrity is protected both through assault and negligence, likewise property through trespass and negligence. Indeed, as the Supreme Court of Canada has recently concluded, even the protection of reputation is protected both through libel and slander laws and through negligence.

In *Young v. Bella*\(^{61}\), the Supreme Court explicitly stated that “defamation has not cornered the market”\(^{62}\) on the protection of reputation. In *Young v. Bella* the defendant, a professor of social work reported a student to the children’s aid society as a potential child abuser on the basis of a report submitted by the student the professor assumed was autobiographical. As a result of the report the plaintiff did not obtain her degree, and was investigated by the children’s aid society. The plaintiff claimed she had suffered damage to her career and her reputation and suffered significant mental distress. While, regrettably, the court did not subject the analysis to the question of the nature of the right at issue, it in essence acknowledged that private law can protect certain rights in various ways, and its decision represents in the area of defamation a continuation of the evolution of the common law towards protection of private law rights in negligence.\(^{63}\)

As set out above, an intentional tort can coexist with negligence in protecting rights in private law. That is not to say the requirements of the two causes of action are identical. Indeed

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\(^{62}\) *Young v. Bella*, supra, at para. 56.

\(^{63}\) Indeed, the Court’s analysis overlooks the need to establish a right in negligence. Instead, continuing its trend of analyzing novel negligence claims solely in terms of a duty of care. In this regard the decision diverges from the analysis I am propounding here.
they are obviously not. This flows directly from the difference in the wrong and indeed the
difference in the available remedies. For an intentional tort nominal damages are available (thus
the aptness of the B.C. Legislatures “without proof of actual damage”); whereas in an action for
negligence they are not. Suggesting that negligence should protect privacy further does not
absolve the plaintiff of proving all of the requisite elements of a cause of action in negligence.
Moreover, as stated by the Supreme Court in Norberg v. Wynrib\(^{64}\), a defendant is liable for all
harm flowing from the intentional conduct irrespective of foreseeability.\(^{65}\) Finally, the remedies
for an intentional invasion of privacy are different from an action based in negligence. An
injunction may be available for an intentional ongoing invasion, whereas, injunctions are not
available in the case of negligent conduct.

To summarize then, an action in respect of invasion of privacy may be either as an
intentional tort of invasion of privacy, or under the umbrella of negligence. The intentional tort
requires the existence of a reasonable expectation of privacy, and conduct on the part of the
defendant that willfully violates that privacy. The intentional tort does not require proof of
damage beyond the violation.\(^{66}\) In order to succeed in negligence, a plaintiff would likewise
need to establish a reasonable expectation of privacy in addition to all of the other elements of a
cause of action in negligence, including a duty of care and its breach, foreseeability of damage,
causation, and actual damage. On this conception of the private law right to privacy, even in
those provinces where a statutory cause of action has been enacted, the common law still has a

\(^{65}\) Norberg v. Wynrib, supra, at para. 53.
\(^{66}\) In this regard, the Court in Warman v. Grosvenor was wrong to conclude that the tort of invasion of privacy need not be considered because there was no evidence of additional damage not covered by the other causes of action advanced by the Plaintiff. Indeed, it was open to the Court to conclude there had been an intentional violation of the defendant's privacy and award nominal damages in the absence of proof of any further damage.
role to play in protecting privacy. Rather than acting as a complete code in respect of privacy, they represent the codification of the intentional tort of invasion of privacy only.

VI. Conclusion

A common law cause of action for invasion of privacy has not yet been recognized in Ontario. This is so despite significant legislative intervention both in Ontario, Federally and in other Provinces which explicitly recognize the existence of such a right in other contexts. This is also so despite the Supreme Court’s many pronouncements on the importance of privacy as a fundamental component of human dignity and individual freedom. If privacy is conceived of as a right that embodies a zone of self-determination that is distinct from property and physical integrity, then a common law right can be justified both as one that is mandated by the development of the common law in accordance with Charter values, and from a theoretical standpoint which views private law rights, and hence wrongdoing as state protection from undue and unequal interference with the external freedom of other citizens. It is possible to conceive the right to privacy being protected in two distinct ways at common law. First, through a tort of invasion of privacy that recognizes the absolute nature of the right to be let alone and which requires an intentional act and no proof of damages. The remedies for such conduct would, like trespass, or nuisance include injunctive relief in the case of an ongoing invasion, or damages in the case of an isolated occurrence.

In addition, the common law should protect the privacy interests through negligence. If, as stated, privacy is conceived of as an interest essential to freedom, then it harm to that interest is one that individuals should be prohibited from injuring through the imposition of undue risk.
In an action for negligence, all of the traditional elements of a negligence action, including a duty of care, a breach of the standard of care, and foreseeable non-remote damage are necessary.

As a concluding remark, it is worth addressing one recurrent criticism of advocates for the recognition of a right to privacy: if it is so essential, and so obvious, why has the common law failed to recognize it to date? The response is a historical one: there was simply no need to advance claims for breach of privacy. Indeed, the invasion of privacy was really only possible, on more than a *de minimis* scale with the advent of technology. The common law, as the eminent legal historian A.W.B. Simpson argues, is really a muddle rather than an organized system of thought. By this I take him to mean that the fundamental nature of the common law is that it does not at any given moment purport to be a code: a system of rules into which each case can be categorized. Rather it is inherently *ad hoc* and remedial. Accordingly, at any given moment in its history it is necessarily incomplete. Absent a compelling reason to advance a particular kind of claim, the law will not recognize a particular right. Thus rather than representing a failure or defect in the notion of privacy as a fundamental, and coherent independent right, the failure to this point of the common law to recognize such a right speaks only about the needs of the individuals in society. Indeed the recent legislative changes, both granting a statutory cause of action and addressing privacy issues more generally suggest that privacy is in some fundamental sense “new.” But only insofar as given the pace of technological change the coercion of the state is now necessary to protect and safeguard this right, not in that privacy was not always what I have defined it to be: essential to human dignity, or an element of

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external freedom. In other words, until recently, it was possible for privacy rights to shelter under the concepts of property and bodily integrity.

As has been stressed since Brandeis and Warren, and as echoed by Justice Stinson in *Somwar*, in the face of rapid technological change, the need for protection of a right to privacy in private law becomes of increasing importance. Of course, it is possible to say that Brandeis and Warren’s fear stretches back one hundred years, and yet we have made due in the absence of a tort of invasion of privacy for this long. Yet, in the age of Google maps, where a camera mounted to the top of a car photographs every house in the world, and the collected images posted on the internet (for profit no less), it is I think not a stretch to imagine that the time has truly come.
Appendix 1: Statutory Causes of Action

British Columbia:

Privacy Act

[RSBC 1996] CHAPTER 373

Contents

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1 Violation of privacy actionable
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Violation of privacy actionable

1 (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

(2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

(3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

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

Exceptions

2 (1) In this section:

"court" includes a person authorized by law to administer an oath for taking evidence when acting for the purpose for which the person is authorized to take evidence;

"crime" includes an offence against a law of British Columbia.

(2) An act or conduct is not a violation of privacy if any of the following applies:

(a) it is consented to by some person entitled to consent;

(b) the act or conduct was incidental to the exercise of a lawful right of defence of person or property;

(c) the act or conduct was authorized or required under a law in force in British Columbia, by a court or by any process of a court;

(d) the act or conduct was that of
(i) a peace officer acting in the course of his or her duty to prevent, discover or investigate crime or to discover or apprehend the perpetrators of a crime, or

(ii) a public officer engaged in an investigation in the course of his or her duty under a law in force in British Columbia,

and was neither disproportionate to the gravity of the crime or matter subject to investigation nor committed in the course of a trespass.

(3) A publication of a matter is not a violation of privacy if

(a) the matter published was of public interest or was fair comment on a matter of public interest, or

(b) the publication was privileged in accordance with the rules of law relating to defamation.

(4) Subsection (3) does not extend to any other act or conduct by which the matter published was obtained if that other act or conduct was itself a violation of privacy.

Unauthorized use of name or portrait of another

3 (1) In this section, "portrait" means a likeness, still or moving, and includes

(a) a likeness of another deliberately disguised to resemble the plaintiff, and

(b) a caricature.

(2) It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose.

(3) A person is not liable to another for the use for the purposes stated in subsection (2) of a name identical with, or so similar as to be capable of being mistaken for, that of the other, unless the court is satisfied that

(a) the defendant specifically intended to refer to the plaintiff or to exploit his or her name or reputation, or

(b) either on the same occasion or on some other occasion in the course of a program of advertisement or promotion, the name was connected, expressly or impliedly, with other material or details sufficient to distinguish the plaintiff, to the public at large or to the members of the community in which he or she lives or works, from others of the same name.

(4) A person is not liable to another for the use, for the purposes stated in subsection (2), of his or her portrait in a picture of a group or gathering, unless the plaintiff is

(a) identified by name or description, or his or her presence is emphasized, whether by the composition of the picture or otherwise, or

(b) recognizable, and the defendant, by using the picture, intended to exploit the plaintiff's name or reputation.

(5) Without prejudice to the requirements of any other case, in order to render another liable for using his or her name or portrait for the purposes of advertising or promoting the sale of

(a) a newspaper or other publication, or the services of a broadcasting undertaking, the plaintiff must establish that his or her name or portrait was used specifically in connection with material relating to the readership, circulation or other qualities of the newspaper or other publication, or to the audience, services or other qualities of the broadcasting undertaking, as the case may be, and

(b) goods or services on account of the use of the name or portrait of the other in a radio or television program relating to current or historical events or affairs, or other matters of public interest, that is sponsored or promoted by or on behalf of the makers, distributors, vendors or suppliers of the goods or services, the plaintiff must establish
that his or her name or portrait was used specifically in connection with material relating to the goods or services, or to their manufacturers, distributors, vendors or suppliers.

**Action to be determined in Supreme Court**

4 Despite anything contained in another Act, an action under this Act must be heard and determined by the Supreme Court.

**Action does not survive death**

5 An action or right of action for a violation of privacy or for the unauthorized use of the name or portrait of another for the purposes stated in this Act is extinguished by the death of the person whose privacy is alleged to have been violated or whose name or portrait is alleged to have been used without authority.

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**Manitoba:**

C.C.S.M. c. P125

The Privacy Act

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Definitions

1(1) In this Act

"common-law partner" of a person means a person who, not being married to the other person, is cohabiting with him or her in a conjugal relationship of some permanence; (« conjoint de fait »)

"court" means the Court of Queen's Bench except in section 5 where it means any court and includes a person authorized by law to take evidence under oath acting for the purposes for which he is authorized to take evidence; (« tribunal »)

"defamation" means libel or slander; (« diffamation »)

"family" means the spouse, common-law partner, child, step-child, parent, step-parent, brother, sister, half-brother, half-sister, step-brother, step-sister, of a person. (« famille »)

Registered common-law relationship

1(2) For the purposes of this Act, while they are cohabiting, persons who have registered their common-law relationship under section 13.1 of The Vital Statistics Act are deemed to be cohabiting in a conjugal relationship of some permanence.

S.M. 2002, c. 24, s. 47; S.M. 2002, c. 48, s. 28; S.M. 2008, c. 42, s. 77.

Violation of privacy
2(1) A person who substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against that other person.

Action without proof of damage

2(2) An action for violation of privacy may be brought without proof of damage.

Examples of violation of privacy

3 Without limiting the generality of section 2, privacy of a person may be violated

(a) by surveillance, auditory or visual, whether or not accomplished by trespass, of that person, his home or other place of residence, or of any vehicle, by any means including eavesdropping, watching, spying, besetting or following;

(b) by the listening to or recording of a conversation in which that person participates, or messages to or from that person, passing along, over or through any telephone lines, otherwise than as a lawful party thereto or under lawful authority conferred to that end;

(c) by the unauthorized use of the name or likeness or voice of that person for the purposes of advertising or promoting the sale of, or any other trading in, any property or services, or for any other purposes of gain to the user if, in the course of the use, that person is identified or identifiable and the user intended to exploit the name or likeness or voice of that person; or

(d) by the use of his letters, diaries and other personal documents without his consent or without the consent of any other person who is in possession of them with his consent.

Remedies

4(1) In any action for violation of privacy the court may

(a) award damages;

(b) grant an injunction if it appears just and reasonable;

(c) order the defendant to account to the plaintiff for any profits that have accrued, or that may subsequently accrue, to the defendant by reason or in consequence of the violation; and

(d) order the defendant to deliver up to the plaintiff all articles or documents that have come into his possession by reason or in consequence of the violation.

Considerations in awarding damages

4(2) In awarding damages in an action for a violation of privacy of a person, the court shall have regard to all the circumstances of the case including

(a) the nature, incidence and occasion of the act, conduct or publication constituting the violation of privacy of that person;

(b) the effect of the violation of privacy on the health, welfare, social, business or financial position of that person or his family;
(c) any relationship, whether domestic or otherwise, between the parties to the action;

(d) any distress, annoyance or embarrassment suffered by that person or his family arising from the violation of privacy; and

(e) the conduct of that person and the defendant, both before and after the commission of the violation of privacy, including any apology or offer of amends made by the defendant.

Accounting not considered in awarding damages

4(3) Notwithstanding anything in subsection (2), in awarding damages in an action for violation of privacy of a person, the court shall not have regard to any order made under clause (1)(c) in respect of the violation of privacy.

Defences

5 In an action for violation of privacy of a person, it is a defence for the defendant to show

(a) that the person expressly or by implication consented to the act, conduct or publication constituting the violation; or

(b) that the defendant, having acted reasonably in that regard, neither knew or should reasonably have known that the act, conduct or publication constituting the violation would have violated the privacy of any person; or

(c) that the act, conduct or publication in issue was reasonable, necessary for, and incidental to, the exercise or protection of a lawful right of defence of person, property, or other interest of the defendant or any other person by whom the defendant was instructed or for whose benefit the defendant committed the act, conduct or publication constituting the violation; or

(d) that the defendant acted under authority conferred upon him by a law in force in the province or by a court or any process of a court; or

(e) where the act, conduct or publication constituting the violation was

(i) that of a peace officer acting in the course of his duties; or

(ii) that of a public officer engaged in an investigation in the course of his duty under a law in force in the province;

that it was neither disproportionate to the gravity of the matter subject to investigation nor committed in the course of a trespass; and was within the scope of his duties or within the scope of the investigation, as the case may be, and was reasonably necessary in the public interest;

(f) where the alleged violation was constituted by the publication of any matter

(i) that there were reasonable grounds for the belief that the publication was in the public interest; or

(ii) that the publication was, in accordance with the rules of law in force in the province relating to defamation, privileged; or

(iii) that the matter was fair comment on a matter of public interest.

Right of action in addition to other rights
6. The right of action for violation of privacy under this Act and the remedies under this Act are in addition to, and not in derogation of, any other right of action or other remedy available otherwise than under this Act; but this section shall not be construed as requiring any damages awarded in an action for violation of privacy to be disregarded in assessing damages in any other proceedings arising out of the same act, conduct or publication constituting the violation of privacy.

Effect on law of evidence

7. No evidence obtained by virtue or in consequence of a violation of privacy in respect of which an action may be brought under this Act is admissible in any civil proceedings.

Application of Act

8(1) Notwithstanding any other Act of the Legislature, whether special or general, this Act applies where there is any violation of the privacy of any person.

Conflict with other Acts

8(2) Where there is a conflict between a provision of this Act and a provision of any other Act of the Legislature, whether special or general, the provision of this Act prevails.

Newfoundland:

RSNL1990 CHAPTER P-22

PRIVACY ACT

Amended:

1995 cL-16.1 s30(3); 1996 c31

CHAPTER P-22

AN ACT RESPECTING THE PROTECTION OF PERSONAL PRIVACY

Short title

1. This Act may be cited as the Privacy Act.

1981 c6 s1

Definition

2. In this Act "individual" means a natural person.

1981 c6 s2
Violation of privacy

3. (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of an individual.

(2) The nature and degree of privacy to which an individual is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, regard being given to the lawful interests of others; and in determining whether the act or conduct of a person constitutes a violation of the privacy of an individual, regard shall be given to the nature, incidence, and occasion of the act or conduct and to the relationship, whether domestic or other, between the parties.

1981 c6 s3

Examples

4. Proof that there has been

(a) surveillance, auditory or visual, whether or not accomplished by trespass, of an individual, by any means including eavesdropping, watching, spying, harassing or following;

(b) listening to or recording of a conversation in which an individual participates, or listening to or recording of messages to or from that individual passing by means of telecommunications, otherwise than as a lawful party to them;

(c) use of the name or likeness or voice of an individual for the purposes of advertising or promoting the sale of, or other trading in, property or services, or for other purposes of advantage to the user where, in the course of the use, the individual is identified or identifiable and the user intended to exploit the name or likeness or voice of that individual; or

(d) use of letters, diaries or other personal documents of an individual,

without the consent, expressed or implied, of the individual or some other person who has the lawful authority to give the consent is, in the absence of evidence to the contrary, proof of a violation of the privacy of the individual first mentioned.

1981 c6 s4

Defences

5. (1) An act or conduct is not a violation of privacy where

(a) it is consented to by some person entitled to consent;

(b) the act or conduct was incidental to the exercise of a lawful right of defence of person or property;

(c) the act or conduct was authorized or required under a law in force in the province or by a court or a process of a court; or

(d) the act or conduct was that of
(i) a peace officer acting in the course of his or her duty for the prevention, discovery or investigation of crime or of the discovery or apprehension of the perpetrators of a crime, or

(ii) a public officer engaged in an investigation in the course of his or her duty under a law of the province,

and was neither disproportionate to the gravity of the crime or matter subject to the investigation nor committed in the course of a trespass.

(2) A publication of a matter is not a violation of privacy where

(a) the matter published was of public interest or was fair comment on a matter of public interest; or

(b) the publication was, under the rules of law relating to defamation, privileged,

but this subsection does not extend to another act or conduct where the matter published was obtained where the other act or conduct was itself a violation of privacy.

(3) In this section

(a) "court" includes a person authorized by law to administer an oath or affirmation for the taking of evidence acting for the purposes for which the person is authorized to take evidence; and

(b) "crime" includes an offence against a law of the province.

1981 c6 s5

Remedies

6. (1) In an action for violation of privacy, the court may do the following:

(a) award damages;

(b) grant an injunction;

(c) order the defendant to account to the plaintiff, for profits that have accrued or that may later accrue to the defendant because of the violation;

(d) order the defendant to deliver to the plaintiff articles or documents that have come into the defendant's possession because of the violation; or

(e) grant other relief to the plaintiff that appears necessary under the circumstances.

(2) In awarding damages in an action for violation of privacy of an individual, the court may disregard an order made under paragraph (1)(c) in respect of the violation of privacy.

1981 c6 s6

Additional remedies
7. (1) The right of action for violation of privacy under this Act and the remedies under this Act are in addition to, and not in derogation of, another right of action or other remedy available otherwise than under this Act.

(2) This section shall not be construed as requiring damages awarded in an action for violation of privacy to be disregarded in assessing damages in other proceedings arising out of the same act, conduct or publication constituting the violation of privacy.

1981 c6 s7

Court

8. An action for violation of privacy shall be heard and determined by the Trial Division.

1981 c6 s8

Paramountcy

9. (1) This Act applies where there is a violation of the privacy of an individual.

(2) Where there is a conflict between this Act and another Act, whether general or special, this Act prevails.

1981 c6 s9

Rep. by 1995 cL-16.1 s30(3)

10. [Rep. by 1995 cL-16.1 s30(3)]

1995 cL-16.1 s30(3)

Death

11. A right of action for violation of privacy is extinguished by the death of the individual whose privacy is alleged to have been violated.

1981 c6 s11

Crown bound

12. This Act binds the Crown.

1981 c6 s12

Action barred

13. No action lies against the minister or his or her designee under this Act as a result of the disclosure of information regarding the criminal history of a person which, in the opinion of the minister or his or her designee, it is in the public interest to disclose.
The Privacy Act

being

Chapter P-24 of The Revised Statutes of Saskatchewan, 1978
(effective February 26, 1979) as amended by the Statutes of
Saskatchewan, 1979, c.69; and 2004, c.L-16.1.

c. P-24 PRIVACY

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CHAPTER P-24
An Act respecting the Protection of Privacy

Short title
1 This Act may be cited as The Privacy Act.

Violation of privacy
2 It is a tort, actionable without proof of damage, for a person wilfully and without
  claim of right, to violate the privacy of another person.
  R.S.S. 1978, c.P-24, s.2.

Examples of violation of privacy
3 Without limiting the generality of section 2, proof that there has been:
   (a) auditory or visual surveillance of a person by any means including
       eavesdropping, watching, spying, besetting or following and whether or not
       accomplished by trespass;
   (b) listening to or recording of a conversation in which a person participates,
       or listening to or recording of messages to or from that person passing by
       means of telecommunications, otherwise than as a lawful party thereto;
   (c) use of the name or likeness or voice of a person for the purposes of
       advertising or promoting the sale of, or any other trading in, any property or
       services, or for any other purposes of gain to the user if, in the course of the
use, the person is identified or identifiable and the user intended to exploit the name or likeness or voice of that person; or
(d) use of letters, diaries or other personal documents of a person;
without the consent, expressed or implied, of the person or some other person who has the lawful authority to give the consent is prima facie evidence of a violation of the privacy of the person first mentioned.
R.S.S. 1978, c.P-24, s.3; 1979, c.69, s.19.

Defences
4(1) An act, conduct or publication is not a violation of privacy where:
(a) it is consented to, either expressly or impliedly by some person entitled to consent thereto;
(b) it was incidental to the exercise of a lawful right of defence of person or property;
(c) it was authorized or required by or under a law in force in the province or by a court or any process of a court; or
(d) it was that of:
   (i) a peace officer acting in the course and within the scope of his duty; or
   (ii) a public officer engaged in an investigation in the course and within the scope of his duty;
and was neither disproportionate to the gravity of the matter subject to investigation nor committed in the course of trespass;
(e) it was that of a person engaged in a news gathering:
   (i) for any newspaper or other paper containing public news; or
   (ii) for a broadcaster licensed by the Canadian Radio-Television Commission to carry on a broadcasting transmitting undertaking;
and such act, conduct or publication was reasonable in the circumstances and was necessary for or incidental to ordinary news gathering activities.
(2) A publication of any matter is not a violation of privacy where:
(a) there were reasonable grounds for belief that the matter published was of public interest or was fair comment on a matter of public interest; or
(b) the publication was, in accordance with the rules of law relating to defamation, privileged;
but this subsection does not extend to any other act or conduct whereby the matter published was obtained if such other act or conduct was itself a violation of privacy.
(3) In this section "court" means any person authorized by law to administer an oath for the taking of evidence acting for the purposes for which he is authorized to take evidence.
R.S.S. 1978, c.P-24, s.4.

Court
5 Notwithstanding anything in any other Act, an action for violation of privacy shall be commenced, tried and determined in the Court of Queen's Bench.
R.S.S. 1978, c.P-24, s.5.

Considerations in determining whether there is a violation of privacy
6(1) The nature and degree of privacy to which a person is entitled in any situation or in relation to any situation or matter is that which is reasonable in the circumstances, due regard being given to the lawful interests of others.
(2) Without limiting the generality of subsection (1) in determining whether any act, conduct or publication constitutes a violation of the privacy of a person, regard
shall be given to:
(a) the nature, incidence and occasion of the act, conduct or publication;
(b) the effect of the act, conduct or publication on the health and welfare, or
the social, business or financial position, of the person or his family or
relatives;
(c) any relationship whether domestic or otherwise between the parties to
the action; and
(d) the conduct of the person and of the defendant both before and after the
act, conduct or publication, including any apology or offer or amends made by
the defendant.

R.S.S. 1978, c.P-24, s.6.

Remedies
7 In an action for violation of privacy, the court may as it considers just:
(a) award damages;
(b) grant an injunction;
(c) order the defendant to account to the plaintiff, for any profits that have
accrued or that may subsequently accrue to the defendant by reason or in
consequence of the violation;
(d) order the defendant to deliver up to the plaintiff all articles or documents
that have come into his possession by reason or in consequence of the
violation; or
(e) grant any other relief to the plaintiff that appears necessary under the
circumstances.

R.S.S. 1978, c.P-24, s.7.

Right of action in addition to other rights
8(1) The right of action for violation of privacy under this Act and the remedies
under this Act are in addition to, and not in derogation of, any other right of action
or other remedy available otherwise than under this Act.
(2) This section shall not be construed as requiring any damages awarded in an
action for violation of privacy to be disregarded in assessing damages in any other
proceedings arising out of the same act, conduct or publication constituting the
violation of privacy.

R.S.S. 1978, c.P-24, s.8.

9 Repealed. 2004, c.L-16.1, s.68.

Death extinguishes right of action
10 A right of action for violation of privacy is extinguished by the death of the
person whose privacy is alleged to have been violated.

R.S.S. 1978, c.P-24, s.10.

Crown is bound
11 The Crown is bound by this Act.

R.S.S. 1978, c.P-24, s.11.