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Consultation Paper on the *Privacy Act of British Columbia*

July 2007

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I. INTRODUCTION

Privacy has become a prominent concern in society. As the means by which privacy can be violated grow continually more numerous and sophisticated, the concern for its preservation has grown correspondingly. The internet has vastly expanded the opportunities for intruding into the private lives of citizens. In a world of webcams, spyware and data mining, the ability to keep one's words, activities, and the details of one's personal life free of unwanted scrutiny acquires a heightened value.

Privacy is an extremely broad subject, with many distinct aspects. At its root is the value placed on being free from unwanted intrusion into private space, physical or conceptual, and on the freedom to avoid or resist scrutiny of the details of one's thoughts, words, and activities. These fundamental values underlie the debate over privacy in all the contexts in which it is raised.

There is much controversy over the volume of information about individuals ("personal information") that is acquired by governments, corporations, non-profit organizations and other bodies and the manner in which that information is used. The collection, use and distribution of personal information by public and private bodies is now regulated by a substantial body of federal and provincial legislation, some of which has been enacted fairly recently.¹

This Consultation Paper is not primarily concerned with the legislation regulating the gathering and handling of personal information, nor is it a wide-ranging study of the law affecting privacy in general. It is concerned with civil liability for violation of privacy. The focus of this Consultation Paper is on the *Privacy Act*² of British Columbia, a statute that makes violation of privacy a tort (a civil wrong compensable by damages).

British Columbia's *Privacy Act* was passed in 1968³ in the wake of controversy over electronic eavesdropping during a trade union convention.⁴ At that time, British Columbia was ahead of other jurisdictions in the British Commonwealth in moving to

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1. The chief federal statutes regulating dealings with personal information are the *Privacy Act*, R.S.C. 1985, c. P-21 and the *Personal Information Protection and Electronic Documents Act* (PIPEDA), S.C. 2000, c. 5. The corresponding provincial statutes are the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 (FOIPPA) and the *Personal Information Protection Act*, S.B.C. 2003, c. 63 (PIPA). There are also many other federal and provincial Acts containing provisions intended to preserve privacy with regard to information collected and used by public and private entities under the authority of those specific Acts.
 2. R.S.B.C. 1996, c. 373.
 3. S.B.C. 1968, c. 39. References in this Consultation Paper to the "*Privacy Act*" are to the British Columbia *Privacy Act* unless there is an express indication that a reference to the federal Act is intended, e.g. "*Privacy Act* (Canada)".
 4. See R.A. Sargent (Commissioner), *Report of the Royal Commission of Inquiry into Invasion of Privacy* (Victoria: The Queen's Printer, 1967) at 5-9.

protect privacy interests through legislation.⁵ Even today, only a minority of Canadian provinces have similar legislation conferring a general civil remedy for violation of privacy.⁶ In the 39 years since the *Privacy Act* of British Columbia was enacted, however, the legal landscape has changed markedly. The counterpart statutes enacted later in several other Canadian provinces are more detailed and precise than their forerunner. Other legislation concerning specific aspects of privacy has been enacted both at the federal and provincial levels. Interception of private communications by a third party has been made a criminal offence under certain circumstances.⁷ The *Canadian Charter of Rights and Freedoms*,⁸ particularly section 8, which guarantees protection against unreasonable search and seizure, has added a new constitutional dimension to the law of privacy.

At the same time, there is tension between the drive to protect privacy and a heightened concern for public security that has also arisen in the wake of the attack on the World Trade Centre and other acts of international terrorism. Widened powers of state surveillance under anti-terror legislation are matters of vigorous debate in Canada as in the rest of the western world. So too are the perceived benefits and detriments of surveillance cameras installed in public places. It is an appropriate time to re-examine the British Columbia *Privacy Act*.

II. OVERVIEW OF THE PRIVACY ACT

A. GENERAL

When the *Privacy Act* was passed in 1968, it was intended to correct a perceived deficiency in the common law. The common law did not recognize a general right to privacy,⁹ although it did protect certain interests that could be described loosely as

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5. See “New Bill to protect privacy,” *The Province* (26 January 1968), in British Columbia, Legislative Assembly, *Sessional Clipping Books: Newspaper Accounts of the Debates*. (The British Columbia Legislative Assembly did not introduce verbatim reporting of its debates until 1970.)
 6. Manitoba, Saskatchewan, and Newfoundland have statutes resembling the B.C. *Privacy Act*, *supra*, note 2. See the *Privacy Act*, C.C.S.M. c. P125; *Privacy Act*, R.S.S. 1978, c. P-24; *Privacy Act*, R.S.N.L. 1990, c. P-22. Articles 35-41 of the Quebec *Civil Code*, L.Q. 1991, c. 64 enshrine the right to privacy and confer various related rights with respect to information concerning a person that is held by others, including rights of access and rectification of inaccuracies.
 7. *Criminal Code*, R.S.C. 1985, c. C-46, s. 184, originally enacted in 1974 as s. 178.11 by S.C. 1973-74, c. 50, s. 2. See also ss. 184.5, 193, 193.1.
 8. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Cited below as “Charter.”
 9. *Lord v. McGregor*, 2000 BCSC 750 at para. 11; *Hung v. Gardiner*, 2002 BCSC 1234 at para. 110. Beginning in the 1970’s, following the passage of the *Privacy Act*, some Canadian courts began to extend the common law to hold that a non-statutory right to sue for violation of privacy existed outside the circumstances to which the torts of trespass and nuisance traditionally applied: see *Motherwell v. Motherwell* (1976), 73 D.L.R. (3d) 62 (Alta. S.C., App. Div.) (harassment by telephone and mail); *Saccone v. Orr* (1982), 34 O.R. (2d) 317 (Co. Ct.) (playing of a tape of a private conversation in a municipal council meeting); *Roth v. Roth*, [1991] O.J. No. 1301 (Gen. Div.) (campaign of harassment between neighbours over road access). Statements in the judgment of the

privacy-related. For example, the interest in being free from unwanted intrusion into one's dwelling was protected by the right to sue for trespass. The interest in being free from unreasonable interference with the enjoyment of one's occupation of land was protected at common law by the right to sue for trespass (if there was actual entry) or nuisance (if the interference was from outside).

The *Privacy Act* was intended to give legal effect to the principle, as expressed by Attorney General Robert Bonner, that "...you have a right to be left alone."¹⁰ While engendered by controversy over electronic eavesdropping, the Act did not deal with that activity as such or with other specific ways in which privacy could be invaded. It dealt with violations of privacy at a more general level by creating two new torts, namely

- wilfully violating the privacy of another person,¹¹ and
- using the name or portrait of another person for the purpose of advertising property or services, or promoting their sale or other trading in them, without that person's consent.¹²

When the *Privacy Act* was introduced in the Legislative Assembly as a first reading Bill, the Attorney General was quoted as saying in relation to its objectives:¹³

I hope it will be a useful approach to the circumstances of modern life which threaten to bear upon the individual too heavily, and it may do a good deal to forestall Big Brother in 1984.

He also stated there had been no existing model on which to base the Bill, and described

Supreme Court of Canada in *Hunter v. Southam*, [1984] 2 S.C.R. 145 at para. 25 are strongly supportive of the existence now of a right to privacy in Canada, at least insofar as unwarranted intrusions by the state are concerned. Notwithstanding this, the Ontario General Division held after an exhaustive review of case law in *Ontario (Attorney-General) v. Dieleman*, (1994) CarswellOnt 151 (Gen. Div.) that no common law tort of invasion of privacy existed there. In *Somwar v. McDonald's Restaurants of Canada*, 2006 CanLII 202 (Ont. S.C.J.), however, the court was unable to conclude that this was settled law in Ontario in the absence of a clear statement by an Ontario appellate court. It is certain that no general right of privacy was recognized in common law Canada in 1968, when British Columbia enacted one into law. *Lord v. McGregor* and *Hung v. Gardiner*, *supra*, also make it clear that the *Privacy Act* occupies the field and precludes an enforceable general right to privacy in British Columbia apart from statute. See also *Peters-Brown v. Regina District Health Board*, [1996] 1 W.W.R. 337 (Sask. Q.B.); *aff'd*, [1997] 1 W.W.R. 638 (Sask. C.A.), where the Saskatchewan Court of Appeal reached a similar conclusion regarding the *Privacy Act* (Sask.), *supra*, note 6.

10. Quoted in *The Province*, *supra*, note 5.

11. *Privacy Act*, *supra*, note 2, s. 1(1).

12. *Ibid.*, note 2, s. 3(2).

13. *Supra*, note 5. The references to "Big Brother" and "1984" are in relation to George Orwell's novel *Nineteen Eighty-four*, which describes a future society in Britain and other parts of the western world in which citizens are under constant electronic surveillance aimed at detecting all opposition to the rule of a dictator known as "Big Brother."

the Bill as “novel” and “revolutionary.”¹⁴ The Act has remained essentially the same since it was enacted, although judicial decisions have supplied meaning and clarification with respect to points on which it is silent. The effect of the Act is not fully understandable without reference to that body of case law. The next several sections of this Chapter contain an analysis of the individual provisions of this brief Act and their interpretation by British Columbia courts.

B. VIOLATION OF PRIVACY AS A TORT: SECTION 1 OF THE *PRIVACY ACT*

1. Section 1

Section 1 of the *Privacy Act* creates the statutory tort of violation of privacy. It reads:

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 accompanied by trespass.

2. The Concept of “Privacy”

(a) General

Something quite notable about the *Privacy Act* is that it contains no definition of “privacy.” This reportedly reflects a deliberate choice by the drafters of the Act to leave the task of defining “privacy” to the courts.¹⁵

In the first case decided under the Act, *Davis v. MacArthur*,¹⁶ both the trial court and the British Columbia Court of Appeal interpreted “privacy” as used in section 1 to be

14. Quoted in *The Province*, *supra*, note 5.

15. *The Province* newspaper, *supra*, note 5, quoted Attorney General Bonner as saying in 1968: “Essentially, this [the Bill that became the *Privacy Act*] means you have a right to be left alone. But it is also worded in such a way as to leave the legal definition of privacy in a specific case to the discretion of the court.”

16. (1969), 10 D.L.R. (3d) 250 (B.C.S.C.); rev’d [1971] 2 W.W.R. 142 (B.C.C.A.).

consistent with U.S. judicial definitions of the word as meaning a “right to be let alone, and to be “free from unwarranted publicity” and “a right to withhold oneself from public scrutiny if one chooses.”¹⁷

The interpretation of the *Privacy Act* by the trial judge in *Davis v. MacArthur* was largely endorsed by the Court of Appeal. The trial judge referred to Dean Prosser’s classification in a well-known article of the interests protected by the law of privacy as it had developed in the U.S. by 1960:¹⁸

[T]he law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff.... “to be let alone.” Without any attempt to exact definition, these four torts may be described as follows:

1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.

The trial judge also insinuated that precise and invariable definitions of privacy and its violation are not possible because the content of these concepts is heavily dependent on the circumstances:¹⁹

Adopting the explanation of the term privacy is not determinative of the plaintiff’s rights because the Act suggests that neither the plaintiff’s right to privacy nor the defendant’s obligation not to violate are fixed. The famous article by Warren and Brandeis, 4 Harvard L. Rev., p. 193 (1890), entitled “The Right to Privacy” anticipated this at pp. 215-6:

Any rule of liability adopted must have in it an elasticity which shall take account of the varying circumstances of each case, a necessity which unfortunately renders such a doctrine not only more difficult of application, but also to a certain extent uncertain in its operation and easily rendered abortive.

The elasticity of the concept of privacy is explored further in the next section.

17. 10 D.L.R. (3d) 250 at 254 (B.C.S.C.); [1971] 2 W.W.R. 142 at 145 (B.C.C.A.). The Court of Appeal drew on the definition of “privacy” in *Black’s Law Dictionary*, which in turn cited two U.S. cases considering the meaning of the term: *Holloman v. Life Insurance Company of Virginia*, 7 S.E. (2d) 169 and *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298.

18. Prosser, “Privacy” (1960), 48 Cal. L. Rev. 383 at 389.

19. *Supra*, note 16 at 254 (B.C.S.C.).

(b) *Limits on Reasonable Expectations of Privacy: sections 1(2) and (3)*

(i) *General*

In attempting to define “privacy,” the Court of Appeal noted in *Davis v. MacArthur* that American decisions characterize privacy not as an absolute right, but one exercisable only to the extent consistent with “law and public policy.” The Court of Appeal observed that what is now section 1(2) of the Act appeared to impose similar limits.²⁰ For convenience, section 1(2) is reproduced again here:

- (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.

Section 1(2) recognizes that normal social interaction requires the interest in privacy to be balanced against the legal rights of others. The ultimate degree of privacy cannot be expected on all occasions and under all circumstances. Outside the confines of a dwelling or other enclosed private space, some degree of observation by others is inevitable. British Columbia courts have held that the degree of privacy to which a person is entitled for the purpose of the Act is greatest where the expectation of privacy is greatest.²¹ Expectations of privacy would normally be highest in the home.²² They would be incrementally less in less private settings.

You cannot walk on a public beach, for example, without expecting to be seen by other people who have an equal right to be present on the same beach. What if observation by others in a public place is not merely of the casual, unavoidable kind, however? What if you are persistently followed about? What if it extends to obnoxious and oppressive surveillance, photography or filming? What if your image is broadcast on television and the internet? Questions like these probe at the boundaries of privacy and the liberties of others.

(ii) *Public Spaces*

It appears that for the purposes of section 1 of the *Privacy Act*, there can be no reasonable expectation of privacy in a place normally open to public view, regardless of the nature of the place. For example, filming an incident involving the plaintiff on the plaintiff’s parking lot and subsequent broadcasting of the videotape have been held not to be an invasion of the plaintiff’s privacy. The fact that the incident occurred on private property and the television crew were trespassers was not material, because a passer-by could see

20. *Supra*, note 16 at 145. (The present s. 1(2) originally appeared as s. 2(2) of the *Privacy Act*, S.B.C. 1968, c. 39.)

21. *Getejanc v. Brentwood College Association* (2001), 6 C.C.L.T. (3d) 261 at para. 18 (B.C.S.C.); *Milner v. Manufacturers Life Insurance Company*, [2005] I.L.R. I-4479 at para. 76.

22. *Milner, ibid.* at para. 88.

the parking lot and anything happening on it.²³

In reaching this result, the court was influenced by a leading U.S. decision in which a photograph of a married couple in an affectionate pose in a public marketplace was taken and later published without their authorization. The couple's claim for invasion of privacy was dismissed because the California court considered that they had voluntarily waived their right of privacy by allowing themselves to be seen in a public place.²⁴

(iii) *Private Spaces*

An expectation of privacy would be higher in a private space, i.e. an enclosed space or one to which access is somehow restricted. The courts have said that if a private space can be viewed from the outside, however, the expectation of privacy for purposes of the Act cannot be high. For example, if you appear in a lighted window of your home at night, you have no complaint if you are seen from the street.²⁵ In *Milner v. Manufacturers Life Insurance Company*²⁶ an investigator positioned outside the plaintiff's house filmed the plaintiff, a disability insurance claimant, through a window. One of the reasons why this was held not to violate the plaintiff's privacy was because the same scene could have been viewed by any passer-by.

(iv) *Waiver of Privacy Through Carelessness*

While some doubt surrounds the proposition, it appears that the right to privacy can be lost through carelessness or an inadvertent lapse in vigilance. In the 1993 case *Milton v. Savinkoff*,²⁷ the plaintiff inadvertently left photographs in a pocket of the defendant's jacket which the defendant had lent her. One of the photographs, taken during a vacation in Hawaii, showed the plaintiff topless. The defendant later showed the photographs to a third person who passed the topless photo to someone else. The court held that the plaintiff implicitly waived her right to privacy by carelessly leaving the photographs in the defendant's jacket and only attempting to retrieve them after learning they had been shown to others. The court also considered that the plaintiff had been indifferent to privacy in having had the roll of film developed in Hawaii.

23. *Silber v. BCTV* (1986), 69 B.C.L.R. 34 (S.C.).

24. *Gill v. Hearst Publishing Co.*, 253 P. 2d 441 (1953).

25. *Milner, supra*, note 21 at para. 83. This is consistent with U.S. cases holding that an expectation of privacy cannot exist with respect to a place visible from a publicly accessible point: *Mark v. Seattle Times*, 635 P. 2d 1081 (1981).

26. *Milner, supra*, note 21 at paras. 83-85. As discussed later in this Consultation Paper, however, the legal interest the investigator and his insurer client had in observing the plaintiff was a circumstance bearing significantly on the characterization of the occasion as one that did not amount to a violation of privacy.

27. [1993] B.C.J. No. 2396 (S.C.).

This case has drawn criticism.²⁸ In *Milner v. Manufacturers Life Insurance Company*, it was not followed to its full extent. There a teenager's momentary lack of vigilance in removing her upper body clothing near a lighted window in her home was held not to amount to a waiver of her privacy rights. Hence the insurance investigator who filmed her from the street in the course of carrying out video surveillance of her mother was found to have violated the teenage daughter's privacy.²⁹

3. What Will Amount to a "Violation of Privacy?"

The Act does not define "violation of privacy" or provide examples of how privacy may be violated other than the two mentioned in section 1(4), namely "eavesdropping" and "surveillance." It is clear from section 1(4) that a violation of privacy within the meaning of the Act need not involve trespassing on someone's property.

Section 1(3) directs the court to consider the context in which the conduct in question occurs in determining whether it amounts to a violation of privacy:

- (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.

Section 1(3) implies that an act or course of conduct may be characterized differently, depending on the circumstances in which it occurs. This has been a prominent factor in the cases decided under the Act.

The cases hold that two questions must be answered in every case in which a violation of privacy under the Act is alleged:³⁰

1. Was the plaintiff entitled to privacy?
2. If so, did the defendant violate the plaintiff's privacy?

As discussed earlier, entitlement to privacy is not automatic. By virtue of section 1(2), it exists only if a reasonable person would have an expectation of privacy under the circumstances of the case in light of the lawful interests of others, and only to the extent of that expectation.

28. See case comment by P.H. Osborne at 18 C.C.L.T. (2d) 292 at 297; cf. *Milner, supra*, note 21 at para. 90. Osborne makes the analogy to someone forgetfully leaving a bedroom window blind open or a personal diary in an accessible location and asks whether this should justify the conduct of a voyeur or surreptitious reader.

29. *Milner, supra*, note 21 at para. 90. As the child was not a party to her mother's action under the *Privacy Act*, however, there was no finding of liability and the mother's claim for the violation of her daughter's privacy was dismissed. The court's remarks to the effect that the daughter's privacy had been violated are likely *obiter dicta* for this reason.

30. *Getejanc v. Brentwood College, supra*, note 21 at para. 16; *Milner v. Manufacturers Life Insurance Company, supra*, note 21, at para. 74.

If a reasonable expectation of privacy existed, the court must consider whether the conduct in question violated the plaintiff's privacy in light of the criteria mentioned in section 1(3), namely the nature, incidence, and occasion on which the conduct occurred, and any relationship between the parties.

These criteria may influence the outcome to a very significant extent. For example, in *Milner v. Manufacturers Life Insurance Company*, the relationship between the plaintiff, a disability insurance claimant, and the defendant disability insurer was a major factor in the difference between the result of the plaintiff's own claim for breach of privacy and that of the claim she brought on behalf of her daughter. The defendant's lawful interest in keeping the plaintiff under video surveillance in order to verify her actual condition was held to justify filming her through a window of her home. The plaintiff's privacy was not found to have been violated. As the corporate defendant had no such relationship with the plaintiff's daughter, it did not have a lawful interest in continuing to film the daughter when she was changing her clothing after the plaintiff was no longer in sight. The daughter's privacy was found to have been violated.³¹

British Columbia courts have held the following to be violations of privacy:

- wrongful publication of details of a sexual assault in violation of a publication ban,³²
- videotaping by a landlord of a female tenant in a state of undress,³³
- release of the plaintiff's financial information to third parties accompanied by suggestions that the plaintiff was acting fraudulently,³⁴
- invasion of the plaintiff's home in the plaintiff's absence by an overzealous teacher of the plaintiff who was looking for another missing student,³⁵
- contacting the plaintiff's workplace and asking personal questions about the plaintiff's income, character and drinking habits without any lawful interest in seeking the information.³⁶
- intercepting, recording and disclosing a neighbour's cordless phone

31. *Supra*, note 21 at paras. 83-85 and 88-94. There was no judgment in the daughter's favour, however, for the reasons mentioned in note 29, *supra*.

32. *F.(J.M.) v. Chappell* (1998), 45 B.C.L.R. (3d) 64 (C.A.).

33. *Malcolm v. Fleming*, [2000] B.C.J. No. 2400 (S.C.).

34. *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2005 BCSC 1091.

35. *Getejanc v. Brentwood College Association*, *supra*, note 21.

36. *I.C.B.C. v. Somosh* (1983), 51 B.C.L.R. 344 (S.C.).

conversations in violation of section 9 of the *Radiocommunications Act*³⁷ and sections 184.5(1) and 193.1(1) of the *Criminal Code*.³⁸

The following have been held *not* to be violations of privacy:

- tailing of the plaintiff's car and planting of a tracking device on it by a private investigator hired by the plaintiff's wife, who suspected the plaintiff of adultery,³⁹
- filming of the plaintiff engaged in an altercation on the plaintiff's parking lot,⁴⁰
- displaying to a third party a partially nude photo of the plaintiff which the plaintiff had carelessly left in the defendant's jacket pocket.⁴¹

4. Meaning of "Wilfully, and Without Claim of Right"

(a) General

Section 1(1) of the *Privacy Act* requires that a violation of privacy must have taken place "wilfully" and "without claim of right" in order for a tort to have been committed. In other words, if the defendant did not act wilfully, or acted with a "claim of right," the plaintiff has no right to sue even though the plaintiff's privacy was violated.

(b) Wilfulness

"Wilfully" in section 1(1) has been interpreted as meaning that the defendant knew or ought to have known that an act would violate the privacy of the plaintiff, not merely that the defendant voluntarily performed an act that had the effect of violating privacy.⁴² In other words, if A receives information from B about C and has no reason to believe that B received the information originally in confidence from C, C has no right under the *Privacy Act* to sue A for damages if A passes on the information to someone else. A has not violated C's privacy "wilfully."

37. R.S.C. 1985, c. R-2.

38. *Watts v. Klaemt*, 2007 BCSC 662.

39. *Davis v. MacArthur*, *supra*, note 16.

40. *Silber v. BCTV*, *supra*, note 23.

41. *Milton v. Savinkoff*, *supra*, note 27.

42. *Hollinsworth v. BCTV* (1998), 59 B.C.L.R. (3d) 121 (C.A.); *Getejanc v. Brentwood College Association*, *supra*, note 21 at para. 22.

(c) “*Claim of Right*”

“Claim of right” in the context of the *Privacy Act* has been interpreted to mean “an honest belief in a state of facts which, if it existed, would be a legal justification or excuse.”⁴³

In a recent case, investigators acting on behalf of the governing body of a professional group submitted information about a person’s conduct to the governing bodies of two other professions to which that person belonged. They were not investigating the conduct of that person, but they believed the information was of a nature warranting investigation by the other bodies. The investigators were found to have made the disclosure with a “claim of right” and so the disclosure did not make them liable for a violation of privacy.⁴⁴

In contrast, the insurance investigator in *Milner* was held to have no valid claim of right to film the plaintiff’s daughter changing her clothing in her own home because the defendant insurer had no lawful interest in surveillance of the daughter.⁴⁵

In another case, a newspaper printed a picture of the plaintiff and mislabelled him as a suspected terrorist when he was in fact a well-known lawyer who had acted for the suspected terrorist. The plaintiff sued for libel but also alleged that his privacy had been violated. The claim for violation of privacy was dismissed because the publishers of the newspaper had held an honest belief that the picture was that of the lawyer’s client. This amounted to a claim of right.⁴⁶

5. Possible Requirement of Malice

A few of the cases decided under what is now section 1 of the *Privacy Act* suggest either that the defendant must have acted maliciously to be liable under the Act, or that malice is a factor to be weighed in determining whether the defendant’s conduct amounts to a violation of privacy. In the first case decided under the Act, one of the reasons given by the Court of Appeal for concluding that the defendant private detective had not violated the plaintiff’s privacy in persistently shadowing him was that the defendant had not been motivated by “malice or mere curiosity.”⁴⁷ In later cases, the court has noted the absence

43. *Hollinsworth v. BCTV*, *ibid.* at 127, citing the judgment of Seaton, J., as he then was, at trial in *Davis v. MacArthur*, *supra*, note 16. While stating that a belief must be honest in order to amount to a “claim of right,” the Court of Appeal declined to decide in *Hollinsworth* whether the belief must be both honest and reasonable as it was unnecessary to do so in the circumstances of that case.

44. *Hung v. Gardiner*, *supra*, note 9.

45. *Supra*, note 21 at para. 92.

46. *St. Pierre v. Pacific Newspaper Group Inc.*, 2006 BCSC 241.

47. *Davis v. MacArthur*, *supra*, note 16 at 147.

of “malice”⁴⁸ or “malevolence or spite”⁴⁹ on the part of the defendant as one of the reasons for finding that no privacy violation within the meaning of the Act took place.

It is unclear what meaning “malice” or “malevolence” have in relation to the violation of privacy. “Malice” can have one of several meanings in law, depending on the context. The usual meaning is simply the intention to perform a wrongful act without legal justification or excuse.⁵⁰ In this sense, “malice” is hardly distinguishable from intention or voluntariness. In the law of defamation and malicious prosecution, it means acting from an indirect or improper motive, whether or not also accompanied by ill will towards a particular person.⁵¹ When used in this second sense, “malice” is sometimes called “malice in fact.”⁵²

Most of the decisions under section 1 of the *Privacy Act*, however, do not indicate that malice is an essential or decisive element to a claim for violation of privacy in addition to willfulness in the sense discussed above.

6. Proof of Damage Unnecessary

Section 1(1) states that the tort of violation of privacy is “actionable without proof of damage.” This means that the plaintiff does not have to prove that some form of actual harm or loss (*damage*) occurred in order to be entitled to commence a lawsuit (*legal action* or simply *action*) to obtain an award of monetary compensation (*damages*) for a violation of privacy.

This is in keeping with the nature of the interest that the statutory tort created by section 1(1) is intended to protect. In the case of an unintentional tort such as negligence, actual damage is the very essence of the wrong for which compensation is awarded. The wrong that section 1(1) serves to deter and compensate for is the loss of privacy itself. Other harm that may flow as a consequence of it, such as embarrassment, loss of reputation, and in some cases possibly also measurable economic loss, is incidental to the loss of privacy, although it could serve to increase the award of damages.

48. *Walker v. College of Dental Surgeons of British Columbia* (19 February 1997), Vancouver C946856 (B.C.S.C.).

49. *Milton v. Savinkoff*, *supra*, note 27.

50. *Mitchell v. Jenkins* (1853), 5 B. & Ad. 588, 110 E.R. 908; *Brown v. Hawkes*, [1891] 2 Q.B. 718, aff’d [1891] 2 Q.B. 725 (C.A.); *Owsley v. Ontario* (1983), 34 C.P.C. 96 at 99 (Ont. C.A.); *Manning v. Nickerson* (1927), 38 B.C.R. 535; aff’d [1928] S.C.R. 91.

51. *Sun Life Assurance Co. of Canada v. Dalrymple*, [1965] S.C.R. 302 (defamation); *Ibbotson v. Berkley* (1918), 26 B.C.R. 156 at 161 (S.C.) (malicious prosecution); *Oneil v. Metropolitan Toronto Municipal Police Force* (2001), 195 D.L.R. (4th) 59 at 82 (Ont. C.A.).

52. *Manning v. Nickerson*, *supra*, note 50 at 553; *Brown v. Hawkes*, [1891] 2 Q.B. 718 at 722.

7. Defences

Section 2 of the *Privacy Act* deals with defences to a claim brought under section 1 for violation of privacy. Section 2 states:

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 by or 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.

Section 2 has generated very few cases. Section 2(2)(b) was recently considered in *Watts v. Klaemt*, where the defendant argued he was justified under this provision in intercepting the cordless telephone conversations of a neighbour, the neighbour’s wife and her mother because the neighbour had threatened him repeatedly. The defendant’s conduct persisted long after the threatening behaviour had ceased and was found to be out

of proportion to the threat, as well as reckless with respect to the privacy of the neighbour's wife and her mother. The interception, recording and disclosure were found to be a violation of the privacy of all three persons whose conversations were intercepted.⁵³

Section 2(3) serves to maintain consistency between the *Privacy Act* and the law of defamation by recognizing defences such as privilege and fair comment that can be raised against defamation claims. It was applied in *Hung v. Gardiner*,⁵⁴ where concurrent claims were brought for defamation and violation of privacy against investigators working on behalf of a professional governing body. The investigators disclosed to two other professional governing bodies information about the plaintiff that they learned while investigating the plaintiff's superior for their own employer. The disclosure was held to have been made on an occasion subject to qualified privilege. In other words, the persons who disclosed the information were under a duty to do so and the bodies to whom it was disclosed were required to receive it. This was a complete defence to the defamation claim and also, by virtue of s. 2(3), the claim for violation of privacy.

C. UNAUTHORIZED USE OF A NAME OR PORTRAIT: SECTION 3

1. Section 3

Section 3 of the *Privacy Act* is a complex provision reading as follows:

- 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,

53. *Supra*, note 38.

54. *Supra*, note 9. In *F.(J.M.) v. Chappell*, *supra*, note 32 on the other hand the defence of privilege failed because publication of the plaintiff's name had been in defiance of a publication ban. Accordingly, general and punitive damages were awarded for the breach of the *Privacy Act*.

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.

Section 3 creates a statutory tort similar to a common law tort sometimes referred to as "appropriation of personality."⁵⁵ This involves exploitation of the name or likeness or other attributes of an individual for the gain of the exploiter without the individual's consent.

The most familiar example of misappropriation of personality would be the unauthorized use of a widely recognized face, such as that of a popular screen actor or athlete, to

55. See *Krouse v. Chrysler Canada Ltd.* (1973), 40 D.L.R. (3d) 15 at 28 (Ont. C.A.). The common law tort is also referred to as "misappropriation of personality": *Joseph v. Daniels* (4 July 1986) Vancouver C845530 (B.C.S.C.). Earlier jurisprudence recognized a claim for unauthorized appropriation of a person's photographic image on the basis of an implied contract not to use the image for gain without the consent of the person photographed: see *Pollard v. Photographic Co.* (1888), 40 Ch.D. 345; *Sports & General Press Agency, Ltd. v. "Our Dogs" Publishing Co. Ltd.*, [1917] 2 K.B. 125.

advertise a product. The advertiser might also opt for a generic image, and use the photograph of someone completely unknown to the public. In either case, the publicity may be undesired, or at any rate undesired if it is not accompanied by payment in return for the use of the image. The advertiser gains the benefits that flow from the association of the well-known personality or the generic image without a corresponding benefit flowing to the person whose image or name is employed.

As with the tort of violation of privacy created by section 1, a plaintiff bringing a claim under section 3 does not need to prove that actual damage was suffered as a result of the use of the plaintiff's name or portrait. The circumstances under which a claim under section 3 could succeed, however, are fairly narrow. Section 3 contains elaborate language aimed at preventing liability in cases of accidental identification or association of an individual in the course of advertising or promotion of a product or service.

2. Elements of the Tort of Unauthorized Use of Name or Portrait

(a) Basic Elements

For a valid claim under section 3, section 3(2) requires that the use of the name or portrait of a person must be

- for the purpose of advertising, selling, or otherwise trading in property or services, and
- without the person's consent or that of someone entitled to give the consent on behalf of the person, such as an agent.

Use of a name or portrait without consent for any purpose other than "advertising, selling or otherwise trading in property or services" is outside the section. Exploitation of someone's name or image for non-commercial reasons may be equally objectionable, but is not tortious under the Act.

While "property or services" is a very broad description, it may not cover the full gamut of subject-matter that can be associated with a name or portrait. A sporting event or a concert might arguably be neither "property" nor a "service," yet the mischief section 3 is aimed at correcting may still be present if it is advertised with the aid of the name and image of someone. The promoters may reap economic gains without providing anything in exchange to the owner of the name or image except unwanted publicity.

(b) Use of Names and Similar Names

Section 3(3) deals with unauthorized use of names or names similar enough to the plaintiff's to be mistaken for that of the plaintiff. In addition to the requirements of section 3(2), before the court can find liability it must be satisfied either that

- the defendant specifically intended to refer to the plaintiff or exploit the plaintiff's name or reputation, or
- the name was expressly or impliedly connected with material or details that allow the public or a member of the community in which plaintiff lives or works to recognize, on the same occasion or on another occasion in the course of a "program of advertisement or promotion," that the reference is to the plaintiff and not to others having the same or a similar name.

Section 3(3) would likely prevent a successful lawsuit by someone who was or might be inadvertently associated with another in the course of advertising unless the manner in which the name was used would clearly lead to such an association.

(c) Portrait Appearing in a Group

In the case of unauthorized use of a portrait of the plaintiff in a picture of a group or gathering, section 3(4) specifies that there is no liability unless the plaintiff is either

- identified by name or description, or made to stand out in some manner, or
- recognizable, and the defendant intended to exploit the plaintiff's name or reputation by using the picture.

(d) Specific Forms of Advertising and Promotion

If the plaintiff alleges that the defendant used the plaintiff's name or portrait without consent to advertise or promote the sale of a newspaper or other publication, or the services of a broadcasting undertaking, section 3(5)(a) provides that the defendant is not liable unless the plaintiff establishes that the name and portrait was used specifically in connection with

- the readership, circulation or other qualities of the newspaper or other publication, or
- the audience, services or other qualities of the broadcasting undertaking.

In other words, liability would only arise from unauthorized use of a name or portrait in advertising a newspaper or magazine if the purpose of the advertising is to promote sale and circulation of the publication, or increase the viewership or use of the services of the broadcaster. If the publisher or broadcaster can show that it had some other purpose, such as to connect the name or portrait with some portion of the content of the publication or broadcast, the plaintiff would have no claim under the Act.

Section 3(5)(b) deals with advertising and promotion of goods or services produced or supplied by sponsors. It requires the plaintiff to prove that the plaintiff's name or portrait

was used specifically in connection with the goods or services or with the sponsors. Section 3(5)(b) is confined to a radio or television program “relating to current or historical events or affairs, or other matters of public interest.” It is unclear why the provision was restricted to broadcast dealing with this type of subject-matter.

3. Litigation Under Section 3

Few claims appear to have been made under section 3 of the *Privacy Act* and none have succeeded to date.

One of the very few cases decided under section 3 involved a bodybuilder who agreed to pose for a photograph for a particular magazine, but refused to sign a consent to unrestricted use of the photograph. The photograph attracted considerable attention, was widely distributed and the photographer caused it to be reproduced on posters for sale. The bodybuilder sued the photographer for unauthorized use of his portrait under section 3(2).

Only the bodybuilder’s torso had appeared in the photograph, however, and the court interpreted section 3 to require that a “portrait” be a recognizable likeness of the plaintiff. As there was no recognizable likeness, the court found that the public would not associate the photo with the plaintiff bodybuilder and dismissed the claim.⁵⁶

In a second case, the plaintiff was a well-known French chef who had consented to the use of his name in the corporate and business names of a culinary school. Later, after the plaintiff had ceased to hold an interest in the business, he sought to terminate his consent and sued the company operating the school under section 3 of the *Privacy Act* for the unauthorized use of his name.

The court held that the original consent to use of the plaintiff’s name remained in effect as part of a contractual arrangement and could not be unilaterally withdrawn. While this was a complete answer to the claim, the court also found that the culinary school had built its own name and was trading on its own reputation. Therefore, there was no exploitation of the plaintiff’s name within the meaning of section 3.⁵⁷ As the plaintiff was quite well-known, and the school clearly valued the goodwill associated with having the plaintiff’s name in its corporate name by stipulating in a contract for its continued use, this appears to require quite a high standard of proof in claims under section 3 of either the defendant’s intent to exploit a name or reputation, or the probability that the public would

56. *Joseph v. Daniels, ibid.*, The plaintiff also sued on the basis of misappropriation of personality at common law. While the court dismissed this claim as well as the claim based on the *Privacy Act*, it apparently treated the common law tort as being in existence in British Columbia, without discussing whether s. 3 supplanted the common law tort.

57. *Dubrulle v. Dubrulle French Culinary School Ltd.* (2000), 8 C.P.C. (4th) 180. As in *Joseph v. Daniels, supra*, note 55, Dubrulle sued both for misappropriation of personality at common law and unauthorized use of his name under s. 3 of the *Privacy Act* and the court considered both heads of the claim, apparently assuming that the common law tort existed concurrently with the statutory one created by s. 3.

associate the plaintiff with the subject-matter of the advertisement or promotion.

D. MISCELLANEOUS PROVISIONS: SECTIONS 4 AND 5

Section 4 requires an action under the *Privacy Act* to be brought in the Supreme Court of British Columbia, notwithstanding anything in another Act. Thus, the action must be brought in the Supreme Court even if the amount of damages sought would otherwise bring the claim within the small claims civil jurisdiction of the Provincial Court.⁵⁸ As sections 2(1) and 3(1) of the Act specify that actual damage is not a prerequisite to liability, however, there is no requirement to plead and prove loss in a specific amount.

Section 5 provides that an action or a “right of action,” i.e. a claim, under the Act for a violation of privacy or unauthorized use of a name or portrait is extinguished by the death of a person whose privacy was allegedly violated or whose name or portrait is alleged to have been used without authorization. Thus, unlike most tort actions, an action under the *Privacy Act* cannot be commenced or continued on behalf of the plaintiff’s estate if the plaintiff dies.

Sections 4 and 5 give the statutory torts under the *Privacy Act* features that are shared with the torts of libel and slander, often referred to collectively as “defamation.” Defamation actions must also be brought in the Supreme Court regardless of the amount, if any, claimed in damages,⁵⁹ and a right of action for defamation also ends with the death of the person allegedly defamed.⁶⁰

There are certain similarities between defamation on one hand and violation of privacy and unauthorized use of a name or portrait or its common law analogue, misappropriation of personality, on the other. The harm produced by all four torts is generally intangible and often it is not readily quantifiable. In defamation the harm is damage to someone’s reputation. Damage to reputation can also be one of the consequences of a violation of privacy or exploitation of someone’s name or photographic image. The same facts may conceivably support a claim for defamation and another under the *Privacy Act*. It is appropriate and efficient to try them before the same court in the same action. For these reasons, the presence of sections 4 and 5 in the *Privacy Act* is unsurprising.

III. REFORM OF THE *PRIVACY ACT*

A. IS A GENERAL PRIVACY STATUTE STILL NEEDED?

When the *Privacy Act* was passed, the law of privacy in Canada was very undeveloped.

58. That monetary limit is \$25,000 at the time of writing: *Small Claims Court Monetary Limit Regulation*, B.C. Reg. 179/2005.

59. *Small Claims Act*, R.S.B.C. 1996, c. 430, s. 3(2).

60. *Hatchard v. Mege* (1887), 18 Q.B.D. 771. See also *Estate Administration Act*, R.S.B.C. 1996, c. 122, s. 59(1)(a). The rule is otherwise in the case of slander of title or goods, and a personal representative may commence or maintain an action on behalf of the owner’s or manufacturer’s estate.

The statements of officials reported in the press at the time indicate that the Act was originally conceived as a flexible instrument to allow the courts wide latitude to arrive at a reasonable and just result in each case.⁶¹ There was little in terms of established legal principle relating to the protection of privacy to guide the courts in applying the Act. In commenting on this in the same year as the British Columbia *Privacy Act* was passed, the Ontario Law Reform Commission said:⁶²

[L]itigation under this statute will fight over the ground of what is reasonable in each case - a situation which, under our legal process, renders any reference to the general problem of protection of privacy faced by the plaintiff irrelevant, prejudicial to the defendant, and not something which should properly be considered by the court. This legislation is fine as it goes, but, absent what would amount to a comprehensive code of privacy, setting definitive norms for information trafficking, control of the means and physical implements for invading privacy, control of psychological in-depth testing, input and disclosure standards for school, medical and governmental records, and all of the rest - in the absence of clear legislative policy in relation to the larger problem of privacy, in short - then this statute standing alone could easily become a well-intentioned dead letter...

Whether the British Columbia *Privacy Act* is a “dead letter” is open to debate, but it is indisputable that in the intervening decades, other legislation has supplied many “definitive norms” in the area of protection of privacy. The *Criminal Code* now prohibits interception of private communications without consent.⁶³ It also provides for the offence of “criminal harassment,” which covers some forms of conduct that arguably could be characterized as invading the privacy of the victim.⁶⁴ Complex legislative restrictions now govern the handling of information concerning individuals by both governments and private entities.⁶⁵ The *Privacy Act* must now be applied against the backdrop of legal policy that places a higher value on privacy.

Some privacy-related regulatory statutes now in force provide for civil remedies. For example, section 57 of the *Personal Information Protection Act*⁶⁶ (PIPA) gives the right to sue for damages for actual harm caused by a breach of an organization’s obligations to safeguard personal information under that Act or the regulations made under it. A prerequisite for liability under section 57 of PIPA is that the Privacy Commissioner must

61. See *supra*, notes 5, 10, 13-15.

62. Ontario Law Reform Commission, *Report on Protection of Privacy in Ontario* (Toronto: Dept. of the Attorney General, 1968) at 68-69.

63. *Supra*, note 7, s. 184. See also ss. 184.5, 193, 193.1.

64. *Ibid.*, s. 264. Section 264(2)(a) and (c) specify, respectively, two forms that criminal harassment of another person may take: “repeatedly following from place to place the other person or anyone known to them” and “besetting or watching” a dwelling-house or workplace of another person. These behaviours are among the activities commonly referred to as “stalking,” about which more is said later in this paper. When these activities take place in a public area, they may not currently be tortious under the *Privacy Act*.

65. See *supra*, note 1.

66. *Supra*, note 1.

previously have made an order against the organization or the organization must have been convicted of an offence under the Act in respect of the conduct that caused the harm. At the federal level, the *Personal Information Protection and Electronic Documents Act*⁶⁷ (PIPEDA) provides for a similar civil remedy that allows the Federal Court to award damages to a complainant in respect of certain contraventions of the Act.⁶⁸

The question may be asked whether the *Privacy Act* has been overtaken and superseded by the deterrent aspects of the criminal law provisions and the more specific privacy-related statutes like PIPEDA and PIPA. In the nearly forty years since it was enacted, relatively few cases have been decided under the provincial *Privacy Act*, and very few actions have succeeded. Should it be retained at all?

This is the age of the webcam, identity theft, and data mining. The ever-expanding ability of digital and other technology to intercept communications, reveal to others what we wish to keep secret, and invade private spaces would seem to call for more protection of privacy rather than less, at least where no legitimate countervailing interest such as public safety is in question.

Several other provinces have general privacy statutes similar to the *Privacy Act*. These too coexist with PIPEDA or the provincial equivalent in those jurisdictions.⁶⁹

The statutory rights of action for damages under PIPEDA and PIPA are narrow in scope. They are auxiliary mechanisms supporting the regulatory scheme of those Acts. The general statutory tort under section 1 of the *Privacy Act* extends to any situation in which a court finds that a violation of privacy has occurred.

The possible overlap of civil remedies in some cases where both the *Privacy Act* and a more specific statute like PIPA may apply to the same facts should not be cause for concern, since the remedies would apply to the same loss. Multiple causes of action in respect of the same loss do not result in multiple recoveries. They simply provide concurrent grounds on which to base the same award.

Without a general civil remedy for violation of privacy, conduct that does not involve the misuse of personal information and that does not reach the level of criminality, but which

67. *Supra*, note 1.

68. Section 16(c) of PIPEDA provides for an award of damages, including damages for humiliation suffered by the complainant, in respect of a contravention of Division I or Schedule I of the Act.

69. Section 26(2)(b) of PIPEDA provides that the Governor in Council may order that Part 1 of PIPEDA does not apply to an organization, an activity, or a class of organizations or activities with respect to the collection, use or disclosure of personal information within a province, if satisfied that substantially similar provincial legislation applies there to the organization, activity, or class. PIPA has been the subject of a federal order in council under s. 26(2)(b) of PIPEDA declaring that it is substantially similar to PIPEDA and therefore it, rather than PIPEDA, governs the collection, use and disclosure of personal information by organizations in British Columbia that are within the constitutional jurisdiction of the provincial Legislature. See *Organizations in the Province of British Columbia Exemption Order*, S.O.R./2004-220.

is still offensively invasive, might not be subject to any legal sanction. While a common law tort of invasion of privacy is beginning to be recognized in some Canadian provinces, British Columbia is not one of them. British Columbia courts have clearly refused to recognize such a tort apart from section 1 of the *Privacy Act*.⁷⁰ The high value given to privacy in present-day society warrants retention of a general civil remedy.

Tentative Recommendation 1

1. *The Privacy Act or an equivalent statute providing a right to sue for violation of privacy should be retained.*

B. LIABILITY FOR VIOLATION OF PRIVACY

1. The Burden of Proof

(a) General

It was noted earlier that a plaintiff suing for violation of privacy must prove that the defendant acted “wilfully and without a claim of right”⁷¹ and that this has been interpreted to mean that the defendant must have known or ought to have known that the conduct complained of would violate the plaintiff’s privacy.⁷²

Similar wording found in the corresponding Acts of two other provinces has been interpreted in a similar fashion.⁷³ The *Privacy Act* of Manitoba uses the words “substantially, unreasonably, and without claim of right.”⁷⁴ This may arguably be an even higher burden of proof.

It is unusual in civil matters to require a plaintiff to prove a subjective state of mind on the part of the defendant. The unusually stringent burden of proof may explain in part why so few claims have succeeded under the provincial *Privacy Acts*. In *Hollinsworth*, for example, the court held that a patient who had consented to his surgery being filmed for medical instructional purposes had no claim against a broadcaster whose employees showed it on the news several years later. They were given the film by the filmmaker in violation of the terms of the plaintiff’s original consent. The court absolved the

70. *Lord v. McGregor*, *supra*, note 9; *Hung v. Gardiner*, *supra*, note 9.

71. *Privacy Act*, *supra*, note 2, s. 1(1).

72. *Hollinsworth v. BCTV*, *supra*, note 42.

73. See *Peters-Brown v. Regina District Health Board*, *supra*, note 9. The *Privacy Act*, R.S.S. 1978, c. P-24, s. 2 and the *Privacy Act*, R.S.N.L. 1990, c. P-22, s. 3(1) contain wording identical to that of s. 1(1) of the B.C. *Privacy Act*.

74. *Supra*, note 6, s. 2(1). In *Bingo Enterprises Ltd. v. Plaxton* (1986), 26 D.L.R. (4th) 604 (Man. C.A.); leave to appeal refused (1986), 74 N.R. 236n (S.C.C.) the Manitoba Court of Appeal appeared to indicate that “substantially” meant the plaintiff must have suffered adverse consequences, although s. 2(2) of the Act declares that an action for violation of privacy may be brought without proof of damage.

employees of liability on the ground that they did not have reason to believe that the plaintiff's expectation of confidentiality continued.

Would it be acceptable, however, to impose liability for inadvertent or negligent breaches of privacy? Should there be some middle ground between forcing the plaintiff to prove the defendant's subjective intent to violate the plaintiff's privacy on one hand, and liability without fault (*strict liability*) on the other?

The Hong Kong Law Reform Commission considered that an invasion of privacy should engender liability only if it is intentional or reckless. It reasoned that indifference on the part of the defendant is equally culpable as direct intention. It also considered, however, that if the defendant knows that a loss of privacy could be the consequence of the defendant's act, the defendant's conduct could be justly characterized as intentional.⁷⁵

(b) Burden of Proof in Other Provincial Privacy Acts

The Manitoba, Saskatchewan and Newfoundland *Privacy Acts* also stipulate that wilfulness and absence of a claim of right are essential aspects of the tort of violation of privacy. They relieve to some extent against the difficulty of proving the state of mind of the defendant by declaring that certain forms of conduct amount to a violation of privacy in the absence of evidence to the contrary. The examples of conduct deemed to be privacy violations in the Saskatchewan *Privacy Act*, which closely resemble those in the Newfoundland and Manitoba statutes, are as follows:

- (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, express 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.

75. Hong Kong Law Reform Commission, *Civil Liability for Invasion of Privacy* (2004) at 134.

(c) *Burden of Proof Under the Uniform Privacy Act*

The approach taken in the *Uniform Privacy Act* promulgated by the Uniform Law Conference of Canada is somewhat different.⁷⁶ The corresponding section in the *Uniform Privacy Act* does not impose an onus on the plaintiff to prove willfulness. It simply states “Violation of the privacy of an individual by a person is a tort that is actionable without proof of damage.” The Uniform Act then provides a non-exhaustive list of examples of acts amounting to a violation of privacy, all of which are intentional.

The list of examples of conduct deemed to be privacy violations in section 3 of the *Uniform Privacy Act* is similar, except that it contains no counterpart to paragraph (c) above. It also contains an additional example not found in the existing provincial *Privacy Acts* regarding the dissemination of information about an individual contrary to a statute or regulation, or in breach of a confidence and for a purpose other than the one for which the information was provided. (This latter provision in the *Uniform Privacy Act*, which dates from 1994, has now been superseded by PIPEDA and its provincial equivalents.)

(d) *Reformulation of the Burden of Proof*

Strict liability for violation of privacy would be onerous in terms of ordinary social interaction. It would penalize purely accidental losses of privacy, like opening the wrong door and revealing someone in a state of undress or a couple in an intimate embrace. There should be something in the nature of fault required for the imposition of liability.

Requiring the plaintiff to prove that the defendant intended to violate the plaintiff’s privacy, as the current interpretation of section 1(1) of the British Columbia *Privacy Act* does, nevertheless imposes an onerous burden on the plaintiff. Seldom will direct evidence of intent be available. The plaintiff will normally be able to point only to the defendant’s acts and their consequences. In the case of other intentional torts, this is all that is required of the plaintiff, because in tort law persons are normally presumed to intend the consequences that would flow reasonably and naturally from their acts.⁷⁷ It is reasonable to put the onus on the defendant to introduce evidence that the intrusion and other consequences were unintended, including evidence of a “claim of right” that would justify or excuse the defendant’s conduct if the facts had been as the defendant believed them to be.

We are inclined to agree with the Hong Kong Law Reform Commission that recklessness (indifference as to the consequences of an act or pattern of conduct) is equally culpable as direct intention. As such, recklessness on the part of the defendant as to the consequences of intrusive acts or behaviour for the plaintiff’s privacy should be capable of satisfying

76. Uniform Law Conference of Canada, *Proceedings of the Seventy-Sixth Annual Meeting* (Ottawa: ULCC, 1994) 48 and 216.

77. *South Wales Miners’ Federation v. Glamorgan Coal Company, Limited*, [1905] A.C. 239 at 244 (H.L.); Linden, *Canadian Tort Law*, 7th ed. (Markham, Ont.: Butterworths, 2001) at 34.

the intentional element of the tort of violation of privacy. The phrase “wilfully, and without claim of right” should be replaced in section 1(1) of the *Privacy Act* by “intentionally or recklessly.” Section 2(2) could be amended to preserve the defence of claim of right in substance by stating that an act or conduct is not a violation of privacy if the defendant honestly believed in a state of facts under which the act or conduct would be legally justified.

This change is a slight departure from uniformity with the corresponding provisions of the counterpart provincial *Privacy Acts*, but it should bring greater clarity to section 1(1). The minor textual difference it would introduce would be more than offset if the list (reproduced above) now found in the other provincial *Privacy Acts*⁷⁸ of types of conduct deemed to amount to a violation of privacy in the absence of contrary evidence were incorporated into the British Columbia *Privacy Act*. Paragraph (c) of that list is to much the same effect as the existing section 3 of the *Privacy Act*, but more succinct. It could replace that section. These changes would harmonize the *Privacy Act* with its extraprovincial counterparts to a much greater extent than is now the case.

Tentative Recommendation 2

2. (a) *Section 1(1) of the Privacy Act should be amended to substitute “intentionally or recklessly” for “wilfully and without a claim of right.”*

(b) *Section 2(2) should be amended by the addition of a paragraph providing that an act or conduct is not a violation of privacy if the actor honestly believed in a state of facts under which, if it had been true, the act or conduct would be legally justified.*

(c) *Section 1 should be amended to correspond with other provincial Privacy Acts by providing that the following are deemed to be violations of privacy in the absence of evidence to the contrary:*

- (i) *auditory or visual surveillance of an individual by any means including eavesdropping, watching, spying, besetting or following and whether or not accomplished by trespass;*
- (ii) *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 thereto;*
- (iii) *use of the name or likeness or voice of an individual for the purposes of*

78. The list of deemed violations of privacy found in the three provincial privacy statutes is preferred to that in the *Uniform Privacy Act* because it does not contain the provision dealing with misuse of personal information that is now superseded by PIPEDA and PIPA, and does contain a version of the tort of unauthorized use of a name or portrait that is much more succinct than s. 3 of the *Privacy Act* and could replace s. 3 altogether.

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 individual is identified or identifiable and the user intended to exploit the name or likeness or voice of that individual; or

(iv) *use of letters, diaries or other personal documents of an individual;*

without the consent, express or implied, of the individual or some other person who has the lawful authority to give the consent

(d) *Section 3 should be repealed.*

2. Protection of Privacy Interests in a Public Place

(a) *General*

When we leave our homes or any other enclosed spaces, some degree of observation by others is inevitable. We cannot expect that what we do in public will not come to the notice of others, or that no consequences will flow in the natural course of events from exposure to the public gaze.

Few of us would assume, however, that merely venturing outside our dwellings results in a surrender of *all* of the interests commonly understood to be embraced by the concept of “privacy.” These extend to a certain level of respect for individual autonomy within a social setting. For example, we expect to be able to interact normally with other members of society without being subjected to close surveillance, persistent following, or interception of our communications.

The Supreme Court of Canada has affirmed that protection of individual privacy against state intrusions is among the chief purposes of the guarantee in section 8 of the Charter against unreasonable search and seizure.⁷⁹ The Supreme Court of Canada has also stated that the protection of section 8 is not linked with trespass to private property by agents of the state, and that the section protects “people, not places.”⁸⁰ While made in addressing questions of searches and seizure in the context of criminal and constitutional law, rather than the sphere of civil wrongs, these are strong statements by the highest court in the country lending support to the view that legitimate privacy interests do not end once citizens have left their dwellings or other controlled-access spaces.

The current interpretation of the *Privacy Act* precluding recognition of a reasonable expectation of any level of privacy in a place that happens to be visible by the public, even in a dwelling, might therefore surprise the average citizen.⁸¹ The case which firmly

79. *Hunter v. Southam Inc.*, *supra*, note 9 at 159-160.

80. *Ibid.*, at 158-159; *R. v. Dyment*, [1988] 2 S.C.R. 417 at 428-429.

81. See above in Chapter II under the heading “(b) Reasonable Expectations of Privacy.”

established the current interpretation in British Columbia, *Silber v. BCTV*,⁸² was influenced by older U.S. case authority that generally excludes a legally enforceable expectation of privacy in a public setting. The traditional U.S. law with respect to privacy was summarized by Prosser in 1960: “On the public street, or in any other public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about.”⁸³

Decisions holding that no reasonable expectation of privacy whatsoever can exist in a public setting have attracted criticism, however. Writers have argued that normal social interaction does not imply a complete waiver of every variety of legitimate privacy interest and that the law should protect against “highly offensive intrusions in public places.”⁸⁴ When someone is carrying out ordinary activities in a public place, such as walking down a street, sitting on a park bench, or commuting to and from the workplace, it is reasonable to expect only casual observation by others. Unwanted and persistent attention from others in settings such as these encroaches on personal autonomy no less than in a private one.⁸⁵ It imposes constraints on the ability to move about freely and to choose those with whom we wish to communicate and associate.

Moreover, to deny the possibility that a degree of privacy worthy of legal protection may persist in a public setting is to deny a basis for protecting against deliberate and oppressive harassment when it occurs in a public place. The subject of stalking is addressed specifically later in this Consultation Paper, but the desirability of curbing the kind of behaviour falling into the category of harassment provides another reason to recognize and protect a residual degree of privacy that survives when we venture out into society, as we must in our daily lives.

U.S. law has moved away from the narrow view summarized by Prosser in 1960 regarding privacy in a public setting. Extensive surveillance or persistent following of a person in public is now held to be a tortious invasion of privacy if it lacks legal justification and is persistent, harassing, or unreasonable.⁸⁶ One well-known case affirming this proposition involved a freelance photographer who pursued Jacqueline

82. *Supra*, note 23.

83. Prosser, *supra*, note 18 at 391 citing *Chappell v. Stewart*, 33 Atl. 542 (1896).

84. Paton-Simpson, “Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places” (2000) 50 U. Tor. L.J. 305 at 308. A.J. McClurg, an American writer, urges a redefinition of the tort of invasion of privacy as recognized in the U.S. to comprise a concept of “public privacy” to protect against intrusions on personal autonomy in a social setting: McClurg, “Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places” (1994-1995), 73 N.C. L. Rev. 989 at 995.

85. Paton-Simpson, *ibid.* at 323.

86. Paton-Simpson, *ibid.*, citing *Galella v. Onassis*, 487 F. 2d 986 (2nd Cir., 1973); *Nader v. Gen. Motors Corp.*, 255 N.E. 2d 765 at 771 (N.Y. Ct. App., 1970); *Wolfson v. Lewis*, 924 F. Supp. 1413 at 1420 (E.D. Pa. 1996); *Kramer v. Downey*, 680 S.W. 2d 524 (Tex. App. 5 Dist. 1984); *Summers v. Bailey*, 55 F. 3d 1564 (11th Cir. 1995).

(Kennedy) Onassis and her children obtrusively for years.⁸⁷ Ms. Onassis was able to obtain an injunction prohibiting the photographer from coming within a specified distance of her and her children. Another celebrated case illustrating the same principle concerned the consumer advocate Ralph Nader, who was the target of systematic surveillance aimed at discrediting or discouraging him.⁸⁸

In England as well a concept of “public privacy” is apparently evolving. While English law does not yet recognize a tort of invasion of privacy,⁸⁹ the action for breach of confidence has been extended to protect against disclosure of information about an individual’s private or family life even if the information is derived from observation of the individual in a public setting.⁹⁰ This development was influenced by article 8 of the European Convention for the Protection of Human Rights (European Convention), as incorporated into English law by section 6 of the *Human Rights Act 1998*.⁹¹ Article 8 of the European Convention prescribes that “Everyone has a right to respect for his private and family life.”

The New Zealand Court of Appeal has taken a bolder approach, eschewing extension of the breach of confidence tort and holding instead that a tort of “public disclosure of private facts” exists in New Zealand.⁹² Liability results under this tort if facts in respect

87. *Galella v. Onassis, ibid.*

88. *Nader v. General Motors Corporation, supra*, note 86.

89. *Wainwright v. Home Office*, [2003] 3 W.L.R. 1137.

90. *Campbell v. MGN Ltd.*, [2004] 2 A.C. 457 (H.L.). Breach of confidence has been described as a *sui generis* cause of action with roots in both equity and common law. It allows for enforcement of an equitable principle that someone who has received confidential information under an obligation to preserve that confidence must not disclose the information or use it to the detriment of the person who communicated it in confidence: *LAC Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 615; *Slavutych v. Baker*, [1976] 1 S.C.R. 254. The traditional prerequisites of the cause of action for breach of confidence in Anglo-Canadian law are: 1. the information in question must be confidential; 2. the information must be communicated in confidence; 3. misuse of the information by the party receiving the information to the detriment of the party who communicated it: *LAC Minerals Ltd. v. International Corona Resources Ltd.*, *supra*. In *Campbell v. MGN Ltd.*, *supra*, however, the House of Lords held that the values stated in articles 8 and 10 of the European Convention were reflected in the tort of breach of confidence. The underlying value protected by the action for breach of confidence is now not only the duty of good faith attaching to receipt of confidential information, but in addition the protection of human autonomy and dignity, part of which is the right to control the dissemination of information about one’s private life: per Lord Hoffmann at para. 51. In *Campbell* the House of Lords awarded damages to a supermodel for publication of a photograph of her leaving a meeting-place for post-addiction group therapy together with information disclosing details of her addiction and frequency of therapy sessions (some of which were inaccurate). The fact that the photograph was taken in a public place and the subject was a celebrity did not absolve the defendant publisher of liability for publishing the information, because it was of such a nature that its publication served no countervailing public interest.

91. 1998, c. 42.

92. *Hosking v. Runting*, [2004] NZCA 34. Public disclosure of private facts is one of the four categories of privacy torts described by Prosser. See above under the heading “The Concept of Privacy” in Chapter II. The tort outlined by the New Zealand Court of Appeal is not fully identical with the tort

of which there is a reasonable expectation of privacy are disclosed, unless the facts are a matter of legitimate public concern justifying publication in the public interest. Whether a reasonable expectation of privacy exists depends on whether the disclosure would cause substantial offence to a reasonable person in the particular circumstances.⁹³ Applying this principle to a case in which photographs of the children of a celebrity were taken while they were being pushed in a stroller on the street, the Court of Appeal held this act did not reach such a level of offensiveness as to amount to a privacy infringement. The parents' action for an injunction to restrain publication was dismissed.

These developments elsewhere highlight a need to reassess the interpretation of the *Privacy Act* in *Silber v. BCTV* and, in our view, to reverse it.⁹⁴ It is unrealistic to limit legal protection of privacy in the civil sphere to activity in enclosed spaces not observable from the outside. The normal expectations of citizens in regard to freedom from interference with their personal autonomy go beyond that. While the degree of privacy that can reasonably be expected in public places is obviously lower than in a dwelling or other private space, it is more than nil. It extends to the ability to move freely about, associate with others and participate normally in society without being subjected to oppressive attention, illegal or unreasonable surveillance, or other forms of harassment from others. As one writer has said,⁹⁵

[T]here is a need to re-conceptualize public space as shared space, with mutual rights and responsibilities, rather than as a realm where human dignity and individual rights are subject to the whims of others.

Given that the interpretation of the Act in *Silber* is well-established, however, protection of a residual privacy interest in a public place can only take place for the purposes of tort law in British Columbia if the *Privacy Act* is amended to overrule that interpretation.

(b) Balancing Privacy with Competing Interests in a Public Place

How far a legally recognized residual “public privacy” interest should extend is a complex question. Clearly, it must be balanced with competing legitimate interests. There is a qualitative difference between a press photographer capturing the image of someone in a crowd merely to obtain a crowd photo, and singling out that individual engaged in normal activities not aimed at attracting attention or publicity, persistently following him or her about, getting in the individual's way and snapping photos repeatedly in an obtrusive and obnoxious manner. In the first case, there is no significant interference with personal autonomy. In the second case, there is. The individual would feel harassed, inhibited in his or her freedom of movement, and would experience a loss of anonymity. The first instance may represent the pursuit of a legitimate commercial purpose outweighing the negligible loss of anonymity, while the second would be widely

of public disclosure of private facts in U.S. law, however.

93. *Ibid.* at para. 259.

94. *Supra*, note 23.

95. Paton-Simpson, *supra*, note 83 at 346.

viewed as an abuse. Of course, it is not always so easy to draw the line.

(c) *Video Surveillance of Public Places: A Case in Point*

(i) *General (Untargeted) Surveillance by Public Authorities*

Most would agree that persistent, close surveillance of an individual's movements by another individual, conducted without a legitimate interest or purpose, ought to be classified as a violation of privacy. There would be a much greater divergence of opinion on whether the use of continuously recording surveillance cameras in places to which there is unrestricted public access should be similarly classified if the purpose is to curb crime or to meet other public safety concerns. Video surveillance of public areas represents an example of the difficulty of balancing privacy with other interests.

In one sense, incidental recording of the activities of law-abiding persons within the range of the camera might be said to resemble the casual and disinterested observation of others that necessarily occurs in any public area. There is arguably a significant distinction in the degree of intrusiveness between surveillance of a specific individual and surveillance of an area, particularly one in which the expectation of privacy cannot reasonably be very high.

The sense of added safety that surveillance cameras may bring in areas where citizens feel vulnerable to crime or possibly terrorist attack, such as airports and mass transit facilities, has an unquestionable appeal. There seems to be a high level of tolerance for the presence of the cameras despite uncertainty as to their actual effect on the volume of crime.⁹⁶

It is equally arguable that systematic video surveillance of public areas by public authorities produces a sense of inhibition and loss of anonymity that operates as an undue constraint on liberty and freedom of association. The former Privacy Commissioner of Canada and the present Information and Privacy Commissioner of British Columbia have espoused this position.⁹⁷ They maintained that systematic, continuous video surveillance

96. Public surveillance cameras are far more prevalent in the U.K., where video surveillance is known as "CCTV," than in Canada. In 2005, an 18-month study of 14 CCTV systems throughout Britain conducted for the Home Office revealed relatively inconclusive results in terms of their effect in reducing crime. In only two of the 14 cases could a statistically significant reduction of crime be attributed to CCTV. In some cases increases in the incidence of crime were noted. In others there was evidence that the cameras may have led to the displacement of criminal activity to other areas. Reductions in particular types of crime were noted in some areas with no significant change in others: Gill et al., *The impact of CCTV: 14 case studies*, Online Report 15/05 (London: Home Office, 2005).

97. According to the Information and Privacy Commission of of British Columbia, "[T]here are qualitative differences between being observed casually and being systematically observed by police, regardless of what one is doing. Absent proof that video surveillance is a cost-effective and useful tool in combating crime in specific cases, therefore, its use should be avoided...." Office of the Information and Privacy Commissioner (B.C.), *Service Plan 2003-2006* at 3. See also Office of the

of public places is justifiable only to address a current and pressing need and then only when conducted with no more than the necessary level of intrusiveness.

The privacy commissioners' stance is based in part on the fact that surveillance of the general public involves collection of information about individuals and therefore must be carried out in accordance with the federal *Privacy Act*⁹⁸ or its provincial counterparts such as British Columbia's *Freedom of Information and Protection of Privacy Act*⁹⁹ when it is done by public authorities subject to those Acts. It also has a firm basis, however, in several Supreme Court of Canada decisions that recognize a potential for erosion of privacy and civil liberties through widespread monitoring of the activities of citizens.¹⁰⁰ In *R. v. Wong*, where warrantless video surveillance was held to be a breach of section 8 of the Charter, the majority in the Supreme Court said:¹⁰¹

[G]eorge Orwell in his classic dystopian novel *1984* paints a grim picture of a society

Privacy Commissioner of Canada, *Letter of Finding to D. Loukidelis, Information and Privacy Commissioner of British Columbia, regarding the actual and proposed installation by the RCMP of surveillance cameras in Kelowna, B.C.*, 4 October 2001. (Following installation of a continuous recording video camera by the RCMP in 2001 on a public street in Kelowna with plans to install numerous others, the Information and Privacy Commissioner of B.C. lodged a complaint under the federal *Privacy Act* because of the Solicitor-General of Canada's jurisdiction over the RCMP. The Privacy Commissioner of Canada concluded that the continuous video surveillance of the general population was a violation of the Act. His conclusion was supported by a legal opinion later obtained from the Hon. Gérard La Forest, a former justice of the Supreme Court of Canada. As of May 2007, the opinion dated April 5, 2002 is found online at http://www.privcom.gc.ca/media/nr-c/opinion_020410_e.asp.)

98. *Supra*, note 1. The *Privacy Act* (Can.) prohibits the collection of "personal information" (generally, any information about an identifiable individual recorded in any form) by a federal government institution except in accordance with an operating program or activity of that institution: s. 4. It also restricts the use that may be made of any personal information that is collected by a government institution: ss. 7, 8. Arguably, video surveillance without recording is not "collection" of personal information, although it normally involves a recording within a certain interval that exists until the images are replaced by a new recording in the next interval. The length of the interval depends on the specifications of the equipment. The position of the Privacy Commissioner of Canada is that the capture of an individual's image by a surveillance camera constitutes information about an individual, such as the individual's whereabouts and behaviour at the time of recording as well as visual identification information and as such constitutes the collection of personal information: *Letter of finding to David Loukidelis, Information and Privacy Commissioner of B.C., regarding the actual and proposed installation by the RCMP of surveillance cameras in Kelowna, B.C.*, October 4, 2001, *ibid*.

99. *Supra*, note 1. FOIPPA prohibits the collection of personal information by a "public body" (a provincial ministry, board, commission, agency, or other scheduled body, or a "local body," i.e. a municipal government, health authority, social services body, educational body, or the governing body of a profession) unless it is authorized by or under an Act, or is done for the purposes of law enforcement, or the collection relates to and is necessary for an operating program or activity of the public body: s. 26. Use of personal information by a public body is restricted to the purpose for which it was obtained or compiled, a use to which the individual from which it was collected has consented, or a use for which the information may be disclosed. Disclosure by a public body is prohibited except for the purposes set out in ss. 33.1 and 33.2.

100. See *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Wong*, [1990] 3 S.C.R. 36; *R. v. Wise*, [1992] 1 S.C.R. 527.

101. *Ibid.* at 47.

whose citizens had every reason to expect that their every movement was subject to electronic video surveillance. The contrast with the expectations of privacy in a free society such as our own could not be more striking. The notion that the agencies of the state should be at liberty to train hidden cameras on members of society wherever and whenever they wish is fundamentally irreconcilable with what we perceive to be acceptable behaviour on the part of government. As in the case of audio surveillance, to permit unrestricted video surveillance by agents of the state would seriously diminish the degree of privacy we can reasonably expect to enjoy in a free society...Moreover...we must always be alert to the fact that modern methods of electronic surveillance have the potential, if uncontrolled, to annihilate privacy.

While *Wong* was a case of surreptitious video surveillance of a hotel room, it may be usefully remembered that the fictional telescreens described by Orwell in his novel *1984* were fully visible and omnipresent. Thus the example cited in the majority judgment of a society in which privacy and freedom had been rendered nonexistent was one characterized by open, not clandestine, video surveillance by the state.

Elaborate guidelines issued by the Office of the Information and Privacy Commissioner of British Columbia for the use of surveillance systems by public bodies have been seminal, influencing similar guidelines issued by other Canadian governments.¹⁰² They recognize that video surveillance of public areas may sometimes be justified as an exceptional step to address a real and substantial problem or danger. Key stipulations of the guidelines are:

- the problem or danger that the video surveillance is intended to solve or reduce should be evidenced by specific, verifiable reports of incidents or public safety concerns or other compelling circumstances;
- use of a surveillance system should be subject to a written policy, which should deal with access to and use, retention and disposal of video recordings;
- the surveillance system should be configured so as to be restricted to identified public areas where surveillance is a necessary and viable deterrent and so as not to monitor areas where there is a heightened expectation of privacy, such as washrooms or the interiors of adjacent buildings;
- the public should be notified through prominently displayed signage that surveillance is or may be in progress.

102. See Office of the Information and Privacy Commissioner of British Columbia, *Public Surveillance System Privacy Guidelines*, OIPC Reference Document 00-01, January 26, 2001 (B.C. Guidelines). The B.C. Guidelines served as the model for guidelines issued in Ontario and Alberta, and heavily influenced those more recently issued by the Office of the Privacy Commissioner of Canada in 2006: see Information and Privacy Commissioner of Ontario, *Guidelines for Using Video Surveillance Cameras in Public Places* (2001) at 2; Government of Alberta, *Guide to Using Surveillance Cameras in Public Areas* (2004) online at <http://foip.gov.ab.ca/resources/publications/SurveillanceGuide.cfm>; Office of the Privacy Commissioner of Canada, *OPC Guidelines for the Use of Video Surveillance of Public Places by Police and Law Enforcement Authorities* (2006).

It is unlikely that video surveillance of a public area would be found tortious if it was conducted in accordance with a privacy commissioner's guidelines aimed at ensuring that privacy is infringed only to the minimum extent necessary to serve a compelling state interest, and any recordings made were used *only* for the purposes authorized by a written policy conforming to both the guidelines and the relevant privacy statute.

If the video surveillance is carried out for purposes of law enforcement, as would most often be the case, section 2(2)(d) of the *Privacy Act* would likely afford a defence to a claim of violation of privacy in most cases.¹⁰³ Surveillance of a public area carried out in accordance with a privacy commissioner's guidelines is not likely to be found "disproportionate to the gravity of the crime or matters under investigation" because the element of proportionality is incorporated into the guidelines themselves. Section 1(3) also requires a court considering allegations of violation of privacy based on section 1(1) to have regard to "the nature, incidence and occasion of the act or conduct...." If a public safety or law enforcement need can be demonstrated, the degree of intrusion is minimal, and privacy commissioners' guidelines for use of video surveillance have been respected, it would be reasonable to expect that no violation would be found.

No tentative recommendation is made, therefore, for an amendment to deal specifically with video surveillance of public places by public authorities.

(ii) *Surveillance of Public Areas by Private Persons*

So far we have been speaking of video surveillance of a publicly accessible area conducted by public authorities. What of surveillance of a publicly accessible area by a private person or organization?

Many of the arguments for and against the proposition that overt and untargeted video surveillance by a public authority infringes upon privacy would apply with equal or greater force to the same activity if it is privately conducted. Arguably, private video monitoring of a public area consists only of observing general activity, not surveillance of an individual. It is merely a robotic observation of what a disinterested human observer would see during a temporary presence in the area.

If, however, the privacy commissioners are correct in their view that video surveillance inherently concerns the collection of information about individuals, namely the fact of their presence and their behaviour in a particular place at a particular time, then the restrictions of the *Personal Information Protection and Electronic Documents Act*¹⁰⁴ (PIPEDA) and (in British Columbia) the *Personal Information Protection Act*¹⁰⁵ (PIPA), are engaged. These are, respectively, the federal and provincial Acts that govern the

103. See the subheading "7. Defences" in Chapter II, *supra*.

104. *Supra*, note 1.

105. *Supra*, note 1.

collection, use and disclosure of personal information by the private sector.¹⁰⁶ They require that the collection of personal information take place only with the knowledge and consent of the individual to which it relates, except in specific cases.¹⁰⁷

In a complaint against a security company that had installed surveillance cameras monitoring a public street in Yellowknife, N.W.T. as a marketing demonstration, the Privacy Commissioner of Canada found that the security company had contravened PIPEDA by the collection of personal information without the consent of the individuals concerned.

In so finding, the Privacy Commissioner stated,¹⁰⁸

There may be instances where it is appropriate for public places to be monitored for public safety reasons. But this must be limited to instances where there is a demonstrable need. It must be done only by lawful public authorities and it must be done only in ways that incorporate all privacy safeguards set out by law. There is no place in our society for unauthorized surveillance of public places by private sector organizations for commercial reasons.

In *Eastmond v. Canadian Pacific Railway*, the Federal Court of Canada appeared to accept the position that video surveillance does amount to a collection of personal information for the purpose of PIPEDA, at least if video images are actually viewed at some point.¹⁰⁹

106. Part 1 (Protection of Personal Information in the Private Sector) of PIPEDA applies to all “organizations,” which are defined to include associations, trade unions, partnerships and persons (but by virtue of s. 4(2)(a), not federal government institutions subject to the *Privacy Act*), in respect of personal information that is collected, used or disclosed in the course of commercial activity. Under s 26(2)(b), the Governor in Council is empowered to exempt an organization, activity or class from the application of Part 1 of PIPEDA other than a federal work, undertaking or business, if satisfied that legislation of a province substantially similar to Part 1 applies to it. An order in council exempting organizations subject to PIPA from the application from Part 1 of PIPEDA was passed in 2004: *Organizations in the Province of British Columbia Exemption Order*, S.O.R./2004-220. The result is that non-governmental, provincially regulated organizations are governed by PIPA in relation to the collection, use and disclosure of personal information and are not subject to Part 1 of PIPEDA. Part 1 of PIPEDA applies in British Columbia to federally regulated works and undertakings such as chartered banks, airlines, interprovincial railroads, and marine industries.

107. See PIPEDA, *supra*, note 1, ss. 5(1), 7(1) and clause 4.3 of Schedule 1, and PIPA, *supra*, note 1, s. 6. PIPA provides for consent to be deemed if the personal information is collected “by observation at a performance, a sports meet or similar event” if the event is open to the public and the individual voluntarily appears: s. 12(1)(d). The reference to an event similar to a performance or sports meet appears to preclude application of this exception to observation of a public place where no specially convened event is concerned.

108. Findings of the Privacy Commissioner of Canada in response to a complaint by the Information and Privacy Commissioner of the N.W.T., 20 June 2001.

109. [2004] F.C. 852. The CPR had installed video cameras in its own maintenance facility to counteract theft. No contravention of PIPEDA was found on the facts, because the CPR was found to be entitled to rely on an exception in s. 7(1)(b) of the Act. The exception allows for personal information to be collected without the individual’s consent if obtaining the consent would compromise the accuracy of

While PIPEDA or PIPA both provide for civil remedies if they are contravened, as noted earlier, it has recently been held that contravention of other privacy-related legislation may amount to a violation of privacy under section 1 of the *Privacy Act* as well.¹¹⁰ A breach of PIPEDA or PIPA could therefore be actionable under the *Privacy Act*.

The argument that the public interest outweighs the degree of intrusion on privacy is not available to private parties wishing to conduct video surveillance for their own purposes. Under some circumstances, however, private video surveillance of public areas might be justified under section 2(2)(b) of the Act as being “incidental to the exercise of a lawful right of defence of person or property.” For example, perimeter surveillance of private property may be important to the effectiveness of a security system. If the cameras incidentally capture images of offsite activity in a publicly accessible area, have privacy interests been infringed? Arguably yes, though the degree of intrusion may be very minimal. Should the situation be treated as an actionable violation of privacy at all?

A special statutory rule or exception is unlikely to achieve a consistently just result in this kind of situation of competing but lawful interests. The best route to a just result is probably through a dispassionate application of sections 1(2) and (3) of the *Privacy Act*. Section 1(2) requires the court to determine the nature and degree of privacy that is reasonable under the circumstances before determining whether any violation of privacy has occurred. Section 1(3) requires the court to consider the nature of the act or conduct allegedly constituting the violation in light of the “incidence and occasion” on which it takes place. The determination should be based on a careful assessment of whether the alleged violation was reasonable conduct in the context of the circumstances in which it occurred.

(d) *Conclusion and Tentative Recommendation on Privacy in a Public Setting*

How far reasonable expectations of privacy can extend outside completely enclosed, access-restricted spaces like a dwelling is a question not easily answered. The difficulties of delineating boundaries to privacy expectations does not provide a reason to leave them completely unprotected, however.

Normal activities of living and social interaction, not aimed at attracting publicity or the attention of others, should not operate as a complete waiver of all privacy expectations. To leave them subject to no privacy protection from the standpoint of tort is to give carte blanche to those who would infringe the personal autonomy of others without a reason that would attract broad consensus as legitimately outweighing individual privacy interests. The law should protect a reasonable expectation of freedom from intrusive activity in a public setting.

the information or is reasonable for the purpose of investigating a contravention of an agreement or federal or provincial law.

110. *Watts v. Klaemt*, *supra*, note 38.

Tentative Recommendation 3

3. Section 1 of the Privacy Act should be amended by adding a further subsection providing that for the purposes of that section, a person may have a reasonable degree of privacy with respect to lawful activities of that person that occur in a public setting, and which are not directed at attracting publicity or the attention of others.

C. REMEDIES

1. General

Damages are the usual remedy granted by the court in a successful tort claim. Other remedies, such as injunctions, are relatively rare in the realm of tort. If a tort is of a continuing nature or is likely to be repeated, the court may grant an injunction to prevent its continued or future commission, provided that the case meets the general requirements for awarding injunctions.¹¹¹

One category of tort in which injunctions are commonly granted is private nuisance, which consists of interference with the enjoyment of land. Another is the tort of passing-off, i.e. selling imitation goods that are calculated or likely to deceive the buyer as to the identity of the real manufacturer.¹¹² Damages would often be a less than adequate remedy in these cases because the injury will continue unless the cause of the nuisance is removed or the imitation goods removed from the market.

Like the tort of nuisance, a violation of privacy may take place on one occasion or be of a continuing nature. Consider the following two examples:

1. A voyeur surreptitiously views the plaintiff.
2. A voyeur surreptitiously views and photographs the plaintiff and shows the photograph to third persons.

111. An injunction is a discretionary remedy. To obtain a permanent injunction, the plaintiff must show at a minimum that a legal or equitable right belonging to the plaintiff is being or will be violated: *The Siskina*, [1977] 3 All E.R. 803 at 824 (H.L.); *Tremblay v. Daigle*, [1989] 2 S.C.R. 530. The court will also take into account whether damages are an adequate remedy: *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 at paras. 87-89. Another important consideration is whether the balance of convenience favours granting the injunction. The court will also consider whether there has been delay on the part of the plaintiff, whether granting an injunction will avoid multiple future actions because of repeated commission of the tort, whether judicial supervision would be required to enforce an injunction in the particular circumstances, and whether the plaintiff has “clean hands,” in the sense of not having engaged in wrongdoing in the matter: Klar et al., *Remedies in Tort*, Linda Rainaldi, ed. (Toronto: Carswell, 1987) looseleaf, updated, vol. 4, ch. 27, at para. 167.

112. *Millington v. Fox* (1838), 3 My. & Cr. 338, 40 E.R. 956; *British Telecommunication plc v. One In A Million Ltd.*, [1998] 4 All E.R. 476 at 493 (C.A.); Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at 783.

In the first case, damages may be sufficient to compensate for the plaintiff's humiliation and distress at being under illicit surveillance.

In the second, the plaintiff's interest in privacy is violated anew every time the voyeur shows the photograph to someone. The embarrassment and mental anguish inflicted on the plaintiff will continue unabated until the offending photograph is surrendered or destroyed. Damages are not an adequate remedy. What is needed to end the continuing injury is a means of compelling the voyeur to stop displaying the photograph. An appropriate remedy for accomplishing this is an injunction, i.e. an order that prohibits certain conduct that violates a legal right, or directs that specified remedial acts be carried out, backed by the threat of imprisonment for contempt of court.

If someone exploits the plaintiff's image by putting it on posters without the plaintiff's authorization and derives large profits from selling the posters, an appropriate award of damages would include an amount equivalent to the ill-gotten profits. In order to quantify such an award, however, the defendant may have to be forced to provide full accounts showing what the profits actually were. This requires a different type of remedy, commonly called an "accounting."

Various other orders may be necessary to provide proper relief to a plaintiff whose privacy has been violated. In the example of the posters given above, the plaintiff should be able to force the defendant to surrender the inventory of posters to the plaintiff to prevent any further distribution. Orders like this that support the effectiveness of the main relief granted by the court are called "ancillary relief."

2. Express Powers Regarding Remedies

The *Privacy Act* is silent with respect to remedies. In contrast, section 5 of the *Uniform Privacy Act* expressly confers the power to:

- (a) award damages,
- (b) grant an injunction,
- (c) order the defendant to account to the plaintiff for any profits that have accrued or may accrue to the defendant as a result of the violation of privacy;
- (d) order the defendant to deliver up to the plaintiff all articles or documents that have come into the defendant's possession as a result of a violation of privacy;
- (e) grant any other relief to the plaintiff that the court considers necessary in the circumstances.

The Manitoba, Saskatchewan and Newfoundland Acts contain similar express powers regarding remedies.¹¹³

113. *The Privacy Act*, C.C.S.M., c. P125, s. 4(1); *Privacy Act*, R.S.S. 1978, c. P-24, s. 7; *Privacy Act*, R.S.N.L. 1990, c. P-22, s. 6.

While it is by no means certain that an injunction could not be granted under the *Privacy Act* as it now stands, none have been granted.¹¹⁴ Only damages have been awarded in the few successful cases to date. The examples given above indicate that adequate legal protection for privacy calls for a range of remedies, not only monetary compensation in the form of damages. The availability of injunctions seems particularly necessary to make civil privacy legislation useful in curbing a privacy violation of a persistent nature. This theme is developed later in this Consultation Paper in relation to stalking.

Inclusion in the *Privacy Act* of express powers like those found in the counterpart Acts and the *Uniform Privacy Act* to grant remedies other than damages would remove any doubt surrounding the court's jurisdiction to do so and also bring about greater uniformity with the Acts of the other provinces. The *Privacy Act* should be amended accordingly.

Tentative Recommendation 4

4. *The Privacy Act should be amended by adding a provision similar to section 5 of the Uniform Privacy Act conferring expressly the power to grant remedies other than damages in an action brought under the Act.*

D. JOINING A CLAIM UNDER THE *PRIVACY ACT* WITH OTHER CLAIMS ARISING FROM THE SAME FACTS

An intrusion into someone's privacy can involve a breach of the *Privacy Act* as well as some other tort. If A installs a webcam or listening device in B's dwelling and uses it to spy on B from a remote location without lawful authority or any reasonable belief that this conduct is legally justified, several distinct claims may emerge from these facts. One of these is under section 1 of the Act. B may also sue A in trespass because of A's entry onto B's premises without B's consent.

Each of the two torts protects a different interest. Section 1 of the *Privacy Act* protects privacy, which in this context may be understood as the right to be free of scrutiny while in a private place. The tort of trespass protects an occupier's interest in having the right of occupation respected. It is arguably appropriate for A to be compensated in damages for the violation of each interest that the law protects, although it is also arguable that there is considerable intersection between the interests involved here, and only one real

114. The jurisdiction to grant an injunction or accounting might arguably be based exclusively on s. 4 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, despite the lack of express authority to grant these remedies in the *Privacy Act*. Section 4 of the *Law and Equity Act* empowers the court to grant equitable relief in cases where it could have been granted by a court of equity prior to 29 April 1879. Courts of equity prior to that time would grant an injunction when damages for the infringement of a legal right was not an adequate remedy: Megarry and Baker, eds., *Snell's Equity*, 31st ed. (London: Sweet & Maxwell Limited, 2005) at 381. They would also order an accounting if it was incidental to an injunction restraining the violation of a legal right, as well as in purely equitable causes: Snell, *ibid.*, at 381.

form of damage, i.e. the humiliation and mental distress flowing from B's intrusive conduct.

Another example might involve the tort of defamation (libel and slander). If A takes a photograph of B while B is not aware of it and then uses the photograph in a commercial publication defaming B, two torts have been committed: libel plus a breach of section 3 of the *Privacy Act*.

Section 3 and the tort of defamation also protect different interests. Section 3 protects an individual's privacy interest in not being subject to unwanted notoriety through unauthorized appropriation of that individual's likeness. The tort of defamation protects reputation. Arguably, B should be compensated for injury to each separate interest in this case too.

The *Uniform Privacy Act* provides that the right of action created by the Act and remedies under it are in addition to and not in derogation of any other right or remedy available to the plaintiff.¹¹⁵ The three other provincial Acts provide similarly.¹¹⁶ This makes it clear that a claim under the Act may be joined with another tortious claim arising from the same facts.

The *Uniform Privacy Act* and the other provincial *Privacy Acts* also provide that the ability to advance a claim under the Act concurrently with a claim of another nature does not require damages for violation of privacy to be disregarded in any other proceedings arising out of the same act, conduct or publication that constituted the violation.¹¹⁷ This means that if the claims are overlapping in the sense that even though there may be more than one source of legal liability, the harm to the plaintiff is essentially the same in each case, then damages need not be assessed separately for each legally differentiated claim.

By contrast, the B.C. *Privacy Act* does not provide expressly for concurrency of remedies arising from the same facts, and case authorities conflict on whether it is possible to join a claim under the Act with tortious or other claims arising from the same events. In *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, damages were awarded for both defamation and a breach of the Act.¹¹⁸ In *St. Pierre v. Pacific Newspaper Group Inc.*, however, the plaintiff was held not to be entitled to concurrent relief for breach of the Act and for defamation.¹¹⁹

It may be proper in some cases to prevent double recovery of damages under two or more separate claims for what amounts to the same illegal conduct. There does not appear to

115. *Uniform Privacy Act*, *supra*, note 76, s. 7(1).

116. Manitoba., s. 6; Saskatchewan., s. 8(1); Newfoundland, s. 7(1), *supra*, note 6.

117. *Uniform Privacy Act*, *supra*, note 76, s. 7(2); Manitoba., s. 6; Saskatchewan., s. 8(2); Newfoundland, s. 7(2), *supra*, note 6.

118. 2005 BCSC 1091.

119. 2006 BCSC 241.

be a cogent reason to prevent a claim under the Act from being joined in the same action with a claim arising from the same facts but based on common law such as trespass, defamation, or nuisance. The Supreme Court of Canada has endorsed the concept of concurrency of remedies in contract and tort where the facts of a case permit it.¹²⁰ The case for recognizing concurrency of tortious remedies is arguably even stronger. A provision dealing with concurrent remedies like that in the *Uniform Privacy Act* and the provincial counterpart Acts should be introduced into the *Privacy Act*.

Tentative Recommendation 5

5. *The Privacy Act should be amended to provide that*
- (a) *the rights of action and remedies under it are in addition to and not in derogation of any other right or remedy available to the plaintiff; and*
 - (b) *damages awarded in an action for violation of privacy need not be disregarded in assessing damages in any other proceedings arising out of the same act, conduct or publication constituting the violation of privacy.*

E. CORPORATE PRIVACY RIGHTS?

The *Uniform Privacy Act* clearly gives a right to sue for violation of privacy only to “individuals.”¹²¹ The *Privacy Act* of Newfoundland and Labrador also refers only to “the privacy of an individual” and for good measure contains an express definition of “individual” to mean “natural person” (i.e., a human being).¹²²

The *Privacy Act* refers instead to the entitlement of a “person” to privacy.¹²³ The word “person” in an enactment includes a corporation unless a contrary intention appears in the enactment or in the *Interpretation Act*.¹²⁴ This would mean that unless a contrary intention can be found in the *Privacy Act*, a corporation could assert a right to privacy and sue under section 1(1) for its violation.

Does a contrary intention appear in the *Privacy Act*? Nothing in the Act expressly restricts its application to natural persons (human beings) as opposed to corporations.¹²⁵ The only provisions that appear to be impliedly limited in their application to natural persons are section 5 and section 3(2) in part.

120. See *BG Checo International Ltd. v. B.C. Hydro and Power Authority*, [1993] 1 S.C.R. 12.

121. *Supra*, note 76.

122. *Supra*, note 6, ss. 2, 3(1).

123. *Supra*, note 2, s. 1(2).

124. R.S.B.C. 1996, c. 238, ss. 2(1), 29 (definition of “person”).

125. The term “corporation” includes a company, society, municipality, incorporated association, or other incorporated body and a corporation sole other than Her Majesty or the Lieutenant Governor: *Interpretation Act*, s. 29 (definition of “corporation”).

Section 5, which states that a right of action under the Act is extinguished on the death of the person whose privacy is alleged to have been violated, can apply only to natural persons.¹²⁶ It does not necessarily follow from the fact that merely because section 5 can only apply to natural persons, every other section in the Act would be similarly restricted.

Section 3(2) makes it a tort to use a portrait for purposes of advertising or promoting trade without the authorization of the person whose portrait is used. Obviously, this can only apply to a portrait of a human being. Section 3(2) also makes it a tort to exploit a name for those purposes without authorization, however, and a corporation's name could be misappropriated in this way as readily as that of a natural person.

It is arguable that section 5 and the reference to portraits in section 3(2) imply that the benefit of the Act does not extend to corporations. There is nothing in the remaining provisions that overtly conveys that intention, however. The question has not been directly decided, but it appears that corporations might be able to sue under section 1(1) of the Act for invasion of their privacy or under section 3(2) for misuse of a corporate name.

In certain respects, a corporation may have privacy-related interests resembling those of individuals. The Supreme Court of Canada has allowed a corporation to claim the protection of section 8 of the Charter against unreasonable search and seizure.¹²⁷ It is obvious that corporations have their secrets and may suffer economic damage from disclosure of certain kinds of information, such as the details of an unpatented process or competitively sensitive production cost data.

Corporations do not stand on the same footing as individuals under the law for all purposes, however. A certain degree of publicity is imposed on corporations, as they are legal constructs with a fictional personality separate from their members.¹²⁸ They must make various kinds of information about themselves public, e.g. the identities of directors and officers,¹²⁹ their share structures,¹³⁰ restrictions on the nature of businesses they may carry on.¹³¹ Societies must reveal the purposes for which they are formed by placing

126. In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 the S.C.C. held that the word "life" in s. 7 of the Canadian Charter of Rights and Freedoms could not refer to a corporation, and so s. 7 could not extend to corporations. By the same token, "death" is a term that is inappropriate to use in reference to corporations, except in a metaphorical sense that *Irwin Toy* appears to preclude. *Irwin Toy* seems to preclude metaphorical application of the terms "life" and "death" to an inanimate legal fiction such as a corporation.

127. *Hunter v. Southam, Inc.*, *supra*, note 9.

128. *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.).

129. *Business Corporations Act*, S.B.C. 2004, c. 57, c. 42(1)(e), 46(4), (5).

130. *Ibid.*, ss. 12(2)(b), 46(4), (5).

131. *Ibid.*, ss. 12(2), 42(2), 46(4), (5).

copies of their constitutions on public record.¹³² Corporations, including societies, must file annual returns noting changes in key information about their directors and officers.¹³³ These minimum requirements of transparency are for the protection of those who deal with the corporation, which could otherwise operate as a faceless, anonymous entity.

More importantly, while corporations have their secrets and do not necessarily thrive in the glare of publicity, they cannot experience injury from violation of privacy in the same way as individuals do. When an individual's privacy is invaded, the harm is sometimes economic but is chiefly experienced in the form of an affront to personal dignity and autonomy and outrage at the breach of accepted standards of respect for the privacy of others. When the statements of the legislators at the time of the enactment of the *Privacy Act* are considered, there can be no doubt that this is the type of harm for which the *Privacy Act* was intended to provide redress.¹³⁴

A corporate right of action for invasion of privacy would have potentially far-reaching effects. Reasonable expectations of "corporate privacy," assuming that the concept exists, have not been explored. They could potentially extend to anything the corporation is not statutorily obliged to divulge. If a corporation is given the same right to privacy as an individual, the *Privacy Act* would become a further means of discouraging internal and external scrutiny of the corporation's activities. Fear of liability could discourage whistleblowers from bringing improprieties or even inefficiencies to light.

Other remedies in breach of contract, breach of fiduciary duty, trespass, and nuisance will normally be available to a corporation that needs to enforce confidentiality agreements or prevent physical or electronic intrusion onto its premises without the need to attribute rights of privacy, which arise from uniquely human considerations, to a legal concept such as a corporation.

Enactment of the Uniform Law Conference of Canada *Uniform Trade Secrets Act*¹³⁵ would provide corporations with a right of action for the improper acquisition or disclosure of commercial information, the value of which depends on it not being generally known in an industry. This would provide a solution specifically engineered for protection of corporate interests that can be analogized to the privacy interests of individuals.

It would be wise to confine the *Privacy Act* to its original purpose of providing redress for natural persons whose interests have been infringed and preclude it from becoming a means of advancing a novel concept of "corporate privacy rights." This could be accomplished by small amendments to clarify that the Act gives rights of action for

132. *Society Act*, R.S.B.C. 1996, c. 433, s. 3(1)(a)(i).

133. *Business Corporations Act*, *supra*, note 129, s. 51; *Society Act*, *supra*, note 132, s. 68.

134. *Supra*, notes 5, 10 and 13.

135. Uniform Law Conference of Canada, *Proceedings of the Seventieth Annual Meeting* (Ottawa: The Conference, 1988) at 31 and 252.

violation of privacy and unauthorized use of a portrait to “individuals.” This would harmonize the language of the *Privacy Act* with that of the *Uniform Privacy Act* and the counterpart Newfoundland statute.

Tentative Recommendation 6

6. Sections 1(1), (2), and any provision replacing sections 3(1)(a) and 3(2) of the *Privacy Act* should be amended to clarify that the rights of action for violation of privacy or unauthorized use of a name or portrait conferred by those sections are conferred only on individuals and not on corporations.

IV. STALKING AND PRIVACY

A. NATURE OF STALKING BEHAVIOUR

“Stalking” is a term used in common parlance to refer generically to harassing behaviour of many kinds. Stalking may consist of following the victim persistently, repeatedly contacting the victim by telephone, watching or besetting the victim’s dwelling, workplace, or other location where the victim is commonly found, or harassing members of the victim’s family in a similar manner. E-mail and the internet provide ample opportunities for harassment via the computer (“cyberstalking”). The stalker’s persistent or repetitive actions may or may not be accompanied by threats or threatening behaviour. The characteristic common to all stalking behaviour is that is obsessive and repetitive, and is aimed at controlling or dominating the victim.¹³⁶ Another distinction between stalking and other conduct impinging on the privacy of another person, which may be similar in form, is one of degree. Stalking interferes to a serious extent over an extended time with regard to personal security, freedom to move about, and engage in ordinary activities of living.

Stalking first gained prominence as a social problem as a result of some high-profile cases of celebrities who were pursued by obsessive fans. The most prominent Canadian example was that of the singer Anne Murray, who was stalked by a Saskatchewan farmer for years.¹³⁷ Most stalking victims, however, are not celebrities or public figures but ordinary people who are acquainted with the stalker.¹³⁸ In Canada between 1999-2004, over 65% of male and female victims aged 15 or older who reported being stalked said the stalker was someone known to them.¹³⁹

While stalking is usually aimed chiefly at harassing or terrorizing the victim, nearly

136. Manitoba Law Reform Commission, *Stalking* (Winnipeg: The Commission, Report #98, 1997) at 6;

137. See *R. v. Kieling* (1990), 64 C.C.C. (3d) 124 (Sask. C.A.).

138. MacFarlane, “People Who Stalk People” (1997), 31 U.B.C. L. Rev. 37 at 38-39; cf. Law Reform Commission of Hong Kong, *Stalking*, (Hong Kong: The Commission, 2000) at 15.

139. Statistics Canada, *Measuring Violence Against Women: Statistical Trends 2006*,: <http://www.statcan.ca/English/research/85-570/85-570XIE/2006/001/findings/prevalence.htm>, Figure 16.

always with a view towards exerting control and domination, it is sometimes a prelude to violence in addition.¹⁴⁰

Stalking is a form of behaviour with strongly gendered overtones. Women are more likely to be stalked than men (in British Columbia, 11% of the female population reported having experienced at least one incident of stalking vs. 7% of males over a five-year period ending in 2004.¹⁴¹ The rates of incidence for British Columbia are consistent with the national ones. Stalkers are also overwhelmingly likely to be male. Stalking by a male was reported by 80% of victims in the 5-year Statistics Canada study mentioned above.¹⁴²

B. DIFFERENT REMEDIAL APPROACHES TO THE PROBLEM OF STALKING

In a report devoted exclusively to stalking, the Manitoba Law Reform Commission identified four kinds of legal remedies that could be employed to combat it: punitive, protective, preventive, and compensatory.¹⁴³ Tort law is primarily concerned with the compensatory aspect and perhaps to a much lesser extent the punitive one. Since remedies in tort principally address civil wrongs that have already taken place, they do not address protection and prevention to any appreciable extent except through deterrence and, in the case of a continuing tort, restraining continuance of the tortious conduct by injunction.

After surveying the various intentional torts such as assault, battery, trespass, and nuisance, and considering how they applied to stalking, the Manitoba Law Reform Commission observed that tort law provided a piecemeal approach to the problem at best. It concluded that no single remedy could provide a solution and that a “basket” of remedies was required.¹⁴⁴ It recommended a self-standing legislative scheme with elaborate procedural provisions to address all four of the remedial approaches.¹⁴⁵ Such a scheme is beyond the scope of this Consultation Paper, which focuses exclusively on the *Privacy Act*.

Privacy is nevertheless one of the principal interests that stalkers violate, along with the

140. In a highly-publicized Ontario case, a man stalked his wife, from whom he was separated, over a period of time by telephoning her incessantly and repeatedly trying to break into her house before murdering her on an Ottawa street with a crossbow: see *R. v. McGregor* (1992), 14 C.R.R. (2d) 155 (Ont. Gen. Div.).

141. *Supra*, note 139, Fig. 14.

142. *Supra*, note 136 at 9.

143. *Supra*, note 136 at 6.

144. *Supra*, note 136 at 96 and 114. See also the identical conclusion of the Law Reform Commission of Hong Kong, *supra*, note 138 at 74.

145. The Manitoba Law Reform Commission’s recommendations led to the enactment of the anti-stalking provisions in *The Domestic Violence and Stalking Act*, C.C.S.M., c. D93. A provision of this Act was challenged on constitutional grounds but was recently upheld by the Manitoba Court of Appeal: *Baril v. Obelnicki*, 2007 MBCA 40.

victim's freedom of movement and sense of physical and psychological security.¹⁴⁶ The severe anxiety and constraints on normal life that stalkers cause their victims requires a compensatory remedy, even if it cannot be more than a component of a broader solution. Determining whether there is a role that the *Privacy Act* might or ought to play in providing a compensatory remedy requires an examination of the criminal provisions relating to stalking and the compensation scheme under the *Crime Victim Assistance Act*.¹⁴⁷

C. THE OFFENCES OF CRIMINAL HARASSMENT AND INTIMIDATION

1. Criminal Harassment

As mentioned above, section 264(1) of the *Criminal Code*¹⁴⁸ is an anti-stalking provision creating the offence of "criminal harassment." Criminal harassment consists of engaging, without lawful authority, in conduct described in s. 264(2) if that conduct causes another person to reasonably fear for his or her safety or the safety of anyone known to him or her. The mental element of the offence is that the accused must be aware that the other person is harassed or be reckless as to whether that is the case or not. The forms of conduct described in s. 264(2) are:

- (a) repeatedly following from place to place the other person or anyone known to them;
- (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
- (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
- (d) engaging in threatening conduct directed at the other person or any member of their family.

The offence of criminal harassment is punishable on conviction by indictment by up to ten years imprisonment or up to six months on summary conviction.¹⁴⁹

2. Intimidation

The offence of intimidation under section 423 of the *Criminal Code* is also relevant to stalking under some circumstances. Persistent following or "besetting or watching" the place where the victim resides, works, carries on business, or happens to be, if done "wrongfully and without lawful authority," are two ways in which the offence may be committed.

146. *Supra*, note 136 at 5.

147. S.B.C. 2001, c. 38.

148. *Supra*, note 7.

149. *Supra*, note 7, ss. 264(3), 787(1).

This behaviour only constitutes the offence of intimidation if it is accompanied by the mental element of intending to compel another person to abstain from doing anything that person has a right to do, or to do anything that the person has a lawful right to abstain from doing. It does not embrace all stalking behaviour falling into the category of “persistent following” or “besetting or watching,” because a stalker will sometimes do this only to induce anxiety in the victim rather than coercing the victim into a particular course of conduct. Sometimes the stalker’s reasons for besetting or following the victim are purely obsessional (such as the fan compulsively pursuing a celebrity), and do not involve evil intentions towards the victim. This lies outside section 423 as well. Following or besetting that does not constitute intimidation within the meaning of section 423 of the *Criminal Code* because it is not done with the requisite intention to compel certain behaviour on the part of the victim may still constitute criminal harassment under section 264 or amount to a tort under the *Privacy Act* if that Act is amended according to Tentative Recommendation 2 above.

D. OVERVIEW OF COMPENSATION UNDER THE *CRIME VICTIM ASSISTANCE ACT*

1. The Benefit Scheme

The *Crime Victim Assistance Act* provides for benefits to be paid to persons who are injured as a direct result of the commission of a prescribed criminal offence in British Columbia.¹⁵⁰ “Injury” for the purposes of the Act includes “psychological harm,” which must be of a kind that interferes with the health or comfort of the victim and is “more than merely transient or trifling in nature.”¹⁵¹ Criminal harassment and intimidation under sections 264 and 423 of the *Criminal Code*, respectively, are among the prescribed offences.

The benefits that may be awarded to a victim of a prescribed offence cover mainly expenses of care, drugs, and various aids that would be required in a case of bodily injury,¹⁵² but include some expenses that a stalking victim might conceivably incur as a result of psychological harm resulting from the offence, such as the cost of counselling services,¹⁵³ security and communication devices,¹⁵⁴ a relocation allowance,¹⁵⁵ moving

150. *Supra*, note 147, s. 3(1)(a)(i). Other persons eligible to receive benefits are immediate family members who experience economic loss or psychological harm as a result of the death of or injury to a victim or who are minor children of a deceased victim, persons who have strong emotional attachment to the victim and who witness a prescribed offence causing a life-threatening injury to the victim or the immediate aftermath if it causes the victim’s death, in circumstances sufficient to alarm, shock and frighten a reasonable person with that emotional attachment, and who suffer psychological harm as a result that is diagnosed as a recognized psychological or psychiatric condition: s. 3(1)(b), (c).

151. *Supra*, note 147, s. 1 (definitions of “injury,” “psychological harm”).

152. *Supra*, note 147, s. 4(1). See also *Crime Victim Assistance (General) Regulation*, B.C. Reg. 161/2002, ss. 7-10.

153. *Crime Victim Assistance (General) Regulation*, *ibid.*, s. 11.

expenses, a rental security deposit and utility connection fees,¹⁵⁶ and courses for personal protection or security.¹⁵⁷

Benefits may be awarded even though no one has been prosecuted for an offence relating to the victim's death or injury.¹⁵⁸

A victim of a prescribed offence or other person eligible to receive benefits must apply to the Director of Crime Victim Assistance within one year from the commission of the offence or the event to which the offence relates.¹⁵⁹ If the person eligible to receive benefits is under 19, the time is extended until one year after the person reaches 19.¹⁶⁰

2. The *Crime Victim Assistance Act* and Concurrent Litigation

A victim who applies for benefits under the *Crime Victim Assistance Act* remains free to sue for damages in respect of the prescribed offence and the amount of damages to which the victim may be entitled is not reduced by benefits provided or which could be provided under that Act.¹⁶¹ Double recovery is prevented, however, by provisions that allow for amounts that the victim recovers by other means to be set off against benefits for which the victim would otherwise be eligible, and for recovery of the value of benefits paid from the amount of a judgment or other form of compensation covering the same losses for which benefits have been paid.

A victim who has applied for benefits and who commences a legal action against any person arising out of the prescribed offence must deliver a copy of the writ of summons to the Director within 10 days after it is served on the defendant.¹⁶²

The Director of Crime Victim Assistance is required to deduct from the benefits that could otherwise be paid to the victim any amounts received by a victim under a judgment or settlement arising from the offence or through another source of compensation.¹⁶³ The Director may also require a victim who has received, or who is or may be eligible to receive, compensation from another source for the same or a similar purpose for which a

154. *Ibid.*, s. 12(1)(a)

155. *Ibid.*, s. 12(1)(c)(i). The allowance is paid for the period during which the victim is unemployed following relocation for a maximum of three months, and is subject to a maximum total of \$7000: *ibid.*, ss. 12(4)(a), (6). It is based on the higher hourly minimum wage: *ibid.*, ss. 12(4)(b).

156. *Ibid.*, s. 12(1)(c).

157. *Ibid.*, s. 12(1)(b).

158. *Supra*, note 147, s. 5(1).

159. *Supra*, note 147, s. 3(2).

160. *Supra*, note 147, s. 3(3).

161. *Supra*, note 147, s. 15(2).

162. *Supra*, note 147, s. 15(1).

163. *Supra*, note 147, s. 9(4).

benefit was provided to repay all or part of the value of the benefit.¹⁶⁴

Another means of preventing double recovery is a provision empowering the Director to require anyone eligible to receive benefits under the *Crime Victim Assistance Act* to assign to the Director all or a portion of any judgment or settlement in order to recover the value of benefits provided to that person.¹⁶⁵

The Director is subrogated to the victim's rights of action if benefits have been provided and may bring an action claiming the value of those benefits. If the Director does this, the value of any benefits that the victim may recover in a legal action against the defendant are reduced by the amount claimed by the Director.¹⁶⁶

E. ALTERNATIVE REMEDIES: TO SUE OR NOT TO SUE?

1. General

From the above, it is apparent that a stalking victim may:

- (a) apply for benefits under the *Crime Victim Assistance Act* without suing the stalker for whatever civil wrongs the stalker has committed, even if the stalker is not prosecuted in the criminal courts;
- (b) apply for benefits under the *Crime Victim Assistance Act* and also sue the stalker for damages;
- (c) sue the stalker for damages without applying for benefits under the *Crime Victim Assistance Act*.

2. Advantages of the Crime Victim Assistance Benefit Scheme Relative to Litigation

The advantage of the benefit scheme under the *Crime Victim Assistance Act* is that it allows recovery of actual pecuniary losses that stalking victims are likely to incur (e.g. relocation expenses, additional security for a dwelling, counselling) without the cost of pursuing the stalker in litigation. There is no need for continuing involvement or contact at any level with the stalker or the stalker's legal representatives, as there necessarily is in litigation while it is in progress.¹⁶⁷ The benefit scheme is also available in cases where

164. *Supra*, note 147, s. 9(5).

165. *Supra*, note 147, s. 8.

166. *Supra*, note 147, ss. 16(1), (2), (3).

167. As noted earlier, s. 9(4) of the *Crime Victim Assistance Act* allows the Director of Crime Victim Assistance to sue the stalker in order to recover the cost of benefits paid as a result of the offence even if the victim chooses not to take any legal action. This would not be done unless there was a significant likelihood of recovery from the assets of the stalker, and the benefits paid were substantial

the stalker is unidentified and the criminal and civil justice systems cannot be fully responsive for that reason.¹⁶⁸

3. Advantages of Litigation Relative to the Crime Victim Assistance Benefit Scheme

(a) Damages for Non-Pecuniary Loss

The benefit scheme does not provide full compensation. It does not compensate for the fear, loss of personal autonomy, and sense of oppression that stalking causes. It is the purpose of general damages in a tort claim to compensate for non-pecuniary losses such as these, which are very real although not precisely quantifiable.¹⁶⁹ Aggravated and punitive damages may also be awarded in tort litigation to denounce particularly offensive conduct.

(b) Availability of Injunctions

Amendment of the *Privacy Act* according to Tentative Recommendation 5 would put it beyond doubt that an injunction could be granted in an action brought under the Act. Stalking victims may seek injunctions to restrain harassing behaviour less frequently than a peace bond¹⁷⁰ or the other types of restraining orders that may be available in some

enough to warrant the cost of litigation. According to information supplied by the Manager of the Crime Victim Assistance Program in May 2007, no subrogated actions had been commenced up to that time in relation to claims arising from the offence of criminal harassment (s. 264).

168. It is possible to commence a civil legal action against a defendant whose identity is unknown by naming “John Doe” as a defendant in pleadings: *Jackson v. Bubela* (1972), 28 D.L.R. (3d) 500 (B.C.C.A.). Actual identification of the defendant at some point is obviously a prerequisite to enforcement of a judgment or order, however. It is not possible to prosecute a criminal charge against an unidentified individual.

169. The criminal injury compensation scheme formerly administered by the Workers Compensation Board allowed benefits in respect of non-pecuniary loss, including pain and suffering, mental or emotional trauma, humiliation and inconvenience: *Criminal Injury Compensation Act*, R.S.B.C. 1996, c. 85, s. 2(4)(f).

170. A stalking victim who can identify the stalker may take advantage of a historic mechanism for securing protection against threatened or anticipated harm from another person. This is the recognizance under section 810 of the *Criminal Code*, *supra*, note 7, commonly called a “peace bond.” A person who fears on reasonable grounds that someone else will cause personal injury to him or her (or a spouse, child or common-law partner) or damage his or her property may lay an information before a justice of the peace, who will cause a summons to the other party to be issued and, after hearing the parties, may require the other party to enter into a bond to “keep the peace” for up to 12 months: s. 810(3)(a).

The peace bond may include conditions prohibiting the other party from being at or within a specified distance of a place where the informant, a spouse, child, or other person on whose behalf the information was laid, is regularly found, and a prohibition against the other party communicating with the informant or those other persons: *ibid.*, ss. 810(3)(a), (3.2).

circumstances.¹⁷¹ Obtaining an injunction in the Supreme Court usually means having to obtain legal counsel. Obtaining a peace bond simply involves a complaint to the police, who will make the necessary application to a justice of the peace. From that point, the application is handled by Crown counsel. There is no cost to the victim. Occasionally, however, injunctions may be a preferable remedy.

A final injunction is permanent, and an interlocutory injunction may last as long as it is required. A peace bond, on the other hand, lasts a maximum of 12 months.¹⁷²

Injunctions are obtainable in a wider range of circumstances than the other alternatives. For example, peace bonds are available only if there are reasonable grounds to fear for the physical safety of the applicant or the applicant's property. Not all stalking cases fit into this pattern. There are cases in which the behaviour of the stalker is oppressive and disturbing but which does not reach the level of a threat to the victim's physical security. The stalker may make repeated telephone calls and send voluminous e-mail messages without making threats. A peace bond is probably not available under those circumstances, but an injunction may well be. An injunction may be granted to restrain contravention of virtually any legal right if damages are not an adequate remedy.¹⁷³ Damages would clearly not be an adequate remedy in such a case, because they cannot compensate for indefinite disruption of normal living.

Moreover, an interlocutory injunction (a temporary injunction issued pending a final decision of the dispute between the parties) can be obtained quickly without notice to the opposing party, in urgent cases.¹⁷⁴ It can even be made against persons whose identities

The other party risks committal to prison for failing to enter into a peace bond if required to do so by the justice: s. 810(3)(b). Breaching the terms of the peace bond will also land the other party in jail: s. 811. Breach of an injunction can of course lead to the same result through committal for contempt of court.

Peace bonds are available also in the following circumstances: where the applicant reasonably fears someone will commit: certain sexual offences against a person under 14 (s. 810.1), a serious personal injury offence as defined under s. 752 against anyone (s. 810.2), intimidation of a justice system participant (e.g. witness) under s. 423.1 of the Code, a criminal organization offence (as defined in s. 1) or a terrorism offence (as defined in s. 1): s. 810.01. (An application under s. 810.01 requires the consent of the Attorney General.)

171. A parent or other person who has lawful custody of a child may apply for an order under s. 37(a) of the *Family Relations Act*, R.S.B.C. 1996, c. 128 restraining another person from molesting, annoying, harassing, or communicating with the applicant or the child. Anyone named in the order may be required to enter into a recognizance and to report to the court or someone designated by the court at specified times: s. 37(b). The order may be obtained in an existing custody proceeding or by originating application. It might be used, for example, when the stalker is an ex-spouse of the victim and the victim is a custodial parent, although its availability is not restricted to those circumstances.

A similar form of restraining order may be made under s. 46 of the *Family Maintenance Enforcement Act*, R.S.B.C. 1996, c. 127 to restrain harassment of a person who is owed spousal maintenance.

172. *Criminal Code*, *supra*, note 7, s. 810(3)(a).

173 See, *supra*, note 111.

174. British Columbia Supreme Court Rule 45(3). In *Provincial Residential Housing Corporation v. Hall*

are unknown at the time the injunction is granted, something which is potentially useful where a stalker's identity is unknown. In contrast, the procedure for securing a peace bond requires that a summons be issued to the stalker. If the stalker does not consent to enter into the recognizance, a hearing is necessary, which will result in delay. Meanwhile, the victim continues to be unprotected. The remedy of injunction should be in the arsenal of a stalking victim, even if seldom used.

(c) *Restoring the Victim's Autonomy*

Stalking involves an attempt to control and dominate the victim. Among its most devastating effects is to deprive victims of their independence and control over the circumstances of their lives. It is important from the perspective of justice to provide a remedial process that restores the victim's autonomy. Neither the Crown-directed criminal justice process, nor a crime victim assistance scheme in which the availability and extent of assistance is determined by a combination of statutory regulation and administrative discretion, provide this to the degree that tort litigation can.¹⁷⁵

The tort process is one largely within the control of the stalking victim. It is the victim who makes the choice to initiate litigation, and as the plaintiff, the victim has a greater measure of control over its course than the stalker.¹⁷⁶ While the tort process has drawbacks in terms of cost, delay, and uncertainty, it allows victims to bring their stalkers to account for the full range of the damage that they inflict. Not to have the tort process available as an option for stalking victims, or to leave it less effective than it could be, would be to deny them full access to justice. While not every stalking victim will want to sue the stalker, the law should still provide the opportunity for those who do.

F. ADAPTING THE *PRIVACY ACT* TO SERVE AS ANTI-STALKING LEGISLATION

1. General

The *Privacy Act* may not be an ideal vehicle for civil anti-stalking remedies, but it is a logical one. The subject-matter of section 1, namely violation of the right to be left alone, intersects broadly with the essence of stalking behaviour, which is persistent harassment carried out with the specific purpose of exerting control over the victim.

Some of the changes to the *Privacy Act* tentatively recommended earlier in this Consultation Paper lay groundwork for the application of the Act to stalking. Foremost among these is Tentative Recommendation 3, which allows for recognition of a

(2005), 41 B.C.L.R. (4th) 291, 2005 BCCA 36 the Court of Appeal stated that an interlocutory injunction granted without notice should be an interim injunction, i.e. one with a specific duration. The party in whose favour it is made then has the onus to justify an extension.

175. The potentially therapeutic value for victims of sexual assault of pursuing a civil action against the offender was explored by Feldthusen: "The Civil Action for Social Battery: Therapeutic Jurisprudence" (1993), 25 Ottawa L.Rev. 204.

176. *Ibid.*, at 216.

reasonable expectation of privacy in a public setting. Much stalking behaviour occurs in public places.

Tentative Recommendation 4 would expressly allow for injunctions to be awarded in actions brought under the *Privacy Act*.

Some forms of conduct amounting to criminal harassment under section 264(2) (if accompanied by the requisite knowledge or recklessness and the inducement of reasonable fear) would probably constitute a “willful” violation of privacy “without claim of right” within section 1 of the *Privacy Act* as it now stands. Despite minor differences in wording, that conduct would certainly be within section 1 if it were amended as proposed in Tentative Recommendation 2(c) to add the specific examples found in the *Uniform Privacy Act* and other provincial Privacy Acts of conduct deemed to be violations of privacy in the absence of evidence to the contrary. For example:

Privacy Act, s.1
(amended per Tentative Recommendation 2(c))

“auditory or visual surveillance of a person by any means including...following”

“auditory or visual surveillance of a person by any means including...watching, spying, besetting...”

Criminal Code, s. 264(2)

s. 264(2)(a): “repeatedly following from place to place the other person or anyone known to them”

s. 264(2)(c): “besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be”

Other conduct constituting criminal harassment is not covered by the wording of the deemed privacy violations in Tentative Recommendation 2(c), but arguably could amount to a violation of privacy within the general provision in s. 1(1) of the *Privacy Act*, both as it now stands and as it would be amended by Tentative Recommendations 1 and 2(a):

s. 264(2)(b) “repeatedly communicating with, either directly or indirectly, the other person or anyone known to them”

Another variety of conduct listed as a form of criminal harassment in s. 264(2) probably lies outside of section 1 of the *Privacy Act*, although it might constitute another tort depending on the precise circumstances:

s. 264(2)(d) “engaging in threatening conduct directed at the other person or any member of their family.”

While the mental element of the offence of intimidation under section 423(1) of the *Criminal Code* is somewhat different from that of criminal harassment, the offence can be committed through “persistent following” and besetting or watching the same places referred to in section 264(2)(d). That conduct could potentially amount to criminal harassment under section 264(2). It would also likely come within the deemed violations

of privacy set out in Tentative Recommendation 2(c).

While there would be considerable overlap between the stalking conduct described in section 1 of the *Privacy Act* as it would be amended according to Tentative Recommendations 2(c), and the stalking conduct constituting criminal harassment under sections 264(1) and (2) and 423(1) of the *Criminal Code*, some forms of criminal harassment would not be expressly mentioned in the amended section 1 of the *Privacy Act*, namely repeated communication and threatening conduct. Rather than add them to the list of deemed privacy violations drawn from the *Uniform Privacy Act* and thereby reduce the level of harmonization with the *Privacy Acts* of other provinces, in our view it is advisable instead to add a separate provision to the *Privacy Act* creating a statutory tort of stalking in substantially similar terms as the offence of criminal harassment is described in sections 264(1) and (2) of the *Criminal Code*.¹⁷⁷

Given the overlap in terms of stalking conduct and similarities of language between section 264(2) and section 1 of the *Privacy Act* as it would read when amended according to Tentative Recommendation 2(c), a stalker could potentially be liable under both the general tort of violation of privacy under section 1 and the proposed section containing the new statutory tort of stalking, depending on the particular facts. Stalking is both a distinct behavioural pattern and a violation of privacy, however. It is not unusual for civil liability to arise on more than one ground from the same set of facts, nor for several distinct claims in a civil action to be pleaded cumulatively and alternatively. The potential applicability of both section 1 and the statutory tort of stalking to the same conduct should be unobjectionable.

If the Act is amended according to Tentative Recommendation 3 to recognize a residual privacy interest in a public setting, intrusive conduct that is not so extreme as to generate fear, but which is still intolerably disruptive of an individual's normal social interactions and private life, could lead to liability for violation of privacy under section 1. This too should be unobjectionable if there is to be effective legal protection against undesired and oppressive attention from others.

Tentative Recommendation 7

7. *The Privacy Act should be amended to contain a provision creating a statutory tort of stalking in terms substantially similar to the description of the offence of criminal harassment in section 264 of the Criminal Code.*

177. Similar recommendations for creating a civil cause of action based on the manner in which stalking is described in the criminal law have been made by the Manitoba Law Reform Commission, *supra*, note 136 at 82 and the Law Reform Commission of Hong Kong, *supra*, note 138 at 172-173.

2. Adapting Section 264 of the Criminal Code As a Statutory Tort

(a) *Removing Requirement to Prove Subjective Intent of Stalker*

Section 264(1) of the *Criminal Code* (reproduced in the Appendix for reference) requires knowledge on the part of the accused that another person is harassed, or recklessness as to whether that is the case, as a mental ingredient of the offence of criminal harassment. While proof of subjective intent or recklessness is a common feature in criminal law, it is uncommon in the law of tort, where intention is normally presumed to accompany voluntary acts. In the Institute's tentative view, it is an excessively high burden of proof for a stalking victim to have to meet in making a civil claim against the stalker and is out of place in a statutory tort provision.

(b) *Civil Standard of Proof*

The new statutory tort of stalking will attract the lower civil standard of proof on the balance of probabilities, instead of the criminal standard of proof beyond reasonable doubt that applies in a prosecution under section 264 of the *Criminal Code*. This flows from the civil nature of the claim, even though a charge under s. 264 based on the same conduct might be well-founded.¹⁷⁸

(c) *Non-exclusivity of Enumerated Forms of Stalking*

Section 264(1) also makes the list of forms of criminal harassment listed in paragraphs (a) to (d) of section 264(2) exclusive. This is in keeping with criminal law principles that require certainty as to the nature of the conduct that is subject to criminal penalties including loss of liberty.

In tort, however, imposition of liability in new circumstances based upon policy considerations is not unusual. Precise identification of the kinds of conduct that will lead to liability is not as overriding a concern. The civil provision, which is primarily compensatory rather than punitive, should not be defeated by the ingenuity of stalkers in devising new means of terrorizing their victims. The Institute tentatively agrees with the Manitoba Law Reform Commission that for civil purposes, the statutory list of stalking behaviours should become non-exclusive.¹⁷⁹

(d) *Threatening Conduct Directed at Non-Relatives of Victim*

Under section 264(2)(d) of the *Criminal Code*, threatening conduct may constitute the offence of criminal harassment if it is directed either at the principal victim or any member of the principal victim's family. In describing the ingredients of the offence,

178. *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154; *Edwards v. ICBC*, (27 June 1997) Vancouver CA21042 (B.C.C.A.) at para. 4.

179. *Supra*, note 136 at 62.

however, section 264(1) nevertheless speaks of causing victims to fear for their safety “*or the safety of anyone known to them.*” Sections 264(2)(b) and (c), dealing respectively with repeated communication and besetting or watching a place frequented by a person, refer also to these activities being directed at the victim or “anyone known to them.”

The reasons for the contrasting wording in section 264(2)(d) that restricts the protected group to the principal victim’s family are unclear, although they may relate to a concern about enforceability of the provision in light of Charter decisions holding criminal provisions unconstitutional on the basis of vagueness or overbreadth.¹⁸⁰ The reference in section 264(2)(d) to members of the victim’s “family” however, still leaves considerable uncertainty with regard to the extent of the relatives of the victim who are protected.

It is arguable that the statutory tort of stalking corresponding to section 264 should encompass threatening conduct directed at persons associated with the principal victim, whether they are relatives or not. A stalker may create great anxiety for the principal victim by threatening a close friend, for example.¹⁸¹ Concerns regarding vagueness and overbreadth are less acute where civil rather than criminal liability is concerned. If the circle of protection is drawn too widely, however, the effectiveness of the provision may be diluted because it will become too difficult to determine who is actually the principal victim and therefore the proper plaintiff.¹⁸² Courts will be reluctant to find liability under the statutory tort if the implication of doing so is that liability for the same act may extend to an indeterminate class of potential plaintiffs.

The Institute invites comment on

- whether a threat directed at someone other than a member of the principal victim’s “family” should give rise to civil liability to the principal victim for stalking, if done with the requisite intent or recklessness insofar as inducing the victim to fear for the person’s safety or the victim’s own, and
- whether, if so, such a person should be merely “anyone known to” the principal victim or if the relationship between such a person and the principal victim should be defined in some other, narrower manner.

(e) *Actionable Without Proof of Damage*

As with the tort of violation of privacy under section 1, the statutory tort of stalking will

180. MacFarlane, *supra*, note 138 at 87.

181. An example of this tactic is found in *R. v. J.S.M.*, 2006 BCCA 377, where the accused stalker told the victim, his former spouse, that he would never leave her alone, ensure she was fired from her job, find her wherever she moved, and “injure any man in her company.”

182. The person at whom threats are actually directed may have civil and criminal remedies against the stalker as well, but they would be different from the proposed statutory tort of stalking. The proper plaintiff in an action based on the statutory tort would be the person whom the stalker intended to harass indirectly by threatening someone else known to that person.

have been created to denounce and curb socially undesirable conduct as well as for purely compensatory purposes. It should therefore be actionable without proof of damage.

(f) *Draft Provision on Tort of Stalking*

Based on the above considerations, the provision creating the tort of stalking might be along these lines:

Stalking

- X.** (1) In this section, “stalking” means to engage intentionally or recklessly, without lawful authority, in conduct that causes another person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them, including:
- (a) repeatedly following another person or anyone known to them from place to place,
 - (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them,
 - (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be, or
 - (d) engaging in threatening conduct directed at the other person or anyone known to them.
- (2) It is a tort, actionable without proof of damage, for a person to stalk another.

V. CONCLUSION

At the beginning of this Consultation Paper, it was noted that British Columbia *Privacy Act* was ahead of its time when first enacted. The evolution of privacy law since its enactment and the increased awareness of privacy issues that has gone hand in hand with steady advances in information technology bear out the validity of the legal thinking underlying the original Act.

The *Privacy Act* has lagged behind these developments, however. The amendments tentatively recommended here are considered necessary to bring the *Privacy Act* into greater harmony with later Canadian privacy legislation and enable it to better protect the reasonable expectations of privacy that surely lie at the cornerstone of the quality of life for every member of society.

VI. LIST OF TENTATIVE RECOMMENDATIONS

Tentative Recommendation 1

1. *The Privacy Act or an equivalent statute providing a right to sue for violation of privacy should be retained. (page 22)*

Tentative Recommendation 2

2. (a) *Section 1(1) of the Privacy Act should be amended to substitute “intentionally or recklessly” for “wilfully and without a claim of right.”*

(b) *Section 2(2) should be amended by the addition of a paragraph providing that an act or conduct is not a violation of privacy if the actor honestly believed in a state of facts under which, if it had been true, the act or conduct would be legally justified.*

(c) *Section 1 should be amended to correspond with other provincial Privacy Acts by providing that the following are deemed to be violations of privacy in the absence of evidence to the contrary:*

- (i) *auditory or visual surveillance of an individual by any means including eavesdropping, watching, spying, besetting or following and whether or not accomplished by trespass;*
- (ii) *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 thereto;*
- (iii) *use of the name or likeness or voice of an individual 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 individual is identified or identifiable and the user intended to exploit the name or likeness or voice of that individual; or*
- (iv) *use of letters, diaries or other personal documents of an individual;*

without the consent, express or implied, of the individual or some other person who has the lawful authority to give the consent.

(d) *Section 3 should be repealed. (page 25)*

Tentative Recommendation 3

3. *Section 1 of the Privacy Act should be amended by adding a further subsection*

providing that for the purposes of that section, a person may have a reasonable degree of privacy with respect to lawful activities of that person that occur in a public setting, and which are not directed at attracting publicity or the attention of others. (page 36)

Tentative Recommendation 4

4. *The Privacy Act should be amended by adding a provision similar to section 5 of the Uniform Privacy Act conferring expressly the power to grant remedies other than damages in an action brought under the Act. (page 38)*

Tentative Recommendation 5

5. *The Privacy Act should be amended to provide that*

- (a) the rights of action and remedies under it are in addition to and not in derogation of any other right or remedy available to the plaintiff; and*
- (b) damages awarded in an action for violation of privacy need not be disregarded in assessing damages in any other proceedings arising out of the same act, conduct or publication constituting the violation of privacy. (page 40)*

Tentative Recommendation 6

6. *Sections 1(1), (2), and any provision replacing sections 3(1)(a) and 3(2) of the Privacy Act should be amended to clarify that the rights of action for violation of privacy or unauthorized use of a name or portrait conferred by those sections are conferred only on individuals and not on corporations. (page 43)*

Tentative Recommendation 7

7. *The Privacy Act should be amended to contain a provision creating a statutory tort of stalking in terms substantially similar to the description of the offence of criminal harassment in section 264 of the Criminal Code. (page 53)*

VII. CONSULTATION

The British Columbia Law Institute invites your comment on the contents of this Consultation Paper and the Tentative Recommendations. We ask that comments be submitted by **31 October, 2007**.

You are invited to submit your comments in any of three ways:

by mail:

British Columbia Law Institute
1822 East Mall
University of British Columbia
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by fax:

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APPENDIX

Privacy Act R.S.B.C. 1996, c. 373

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 accompanied 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 by or 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) 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.

**Criminal Code
R.S.C. 1985, c. C-46**

Section 264 - Criminal Harassment

264. (1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.
- (2) The conduct mentioned in subsection (1) consists of
- (a) repeatedly following from place to place the other person or anyone known to them;
 - (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
 - (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or

happens to be; or

- (d) engaging in threatening conduct directed at the other person or any member of their family.

(3) Every person who contravenes this section is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or

- (b) an offence punishable on summary conviction.

(4) Where a person is convicted of an offence under this section, the court imposing the sentence on the person shall consider as an aggravating factor that, at the time the offence was committed, the person contravened

- (a) the terms or conditions of an order made pursuant to section 161 or a recognizance entered into pursuant to section 810, 810.1 or 810.2; or

- (b) the terms or conditions of any other order or recognizance made or entered into under the common law or a provision of this or any other Act of Parliament or of a province that is similar in effect to an order or recognizance referred to in paragraph (a).

(5) Where the court is satisfied of the existence of an aggravating factor referred to in subsection (4), but decides not to give effect to it for sentencing purposes, the court shall give reasons for its decision.

1993, c. 45, s. 2; 1997, c.16, s. 4; 2002, c. 13, s. 10.

Section 423 - Intimidation

423. (1) Every one is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he or she has a lawful right to do, or to do anything that he or she has a lawful right to abstain from doing,

- (a) uses violence or threats of violence to that person or his or her spouse or common-law partner or children, or injures his or her property;

- (b) intimidates or attempts to intimidate that person or a relative of that person by threats that, in Canada or elsewhere, violence or other injury will be done to or punishment inflicted on him or her or a relative of his or hers, or that the property of any of them will be damaged;

- (c) persistently follows that person;

- (d) hides any tools, clothes or other property owned or used by that person,

or deprives him or her of them or hinders him or her in the use of them;

- (e) with one or more other persons, follows that person, in a disorderly manner, on a highway;
- (f) besets or watches the place where that person resides, works, carries on business or happens to be; or
- (g) blocks or obstructs a highway.

Exception

(2) A person who attends at or near or approaches a dwelling-house or place, for the purpose only of obtaining or communicating information, does not watch or beset within the meaning of this section.

R.S., 1985, c. C-46, s. 423; 2000, c. 12, s. 95; 2001, c. 32, s. 10.

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