
The Right to Privacy in Verbal Communication: The Legality of Unauthorised Participant Recording

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The author analyses the right to privacy in telephone conversations and, in particular, the legality of unauthorised participant recording. After reviewing various provincial and federal acts, as well as relevant common law actions, the author concludes that such recording is legal, as is public disclosure of most conversations. The author then considers the scope of relevant American federal and state legislation, and of the American common law right to privacy. Finally, the author concludes that absent legislation in Canada prohibiting such recording, a telephone conversant's legitimate expectation of privacy will remain unprotected.

L'auteur examine le droit d'un individu au respect de ses conversations téléphoniques privées et, plus particulièrement, la légalité de leur enregistrement, sans consentement, par un des interlocuteurs. L'auteur passe en revue diverses lois provinciales et fédérales, ainsi que divers droits d'action applicables en *common law*. Il conclut que ce type d'enregistrement est légal et que la majorité de ces conversations peuvent être rendues publiques. L'auteur examine ensuite la portée des lois fédérales et celle des états américains et du droit au respect de la vie privée tel qu'établi au niveau du droit commun américain. Enfin, l'auteur conclut qu'en l'absence de législations canadiennes prohibant ce type d'enregistrement, un individu ne peut être assuré du respect de ses communications téléphoniques.

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Introduction

In two recent judgments,¹ the Supreme Court of Canada held that a police officer who records a conversation in which he was a participant, without the consent of all parties or without a court order, violates a person's reasonable expectation of privacy in verbal communication. According to the Court, this particular right flows from section 8 of the *Canadian Charter of Rights and Freedoms*,² which provides that everyone "has the right to be secure against unreasonable search and seizure". In light of these decisions, the status of unauthorised participant recording between *private* citizens has become less certain. This paper addresses the issue.

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¹*R. v. Duarte*, [1990] 1 S.C.R. 30, 65 D.L.R. (4th) 240 [hereinafter *Duarte*] and *R. v. Wiggins*, [1990] 1 S.C.R. 62 [hereinafter *Wiggins*].

²Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11.

In brief, the issue is as follows: can one party to a telephone conversation record that conversation without the knowledge or permission of the other? If so, can that same party broadcast the tapes publicly, or tender them as evidence in any civil proceeding? The discussion itself is broken down into two main headings, the law in Canada and the law in the U.S., and these headings are subdivided into three further headings: federal offences, provincial/state offences, and civil law actions. Consider, first, the law in Canada.

I. The Law in Canada

A. Federal and Provincial Statutory Offences

With respect to criminal liability the law is clear: unauthorised participant recording of a telephone conversation does not constitute a criminal offence. According to section 184(1) of the *Criminal Code*, the only section which is even peripherally relevant, one cannot "intercept" a private communication unless authorised by law. This section and the ones that follow are designed to prevent an unauthorised *third party* from recording a telephone conversation. Hence, this section does not prohibit two situations: where one of the participants to the conversation, with or without the knowledge of the other(s), himself records the conversation; or where a third party with the consent of one of the participants intercepts and records the conversation.³

Furthermore, on the basis of the recent Supreme Court decision in *R. v. Stewart*,⁴ it is clear that information does not constitute property in terms of the criminal law theft provisions. Hence, one party could not argue that the other is "stealing" information by recording a telephone conversation.⁵

With respect to non-criminal, public welfare offences, various provincial statutes are relevant. For example, s. 112 of the *Telephone Act*,⁶ provides as follows:

Every person who, having acquired knowledge of any conversation or message passing over any telephone line not addressed to or intended for such person,

³See, Law Reform Commission of Canada, *Electronic Surveillance*, Working Paper No. 47 (Ottawa: Law Reform Commission of Canada, 1986) at 26. See, also, *R. v. McQueen*, [1975] 6 W.W.R. 604, 25 C.C.C. (2d) 262 (Alta C.A.).

⁴[1988] 1 S.C.R. 963, 50 D.L.R. (4th) 1.

⁵The other federal Act directly on point is the *Broadcasting Act*, R.S.C. 1985, c. B-9 and, in particular, s. 3(e) of the Radio Regulations, SOR/86-982. This section provides that no "telephone interview or conversation, or any part thereof", shall be broadcast by either an AM or FM radio station, unless the person consents prior to the broadcast or unless the person telephones the station to participate in the broadcast. Interestingly, this section does not seem to prohibit broadcasting the contents of the conversation, only the taped conversation itself. Further, the Television Broadcasting Regulations, 1987, SOR/87-49, do not contain a similar prohibition.

⁶R.S.O. 1980, c. 496.

divulges the purport or substance of the conversation or message, except when lawfully authorized or directed so to do, is guilty of an offence and on conviction is liable to a fine of not more than \$50.00 or to imprisonment for a term of not more than thirty days, or to both.

Since this section applies *only* to third parties, that is, to persons to whom the conversation is not “addressed” or “intended”, the section in no way prohibits participant recording.⁷

Four provinces have enacted privacy acts.⁸ The acts in Saskatchewan, Newfoundland and British Columbia create a tort, “actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another” (B.C. Act, s. 1(1)). The Manitoba Act, however, prohibits a person “substantially, unreasonably, and without claim of right”, from violating the privacy of another (s. 2(1)). Thus, the Manitoba Act applies to intentional as well as “unreasonable” (*i.e.* negligent) acts.

With respect to electronic recordings, these Acts provide, in pertinent part, as follows:

3(1) Without limiting the generality of section 2, privacy of a person may be violated

(b) by the listening to or recording of a conversation in which that person participates, or messages to or from that person, passing along, over or through any telephone lines, *otherwise than as a lawful party thereto...* (Manitoba Act, emphasis added)

. . .

3. Without limiting the generality of section 2, proof that there has been:

(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; ...*

without the consent, expressed or implied, of the person or some other person who has the lawful authority to give the consent is *prima facie* evidence of a violation of the privacy of the person first mentioned. (British Columbia Act, emphasis added)

⁷There are cases which hold that a privacy right has been created by a specific statute. For instance, in *Re MacIssac and Beretanos* (1971), 25 D.L.R. (3d) 610 (B.C. Prov. Ct), the Plaintiff sued his landlord for violation of s. 46 of the B.C. *Landlord and Tenant Act*, for failure to give proper notice before entering the Plaintiff's apartment. The Court held that since s. 46 did not provide a remedy for infringement, the Act itself “creates a statutory right to privacy” (at 614). Hence violation of this section constitutes a tort for which damages are available. This holding seems quite strange in that breach of s. 46 is also a breach of the tenant's contractual right to quiet enjoyment of his property. Given the availability of contractual damages, recourse to the right to privacy is unnecessary. Similar reasoning applies in other cases.

⁸See, the *Privacy Act*, R.S.B.C. 1979, c.336; the *Privacy Act*, S.M. 1970, c.74; the *Privacy Act*, R.S.S. 1978, c.P-24; the *Privacy Act*, S.N. 1981, c. 6.

. . .

4. Without limiting the generality of section 3, proof that there has been

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

without the consent, expressed or implied, of the individual or some other person who has the lawful authority to give the consent is *prima facie* proof of a violation of the privacy of the individual first mentioned. (Newfoundland Act, emphasis added)

The Saskatchewan Act states, in s. 1(4), that "Privacy may be violated by eavesdropping or surveillance", but does not define either term. Further, s. 2(1)(a) provides that an act is not a violation of privacy where "it is consented to by some person entitled to consent".

Although the wording of these sections is somewhat unclear, there can be no doubt that a participant is a lawful party to a conversation. Since a participant is a lawful party with respect to "listening", he must also be a lawful party with respect to "recording", since the two acts appear in the same phrase. Further, since a participant who listens to a conversation is not an eavesdropper, participant recording probably does not constitute "eavesdropping or surveillance" under the Saskatchewan Act. Thus, it seems likely that participant recording is not prohibited by any of these sections, although there are no cases on point.

B. Civil Liability

1. Right to Privacy at Common Law

With respect to civil liability, learned opinion varies substantially as to whether there is, at common law, a right to privacy in Canada. According to Professor Fleming, only statutory remedies are available for an alleged invasion of privacy, and "for a private remedy one can only look to nuisance".⁹ Although nuisance law protects the quiet enjoyment of property, it does not create a general right to privacy. Such a right must be predicated on a reasonable expectation of privacy, that is, on a personal right, and not on a right which only flows from an interest in real property.

As Professor Linden observes, however, "Canadian courts have come near to recognizing a general right of privacy".¹⁰ Consider, for instance, the case of

⁹J.G. Fleming, *The Law of Torts*, 7th ed. (The Law Book Co. Ltd: Sydney, 1987) at 574.

¹⁰A.M. Linden, *Canadian Tort Law*, 4th ed. (Toronto: Butterworths, 1988) at 52. This right should be distinguished from misappropriation of personality. The latter prohibits the appropriation of any *commercial* value in a name or likeness, whereas the former prohibits the public exploitation of one's personal affairs, when one might reasonably expect those affairs to remain private. Hence,

Saccone v. Orr, the only Canadian case which holds explicitly that a common law right to privacy exists. There, the Plaintiff sued the Defendant for taping a telephone conversation and for publicly broadcasting that tape without the Plaintiff's authorisation. According to Jacob Co. Ct J.,

Certainly, for want of a better description as to what happened, this is an invasion of privacy and, despite the very able argument of defendant's counsel that no such action exists, I have come to the conclusion that the plaintiff must be given some right of recovery for what the defendant has in this case done.¹¹

It is unclear, however, whether this "invasion of privacy" consists of the unauthorised recording, of the unauthorised rebroadcast, or of both. In fact, the Court seems to suggest that the unauthorised recording, without rebroadcast, is itself an invasion of privacy (at 321). Further, the Court does not address two key issues: whether the Plaintiff was a public figure and should, therefore, possess a more limited right to privacy; and whether an expectation of privacy existed in the contents of the conversation, which seemed to concern a *public* matter. Finally, it is unclear whether this case is good law, since no other Canadian court has held that such a right exists at common law and since the case has not been cited as authority in subsequent caselaw dealing with privacy-related issues.

Nonetheless, a number of courts have refused to hold that a right to privacy does not exist in Canada. In *Krouse v. Chrysler Canada Ltd*, the defendant used a photograph of the plaintiff football player in association with the sale of cars. With respect to a claim for invasion of privacy, Parker J. held as follows:

It may be that the action is novel, but it has not been shown to me that the Court in this jurisdiction would not recognize a right of privacy.¹²

Similarly, in *Burnett v. R.*, Mr. Justice O'Driscoll cited with approval the reasoning of Parker J., and refused to strike out the Plaintiff's claim for invasion of privacy:

In my view, having regard to the present state of the law in this Province, the words of Parker J. (as he then was), are most apt and this part of the defendants' application will be dismissed.¹³

Finally, in *Capan v. Capan*, Osler J. refused a similar motion. In *Capan*, the female Plaintiff continued to receive harrasing telephone calls after separating from her husband. Further, she alleged constant visits and even physical

misappropriation protects economic rights whereas privacy protects personal rights. In the U.S., the appropriation doctrine was originally grounded on the right of privacy. Today it is based on "the right of publicity", which is a separate though related tort. See, B. Gray, "The Right of a Personality to Control the Use of His Name and Likeness in Canada" (1983) 17 P.T.I.C. 1141.

¹¹(1981), [1982] 34 O.R. (2d) 317 at 321-22 (Co. Ct).

¹²(1970), 3 O.R. 135 at 136, 12 D.L.R. (3d) 463 at 464 (H.C.).

¹³(1979), 23 O.R. (2d) 109 at 115, 94 D.L.R. (3d) 281 at 288 (H.C.).

abuse. Instead of suing under several torts (like trespass, nuisance or even battery), she chose to sue under one tort only: invasion of privacy. (In *Krouse and Burnett*, other torts were involved.) With respect to the Defendant's application to strike out the Plaintiff's Statement of Claim, the Court held as follows:

In my view, it would not be right, on a motion of this kind, for the Court to deprive itself of the opportunity to determine, after hearing the evidence, whether such right exists and whether it should be protected.¹⁴

2. Breach of Confidence

Although this tort does not create a general right to privacy in confidential information, and although it does not prohibit the recording of telephone conversations, it does prohibit the public broadcast or dissemination of certain information arising from marital, fiduciary, or vicarious contractual relations. For instance, in *Duchess of Argyll v. Duke of Argyll*,¹⁵ the Plaintiff successfully obtained an injunction preventing her former husband from disclosing, in a series of newspaper articles, matters relating to their marriage. The Court based its holding on public policy, namely, that certain kinds of information, when received, are received in confidence and ought not to be disclosed. Thus, as a matter of policy, personal information acquired by a spouse or ex-spouse during the course of a marriage is impressed with a duty of confidence.

Further, there is no doubt that fiduciaries are not permitted to disclose or use information acquired in confidence. In the leading case of *Canadian Aero Services Ltd v. O'Malley*,¹⁶ the Supreme Court of Canada held that the "strict ethic" of fiduciaries applies to "top management" of a company. This ethic prevents the fiduciary from using any confidential information acquired during the course of employment to compete with a former employer. Further, the fiduciary cannot reveal such information to a competitive third party. Finally, if that third party uses such information, he may also be liable to the ex-employer.¹⁷

This fiduciary duty also applies to the contractual relations between employer-employee,¹⁸ doctor-patient and lawyer-client. For instance, in *H. v.*

¹⁴(1980), 14 C.C.L.T. 191 at 197 (Ont. H.C.). See, also, *F.(P.) v. Ontario* (1989), 47 C.C.L.T. 231 (Ont. D.C.).

¹⁵[1967] Ch. 302.

¹⁶[1974] S.C.R. 592, 40 D.L.R. (3d) 371, 11 C.P.R. (2d) 206.

¹⁷Liability will depend on how the information was acquired. For instance, the third party may have committed the following torts: inducement to breach a contract, or wrongful interference with the business of another. Further, in some cases, courts have awarded damages against an *innocent* third party. See, A.J. Weinrib, "Information and Property" (1988) 38 U.T.L.J. 117 at 134.

¹⁸See, R.G. Hammond, "Breach of Confidence: Assignability of Rights" (1986) 2 I.P.J. 247 at 247-48:

[breach of confidence] is now widely accepted as being a distinct head of equity jurisdiction. That is, it is *sui generis*. The doctrine is quite unconnected with fiduciary law and has, in practice, several advantages over that cause of action. For instance, a plaintiff does not have to show, as with fiduciary law, that the defendant was a "key"

T.,¹⁹ the Court held that a doctor was liable in damages for maliciously publishing the nature of the illness of a former patient whom he was then suing for non-payment of fees.²⁰

Finally, there may be a general duty to respect information which is solicited in confidence. In *Slavutych v. Baker*,²¹ the Plaintiff professor provided an opinion on a colleague who was applying for tenure. The professor had been told that the opinion would be kept "in confidence". It was later used against the professor as a basis for a charge of misconduct. The case reached the Supreme Court of Canada, where Spence J. held, *per curiam*, that "confidential communications, made in good faith, ought not to be used to the prejudice of their maker as a member of the university community". Arguably, this case stands for the proposition that protection will be given to certain communications when the rules of "fair play" demand it.²² Although these "rules" seem ambiguous, on the fact of this case, the university's actions amounted to entrapment, and such acts are clearly prohibited.

Clearly, there are, however, two major problems with a claim for breach of confidence. First, absent a fiduciary, contractual or spousal relationship, it is very difficult to prove that a duty of confidence exists. A Plaintiff must show that the information is intrinsically confidential and that permitting disclosure would, in a sense, shock the conscience of the court. This appears to be the reasoning in *Argyll* and *Slavutych*. Second, it seems that the remedy for breach of this duty in situations other than business relationships, where economic interests are at issue, is an injunction only. Thus, absent a loss of profits, courts have denied compensation for damages resulting from the publication of true, though confidential material. Consider, for instance, the reasoning in *Bingo Enterprises Ltd v. Plaxton*,²³ where the court held that "[a]nticipatory breaches may be restrained, but actual non-contractual breaches are not compensable in the absence of loss of profit". Thus, in a non-business relationship, the usefulness of this tort is limited to enjoining further dissemination of certain types of information.

employee. Even lesser employees or persons who had no "regular" contact with the plaintiff may well be within the reach of the breach of confidence doctrine.

¹⁹(1979), 2 L.N. 202 (Q.B.), cited in Proudfoot, *infra*, note 29.

²⁰Further, certain taped communications between lawyers may be inadmissible evidence. Since settlement negotiations made "without prejudice" are fully privileged, it appears that an unauthorised participant recording of settlement negotiations would similarly be privileged. Thus, the tapes would be inadmissible at trial.

²¹(1975), [1976] 1 S.C.R. 254, 55 D.L.R. (3d) 224, 4 W.W.R. 620.

²²See, E.F. Geddes, "The Private Investigator and the Right to Privacy" (1989) 27 *Alta L. Rev.* 256 at 283.

²³(1986), 26 D.L.R. (4th) 604 at 614, 41 *Man. R.* (2d) 19 at 25 (*sub nom. Bingo Enterprises Ltd v. Price Waterhouse*) (C.A.).

3. Wilful Infliction of Emotional Distress

Like the tort of breach of confidence, this tort in no way prohibits participant recording. Nonetheless, on the basis of *Wilkinson v. Downton*,²⁴ the broadcast of certain information may be actionable. According to *Wilkinson*, a person is liable if he wilfully does an act calculated to cause harm to another, and if the act causes both mental distress and physical harm to the other. In *Wilkinson*, the Defendant falsely informed the Plaintiff that her husband had been severely injured in an accident. This "news" caused the Plaintiff both mental and physical harm, and at trial, the Defendant was held liable for intentionally inflicting emotional distress resulting in physical harm. Interestingly, since the Defendant appeared to lack malice, being a "practical joker", it seems that proof of malice is not required.²⁵

Similarly, in *Janvier v. Sweeney*²⁶ the Plaintiff recovered damages where the Defendants, two private investigators posing as police officers, falsely informed the Plaintiff that her German fiancé might be a German spy. The purpose of the accusation was to get the Plaintiff to turn over certain incriminating letters in the possession of her employer. The accusation caused the Plaintiff severe mental shock which resulted in physical harm (the Plaintiff became ill).

Although both cases deal with disclosure of false information, given the definition of the tort, there is no reason in theory why the broadcast of a private conversation concerning true matters could not be calculated to cause emotional harm, and could not, in turn, produce physical harm. One need only imagine an intimate conversation taped by means of an act of extreme duplicity, which is then broadcast publicly, causing one party extreme emotional and physical distress. Nonetheless, if physical harm remains a *sine qua non* of the tort,²⁷ its usefulness is quite limited.

4. Quebec Civil Law

In Quebec, section 5 of the *Charter of Human Rights and Freedoms*²⁸ provides that "Every person has a right to respect for his private life". Although

²⁴[1897] 2 Q.B. 57.

²⁵Further, Canadian courts seem willing to impute an intention to harm when acts of extreme recklessness are at issue. See, H.J. Glasbeek, "Outraged Dignity — Do We Need A New Tort?" (1968) 6 Alta L. Rev. 77 at 89-90 (and cases cited therein).

²⁶[1919] 2 K.B. 316.

²⁷Some writers argue that physical harm may no longer be a necessary condition of recovery, and that even if it still is, it should now be abandoned. See, H.J. Glasbeek, *supra*, note 25 at 93. Others suggest that a court, when faced with an appalling act causing severe emotional distress, will overlook the need for physical harm. See, E.F. Geddes, *supra*, note 22 at 275.

²⁸R.S.Q., 1977, c. C-12.

there appear to be no privacy cases decided under this section, there have been several cases since the late 1800s decided under Article 1053 of the *Civil Code of Lower Canada*. This article forms the basis of delictual (tort) liability. In 1874, for instance, the Quebec Superior Court awarded damages for the unauthorised opening of a letter.²⁹

More recently, in *Robbins v. CBC (Quebec)*,³⁰ the Court awarded damages in an invasion of privacy action. In *Robbins*, the Defendant broadcast a programme which revealed the Plaintiff's telephone number and which asked viewers to contact him at that number. For three days, until the Plaintiff changed his number, his telephone rang non-stop. Scott A.C.J. had no difficulty characterising the Defendant's conduct as "a form of malicious mischief or a premeditated way of causing a public nuisance to the doctor." In other words, the Defendant violated the duty of care owed to the Plaintiff by broadcasting his number in such a way as to cause injury to the Plaintiff. According to Proudfoot, this "judgment reinforced the right of solitude which has been upheld in a number of debt collection cases in Quebec where collection agencies have been held civilly liable for harassment by telephone and other means used against defaulting debtors."³¹ Further, Proudfoot argues that the right to anonymity has been considered in several Quebec judgments, although Plaintiffs have had little success in obtaining an injunction or damages absent commercial exploitation of their name or likeness.³²

Despite the existence of a limited right to seclusion and anonymity, there seems to be no general remedy for the disclosure of personal information under Quebec Civil Law.³³ In other words, since the broadcast of an unauthorised recording by a person not standing in a marital, fiduciary or contractual relation does not constitute a "fault" pursuant to Article 1053, it appears that such broadcasts cannot be enjoined.

²⁹*Cordingly v. Nield* (1874), 18 L.C.J. 204, cited in G.F. Proudfoot, *Privacy Law and the Media in Canada* (Ottawa: Canadian Bar Foundation, 1984) at 16.

³⁰[1958] C.S. 152, 12 D.L.R. (2d) 35 at 42 (Que. S.C.).

³¹*Supra*, note 29 at 16.

³²*Ibid.* See, in particular, *Deschamps v. Automobiles Renault of Canada Ltd*, [1977] C. de D. 937 (Que. S.C.), where the Plaintiff comedian obtained an injunction on the basis of his right to privacy, preventing the unauthorised use of his name or likeness on any advertising for the Defendant's cars.

³³H.P. Glenn, "The Right to Privacy in Quebec Law" in D. Gibson, ed., *Aspects of Privacy Law; Essays in Honour of John M. Sharp* (Toronto: Butterworths, 1980) 86.

II. The Law in the United States

A. Fourth Amendment Protection

With respect to a telephone conversation recorded without warrant by a police officer or federal agent, the caselaw is clear: such recording does not violate the Fourth Amendment.³⁴ Further, the recording is admissible in court provided at least one participant consented to the recording or interception of the conversation.³⁵

A leading case on point is *Lopez v. U.S.*,³⁶ the facts of which were as follows. An internal revenue agent, in an attempt to obtain evidence of an attempted bribe, recorded a conversation he had with the Defendant by means of a recording device strapped to his person. The U.S. Supreme Court, affirming the decisions of the lower courts, held that the conversation, though electronically seized without warrant, was admissible to corroborate the direct testimony of the informer. The Court based its holding on the following argument:

this case involves no "eavesdropping" whatever in any proper sense of that term. The Government did not use an electronic device to listen in on conversations it could not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose.³⁷

Similar reasoning is found in *Katz v. U.S.*,³⁸ where Justice White held as follows:

When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. ... It is but a logical and reasonable extension of this principle that a man takes the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another.

Finally, in *U.S. v. DeVore*,³⁹ the Court held as follows:

³⁴The Fourth Amendment provides as follows:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

³⁵Of course, the Fourth Amendment only applies to the government (both state and federal), and not to personal litigants: *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³⁶373 U.S. 427 (1963).

³⁷*Ibid.* at 439. This holding has been affirmed in several other U.S. Supreme Court decisions, including *Hoffa v. U.S.*, 385 U.S. 293 (1966) and *U.S. v. White*, 401 U.S. 745 (1971).

³⁸389 U.S. 347 at 363 (1967).

³⁹423 F.2d 1069 (C.A. 4th Cir.) (cert. den. 402 U.S. 950).

When a defendant has a conversation with another person he relinquishes his right of privacy with respect to that person. He may constitutionally complain of breach of privacy by an eavesdropper, but not of a breach of trust by the person he chooses to trust, however unwisely. Since the participants in a conversation are privileged to tell what was said, it necessarily must follow that a recording of what was said may either be used to corroborate the revelation, or simply as a more accurate [*sic*] means of disclosure.

Hence, in terms of participant recording, the right to privacy as guaranteed by the Fourth Amendment clearly applies only when an unauthorised third party intercepts a private telephone communication.

B. Federal Legislation

The *Omnibus Crime Control and Safe Streets Act*,⁴⁰ requires that a federal officer obtain a warrant before engaging in certain types of electronic surveillance. Section 2511, subsection 2(c), however, specifically exempts a telephone conversation from the warrant requirement if one party consents to its recording or interception. That subsection provides as follows:

It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral or electronic communication, where such person is a party to the communication *or* one of the parties to the communication has given prior consent to such interception.⁴¹

Hence, in *Commonwealth of Pa v. Donnelly*,⁴² Price J. held that the tape of a recorded conversation was admissible in court since a participant to the conversation had authorised the recording. This reasoning has been affirmed in a large number of cases.⁴³

C. State Common Law

1. Right to Privacy

In most American states, there exists at common law a general right to privacy. Since the common law in each state is determined by the courts of that state, the common law often differs from one state to the next. Nonetheless, by

⁴⁰18 U.S.C.A. (1970).

⁴¹[Emphasis added]. Subsection 2(d) exempts a person *not* acting under colour of law from criminal liability, provided that the person is a party to the communication or is authorised by a party to the communication, and provided that the communication is not intercepted for the purpose of committing an act that is criminal or tortious under federal or state law. In *Park v. El Paso Bd of Realtors*, 764 F.2d 1053, cert. den. 474 U.S. 1102, the Texas Court of Appeal held that taping conversations to preserve evidence for a civil trial was not an "injurious act" within the meaning of s. 2(d).

⁴²336 A.2d 632 at 639 (S.C. 1975).

⁴³See, e.g., *Bakes v. U.S.*, 350 F. Supp. 547 (N.D. Ill., E.D. 1972).

looking at the jurisprudence as a whole, various general observations are possible.

With respect to participant recording by a party not acting in the course of law enforcement or governmental duties, there are no cases in which the non-consenting party was successful in alleging a violation of his common law right to privacy *per se*. Indeed, there are several cases to the opposite effect. For instance, in *Marks v. Bell Telephone Co. of Pa.*,⁴⁴ the Court found no Pennsylvania appellate cases in which the invaded interest was the privacy of one's conversations. The Court then analysed the caselaw from other jurisdictions, and concluded as follows:

all [cases] indicate the interest the law seeks to protect is the right to keep one's private conversations safe from *unauthorized* listeners. Thus a basic element of this form of the tort is the intentional overhearing by one not intended to be a party to the communication of the contents of a private communication. In the absence of an overhearing of a private communication, this tort has not been committed.⁴⁵

2. Right to Confidentiality

The common law right to confidentiality, which forms part of the common law right to privacy,⁴⁶ applies when a participant to a conversation discloses publicly,⁴⁷ private facts in which the speaker has a reasonable expectation of pri-

⁴⁴Pa., 331 A.2d 424 at 430.

⁴⁵*Ibid.* at 431 [emphasis added]. Support for this conclusion is also found in the various texts on tort law. In the sections dealing with privacy rights, none of those texts lists, as a cause of action, the recording of a telephone conversation by a party to the conversation. In J.D. Lee & B.A. Lindahl, eds., *Modern Tort Law* (Cum. Supplement) (Callaghan & Co.: Illinois, 1989) at s. 35.07, p. 226, the authors list "eavesdropping on a private conversation" as an actionable offence, but define "eavesdropping" as third-party interception of a telephone communication. Similarly, in W.P. Kecton, ed., *Prosser and Keeton on The Law of Torts*, 5th ed. (St. Paul, Minn.: West Publishing Co., 1984) at s. 117, p. 854, the authors note that the tort of "unreasonable ... intrusion upon the seclusion of another" has "been carried beyond such physical intrusion, and extended to eavesdropping upon private conversations by means of wiretapping and microphones". The cases in support of the "eavesdropping" prohibition all concern electronic recording by third parties.

⁴⁶For a discussion of the right to confidentiality, see *Martinelli v. District Court in and for Denver (City and County)*, 612 P.2d 1083 at 1091 (Col. S.Ct 1980). Further, according to the *Restatement (Second), Torts*, s. 652A, invasion of privacy encompasses four distinct types of activity:

- (1) unreasonable intrusion upon the seclusion of another (s. 652B)
- (2) appropriation of the other's name or likeness (s. 652C)
- (3) unreasonable publicity given to one's private life (s. 652D)
- (4) publicity that unreasonably places the other in a false light (s. 652E).

Finally, according to the courts, the third prohibition is predicated on a general right to confidentiality in one's private affairs. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), where the U.S. Supreme Court adopted this four-part classification.

⁴⁷In the U.S., there is no cause of action for a purely private disclosure. Thus, a certain degree of general publicity is required. See, e.g., *Polin v. Dun & Bradstreet, Inc.*, 768 F.2d 1204 (C.A. 10th Cir. 1985), where the distribution of credit reports to a limited number of subscribers was held not to constitute an invasion of privacy. See, also, Lee and Lindahl, *supra*, note 45 at s. 35.02, p. 3. By analogy, therefore, evidence adduced in court, which is made public to a select group of indi-

vacy, and in which the state has no legitimate interest. Further, such disclosure must be in a form that is highly objectionable to a reasonable person of ordinary sensibilities.⁴⁸

The right to confidentiality is of particular interest since the manner in which the information is obtained is *not* determinative of whether this tort has been committed.⁴⁹ Thus, the fact that participant recording is legal does not mean that publicising that recording (by rebroadcast) is also legal. In other words, whether the method of obtaining information is legal and whether publication is legal, are two separate questions involving two different torts.

Clearly, this tort requires public disclosure of intimate details about a *person's* life. According to *Byron, Harless, Schaffer, Reid and Associates, Inc. v. State of Fla ex rel. Schellenberg*,⁵⁰ there is a "descending order of sensitivity and constitutional interest", pursuant to which the Plaintiff's objective expectation of non-disclosure is to be determined. At the top of this ranking are any materials or information which reflect the "intimate relationships" of the Plaintiff with other persons. Below the top tiers,

the progressively lower tiers would include [the Plaintiff's] beliefs and self-insights; his personal habits; routine autobiographical material; and finally, his name, address, marital status, and present employment, which together may constitute his irreducible identity to anyone who has reason to acknowledge his existence.⁵¹

viduals, may not constitute public dissemination. Further, the various Canadian privacy acts, if applicable, provide the same defences to public disclosure (namely, "fair comment" and "privilege") as are available under provincial defamation Acts (see, *infra*).

⁴⁸According to *Modern Tort Law, supra*, note 45 at s. 35.08, pp. 13-14, the following factors must be balanced when determining the scope of this common law right: (1) Does the Plaintiff have a legitimate expectation that the material or information will not be disclosed?; (2) Is disclosure required to serve a compelling state interest?; (3) If so, will disclosure occur in the least intrusive manner with respect to the right to confidentiality? See, also, *Prosser and Keeton on The Law of Torts, supra*, note 45 at s. 117, pp. 856-57, which phrases the test as follows: (1) is there *public* disclosure (2) of *private* facts, and is the disclosure (3) highly offensive and objectionable to a reasonable person of ordinary sensibilities? The *Restatement (Second), Torts*, at s. 652D (d), adds a fourth condition: the public must not have a legitimate interest in having the information made public.

⁴⁹See, *Virgil v. Time, Inc.*, 527 F.2d 1122 at 1126 (C.A. 9th Cir. 1975). In this case, a reporter for *Sports Illustrated* legally acquired information from an individual who was to be the subject of a future article. Before publication of the article, the subject withdrew his consent to publication. The Court held that "[t]he offense with which we are here involved is not the intrusion by means of which information is obtained ...; it is the publicizing of that which is private in character". Further, at 1127, the Court held that "voluntary disclosure by Kirkpatrick [the subject] did not in itself constitute a making public of the facts disclosed". For both reasons, the Defendant publication's motion for summary judgment was denied.

⁵⁰360 So. 2d 83 at 95 (Fla C.A. 1978).

⁵¹*Ibid.* This passage is also cited with approval in *Martinelli, supra*, note 46 at 1092. See, also, *Virgil, supra*, note 49 at 1126, which cites with approval the *Restatement (Second), Torts (Tentative*

Since the "top tiers" of information are protectible, this tort may prohibit disclosure of "intimate" telephone communications. Nevertheless, there are no American cases on point, and obviously no Canadian cases which recognise the existence of this tort.

Further, it is arguable that neither financial information in particular, nor "business" information in general, concerns the private life of an *individual*. In other words, a corporate Plaintiff cannot avail itself of this particular right. This conclusion might be supported by the following arguments. First, it is difficult to see how public disclosure of business information would be "highly offensive and objectionable to a person of ordinary sensibilities". Indeed, all the common law privacy cases dealing with the right to confidentiality concern public disclosure of personal information. None concerns public disclosure of business information (which cannot be "embarrassing" or intrinsically private in quite the same way). Second, the right to confidentiality evolved as a separate tort precisely because few remedies existed to prevent public disclosure of embarrassingly personal information. In business relationships, however, other remedies exist to prevent public disclosure of confidential information (such as breach of contract, breach of trust and breach of confidence). Thus, there is no reason to apply this tort to business conversations.

3. Intentional Infliction of Emotional Distress

Another possible cause of action, which does not require the illegal gathering of information, is the tort of intentional infliction of emotional distress. In the *Restatement (Second), Torts*, this tort is defined as follows:

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Unlike the Canadian tort of wilful infliction of emotional distress, this American tort does not require the presence of physical harm. Further, the American tort applies to intentional as well as reckless (*i.e.* negligent) acts.

The leading case on point is *Hustler Magazine v. Falwell*,⁵² which concerned an article published by the Defendant magazine. This article described an incestuous (though fictitious) encounter between the Reverend Falwell and his mother (the account was described in a disclaimer as fictitious). The U.S. Supreme Court held that the Plaintiff, Jerry Falwell, was not entitled to damages because the statements at issue were fictitious. Since the Court did not decide

Draft No. 21, 1975). Section 652C concerns the scope of the term "private life", and reads in pertinent part as follows:

The rule stated in the Section applies only to publicity given to matters concerning the private, as distinguished from the public, life of the *individual* [emphasis added].

⁵²108 S. Ct 876 (1988).

if damages would be available if the statements were factual, the scope of this tort is as yet undetermined.

A further source of confusion is the relationship between this tort and the actual malice requirement. This requirement was first articulated in *New York Times Co. v. Sullivan*,⁵³ which held that when suing for defamation, a public figure Plaintiff must prove that the article is defamatory and that the Defendant published with knowledge of falsity or with reckless disregard of the truth. In *Hustler*, the U.S. Supreme Court held that in addition to proving false statements of fact, a public figure plaintiff must also prove actual malice. Since the Court based its holding on the distinction between statements of fact and statements of opinion (the latter includes fiction, satire and parody and is constitutionally protected speech), the holding vis-a-vis actual malice is *obiter*. Thus, according to various authorities,⁵⁴ it is still unclear whether a public figure plaintiff must prove actual malice as a condition of recovery. Of course, a private figure plaintiff need only show an intent to publish.

Whether Canadian courts will expand the ambit of the Canadian tort in light of its American cousin is unclear.⁵⁵ If so, the expanded tort would provide a Plaintiff with a possible remedy if the broadcast of a taped conversation constitutes "extreme and outrageous" conduct, and if it causes the Plaintiff "severe" emotional distress. Further, since there is no requirement of physical harm and since recklessness is sufficient for liability, the rights of the Plaintiff under this tort would be greatly increased. Finally, since the actual malice standard has not (as yet) been adopted in Canada, public figure Plaintiffs could potentially benefit from this tort as well.

4. State Legislation

Since criminal law is a matter of state jurisdiction, some states have prohibited by statute the recording of telephone conversations while others have not. The caselaw in the states which have prohibited such recording deals with the scope of the applicable statutory provision, usually focusing on the definition of the word "intercept";⁵⁶ or on whether "any party thereto" means "all par-

⁵³376 U.S. 254 (1964).

⁵⁴See, e.g., Farnham, "Free Speech and Freedom from Speech: *Hustler Magazine v. Falwell*, the *New York Times* Actual Malice Standard and Intentional Infliction of Emotional Distress" (1988) 63 *Indiana L.J.* 877.

⁵⁵For instance, no reference to the American tort appears in G.H.L. Fridman, *The Law of Torts in Canada* (Toronto: Carswell, 1989).

⁵⁶In Pennsylvania, see *Parkhurst v. King*, 266 F. Supp. 780 (D.C. Pa 1967), holding that the word "intercept" did not prohibit participant recording; but see *Commonwealth of Pennsylvania v. McCoy*, 275 A. 2d 28 (Pa Supr. Ct), holding that use of an induction coil device by the victim of threatening telephone calls to record those calls and simultaneously to amplify them so that they would be audible to anyone in the room, constitutes an "interception".

ties thereto",⁵⁷ or on whether the prohibition against recording a "confidential communication" permits participant recording of a non-confidential communication.⁵⁸ This caselaw is of limited relevance since there is no such legislation in Canada and will not be pursued further.

III. Future Developments

Since the Fourth Amendment in the United States does not prohibit unauthorised participant recording and since the common law right to privacy does not prohibit it either, protection in the U.S. against public disclosure of personal (but true) information must be based either on state legislation, on the common law right to confidentiality, on breach of confidence, or on intentional infliction of emotional distress.

As mentioned above, there are no Canadian cases dealing with the common law right to confidentiality. Further, the Canadian privacy statutes do not explicitly create such a right.⁵⁹ Nonetheless, these acts do not purport to exclude other privacy rights which may exist within the statutory tort itself.⁶⁰ Hence, the fact that participant recording is not specifically prohibited does not necessarily mean that it is permissible. The issue, then, is the scope of each statutory tort.

⁵⁷This issue was litigated constantly in Illinois. Based on two recent cases, however, it appears that only one party need consent. See, *People v. Knight*, 327 N.E. 2d 518 at 529 (C.A. Ill. 1975) and *People v. Drish*, 321 N.E. 2d 179 at 183-84 (C.A. Ill. 1974).

⁵⁸In California, see *Rogers v. Ulrich*, 125 Cal. Rptr 306 (C.A. 1st Distr. 1976), holding that the communication must be confidential; but see *People v. Wyrick*, 144 Cal. Rptr 38 at 42 (C.A. 3rd Distr. 1978), where the Appeal Court held that the trial Judge's focus "upon the subjective expectations of the parties, as those expectations bore upon probable re-communication of the content of the conversation, was thus error". California appears to be one of the few states that uses the word "confidential" in its statute prohibiting participant recording. Other states simply prohibit any unauthorised recording. If a similar law is adopted in Canada, it would be preferable to prohibit unauthorised recordings irrespective of whether the contents may be viewed, subjectively or objectively, as confidential. The purpose of such a law would be to protect a reasonable expectation of privacy, and such an expectation surely exists in a telephone conversation, which usually occurs in the privacy of one's home or office, where the intention almost always is to communicate in private with one or perhaps several people.

⁵⁹It is arguable, however, that the right to confidentiality is a key element of any privacy right. Consider, for instance, the definition of privacy in *Duarte, supra*, note 1 at 46:

If privacy may be defined as the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself, a reasonable expectation of privacy would seem to demand that an individual may proceed on the assumption that the state may only violate this right by recording private communications on a clandestine basis when it has established to the satisfaction of a detached judicial officer that an offence has been or is being committed

On the basis of this somewhat tentative definition, it appears that the right to privacy embodies the right to control the release of personal information. In the civil context, the corollary of this right is the right to prevent disclosure of such information, in other words, a right to confidentiality.

⁶⁰See, s. 1(4) of the Saskatchewan Act; the relevant sections in the other Acts refer to not "limiting the generality" of the tort itself. See, *supra*, text following note 8.

On this point, the scope of the American constitutional right to privacy is of obvious relevance. As mentioned above, participant recording of telephone conversations and the tendering of those tapes into court, does not violate the right to privacy created by the 4th Amendment. Will Canadian courts give more "teeth" to statutory privacy rights than American courts have given to the Fourth Amendment?

Based on the recent cases of *R. v. Duarte* and *R. v. Wiggins*, the answer appears to be "yes". In both cases, the Canadian Supreme Court held, with only Lamer J. dissenting, that an undercover police officer could not legally record a conversation in which he was a participant, without either the consent of all parties or a court order. Since neither condition was met, the recording at issue violated s. 8 of the *Charter*.

Duarte and *Wiggins* are of judicial importance for at least three reasons. First, they overrule a series of lower court decisions which held that participant recording does not violate s. 8 of the *Charter*. Second, they render inapplicable the distinction in American caselaw between third party interception of a conversation and unauthorised participant recording of a conversation. In the United States, courts distinguished between the two on the basis that in cases of participant recording, the speaker should bear responsibility for the actions of the person with whom he voluntarily communicates. Conversely, the speaker should not bear the risk that a third party will intercept a conversation. The Canadian Supreme Court, however, focussed on the effect of such recording, holding that both forms of electronic surveillance have a serious effect on a person's legitimate expectation of privacy.⁶¹ Hence, a distinction based on the means by which the recording is made, whether by microphone glued to a wall or by one attached to a body, is essentially irrelevant since the harm to privacy in both cases is the same.⁶²

Duarte and *Wiggins* are relevant only with respect to government agents since the *Charter* does not apply to personal litigants.⁶³ Nonetheless, these cases might support the argument that privacy rights subsist in personal and business telephone conversations under the provincial privacy acts. Consider, first,

⁶¹According to Mr. Justice La Forest in *Duarte, supra*, note 1 at 44, this distinction in American caselaw misses the very purpose of regulation:

the regulation of electronic surveillance protects us from a risk of a different order, *i.e.*, not the risk that someone will repeat our words but the much more insidious danger inherent in allowing the state, in its unfettered discretion, to record and transmit our words. ... The very efficacy of electronic surveillance is such that it has the potential, if left unregulated, to annihilate any expectation that our communications will remain private.

⁶²*Ibid.* at 47, La Forest J.

⁶³See, *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 200, 87 C.L.L.C. 14,002.

whether a business can sue for invasion of privacy. On this point several recent *Charter* cases dealing with privacy rights are of direct relevance.⁶⁴ Although privacy rights are probably not covered by s. 7,⁶⁵ there is a "limited privacy right" under s. 8. In the leading case of *Hunter, Dir. of Research & Investigation, Combines Investigation Branch v. Southam Inc.*,⁶⁶ the Canadian Supreme Court held that a warrant should be obtained, if reasonably possible, before searching the premises of a business. Similarly, in *R. v. Rao*,⁶⁷ the Ontario Court of Appeal held a search of business premises invalid, on the basis that a warrantless search was not authorised on the facts of the case. The Court also held that the accused, the owner of the business, could reasonably expect that *personal effects* stored in his office would be secure against unreasonable search and seizure. In other words, the accused had a legitimate expectation of privacy in the use of business premises.⁶⁸

Further, according to *R. v. Finlay and Grellette*,⁶⁹ and *R. v. Sanelli*,⁷⁰ the interception of a private communication constitutes a search or seizure within the meaning of s. 8 of the *Charter*. Thus, the legislation authorising interception must meet the constitutional standard of reasonableness articulated in *Hunter v. Southam*.

Although these cases could be used to support the argument that certain privacy rights adhere to business premises under provincial privacy acts, such an argument would appear unnecessary.⁷¹ In fact, of the three cases decided to date under the various privacy acts, two concern the rights of a business, and in neither case did the issue of corporate entitlement arise.⁷² This result is hardly surprising in light of the aforementioned *Charter* caselaw. Why, for instance,

⁶⁴For a recent discussion of privacy rights under s. 8 of the *Charter*, see R.T.H. Stone, "The Inadequacy of Privacy: *Hunter v. Southam* and the Meaning of "unreasonable" in Section 8 of the *Charter*" (1989) 34 McGill L.J. 685.

⁶⁵See, *Charbonneau v. College of Physicians and Surgeons of Ontario* (1985), 52 O.R. (2d) 552, 22 D.L.R. (4th) 303 (H.C.).

⁶⁶[1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641, 41 C.R. (3d) 97.

⁶⁷(1984), 46 O.R. (2d) 80, 40 C.R. (3d) 1, 12 C.C.C. (3d) 97.

⁶⁸The Court's introduction of privacy rights under the *Charter* should be contrasted with the federal government's reluctance to legislate a general right to privacy. This reluctance is perhaps best illustrated by the defeat of a motion in 1981 to add "freedom from unreasonable interference with privacy, family, home and correspondence" to the *Charter*. Though supported by the N.D.P. and the Conservative parties, the motion was defeated because the concept of privacy was seen as "too vague and ill-defined". See, D.H. Flaherty, *Protecting Privacy in Two-Way Electronic Services* (White Plains, New Jersey: Knowledge Industries Publications, 1985) at 11.

⁶⁹(1985), 52 O.R. (2d) 632 (C.A.), appeal refused (1986), 54 O.R. (2d) 510n (S.C.C.).

⁷⁰(1987), 60 C.R. (3d) 142 (Ont. C.A.).

⁷¹The Newfoundland *Privacy Act*, however, specifies in s. 2 that "individual" means "natural person", thereby excluding corporations from the benefit of the Act.

⁷²See, *Silber v. B.C. Broadcasting Systems Ltd* (1986), 25 D.L.R. (4th) 345, [1986] 2 W.W.R. 609, 69 B.C.L.R. 34 (S.C.) and *Bingo Enterprises Ltd v. Plaxton*, *supra*, note 23. Neither case dealt with privacy rights in verbal or telephone communications.

should a corporation benefit from a right to privacy under the *Charter* and not benefit from a similar right under a provincial statute?⁷³ Further, if the word “everyone” in s. 8 of the *Charter* embraces a corporation, surely the word “another” (in the B.C. Act) is equally capable of embracing a corporation.⁷⁴

Since both individuals and businesses possess a right to privacy under provincial privacy acts, is that right infringed by unauthorised participant recording? Much may depend on when the recording was made and how it is used. Courts, for instance, may distinguish between personal and business conversations, and between personal and public use. Moreover, an analysis of the nature and degree of the invasion, and a balancing of the lawful interests of others, is specifically required by each of the Acts.⁷⁵

With respect to the first distinction, courts may hold that the expectation of privacy is perhaps *less* in a business conversation than in a personal conversation. The business conversation, after all, concerns money (not personal affairs), and any breach of confidentiality can be dealt with by other means, such as an action for breach of contract, breach of trust or breach of confidence. Conversely, a court might hold that a right to privacy exists in business conversations for the same reason that it exists in personal conversations — because, in both cases, there is a legitimate expectation of privacy.

In personal conversations, however, precious few remedies exist aside from the tort of invasion of privacy, to prevent the unauthorised broadcast of embarrassingly personal (but true) details about one’s private life. Of course, if the details are false or inaccurate, public broadcast may constitute defamation. Further, if the details are false and are spoken with an intent to cause harm, a claim for wilful infliction of emotional distress may be available. Finally, if the details are true, a claim for breach of confidence may in certain circumstances be available. As noted above, however, these remedies are of limited use.

⁷³In terms of *Charter* rights, the Supreme Court of Canada has held that companies are entitled to a variety of personal rights, including freedom of expression and association. (For a list of “corporate rights” under the *Charter*, see A. Petter, “Legitimizing Sexual Inequality: Three Early Charter Cases” (1989) 34 McGill L.J. 358 at 359, n.3).

⁷⁴In California, however, the term “person” has been defined in the penal provisions dealing with the recording of telephone conversations as including “an individual, business association, partnership, corporation, or other legal entity ...” (West’s Ann. Pen. Code, s. 632(b)). It appears that a non-penal statute (like a privacy act) does not require a similarly detailed definition of “person” or “another”.

⁷⁵See, e.g., s. 6 of the B.C. Act, s. 1(2) of the Saskatchewan Act and 3(2) of the Newfoundland Act. In Manitoba, however, this balancing of rights is relevant only with respect to the quantification of damages (s. 4(2)).

With respect to how the recording is used, courts may distinguish between personal and public use. If the recording was made for one's records⁷⁶ and not for public rebroadcast, then the recording has a less intrusive effect on the other party's personal life. If the recording is rebroadcast, then, obviously, the recording has a much greater effect. This distinction between private and public use can be premised on the emerging body of American caselaw dealing with the right to confidentiality and the need for public disclosure. This right, however, even if it exists in Canada, requires further expansion if it is to protect anything more than intrinsically private conversations in which the state has no legitimate interest.

With respect to the effect of these privacy acts on the future development of the common law, an interesting problem arises. According to Howell, such development with respect to true privacy interests (*e.g.* solitude and seclusion, the violation of which produces mental suffering), has been pre-empted in those provinces which have enacted privacy legislation.⁷⁷ This view, Howell argues, is strengthened by the decision of the Canadian Supreme Court in *Seneca College of Applied Arts & Technology (Bd of Governors) v. Bhadauria*,⁷⁸ which denied the creation of a common law tort of discrimination in jurisdictions which provide statutory remedies against discrimination.

If this view is correct, then the common law in the four privacy act provinces will not recognise a common law right to confidentiality.⁷⁹ This right, there-

⁷⁶Reporters, for instance, frequently tape conversations to ensure that quotations are correct and not taken out of context, and to protect themselves against a possible claim of defamation. Further, according to R.S. Bruser and B.M. Rogers, *Journalists and the Law: How to Get the Story Without Getting Sued or Put in Jail* (Ottawa: Canadian Bar Foundation, 1985) at 4-5, unauthorised participant recordings are admissible in court provided the following conditions are met: (1) the accuracy of the recording is proved; (2) the voices on the recording are properly identified; (3) nothing was added to or deleted from the recording; and (4) the recording is relevant and otherwise admissible as evidence in the action. If these conditions are met, the tape is treated like a document, and must be produced for inspection during Discovery.

⁷⁷R.G. Howell, "The Common Law Appropriation of Personality Tort" (1986) 2 I.P.J. 149 at 190.

⁷⁸[1981] 2 S.C.R. 181, 124 D.L.R. (3d) 193, 2 C.H.R.R.

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⁷⁹Other critics, including Professor D. Vaver, concur in this view. In "What's Mine is Not Yours: Commercial Appropriation of Personality Under the Privacy Acts of British Columbia, Manitoba and Saskatchewan" (1981) 15 U.B.C. L. Rev. 241 at 261, Vaver argues that "by specifically legislating on the matter of privacy, the legislature has intended to pre-empt the field and has excluded any possibility of a common law action for invasion of privacy developing. This is precisely what has happened in New York". Further, Vaver argues that if the Ontario right of commercial appropriation of personality develops along the lines of the American right to publicity, then the Ontario right will be substantially wider than the right to privacy under the various privacy acts. Hence, certain advantages of suing under the Ontario common law right as it may develop (such as the capability of assignment, exclusive licensing and, possibly, decent after death), would not be available under the relevant provincial statute. Indeed, in the recent case of *Parasiuk and Parasiuk v.*

fore, may only exist under statute. Further, even if it exists under statute, it becomes subject to the defamation defences of "fair comment" and "privilege".⁸⁰ These defences, however, are congruent with the right itself, since the right presupposes that the public has no legitimate interest in the information which is revealed publicly. Indeed, even if this right were held to exist at common law, it is quite likely that the same defences would be available, given the requirement that the state possess no "legitimate" interest in the information disclosed.

Further, since statements by witnesses, testimony by experts or reports by experts, adduced as evidence before a court or a statutory board which possesses the attributes of a court, are fully privileged,⁸¹ it seems clear that under the various privacy acts and at common law, the tendering of tapes as evidence into court would not violate the right to confidentiality or constitute an invasion of privacy.

Further still, the American tort of intentional infliction of emotional distress, assuming it exists in Canada, presupposes "extreme and outrageous conduct". Since "fair comment" and "privilege" are neither extreme nor outrageous, both defences apply to this tort as well. In all likelihood, they would also apply to the Canadian tort of wilful infliction of emotional distress, in that both "fair comment" and "privilege" militate against the intention to cause harm.

Finally, an action for breach of confidence would prohibit disclosure only if the party wishing to disclose stands in a contractual, fiduciary or spousal relationship with the other party. Absent such a relationship, the possibility of preventing disclosure turns on how the information was obtained. From the case-law, it appears that only the disclosure of information obtained in a manner that shocks the conscience of the Court could be enjoined. For these reasons, unauthorised participant recording in Canada between private parties remains legal, as does the right to broadcast publicly the content of most conversations. Further, given the limited number of restrictions on the right to rebroadcast, it

Cdn Newspapers Co. Ltd., [1988] 2 W.W.R. 737, 53 Man. R. (2d) 78 (Q.B.), Scollin J. held that no tort of "false light invasion of privacy" at common law existed in Manitoba, since "the proposed tort ... has been expressly rejected by the lawmakers" (at 739, W.W.R.). In other words, if it had been intended to import the tort into Manitoba, "I am convinced that the legislature would have mentioned it in s. 3" (at 739, W.W.R.), citing with approval the words of Referee Cantlie whose order was being appealed.

⁸⁰See, s. 5(f), s. 4(2), s. 5(2), and s. 2(2) in the Manitoba, Saskatchewan, Newfoundland and British Columbia Acts, respectively. Further, the British Columbia Act contains a general "news gathering" defence, which exempts all acts that are "reasonable", and "necessary or incidental", to the ordinary gathering of news. Further, the defences of privilege and fair comment are not available in Newfoundland, Saskatchewan or British Columbia if the information was obtained in a manner that itself constitutes an invasion of privacy. Since participant recording is legal, however, this qualification does not apply.

⁸¹See, A.M. Linden, *supra*, note 10 at 651ff.

appears that a conversant's legitimate expectation of privacy in telephone communication will continue to remain largely unprotected.⁸²

⁸²Interesting, the Law Reform Commission of Canada, in Working Paper 47, *supra*, note 3 at 28, recommends that unauthorised participant recording remain lawful, since tape recordings of sounds and conversations is now common practice in business and domestic circumstances. Thus, "[t]his conduct should not bear the full weight of the criminal law" (citing the 1983 report of the Australian Law Reform Commission titled *Privacy*). Further, the Commission recommends that such tapes remain admissible as evidence, since "[w]e think it would be wrong ... as a general rule to exclude evidence which may be highly cogent and of great assistance to the trier of fact".