
Invasion of Privacy and Charter Values: The Common-Law Tort Awakens

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The author argues for the recognition of a tort of invasion of privacy in the common-law provinces of Canada. The article provides an overview of various methods of protecting privacy, including civil-law approaches in Quebec and Germany, American and German constitutional approaches, and the protection in the public sphere provided by the *Canadian Charter of Rights and Freedoms*. The author advocates the "Charter values" approach in defining the parameters of a Canadian common-law privacy tort.

The review contrasts the United Kingdom and Australia, where the tort of invasion of privacy has been forcefully denied, with the United States and Germany, where it has been generally recognized. After a survey of the *Charter* protection and its scope, and using the case of *Dyment* as a guide, the author proposes a three-part formulation for the privacy tort. Under this test, a plaintiff may recover where there is an identifiable private object falling within one of the three privacy zones (territorial, personal, informational), where the defendant has acted intentionally or recklessly in compromising the private object, and where the invasion of the private object was unreasonable in the circumstances.

In conclusion, the author argues that not only should the new tort be developed by reference to *Charter* values, but the Canadian courts should use American jurisprudence and the civilian experience in its implementation. He explains that there is both a need and a secure foundation for a Canadian common-law privacy tort.

L'auteur propose la reconnaissance d'un délit civil d'invasion de la vie privée en *common law* canadienne. L'article dresse un survol de diverses méthodes employées pour protéger la vie privée, soit l'approche de droit civil au Québec et en Allemagne, l'approche constitutionnelle aux États-Unis et en Allemagne, ainsi que la protection accordée par la *Charte canadienne des droits et libertés* dans le domaine public. L'auteur prône l'adoption de critères inspirés des valeurs véhiculées par la *Charte* pour définir un délit d'invasion de la vie privée en *common law* canadienne.

L'auteur note le contraste existant entre l'Australie et la Grande-Bretagne, où l'existence d'un délit d'invasion de la vie privée a été nié vigoureusement, et les États-Unis et l'Allemagne, où il a été reconnu. Après avoir tracé un survol de la protection accordée par la *Charte*, et avoir analysé l'arrêt *Dyment*, l'auteur propose une définition en trois parties du délit d'invasion de la vie privée. En vertu de ce test, le demandeur aurait droit à la réparation du préjudice subi s'il remplit les conditions suivantes : (1) il existe une dimension privée appartenant à l'une des trois sphères de vie privée (territoriale, personnelle et informationnelle) ; (2) le défendeur a agi de manière volontaire ou il a fait preuve d'insouciance en mettant en péril la dimension privée et (3) l'invasion de la sphère privée n'était pas raisonnable dans les circonstances.

En conclusion, l'auteur propose que ce nouveau délit civil soit développé, non seulement en tenant compte des valeurs véhiculées par la *Charte*, mais également en référence à la jurisprudence américaine et à l'expérience civiliste dans ce domaine. Selon l'auteur, il existe en effet une fondation solide pour l'établissement de ce nouveau délit ; de plus, sa création est nécessaire en droit canadien.

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Introduction

Canadians are concerned about their privacy. A comprehensive poll of Canadians' views about privacy, *Privacy Revealed: The Canadian Privacy Survey* (1993), found that ninety-two percent of Canadians express some concern about their privacy, and fifty-two percent are "extremely concerned"; sixty percent believe that they enjoy less privacy than a decade ago, and eighty-one percent view computers as a threat to their private lives.¹ In the span of a few decades, we have become an information society, replete with computers, databases, video cameras, and advanced surveillance systems. The amount of information available through public and private computer databases is astounding, and grows year by year. Equally astounding is the ease with which the privacy of citizens can be violated through the use of sophisticated new technologies. In the information age, as privacy becomes increasingly vulnerable, citizens are justified in looking to the law, and in particular the common law, for a response. Yet in those provinces that have not legislated a statutory tort of invasion of privacy,² common-law privacy protection is still emerging, and seems inadequate to the task of protecting citizens in the era of the camcorder and cell-phone scanner.³ The opportunity to develop a rich and comprehensive common-law tort of invasion of privacy is clearly at hand. In fact, as will be argued below, the fundamental values of Canadian society, as embodied in the *Canadian Charter of Rights and Freedoms*⁴ and elabo-

¹ See Ekos Research Associates, *Privacy Revealed: The Canadian Privacy Survey* (Ottawa: Communications Canada, 1993) at i and 4, 6, 12. See also Privacy Commissioner of Canada, *Annual Report* (Ottawa: 1994-95) at 2. Canadian public opinion has apparently changed little in the past 10 years. A 1984 Royal Bank of Canada survey found that 88% of respondents considered protecting personal privacy "very important", while a 1984 Gallup poll showed that 68% of respondents "did not believe there was any real privacy in Canada" (Privacy Commissioner of Canada, "Entrenching a Constitutional Privacy Protection for Canadians", Submission to the Special Joint Committee on a Renewed Canada, 1991 at 2-3).

² The provinces that have created a statutory tort of invasion of privacy are: British Columbia (*Privacy Act*, R.S.B.C. 1979, c. 336), Manitoba (*The Privacy Act*, R.S.M. 1987, c. P125), Newfoundland (*Privacy Act*, R.S.N. 1990, c. P-22) and Saskatchewan (*The Privacy Act*, R.S.S. 1978, c. P-24). Invasion of privacy was first recognized as a general delict within art. 1053 of the *Civil Code of Lower Canada* [hereinafter C.C.L.C.] in *Robbins v. C.B.C.* (1957), [1958] Que. S.C. 152, 12 D.L.R. (2d) 35 [hereinafter *Robbins* cited to D.L.R.]. This view has subsequently been codified, with privacy being elevated to the status of a right. Section 5 of Quebec's *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12 [hereinafter *Quebec Charter*], guarantees to everyone the "right to respect for his private life". Art. 3 *Civil Code of Quebec* [hereinafter C.C.Q.] declares: "Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy. These rights are inalienable." The provinces with no statutory tort of invasion of privacy are: Alberta, New Brunswick, Nova Scotia, Ontario and Prince Edward Island.

³ Consider the story of a New York couple who found their landlord's camcorder behind a one-way mirror. The camera was trained on their bed (*International Herald-Tribune* (14 February 1996) 3). Scanners allow a person to listen in on cellular telephone calls and police radio transmissions.

⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

rated upon by the Supreme Court of Canada, provide the foundation on which to build such a tort.

The aim of this article is to advocate the recognition of the tort of invasion of privacy in the common-law provinces. Recent decisions from the lower courts of Ontario demonstrate an increasing willingness on the part of the judiciary to provide a remedy for privacy intrusions. This places Canada somewhere between the situation in the United States, where the tort of invasion of privacy is generally recognized, and that prevailing in the United Kingdom and Australia, where the existence of the tort has been forcefully and repeatedly denied. One aspect of this article concerns the reasons underlying the diverse treatment of privacy in the common-law jurisdictions. Another focus is the legal protection of privacy in civil-law jurisdictions, in particular Quebec, but also Germany, where the interplay between constitutional and civil privacy protection is most illuminating. Privacy protection is flourishing in civil-law systems, and much can be learned in developing a Canadian common-law position. However, the ultimate goal is two-fold: first, to demonstrate that Canadian common law should be developed in light of the fundamental value of privacy, as embodied in the *Charter*, and second, to employ *Charter* privacy jurisprudence, and *Charter* values generally, to define the actual content and requirements of a Canadian common-law privacy tort.

I. Laying the Foundation for Common-Law Privacy Protection through the *Charter*-Values Approach

A. *Why Protect Privacy?*

The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.⁵

So wrote Samuel Warren and Louis Brandeis in 1890 in their groundbreaking article advocating the recognition at common law of a general right of privacy. Referring to the right more specifically as the “right to be let alone”,⁶ Warren and Brandeis argued that the right of privacy was central to the enjoyment of life, but was coming under attack in modern society. The common law, according to these two eminent writers, should respond through the judicial recognition of a tort remedy for invasions of privacy, since such invasions offended the human spirit.⁷

⁵ S.D. Warren & L.D. Brandeis, “The Right to Privacy” (1890) 4 Harv. L. Rev. 193 at 196.

⁶ *Ibid.* at 195.

⁷ See *ibid.* at 197. Warren and Brandeis referred to the wrong associated with an invasion of privacy as being “spiritual” in nature.

Warren and Brandeis were the first common-law⁸ scholars to recognize that the importance of privacy to the individual and society should be fostered through legal privacy protection, and they were thus the first to advocate the judicial recognition of a general privacy right. However, the concept of “private life”, as distinct from “public life”, and the role of that conceptual distinction in liberal-democratic societies, have been part of political and philosophical debate for centuries.⁹ This debate has traditionally sought to distinguish between the areas of life where governmental, or public, intervention is justified, and a private area immune from such intervention. Of course, the law remains relevant even to this private sphere of life, since there may arise a need to shield that which is private from public encroachment. Thus, the common law has developed a considerable body of protection against *tangible* intrusions by others on the person and property. Certainly, as of 1890, notions of private life were not foreign to the common law. However, Warren and Brandeis sought to extend common-law protection to *intangible* qualities of life — dignity, thoughts, sentiments and emotions — which were at risk because of technological developments. For example, developments in printing technology, production methods, and instantaneous photography were identified by Warren and Brandeis as threatening “to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the housetops’”.¹⁰ They thus argued that common-law remedies for intrusions upon private life should expand beyond their traditional roots in tangible bodily and property interests, in order to protect the more sweeping and intangible concept of “inviolable personality”, under which the dignity and emotional well-being of the individual would be paramount.

One hundred years after Warren and Brandeis, there appears to be a consensus that privacy is essential to life in all societies, and particularly in modern ones.¹¹ That privacy has emerged as a fundamental value of human society is evinced by the inclusion of the right against arbitrary interference with privacy in article 12 of the *Universal Declaration of Human Rights*,¹² and article 17 of the *International Covenant on Civil and Political Rights*.¹³ In a similar vein, the Supreme Court of Canada has declared

⁸ The right to privacy had already been recognized in the law of France (see *ibid.* at 214).

⁹ See M.R. Konvitz, “Privacy and the Law: A Philosophical Prelude” (1966) 31 *L. & Contemp. Probs.* 272. Konvitz suggests that “[t]o mark off the limits of the public and private realms is an activity that began with man himself and is one that will never end” (at 274); see also J. Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. by J.H. Burns & H.L.A. Hart (London: Methuen, 1970) c. 17, especially at 282, 293; J.S. Mill, *On Liberty*, ed. by G. Williams (London: Everyman, 1993) at 77-79.

¹⁰ *Supra* note 5 at 195; see also K. Gormly, “One Hundred Years of Privacy” (1992) 92 *Wis. L. Rev.* 1335 at 1350-52. Gormly discusses how technology transformed the press in the latter part of the nineteenth century, thus creating the “mass media”.

¹¹ A.F. Westin, in his important study, *Privacy and Freedom* (New York: Atheneum, 1967), examined several modern and primitive societies, and concluded that “[n]eeds for individual and group privacy and resulting social norms are present in virtually every society” (*ibid.* at 13). However, due to modern intrusions such as electronic surveillance, “the achievement of privacy for individuals, families and groups in modern society has become a matter of freedom rather than the product of necessity” (*ibid.* at 21-22).

¹² GA Res. 217A (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

¹³ 19 December 1966, Can. T.S. 1976 No. 47, 999 U.N.T.S. 171.

that "privacy is at the heart of liberty in a modern state" and "is essential for the well-being of the individual".¹⁴

There is a basic similarity between each of the justifications for protecting privacy as a fundamental value and human right: privacy is a condition or state that provides the individual with a retreat from the conformist pressures of social norms. Privacy protects the individual from interferences in the personal decision-making process, which can result from ridicule, hostile reactions, and demands to conform. Privacy is essential to the promotion of individualism, and in particular, individual autonomy and independence. Joseph Raz has described independence, a dimension of autonomy, as an essential ingredient of individual well-being,¹⁵ and this suggests that privacy is also such a condition. If an individual is to act independently, then she must be able to retreat from social distractions and social pressures. She must be able to explore all the options available, while resisting pressures to conform merely "for the sake of". The private life and the independent life are so linked as to be practically synonymous.

Moreover, by insulating the individual from external intrusions and distractions, privacy facilitates concentration and creativity.¹⁶ It fosters the development of new ideas, attitudes, beliefs and lifestyles. Privacy thus breeds diversity, which is essential to any pluralistic, democratic society.¹⁷ To a certain extent, then, the democratic justification for privacy is similar to that of freedom of expression, since both the free *formulation* of viewpoints, and their free *expression*, are necessary to democratic political debate, and the right to vote.¹⁸

Some commentators, most notably Sidney Jourard, have linked privacy to individual mental health and well-being.¹⁹ Jourard argues that privacy is crucial not only because it allows individuals to escape social pressures for the purpose of autonomous decision-making, but also because it affords to everyone an environment where they "can simply *be*, rather than be *respectable*".²⁰ The ability to retreat from society ensures that individuals have outlets for self-expression and can explore alternative ways-of-life away from conformist pressures. The mental well-being of individuals, according to Jourard, is preserved and promoted by the protection of private life. De-

¹⁴ *R. v. Dyment*, [1988] 2 S.C.R. 417 at 427-28, 55 D.L.R. (4th) 503, 66 C.R. (3d) 348, La Forest J. (quoting Westin with approval) [hereinafter *Dyment* cited to S.C.R.].

¹⁵ See J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 369-72.

¹⁶ See R. Gavison, "Privacy and the Limits of the Law" (1980) 89 Yale L.J. 421 at 448-50.

¹⁷ See A.F. Westin, "Science, Privacy, and Freedom: Issues and Proposals for the 1970's" (1966) 66 Colum. L. Rev. 1003. Westin writes: "The reasons for protecting privacy are so obvious to citizens of liberal democracies that they often lose sight of the specific functions that privacy performs in their political systems" (*ibid.* at 1019).

¹⁸ As Gavison observes, "Part of the justification for majority rule and the right to vote is the assumption that individuals should participate in political decisions by forming judgments and expressing preferences" (*supra* note 16 at 455). See also E. Paton-Simpson, "Human Interests: Privacy and Free Speech in the Balance" (1995) 16 N.Z.U.L.R. 225 at 233-34.

¹⁹ See S.M. Jourard, "Some Psychological Aspects of Privacy" (1966) 31 L. & Contemp. Probs. 307.

²⁰ *Ibid.* at 310.

nial of privacy is not simply upsetting to the victim, or offensive to the victim's dignity; it can lead to pain, depression, anxiety, hopelessness and malaise.²¹

Additionally, Charles Fried has argued that privacy is inherent to the notions of respect, love, friendship and trust, and that close human relationships are only possible if persons enjoy and accord to each other a certain measure of privacy.²² This view holds that close, intimate relationships are possible only after the sharing of private information concerning attitudes, interests and details about a host of subjects. Surveillance, monitoring and other privacy intrusions destroy the exclusivity of that sharing, and thereby undermine intimacy, love and friendship.

Thus, social retreat is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas, opinions, beliefs and ways-of-living, and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value, and should be vigorously protected in law. Each intrusion upon private life is demeaning not only to the dignity and spirit of the individual, but also to the integrity of the society of which the individual is a part.

B. In Search of Protection of Private Life in the Canadian Common Law

Unlike the situation in the United Kingdom and Australia, where appellate courts have rejected the existence of a general tort of invasion of privacy at common law,²³

²¹ See *ibid.* at 309. Westin has reached a similar conclusion, although in slightly different terms. He argues that each one of us distinguishes between the person we really are, and the person we want the world to see (*i.e.*, the private self and the public persona). When our private self is revealed to the public, we are subjected to forced exposure, and depending on the circumstances, may be embarrassed, or find ourselves ridiculed, and even hated. Westin observes that "[t]he numerous instances of suicides and nervous breakdowns resulting from such exposure" are a reminder of the critical social need to respect privacy (*supra* note 11 at 33-34.)

²² See C. Fried, "Privacy" (1968) 77 *Yale L.J.* 475 at 477.

²³ For England, see *Tapling v. Jones* (1865), 11 H.L.C. 290, 11 E.R. 1344, and more recently, *Re X* (1974), [1975] 1 All E.R. 697 (C.A.) at 704, Lord Denning: "We have as yet no general remedy for infringement of privacy; the reason given being that on balance it is not in the public interest that there should be."

For Australia, see *Victoria Park Racing and Recreation Grounds Co. v. Taylor* (1937), 58 C.L.R. 479 (H.C.) at 495-96 [hereinafter *Victoria Park*], Latham C.J. Strong dissents were registered in *Victoria Park*. The following comment by Rich J. is notable: "Indeed the prospects of television make our present decision a very important one, and I venture to think that the advance of that art may force the courts to recognize that protection against the complete exposure of the doings of the individual may be a right indispensable to the enjoyment of life" (*ibid.* at 505).

New Zealand, like Canada, stands somewhere between the American and Anglo-Australian situations. In both *Bradley v. Wingnut Films Ltd.* (1992), [1993] 1 N.Z.L.R. 415 (H.C.) and *Tucker v. News Media Ownership Ltd.*, [1986] 2 N.Z.L.R. 716 (H.C.) [hereinafter *Tucker*], the New Zealand High Court supported the introduction into the New Zealand common law of an invasion-of-privacy tort, although the Court urged a cautious and slow development.

Canadian appellate courts have yet to make such a conclusive determination, and instead have left the door open to the development of an American-style general tort.²⁴ Because of this gap in appellate authority, the status of the tort of invasion of privacy remains unclear. This explains why four provinces have resorted to legislation to create such a tort, thereby accelerating the process of its recognition.²⁵

1. The Principled Approach to Developing the Common Law

The first Canadian decision to provide a remedy for invasion of privacy was *Robbins v. C.B.C.*,²⁶ decided under Quebec's *Civil Code of Lower Canada* ("C.C.L.C."). There, the plaintiff complained to the Canadian Broadcasting Corporation about the content of a television show, only to have the producers exact their revenge by displaying the plaintiff's address and telephone number on the screen during a broadcast, and inviting other viewers to contact the plaintiff to "cheer him up". Not surprisingly, the plaintiff was bombarded with harassing telephone calls and letters. The plaintiff alleged a breach of article 1053 of the C.C.L.C., a general delict provision which declared that every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill. In applying this article, Scott J. held that the "fault" was related not to the loss or enjoyment of property by the plaintiff, but to the persecution of the plaintiff, which resulted in severe emotional disturbance, humiliation, and an invasion of his private life.²⁷ *Robbins* thus became the first of a series of Quebec cases to hold defendants liable for invasion of privacy under the C.C.L.C.²⁸

Following the codification of Quebec's right of privacy,²⁹ important case law has continued to emerge. For example, in *Valiquette v. The Gazette*,³⁰ an action under the privacy right guaranteed by section 5 of Quebec's *Charter of Human Rights and Freedoms*, the plaintiff school teacher was able to recover damages for invasion of privacy

²⁴ In *Krouse v. Chrysler Canada Ltd.* (1974), 1 O.R. (2d) 225, 40 D.L.R. (3d) 15, 13 C.P.R. (2d) 28 (C.A.) [hereinafter *Krouse* cited to O.R.], the Ontario Court of Appeal stated that Canadian courts have not "as yet recognized such a right" (*ibid.* at 234). The Supreme Court of Canada has yet to consider whether a common-law tort of invasion of privacy exists in Canada.

²⁵ See *supra* note 2. The statutory creation of a privacy tort could not have been motivated by judicial disapproval of the tort at common law, since no Canadian appellate court has rejected it, in contrast to the Anglo-Australian courts. See generally Ontario Law Reform Commission, *Report on Protection of Privacy in Ontario* (Toronto: Department of the Attorney General, 1968) (Chair: H.A. Leal); Manitoba Law Reform Commission (Report No. 9) *Report on A Review of "The Privacy Act"*, Cap. P125 and *The Proposed Amendments to the Criminal Code Expressed in Bill C-6* (Winnipeg, 11 September 1972) (Chair: F.C. Muldoon).

²⁶ *Robbins*, *supra* note 2.

²⁷ See *ibid.* at 44.

²⁸ See also *Rebeiro v. Shawinigan Chemicals (1969) Ltd.*, [1973] C.S. 389; *Deschamps v. Automobiles Renault Canada Lee* (24 February 1972), Montreal 500-05-018140-71 (Sup. Ct.); H.P. Glenn, "Civil Responsibility — Right to Privacy in Quebec — Recent Cases" (1974) 52 Can. Bar Rev. 297.

²⁹ See art. 3 C.C.Q.; *Quebec Charter*, *supra* note 2, s. 5.

³⁰ [1991] R.J.Q. 1075, 8 C.C.L.T. (2d) 302 (Sup. Ct.) [hereinafter *Valiquette* cited to C.C.L.T.].

after the defendant newspaper published an article that revealed he was suffering from AIDS. The article was a bombshell to the plaintiff, contributing to the deterioration of his health. The plaintiff was not a public figure, and in the opinion of Viau J., "On ne peut trouver meilleur exemple d'un cas où l'intérêt commercial a pris le pas sur l'intérêt public et sur le droit à la vie privée."³¹

The ease with which the right of privacy has been accepted in Quebec,³² through *Robbins* and later cases, is indicative of the principled approach to tort or delict law under the C.C.L.C., and now the *Civil Code of Quebec* ("C.C.Q."). In civilian systems, liability is grounded in the twin notions of fault and harm. Thus, where the defendant has acted in a manner causing harm to the plaintiff, the plaintiff may recover damages.³³ The inherent flexibility of the civil-law delict principle, which allows it to deal easily with new forms of fault, should be contrasted with the rigidity of the common law, where centuries of precedent have given rise to identifiable categories of fault (*i.e.*, "torts"), each with specific criteria that must be met before a remedy can be awarded. Often, the tort categories are applied by courts without any consideration of the underlying principles that originally led to their development. This phenomenon has been the greatest impediment to the judicial recognition of a privacy tort at common law. Consider the following passage from the reasons of Dixon J. in the Australian case of *Victoria Park*, where he rejected the existence of the tort in Australian common law:

There is, in my opinion, little to be gained by inquiring whether in English law the foundation of delictual liability is unjustifiable damage or breach of a specific duty. The law of tort has fallen into great confusion, but in the main, what acts and omissions result in responsibility and what do not are matters defined by long-established rule of law from which judges ought not wittingly to depart, and no light is shed upon a given case by large generalizations about them.³⁴

Such a rigid and conservative view of the judicial role in interpreting and fashioning the common law is untenable, at least in the Canadian context.³⁵ That judges

³¹ *Ibid.* at 310.

³² Quebec is widely considered to be a world leader in privacy protection: see P.-A. Comeau & A. Ouimet, "Freedom of Information and Privacy: Quebec's Innovative Role in North America" (1995) 80 Iowa L.R. 651.

³³ See F.P. Walton, "The Comparative Law of the Right to Privacy: The French Law as to the Right of Privacy" (1931) 47 L.Q. Rev. 219 at 220; D.A. Cornfield, "The Right to Privacy in Canada" (1967) 25 U.T. Fac. L. Rev. 103 at 108. Remedies for invasion of private life were first recognized in France almost a century before *Robbins*, *supra* note 2. Today, the delict of invasion of privacy has been codified as a specific privacy right: "Each individual has the right to respect for his private life" (art. 9 C. civ.). See J.M. Hauch, "Protecting Private Facts in France: The Warren and Brandeis Tort is Alive and Well and Flourishing in Paris" (1994) 68 Tul. L. Rev. 1219.

³⁴ *Supra* note 23 at 505.

³⁵ For a recent examination of the nature of Canada's common law, see H.P. Glenn, "The Common Law in Canada" (1995) 74 Can. Bar Rev. 261, especially at 283:

The common law has been open to the particularities of the society around it, open to often distant sources, and tolerant of diversity. ... Today the common law should, logically, continue to exhibit the same characteristics. To fail to do so would be to abandon

should blindly apply tort categories, without reference to the principles underlying such categories, seems to be inviting absurdity and injustice. More to the point, the common law is judicially-created, and is in a constant state of evolution in response to changing social conditions.³⁶ Consider, for example, the relatively recent development of the tort of private nuisance, and the emergence of the tort of intentional infliction of mental distress. In both cases, common-law principles — protection of private property and security of the person, respectively — were employed to provide relief where harm that offended the principle had occurred, yet where existing tort categories afforded no relief.³⁷ Moreover, in two recent cases considering the common-law hearsay rule, the Supreme Court of Canada rejected categorical rigidity in favour of principled analysis.³⁸ These decisions confirm that the common law is a principled system, and that its development has not halted, but can and should continue on a principled basis.

An illustration in the privacy context will reinforce this point. Although ultimately a disappointing case, the decision of the Alberta Court of Appeal in *Motherwell v. Motherwell*³⁹ is the most significant Canadian appellate decision in the area of common-law privacy protection. The appellant subjected her father, brother and sister-in-law (collectively, the respondents) to harassing telephone calls and hostile letters. At trial, the respondents had obtained an injunction against the harassment, and nominal damages. For the Court of Appeal, Clement J.A. held that “the common law demonstrates its continuing ability to serve the changing and expanding needs of our present society.”⁴⁰ He then distinguished between the *principles* of the common law, which he

the common law tradition — to abandon an identity — and equally importantly, to fail to respond to contemporary circumstance.

³⁶ See *Fleming v. Atkinson* (1958), [1959] S.C.R. 513 at 535, 18 D.L.R. (2d) 81, Judson J.: “It has always been assumed that one of the virtues of the common law system is its flexibility, that it is capable of changing with the times and adapting its principles to new conditions.”

³⁷ In the case of private nuisance, a tort remedy was developed for an interference with the enjoyment of property that was *indirect*, and therefore not actionable in trespass (see A.M. Linden, *Canadian Tort Law*, 5th ed. (Toronto: Butterworths, 1993) at 511). In the case of intentional infliction of mental distress, the court in *Wilkinson v. Downton*, [1897] 2 Q.B. 57 [hereinafter *Wilkinson*] recognized tort liability where a defendant commits an act calculated to cause physical harm to the plaintiff, thereby infringing the plaintiff’s “legal right to personal safety” (*ibid.* at 59). This principle was then applied where the harm included nervous shock with physical ramifications.

One might also have regard to the following statement from Lord Reid in *Dorset Yacht Co. v. Home Office*, [1970] A.C. 1004, [1970] 2 All E.R. 294, [1970] 1 Lloyd’s Rep. 453 [hereinafter cited to A.C.], concerning negligence:

[T]here has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognised principles apply to it. *Donaghue v. Stevenson*, [1932] A.C. 562 may be regarded as a milestone, and the well-known passage in Lord Atkin’s speech should I think be regarded as a statement of principle (*ibid.* at 1026-27).

³⁸ See *R. v. Khan*, [1990] 2 S.C.R. 531, especially at 540, 113 N.R. 53, 79 C.R. (3d) 1; *R. v. Smith*, [1992] 2 S.C.R. 915, especially at 930, 15 C.R. (4th) 133

³⁹ (1976), 1 A.R. 47, 73 D.L.R. (3d) 62, [1976] 6 W.W.R. 550 (S.C.A.D.) [hereinafter *Motherwell* cited to D.L.R.].

⁴⁰ *Ibid.* at 68.

characterized as “a general concept of legal rights and duties in an aspect of human activities in which some common element is to be found”,⁴¹ and *categories*, which concern “the application of a principle to particular circumstances, discernible in precedents, which have been found to come within the principle.”⁴² Clement J.A. then argued that simply because the circumstances of a case do not appear to fall within a category does not bar recovery in tort; on the contrary, the novel circumstances may lie sufficiently within the concept of a principle “that consideration of a new category is warranted.”⁴³

Clement J.A. then proceeded to consider the respondents’ claim that the appellant’s actions were a form of nuisance, constituting an invasion of their privacy, specifically an “invasion of privacy by abuse of the telephone system”.⁴⁴ In reliance on the nuisance principle that indirect interference with the use or enjoyment of land should be actionable, he concluded that “protracted and persistent harassment (in the home and office) by abuse of the telephone system” fell within that principle.⁴⁵

Although *Motherwell* constitutes a progressive approach to the development of the common law, it is at the same time of limited value to privacy law. This is because the decision recognizes invasion of privacy as an aspect of private nuisance, which protects *property* interests. Thus, the interests that were undermined by the appellant’s harassing behaviour were “loss or enjoyment of property” or “loss of the amenities of the premises”.⁴⁶ True privacy interests, however, are not proprietary in nature, but are *personal*, rooted in the autonomy, independence and dignity of the individual. Compare the proprietary interests ostensibly grounding liability in *Motherwell* to the sources of fault discussed by Scott J. in *Robbins*: prejudice, humiliation, persecution, emotional disturbance, and, indeed, invasion of privacy itself.⁴⁷ Both *Robbins* and *Motherwell* deal with similar situations — harassing telephone calls and letters — yet the *Robbins* court framed the legal issues in terms of the personal interests of the plaintiff-victim. In *Motherwell*, the victims succeeded because their enjoyment of property was diminished. This is a most artificial manner of characterizing the harm caused to the victims — a point evinced by the Court’s extensive consideration of whether one of the plaintiffs, who was not an owner of the property in question, could nevertheless recover damages in private nuisance.⁴⁸

2. Invasion of Privacy As a Personal Tort in the Common Law

Many commentators have noted that existing common-law torts do afford some protection for privacy interests, but only as incidental to the protection of other inter-

⁴¹ *Ibid.* at 69.

⁴² *Ibid.*

⁴³ *Ibid.* at 69-70.

⁴⁴ *Ibid.* at 74.

⁴⁵ *Ibid.* at 71, 74.

⁴⁶ *Ibid.*

⁴⁷ See *Robbins*, *supra* note 2 at 38, 40, 42.

⁴⁸ See *Motherwell*, *supra* note 39 at 76-78.

ests.⁴⁹ For example, trespass to property might provide a remedy where a defendant has planted a microphone in the plaintiff's residence. However, relief would likely be nominal, and would be granted for the intrusion onto the plaintiff's property, as opposed to an invasion of the plaintiff's private life. In short, similar problems would arise to those encountered in *Motherwell*. Defamation law is also mentioned as protecting privacy. However, defamation is premised on falsity, and serves to protect an individual's interest in reputation.⁵⁰ It therefore bears only a passing relationship to an individual's interest in preserving his private life, or more specifically, in keeping certain *true* aspects of his life within the private realm.

The manner in which a recent British case was resolved by the English Court of Appeal demonstrates the inadequacy of a common-law system that does not recognize a general tort of invasion of privacy grounded in personal interests. In *Kaye v. Robertson*,⁵¹ the plaintiff was a well-known English actor who had suffered head trauma in a serious automobile accident. Despite the signs outside Kaye's hospital room warning that he should not be disturbed, reporters from an English tabloid newspaper, the *Sunday Sport*, entered and photographed him lying in his bed. Kaye sought an injunction to prevent publication of the photographs. In the Court of Appeal, all three judges confirmed that no tort of invasion of privacy existed in English law, but nevertheless noted the injustice of the situation.⁵² The Court found that it could order an injunction against the publication of the photographs and related story on a theory of malicious falsehood. Apparently, the *Sunday Sport* intended to publish the claim that the photographs were taken with Kaye's permission, which was patently untrue.

In reading the decision in *Kaye*, one is struck by the strained, albeit creative, approach of the Court in fashioning a remedy within traditional tort law (for example, the fact that the Court seriously considered the issue of battery by the use of flash photography!). As Basil Markesinis has pointed out,

[Kaye] won, but only just, because judges anxious to do justice were willing "to be persuaded" that something, somehow, should be done. In this, they were

⁴⁹ See P. Burns, "The Law of Privacy: The Canadian Experience" (1976) 54 Can. Bar Rev. 1 at 14-24. See also Cornfield, *supra* note 33 at 107-108; H.J. Glasbeek, "Outraged Dignity - Do We Need a New Tort?" (1967-68) 6 Alta. L. Rev. 77 (Glasbeek argues that the tort of intentional infliction of mental distress might be expanded to a tort of "outraged dignity", which would provide relief for substantial privacy invasions (*ibid.* at 91-94)); W.H. Pedrick, "Publicity and Privacy: Is It Any of Our Business?" (1970) 20 U.T.L.J. 391.

⁵⁰ See *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at 1175, 126 D.L.R. (4th) 129, 25 C.C.L.T. (2d) 89 [hereinafter *Hill* cited to S.C.R.].

⁵¹ (1990), 18 F.S.R. 62 (C.A.) [hereinafter *Kaye*].

⁵² Bingham L.J., for example, stated: "This case nonetheless highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens ... We cannot give the plaintiff the breadth of protection which I would, for my part, wish" (*ibid.* at 70). The Court then proceeded to consider whether an injunction could be granted on the bases of libel (which was rejected because it was unclear whether a jury would conclude at trial that the printing of the photographs was defamatory), battery by reason of the use of flash photography (which was also rejected because it caused Kaye no damage), or passing off (the requirements of which could not be shown since Kaye was not a trader in relation to his accident story).

following other distinguished courts which had tried to put old torts on the procrustean bed in order to protect privacy.⁵³

However, one also must be mindful of the inadequacies of the remedy ordered. If the *Sunday Sport* had intended to publish the photographs alongside a story telling readers the truth, namely that their photographer had burst into Kaye's hospital room uninvited and had taken photographs without permission, then no injunction could have been granted for malicious falsehood. Presumably, even after the injunction, it was still open to the *Sunday Sport* to publish only the photographs.⁵⁴

The fact that Kaye could not recover for an egregious invasion of privacy under English common law seems intolerable, particularly when citizens of countries such as the United States and France benefit from general privacy protection. In Canada, plaintiffs in the same position as Kaye would have a remedy in Quebec, and in those provinces with statutory privacy torts. In other jurisdictions, however, at least until recently, such plaintiffs might have found themselves with no remedy at all because Canadian tort law in the area of privacy had progressed no further than the law in England. Recent developments, though, would indicate that Canadians should not despair.

3. The Emerging Common-Law Right of Privacy in Ontario

As noted earlier, no Canadian appellate court has closed the door to the introduction of a common-law privacy tort. In fact, as of 1996, the general tort of invasion of privacy has emerged in the jurisprudence of the lower courts in Ontario, and has the real potential to be recognized throughout Canada.

The Ontario cases fall into two categories. There are those where a defendant has moved to strike a statement of claim based on the tort of invasion of privacy. Such motions have not met with success, illustrating that the existence of the tort in Ontario

⁵³ B.S. Markesinis, "Our Patchy Law of Privacy — Time to Do Something about It" (1990) 53 Mod. L. Rev. 802 at 804-805 [hereinafter "Patchy Law"]. Markesinis makes a similar comment in his text, B.S. Markesinis, *A Comparative Introduction to the German Law of Torts*, 3d ed. (Oxford: Clarendon Press, 1994) at 416 [hereinafter *The German Law of Torts*].

⁵⁴ The Court of Appeal's approach in *Kaye* should be contrasted with the decisions of two other courts where, in virtually identical circumstances, a remedy was awarded on the basis of invasion of privacy. In Paris, 13 March 1965, *Philippe v. France Éditions*, Gaz. Pal. 1966. 1^{er} sem. Jur. 38 [hereinafter *Philippe* (Paris)], aff'd Cass. civ. 2e, 12 juillet 1966, D.1967.Jur.181, reporters entered the hospital room of the nine-year-old son of a French actor, took photographs, and planned to publish them alongside a story about the boy's illness. The Paris Court of appeal granted injunctive relief, holding that the unauthorized photographs and story were "an intolerable intrusion into the private life of the Philippe family" (*ibid.* at 38). Similarly, in *Barber v. Time Inc.* (159 S.W. 2d 291 (Mo. 1942)), the plaintiff was being treated in hospital for a rare eating disorder when reporters entered her room without permission, and photographed her despite her objections. *Time* magazine published the photographs and an accompanying article entitled "Starving Glutton". The Supreme Court of Missouri confirmed a jury award of \$1500, reasoning that the right of privacy includes "the right to obtain medical treatment at home or in a hospital for an individual personal condition (at least if it is not contagious or dangerous to others) without personal publicity" (*ibid.* at 295).

remains an open question.⁵⁵ More pertinent are those cases in which the general tort of invasion of privacy was found to exist in Ontario common law. Three are noteworthy:

- *Saccone v. Orr* (1981)⁵⁶ — The defendant had recorded conversations with the plaintiff (without the plaintiff's knowledge) and played the recording at a municipal council meeting. Jacobs Co. Ct. J. rejected the defendant's argument that no tort of invasion of privacy existed in Ontario common law. He wrote:

[I]t's my opinion that certainly a person must have the right to make such a claim as a result of a taping of a private conversation without his knowledge and, also, as against the publication of the conversation against his will or without his consent.

Certainly, for want of a better description as to what happened, this is an invasion of privacy and ... 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.⁵⁷

Jacobs Co. Ct. J. then awarded damages to the plaintiff in the amount of \$500.

- *Roth v. Roth* (1991)⁵⁸ — The plaintiffs and defendants were neighbours, and had enjoyed good relations until a dispute arose concerning an access road. The defendants began a campaign of harassment against the plaintiffs, including verbal harassment, physical assault and property damage. Mandel J. considered the application of several torts, including nuisance, trespass, assault, battery and invasion of privacy. He concluded that the cumulative effect of the defendants' actions was so offensive and intolerable as to amount to an invasion of the plaintiffs' privacy.⁵⁹ He emphasized that their privacy right was not rooted in their ownership of property, but rather in their rights as individuals:

It appears to me to make no sense where in certain circumstances as a result of an action of A both the privacy of B and C are invaded, that B would have cause of action because he has a proprietary interest whereas C who is a guest in his house would not.⁶⁰

Having rejected the view that privacy flowed from property rights, Mandel J. held that the common law in Canada does provide a remedy for an invasion of privacy. In his view, echoing on this methodological point the position of the Alberta Court of Appeal in *Motherwell*, the common law should not be confined to existing cate-

⁵⁵ See e.g. *Krouse v. Chrysler Canada Ltd.*, [1970] 3 O.R. 135 at 136, 12 D.L.R. (3d) 463 (H.C.J.), Parker J. ("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."); *Burnett v. R.* (1979), 23 O.R. (2d) 109, 94 D.L.R. (3d) 281 (H.C.J.); *Capan v. Capan* (1980), 14 C.C.L.T. 191 at 197 (Ont. H.C.); *P.F. v. Ontario* (1989), 47 C.C.L.T. 231 (Ont. Dist. Ct.); *Gray v. Filliter* (28 July 1995), (Ont. C.J. (Gen. Div.)) [unreported].

⁵⁶ 34 O.R. (2d) 317, 19 C.C.L.T. 37 (Co. Ct.) [hereinafter *Saccone* cited to O.R.].

⁵⁷ *Ibid.* at 321-22.

⁵⁸ 4 O.R. (3d) 740, 9 C.C.L.T. (2d) 141 (C.J. (Gen. Div.)) [hereinafter *Roth* cited to C.C.L.T.].

⁵⁹ See *ibid.* at 160.

⁶⁰ *Ibid.* at 159.

gories of protection, but instead should be developed in a manner consistent with its spirit and history.⁶¹

- *MacKay v. Buelow* (1995)⁶² — The plaintiff sued her ex-husband after he harassed and intimidated her for a period of four months. His actions included continuous telephone calls and letters, stalking, threatening the plaintiff and her daughter, hanging a used condom inside the plaintiff's residence, videotaping the plaintiff through her bathroom window from a tree, and advising third parties of the existence of pornographic films of the plaintiff. She suffered considerable emotional trauma as a result of the harassment, and by the time of the civil trial, the defendant had already been convicted of several criminal offences arising from his actions. In reliance on *Capan v. Capan*,⁶³ *Motherwell* and *Roth*, Binks J. found that there was an invasion of privacy, a trespass to the person, and the intentional infliction of mental distress. He awarded the plaintiff over \$100,000 in damages.

On the basis of *Saccone*, *Roth* and *MacKay*, then, one might well conclude that a general tort of invasion of privacy, rooted in personal interests such as dignity and autonomy, as opposed to property rights, is now emerging in the common law of Ontario.

C. Constitutional Human-Rights Principles and the Development of the Common Law

It is submitted that the legal analysis undertaken by Mandel J. in *Roth* is essentially correct, and that his analysis supports the recognition of the general tort of invasion of privacy in the Canadian common law. In *Roth*, Mandel J. considered two issues: first, whether a right of privacy exists in Canadian law, and second, whether a remedy exists at common law for a breach of that right by a private actor. In terms of the first issue, Mandel J. relied on the jurisprudence of the Supreme Court of Canada relating to section 8 of the *Charter*.⁶⁴ Specifically, he focused on the Court's decision in *Hunter v. Southam Inc.*,⁶⁵ where Dickson J. (as he then was) held that the section 8 right against unreasonable search or seizure was the constitutional embodiment of the "right to be let alone by other people".⁶⁶ Mandel J. therefore concluded that the right of privacy existed in Canada.⁶⁷ He then determined that a remedy should be afforded for an invasion of privacy by a private party.⁶⁸

At first blush, Mandel J.'s conclusion that the right of privacy exists in Canadian common law because it exists under the constitution might seem like a considerable logical leap. After all, *Charter* rights are not justiciable as between private parties, and

⁶¹ See *ibid.* at 160.

⁶² 11 R.F.L. (4th) 403, 24 C.C.L.T. (2d) 184 (Ont. Gen. Div.) [hereinafter *MacKay*].

⁶³ *Supra* note 55.

⁶⁴ *Supra* note 4. Section 8 reads: "Everyone has the right to be secure against unreasonable search or seizure."

⁶⁵ [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641, 41 C.R. (3d) 97 [hereinafter cited to S.C.R.].

⁶⁶ See *Roth*, *supra* note 58 at 159.

⁶⁷ See *ibid.*

⁶⁸ See *ibid.* at 159-60.

the common law is not itself subject to *Charter* scrutiny save where some state action on the part of the legislature or executive is involved.⁶⁹ However, in light of the Supreme Court of Canada's theory of "*Charter* values", which requires the judiciary to interpret and develop the common law in a manner consistent with the fundamental values of Canadian society enshrined in the *Charter*, Mandel J.'s logical leap seems inevitable.

1. "*Charter* Values" and Constitutional Protection of Private Life

The genesis of the "*Charter* values" approach was *R.W.D.S.U. v. Dolphin Delivery*,⁷⁰ where the Supreme Court first faced the issue of the relationship between the *Charter* and the common law. McIntyre J., for a unanimous Court, concluded that the *Charter* could be asserted against the common law only where a state actor is involved,⁷¹ but he then added,

I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the *Constitution*. The answer to this question must be in the affirmative. In this sense, then, the *Charter* is far from irrelevant to private litigants whose disputes fall to be disposed at common law.⁷²

The "*Charter* values" approach to developing the common law was elaborated in *R. v. Salituro*,⁷³ a case concerning the common-law spousal-incompetency rule. Iacobucci J., writing for the Court, agreed that the common law should be adapted and developed to reflect changing circumstances in society at large, and that such development should occur in light of the societal values embodied in the *Charter*.⁷⁴ He cautioned, however, that courts should be reluctant to "dramatically recast established rules of law", as complex matters are best left to the legislature.⁷⁵ Thus, fundamental change should be avoided, although incremental change to the common law is within the purview of the courts.

In his decision, Iacobucci J. relied heavily on the *Charter*, and in particular, on the general principle of individual liberty found in section 7, and the equality principle

⁶⁹ See generally *R.W.D.S.U. v. Dolphin Delivery*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174, 38 C.C.L.T. 184 [hereinafter *Dolphin Delivery* cited to S.C.R.].

⁷⁰ *Ibid.*

⁷¹ See *ibid.* at 599.

⁷² *Ibid.* at 603.

⁷³ [1991] 3 S.C.R. 654, 50 O.A.C. 125, 9 C.R. (4th) 324 [hereinafter *Salituro* cited to S.C.R.].

⁷⁴ See *ibid.* at 666, 675.

⁷⁵ *Ibid.* at 668. Iacobucci J. further stated:

Where the principles underlying a common law rule are out of step with the values enshrined in the *Charter*, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with *Charter* values, without upsetting the proper balance between judicial and legislative action ... then the rule ought to be changed (at 675).

underlying section 15.⁷⁶ He stated that the rule making an irreconcilably separated spouse an incompetent witness was “inconsistent with the values enshrined in the *Canadian Charter of Rights and Freedoms*” and that preserving the rule “would be contrary to this Court’s duty to see that the common law develops in accordance with the values of the *Charter*.”⁷⁷

In deciding whether or not the Canadian common law should be developed to include a general tort of invasion of privacy, it is surely relevant that the *Charter* includes a personal right of privacy (section 8). In *R. v. Dyment*, the Supreme Court of Canada characterized the section 8 right as follows: “Grounded in a man’s physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order.”⁷⁸ The Court has thus recognized a constitutional right of privacy in section 8 of the *Charter*,⁷⁹ rooted in individual autonomy and dignity, and has identified privacy as being at the very core of liberty in Canadian society. Privacy stands not only as a *Charter* value, but also as a fundamental value of Canadian society.

In light of this pronouncement, one would think that the scales have been tipped in favour of the recognition of a general privacy tort. The principle that the common law should be developed in light of *Charter* values seems to dictate this result. Although the tort’s status will not be resolved definitively until considered by the Supreme Court, it is difficult to imagine that it would be rejected by the same Court that has

⁷⁶ Section 7 of the *Charter*, *supra* note 4, reads: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Section 15(1), *ibid.*, reads: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

⁷⁷ *Salituro*, *supra* note 73 at 671. Two recent decisions from the Court concerning freedom of expression and the common law demonstrate the continuing vitality of the *Charter*-values approach. In both *Dagenais v. C.B.C.* ([1994] 3 S.C.R. 835 at 875-78, 120 D.L.R. (4th) 12, 34 C.R. (4th) 269 [hereinafter *Dagenais* cited to S.C.R.]), and *Hill* (*supra* note 50 at 1169, Cory J.), the Court made extensive reference to the principles underlying various provisions of the *Charter* for the purpose of developing the common law in a manner consistent with those principles. In these cases, as in *Dolphin Delivery* (*supra* note 69) and *Salituro* (*ibid.*), the Court was faced with an extant common-law rule, and had to determine whether that rule was consistent with the values embodied in the *Charter*. This is a different situation from that prevailing in the case of the common-law tort of invasion of privacy, since the privacy debate is now focused on the issue of whether or not there should be a common-law rule, with the actual framing of the rule being a secondary concern. Obviously, however, *Charter* values will be relevant to both matters.

⁷⁸ *Supra* note 14 at 427; see also *R. v. Duarte*, [1990] 1 S.C.R. 30, 65 D.L.R. (4th) 240, 74 C.R. (3d) 281.

⁷⁹ In *R. v. Beare*, [1988] 2 S.C.R. 387, 55 D.L.R. (4th) 481, 66 C.R. (3d) 97 [hereinafter cited to S.C.R.], La Forest J. suggested that the section 7 guarantee of life, liberty and security of the person also includes a right to privacy not unlike that found in section 8 (see *ibid.* at 412). See also *B.(R.) v. Children’s Aid Society*, [1995] 1 S.C.R. 315 at 369, 122 D.L.R. (4th) 1, La Forest J.; *R. v. O’Connor*, [1995] 4 S.C.R. 411, 130 D.L.R. (4th) 235, 44 C.R. (4th) 1, 103 C.C.C. (3d) 1, L’Heureux-Dube J.

characterized privacy as "essential" to the well-being of the individual, and as profoundly significant for social order.⁸⁰

The role of constitutional privacy protection in developing the common law is particularly important when considered together with the principled approach to the common law, as advocated in *Motherwell*, and in the Supreme Court's recent hearsay decisions. The principled approach requires courts to look beyond the rigidified categories of tort law, and to examine the underlying common-law theory from which extant categories have emerged. In this way, new categories may be developed, so long as they are firmly rooted in principle. Even a cursory reading of the Supreme Court's constitutional privacy jurisprudence demonstrates that the Court views privacy as a personal right of the individual, based on autonomy, dignity, liberty and security interests. This constitutional theory relies on the very same personal interests that underlie the tort categories collectively known as "intentional interference with the person" or "the personal torts": assault, battery, false imprisonment, and mental distress.⁸¹ Each of these tort categories is premised on the notion that the individual has the right to be free from interference by third parties, and to live in security and safety. The governing principle of the personal torts is, at its most basic, security of the person.⁸² This, of course, was the point made by Warren and Brandeis when they argued by reference to various tort categories that the common law has always permitted recovery for intrusions on the inviolate personality of the individual.⁸³

⁸⁰ In fact, the Court has already demonstrated its willingness to have recourse to constitutional privacy principles in determining the common-law rights of patients with respect to their medical files. See *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, 93 D.L.R. (4th) 415, 12 C.C.L.T. (2d) 225 [hereinafter cited to S.C.R.], where La Forest J. concluded that as a general principle flowing from the fiduciary nature of the physician-patient relationship, patients are entitled to have access to all their medical records. He justified this (*ibid.* at 148) by relying upon the fact that these "records consist of information that is highly private and personal to the individual", and linking this to the right of privacy recognized in *Dyment* (*supra* note 14 at 429).

⁸¹ See generally Linden, *supra* note 37, c. 2.

⁸² E.J. Bloustein writes in "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" ((1964) 39 N.Y.U. L. Rev. 962):

An intrusion on our privacy threatens our liberty as individuals to do as we will, just as an assault, a battery or imprisonment of our person does. And just as we may regard these latter torts as offensive "to the reasonable sense of personal dignity," as offences to our concept of individualism and the liberty it entails, so too we should regard privacy as a dignitary tort. ...

What distinguishes the invasion of privacy as a tort from the other torts which involve insults to human dignity and individuality is merely the means used to perpetrate the wrong (*ibid.* at 1002-1003 [footnotes omitted]).

⁸³ See *supra* note 5 at 205. H.J. Glasbeek has made a similar observation, in the course of arguing for the extension of the tort of intentional infliction of mental distress to include "outraged dignity". Glasbeek notes that while the personal torts are superficially connected to physical harm, their essence is not bodily integrity *per se*: a battery can occur by *mere touching without damages*; an assault is an apprehension of harm, and compensation is provided for a plaintiff's *fear*; false imprisonment will be actionable even where the plaintiff was *not aware* of her imprisonment at the time it occurred; and mental distress is primarily directed at *psychological suffering* (Glasbeek, *supra* note 49 at 83-

One would expect that a common-law jurisdiction with a system of constitutionally-entrenched human rights, for example the United States or Canada, would be more likely to engage in a principled development of the common law, for two reasons. First, constitutional jurisprudence affords judges many opportunities to consider and elaborate upon principles such as liberty or security of the person which lie at the roots of both constitutional and personal-tort law. The effective result is the cross-pollination of the common law by constitutional principles, even if the common law is not directly subject to constitutional review. In the area of privacy, for example, it is difficult to imagine how Canadian courts could resist applying, in the common-law context, the principles and values asserted by the Supreme Court of Canada in the constitutional context.⁸⁴ In a democratic society where the protection of private life is considered essential to liberty, one would expect the judiciary to be no more tolerant of intrusions on privacy by private persons than by state actors. Second, the judiciary in a system incorporating constitutional human rights will develop considerable expertise in the application of general principles to concrete facts. Because of its constitutional role, such a judiciary will likely be more interventionist, *developing* the law to take into account changing social circumstances, as opposed to merely *applying* extant law.⁸⁵ One would therefore expect such a judiciary to be bolder in reforming the law, yet also acutely aware of the need for principle to serve as a guide.

By recognizing that the *Charter*-values approach to developing the common law is part and parcel of the principled approach, one avoids the potential criticism that the judicial recognition of a general privacy tort would be encroaching on the legislative

87). It is thus incorrect to confine the personal torts to the field of intrusion upon the physical person. Their underlying rationale must be broader, relating to personal interests of a spiritual nature, such as autonomy, liberty, security and dignity. It is certainly notable that when the court in *Wilkinson*, *supra* note 37, applied the principled approach, and thereby developed the tort of intentional infliction of mental distress, the principle relied upon was "personal safety". In *Tucker*, *supra* note 23, the New Zealand High Court decided to adapt the principle underlying *Wilkinson* for the purpose of developing a common-law privacy tort.

⁸⁴ One example of this phenomenon is the use of *Charter* privacy values in interpreting the terms of collective agreements. In *Re Doman Forest Products Ltd.* (1990), 13 L.A.C. (4th) 275 (B.C.), the employer placed the grievor under constant surveillance because of chronic absenteeism. The grievor was later discharged, and at an arbitration to determine the validity of the discharge, the employer sought to introduce into evidence videotapes obtained during the surveillance. In determining the admissibility of the videotapes, the arbitrator stated:

[I]t seems to me that while s. 8 of the *Charter* does not apply to this dispute, as an adjudicator I am called upon to bear in mind those fundamental *Charter* values now articulated by the Supreme Court of Canada ... As already noted, the values extracted from those decisions are clear. Electronic surveillance *by the state* is a breach of an individual's right to privacy and will only be countenanced by application of the standard of reasonableness enunciated in *Hunter v. Southam Inc.*

I must now relate those values to the realm of a private dispute between an employer and an employee whose relationship is governed by the terms of a collective agreement (*ibid.* at 279).

⁸⁵ See S.M. Skala, "Is There a Legal Right to Privacy?" (1977) 10 U. Queensland L.J. 127 at 143, comparing the constitutional roles of American judges with those of the Anglo-Australian judiciary.

field. In *Salituro*, Iacobucci J. warned that while the common law should be developed in light of *Charter* values, the courts should be reluctant to modify dramatically the common law, and should leave matters of complexity to the legislatures.⁸⁶ No test has yet been proffered in terms of what is too “dramatic” or “complex” for judicial elaboration within the common law. However, developing a new category of personal-tort protection, namely invasion of privacy, on the basis of a constitutional theory that places privacy on the same theoretical plane as the existing personal-tort categories, resembles more an incremental adjustment to the common law than a fundamental or dramatic shift. Perhaps the adoption of an entirely new common-law *principle* would implicate the *Salituro* warning, but the development of a new *category*, premised on a traditional common-law principle, is hardly earth-shattering. In fact, in both the United States and Germany, civil privacy protection has been judicially-developed, and has been influenced extensively by the principles underlying constitutional privacy protection. Consideration of the experience of these two jurisdictions demonstrates that the *Charter*-values approach to developing Canadian common-law privacy protection is sound.

2. The American Experience

Although there is no mention of constitutional privacy protection in Warren and Brandeis's 1890 article, it is important to keep in mind that they borrowed the concept of “the right to be let alone” from Judge Thomas Cooley, himself a respected commentator in both tort and constitutional law fields.⁸⁷ Twenty years before Warren and Brandeis had written of tort privacy, Cooley had linked the Fourth Amendment of the U.S. Constitution to privacy, characterizing it as securing “to the citizen immunity in his home against the prying eyes of the government”.⁸⁸

In the first significant American decision to recognize the common-law tort of invasion of privacy, *Pavesich v. New England Life Insurance Co.*,⁸⁹ constitutional principles were front and centre. *Pavesich* is a sweeping decision, in which Cobb J., for the Georgia Supreme Court, linked privacy to the principles of personal security and liberty which form the basis of both the Bill of Rights and the common law. He then identified the right to privacy as flowing both from natural law, and from the constitutional guarantee in the Fourteenth Amendment that no person shall be deprived of liberty except by due process of law.⁹⁰ He further observed that the Fourth Amendment right against unreasonable search and seizure is a constitutional expression of the

⁸⁶ See *supra* note 73 at 668.

⁸⁷ See T.M. Cooley, *Law of Torts*, 2d ed. (Chicago: Callaghan, 1888); T.M. Cooley, *Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (Boston: Little Brown, 1868) [hereinafter *Treatise*]. Judge Cooley is discussed in Gormly, *supra* note 10 at 1359-60.

⁸⁸ *Treatise*, *ibid.* at 299.

⁸⁹ 50 S.E. 68 (Ga. 1905) [hereinafter *Pavesich*]. The case concerned the unauthorized use by the defendant of the plaintiff's likeness in a newspaper advertisement. *Pavesich* is cited with approval in virtually every state-court decision recognizing the common-law privacy tort.

⁹⁰ See *ibid.* at 70-71. See U.S. Const. amend. XIV.

“ancient right” to privacy over the home, and concluded that “[t]he liberty of privacy exists, has been recognized by the law, and is entitled to continual recognition.”⁹¹ What is clear from Cobb J.’s decision in *Pavesich* is that he viewed the right of privacy as an aspect of the liberty guaranteed by the Fourth and Fourteenth Amendments. He took the view that the common-law tort is itself premised on the very same liberty principle, and should therefore be able to accommodate a right of privacy.⁹²

The interplay between the common law of privacy, and constitutional privacy protection, has continued in American jurisprudence throughout this century. Most notably, in *Olmstead v. United States*,⁹³ Brandeis J.’s dissenting view of the Fourth Amendment as a personal-privacy right linked to human dignity repeated his earlier theory of the common-law privacy tort, yet stood in sharp relief to the Supreme Court majority’s position that an infringement of the Fourth Amendment could only occur through an actual trespass by state officials onto the defendant’s private property. Since the case concerned the wiretapping of telephone conversations away from the defendant’s premises, the majority’s view meant that the Fourth Amendment was not even implicated. Forty years later, however, this narrow, property-centred view of the Fourth Amendment was repudiated by the United States Supreme Court, in favour of the broader position advocated by Brandeis J.⁹⁴ The result, then, is that American privacy protection in both the common-law and constitutional contexts is now premised on the very same interests of human dignity and liberty.⁹⁵

3. The German Experience

Unlike the American experience, which has been characterized by a more subtle interplay between constitutional and common-law privacy principles, the German experience has seen an almost direct transplantation of constitutional privacy rights into the civil context.

⁹¹ *Pavesich, ibid.* at 71-72.

⁹² Another example of the use of constitutional principles in developing civil privacy protection is *Melvin v. Reid*, 297 P. 91 (Cal. Dist. Ct. App. 1931). There, the plaintiff claimed a violation of her right of privacy when the defendants produced a motion picture based on her life. She had been a prostitute, but had subsequently rehabilitated herself. The Court found that she enjoyed a right of privacy on the basis of article 1 of the Constitution of California which guaranteed to her the rights of “life and liberty”, and the right to pursue and obtain “safety and happiness”. The Court held:

The right to pursue and obtain happiness is guaranteed to all by the fundamental law of our state. This right by its very nature includes the right to live free from the unwarranted attack of others upon one’s liberty, property, and reputation ... Whether we call this a right of privacy or give it any other name is immaterial ... (*ibid.* at 93).

⁹³ 277 U.S. 438 (1927).

⁹⁴ See *Katz v. United States*, 389 U.S. 347 (1967) [hereinafter *Katz*].

⁹⁵ In *Goldstein v. United States*, 316 U.S. 114 (1942), Murphy J. (dissenting) actually cited the Warren and Brandeis article (*supra* note 5), and several tort cases including *Pavesich*, in defining the scope of privacy protection afforded by the Fourth Amendment. His reasons were ultimately vindicated in *Katz, ibid.* See also Bloustein, *supra* note 82 at 995.

Following World War II, and the atrocities of the Nazi regime, the Constitution of Bonn,⁹⁶ including a Bill of Rights guaranteeing the right of privacy, was adopted.⁹⁷ In 1958, the German Constitutional Court rendered its decision in *Lüth*,⁹⁸ a private dispute raising freedom of expression issues. The Court was therefore required to confront the issue of the justiciability of constitutional rights as between private actors. Despite reaching the conclusion that the main purpose of the Bill of Rights was to constrain public power, the Court nevertheless concluded:

[F]ar from being a value-free system the Constitution erects an objective system of values in its section on basic rights, and thus expresses and reinforces the validity of the basic rights. This system of values, centring on freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision. It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.⁹⁹

Thus, the German Constitutional Court adopted the principle of “*Drittwirkung*”, or “indirect effect”: while constitutional *rights* are not directly justiciable in private disputes, constitutional *values* inform the interpretation and application of the *Civil Code*.¹⁰⁰ The Court thought that this indirect application of the basic constitutional

⁹⁶ *Grundgesetz* (23 May 1949). See “Germany”, ed. by G.H. Flanz in A.P. Blaustein & G.H. Flanz, eds., *Constitutions of the Countries of the World*, vol. 7 (New York: Oceana, 1994) [hereinafter “Germany”]. “*Grundgesetz* is sometimes literally translated as Basic (Constitutional) Law; and it was so called in German since the belief was that a Constitution (*Verfassung der Bundesrepublik Deutschland*) could only be drafted once Germany was reunited” (*The German Law of Torts, supra* note 53 at 3n). Following reunification, the Constitution of Bonn became the constitution of the united Germany (see “Germany”, *ibid.*).

⁹⁷ See “Germany”, *ibid.* at 106-14. In the area of privacy, several rights-granting articles are relevant:

Article 1(1) The dignity of man is inviolable. To respect and protect it shall be the duty of all public authority (*ibid.* at 106).

Article 2(1) Everybody has the right to self-fulfilment in so far as they do not violate the rights of others or offend against the constitutional order or morality (*ibid.*).

Article 10(1) Privacy of correspondence, posts and telecommunications is inviolable (*ibid.* at 109).

Article 13(1) Privacy of the home is inviolable (*ibid.* at 111).

⁹⁸ BVerfGE 7, 198 (1958), trans. by T. Weir in *The German Law of Torts, supra* note 53 at 352 [hereinafter *Lüth* cited in translation to *The German Law of Torts*]. The case arose after Erich Lüth, a Hamburg official, called for a boycott of a new film by Veit Harlan, who had produced racist films for the Nazis. Harlan sued under a general provision (§826) of the German *Bürgerliches Gesetzbuch* (*Civil Code*, hereinafter also BGB), which provides a remedy against a person “who wilfully causes damage to another in a manner *contra bonos mores*” (trans. in *The German Law of Torts, ibid.* at 12). Lüth defended by relying on his constitutional free-speech right. The case is discussed in detail in P.E. Quint, “Free Speech and Private Law in German Constitutional Theory” (1989) 48 Md. L. Rev. 247 at 252-90.

⁹⁹ Lüth, *ibid.* at 355 [references already omitted in translation].

¹⁰⁰ Quint explains “indirect effect” as follows:

rights would be most relevant to certain general clauses of the *Civil Code*, where a defendant's actions are to be measured against standards of propriety or reasonableness:

"General clauses" ... allow the courts to respond to this influence [of the value-system of the basic constitutional rights] since in deciding what is required in a particular case by such social commands, they must start from the value-system adopted by the society in its constitution at that stage of its cultural and spiritual development. The general clauses have thus been rightly described as "points of entry" for basic rights into private law.¹⁰¹

While the *Lüth* decision was rendered in 1958, the "indirect effect" approach had already been adopted by the Federal Supreme Court in *Schacht*¹⁰² for the purpose of extending constitutional privacy protection into the civil field. There, the plaintiff attorney complained that his right of personality had been infringed by the defendant's newspaper. The plaintiff had written a letter to the newspaper on behalf of a client, demanding a retraction for an earlier article. Instead of printing the retraction, the newspaper printed the plaintiff's actual letter in its "Letters from Readers" column. The Supreme Court characterized the defendant's actions as "intolerable" and "misleading".¹⁰³ The plaintiff had failed in the Court of Appeal because that court took the view that German law contained no positive statutory protection of a general personality right. The Supreme Court disagreed. The Court reasoned (foreshadowing the *Lüth* decision) that because the constitution recognized the right of a human being to have his dignity respected and the right of personality,¹⁰⁴ "the general personality right must be regarded as a constitutionally guaranteed fundamental right", and should therefore be recognized within §823 I, the general delict provision of the German *Civil Code*.¹⁰⁵

In a public law action between an individual and the state, a constitutional right can directly override an otherwise applicable rule of public law. In private law disputes between individuals, in contrast, constitutional rights were said to "influence" rules of civil law rather than actually to override them. A certain intellectual content "flows" or "radiates" from the constitutional law into the civil law and affects the interpretation of existing civil law rules (*supra* note 98 at 263 [footnote omitted]).

¹⁰¹ *Lüth*, *supra* note 98 at 355 [references already omitted in translation].

¹⁰² BGHZ 13, 334 (1954), trans. by F.H. Lawson & B.S. Markesinis in *The German Law of Torts*, *supra* note 53 at 376 [hereinafter *Schacht* cited in translation to *The German Law of Torts*].

¹⁰³ *Ibid.* at 377.

¹⁰⁴ *Grundgesetz*, *supra* note 96, art. 1(1) & 2(1).

¹⁰⁵ The decision in *Schacht* was confirmed in *Herrenreiter* (BGHZ 26, 349 (1958), trans. by F.H. Lawson & B.S. Markesinis in *The German Law of Torts*, *supra* note 53 at 380 [hereinafter cited in translation to *The German Law of Torts*]), where the plaintiff, a show jumper, complained of the unauthorized use by the defendant of his photograph in an advertisement for a sexual potency drug. The Supreme Court (First Civil Division) found that the plaintiff had the right to control his image as part of his personality right, and further held that the general constitutional right to one's personality "also possesses validity within the framework of the civil law and enjoys the protection of §823 I BGB" (*ibid.* at 383). See also *Lebach*, BVerfGE 35, 202 (1973), trans. by F.H. Lawson & B.S. Markesinis in *The German Law of Torts*, *ibid.* at 390 [hereinafter *Lebach* cited in translation to *The German Law of Torts*].

The result, then, is that "the right to be let alone" has emerged in German civil law in a manner analogous to its acceptance in American common law. In both cases, the foundation of the right was identified in certain fundamental societal values that had been given constitutional expression. In the United States, privacy was linked in *Pavesich*¹⁰⁶ to the constitutional guarantee of liberty and to Fourth Amendment protection against state intrusions into private realms such as the home. In Germany, privacy was linked in *Schacht*¹⁰⁷ to the constitutional protection of human dignity and personality. Thus, the constitutional values of liberty and dignity provided the foundation on which civil privacy rights could be developed judicially.

The conclusion to be drawn from the American and German experiences is that the "indirect effect" approach of developing private law in light of values embodied in constitutional human rights, otherwise known in Canada as the *Charter*-values approach, is a feasible and even compelling means by which to introduce the general tort of invasion of privacy into the Canadian common law. This, as noted above, is essentially the analysis of Mandel J. in *Roth*.¹⁰⁸ It is an analysis that fits squarely within the traditional role of the judiciary to develop the common law on a principled basis.

II. Developing a Common-Law Privacy Tort by Reference to *Charter* Privacy Jurisprudence and *Charter* Values

A. *The Definitional Debate over Privacy*

The academic literature on privacy evinces considerable controversy over the true nature and scope of the "right to be let alone". This is largely a function of the fact that privacy has been pitched from its inception as a broad right protecting certain personal interests deemed "private". Many commentators have sought to bring greater specificity to the concept of privacy, yet it seems that each privacy commentator forwards a different definition of privacy and at least five reasons why every other definition is inadequate.¹⁰⁹ Consider a small sample of these competing definitions, all of which build on Judge Cooley's "right to be let alone":

1. Privacy is the legally-recognized freedom or power of an individual to determine the extent to which another individual may (a) obtain or make use of his ideas, writings, names, likeness, or other indicia of identity, or (b) obtain or reveal information about him or those for whom he is personally responsible, or (c) intrude physically or in more subtle ways into his life space and his chosen activities.¹¹⁰

¹⁰⁶ *Supra* note 89.

¹⁰⁷ *Supra* note 102.

¹⁰⁸ *Supra* note 58.

¹⁰⁹ See Gormly, *supra* note 10 at 1335; W.A. Parent, "Recent Work on the Concept of Privacy" (1983) 20 *Am. Phil. Q.* 341.

¹¹⁰ See W.M. Beaney, "The Right to Privacy and American Law" (1966) 31 *L. & Contemp. Probs.* 253 at 254.

2. Privacy is the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about themselves is to be communicated to others.¹¹¹
3. Privacy is a complex of three independent and irreducible elements: secrecy (the extent to which an individual is known), anonymity (the extent to which an individual is the subject of attention), and solitude (the extent to which others have physical access to an individual).¹¹²
4. Privacy concerns personal information regarding aspects of life which reasonable members of society would respect as being such that an individual is ordinarily entitled to keep them to himself, whether or not they relate to his mind or body, to his home, to his family, to other personal relationships, or to correspondence or documents.¹¹³
5. Privacy is control over when and by whom the various parts of us can be sensed by others.¹¹⁴

Such definitional diversity perhaps reflects the futility of attempting to devise a "perfect" privacy definition. Any such effort would require some means of distinguishing between public and private aspects of life, yet that distinction is circumstantial. Thus, any definition of privacy must have a high level of generality. Some have viewed such generality as a stumbling block to the judicial recognition of the common-law privacy tort. For example, Leon Brittan has argued against the recognition of the tort, because "neither in its common law nor in its statutory form does (privacy) provide a logical or workable criterion".¹¹⁵ The Younger Committee (1972) echoed this view in recommending against the introduction of the tort in England:

[T]he kinds of privacy to which importance is attached and the intrusions against which protection is sought differ so widely from one individual to another and from one category to the next that it is not so far been found easy to fit the concept tidily into a single legal framework, so as to give it reasonably comprehensive recognition and protection through the civil and criminal law.¹¹⁶

¹¹¹ See Westin, *supra* note 11 at 7. This definition was adopted in the *Report of the Ontario Commission on Freedom of Information and Individual Privacy*, vol. 3 (Toronto: Queen's Printer of Ontario, 1980) (Chair: D.C. Williams); See also L. Lusky, "Invasion of Privacy: A Clarification of Concepts" (1972) 72 *Colum. L. Rev.* 693 at 709.

¹¹² See Gavison, *supra* note 16 at 433-34.

¹¹³ See U.K., Home Office, "Report of the Committee on Privacy and Related Matters" Cm. 1102 (1989-90) (Chair: D. Calcutt) at 49 [hereinafter Calcutt Committee].

¹¹⁴ See R.B. Parker, "A Definition of Privacy" (1974) 27 *Rutgers L. Rev.* 275 at 283-84, 290.

¹¹⁵ L. Brittan, "The Right of Privacy in England and the United States" (1963) 37 *Tul. L. Rev.* 235 at 267.

¹¹⁶ Home Office, Lord Chancellor's Office, Scottish Office "Report of the Committee on Privacy" (London: Her Majesty's Stationery Office, July 1972) (Younger Committee) (Chair: K. Younger) at 5 [hereinafter Younger Committee]; see also Parliament of the Commonwealth of Australia, "Report on the Law of Privacy" (Parliamentary Paper No. 85) by W.L. Morison (Canberra: The Government Printer of Australia, February 1973).

Such a conclusion seems rather strange given that civil protection of private life has emerged in the American common law and in the Quebec, French and German civil law, and has found expression in numerous privacy statutes.¹¹⁷ Clearly, the lack of a precise, exhaustive definition of privacy has not been a bar to its legal protection in a variety of contexts. Indeed, the report of England's Calcutt Committee (1990) repudiated the views of the Younger Committee on the issue of defining privacy:

We accept that there is little possibility of producing a precise or exhaustive definition of privacy or, for that matter, public interest. We have taken this into account when examining proposals for additional remedies, whether statutory or non-statutory. Nevertheless, many other legal concepts, such as defamation or negligence, are workable though incapable of precise or exhaustive definition. The courts have been able to develop a detailed case law, as they have done on privacy in other countries.¹¹⁸

Although the Calcutt Committee did not recommend the introduction of a privacy tort, preferring other options such as media self-regulation, the Committee stressed that it was possible to define privacy adequately, and that "[o]ur grounds for recommending against a new tort do not, therefore, include difficulties of definition".¹¹⁹

If privacy is to be defined for the purpose of a Canadian version of the common-law tort, certain considerations should be kept in mind. Foremost among these is that legal perfection is not the standard by which the adequacy of any such definition should be assessed. In fact, a flexible and general privacy definition is preferable in order to accommodate the diverse circumstances in which the private life of an individual may be compromised.¹²⁰ Writing on the subject of constitutional vagueness, Gonthier J. has made the point that precision in legislative drafting may be difficult in situations where a statute is intended to deal with a complex subject matter and a wide range of activities, not all of which are foreseeable at the time of the statute's enactment. Instead, he noted, the legislature may properly frame a statute broadly, and may rely on the "mediating role of the judiciary", in accordance with which the judiciary will give substance to general provisions through interpretation.¹²¹ Although made in

¹¹⁷ All the Canadian provincial privacy statutes provide examples of invasions of privacy, but none attempt to define privacy. In fact, all four statutes essentially declare that the tort of invasion of privacy exists. Section 3(1) of Newfoundland's *Privacy Act* (*supra* note 2) is typical: "It is a tort, actionable without proof of damage, for a person, wilfully and without claim of right, to violate the privacy of an individual." See also *Privacy Act 1993* (New Zealand), N.S. Stat. 1993, No. 28.

¹¹⁸ *Supra* note 113 at 6.

¹¹⁹ *Ibid.* at 48-49. See also Lord Chancellor's Department, "Infringement of Privacy" (Consultation Paper) (July 1993).

¹²⁰ See P.A. Freund, "Privacy: One Concept or Many" in J.R. Pennoch & J.W. Chapman, eds., *Privacy* (New York: Atherton Press, 1971) (NOMOS 13) 197. See also Burns, *supra* note 49, who argues that the best approach is to regard privacy as a principle of flexibility, and to articulate and elaborate upon this principle through case law. He terms this an "open-textured" approach, and observes, "It may not be entirely satisfactory from a theoretician's perspective but from the viewpoint of efficiency and simplicity it is arguably best" (*ibid.* at 11).

¹²¹ See *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 at 1070-71, 125 D.L.R. (4th) 385, 41 C.R. (4th) 147 (S.C.C.); see also *R. v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 at 641, 93 D.L.R. (4th) 36, 15 C.R. (4th) 1 (S.C.C.).

relation to legislation, Gonthier J.'s point is equally relevant to the common law, where experience demonstrates the practical benefits of flexible statements of principle (such as the "neighbour principle" from *Donaghue v. Stevenson*¹²²) over rigidified categories of protection.¹²³ One might conclude, to borrow the statutory vagueness test adopted by Gonthier J., that a common-law definition of privacy will be sufficient if it provides the basis for meaningful legal debate. The "mediating role of the judiciary" can certainly be relied upon in applying a broadly-framed privacy definition.¹²⁴

Furthermore, a general common-law definition of privacy will not be applied by Canadian common-law courts *in abstracto*. On the contrary, the courts may draw on a wealth of jurisprudence from the United States, France, Germany and, perhaps most significantly, Quebec, and make use of legal principles flowing from the four provincial privacy statutes.¹²⁵ Because of Canada's dual common- and civil-law heritage, our courts are uniquely placed to assimilate privacy law from a variety of jurisdictions. In fact, recourse to civilian privacy jurisprudence may provide an important counterbalance to the American law, particularly in cases where privacy and free speech are seen to be in conflict.

B. Defining a Canadian Common-Law Tort of Privacy

1. Adopting the *Charter* Definition of Privacy

The most significant consideration in defining privacy within the common law in Canada is that the Supreme Court has already adopted a definition of privacy for the purpose of applying section 8 of the *Charter*. In *Dyment*, La Forest J. wrote that the first challenge in defining privacy "is to find some means of identifying those situations where we should be most alert to privacy considerations."¹²⁶ To this end, he adopted the concept of "zones of privacy", and identified three such zones: territorial, personal and informational.¹²⁷ Territorial privacy refers to places, such as the home,

¹²² *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562, All E.R. Rep. 1 (U.K.).

¹²³ See text above, accompanying notes 32-43.

¹²⁴ I would suggest the following definition: "Privacy is a condition of control enabling the individual to prevent unreasonable access by others to private objects, and the right of privacy is the right of the individual to assert that control".

¹²⁵ Although the statutory torts and the common-law tort appear to cover the same legal ground, it is possible that the common-law tort will perform a gap-filling role in the case of Manitoba. That province's *The Privacy Act*, *supra* note 2, requires a "substantial" invasion of privacy before the statutory tort is engaged (s. 2(1)) (see *Bingo Enterprises v. Price Waterhouse* (1986), 41 Man. R. (2d) 19, 26 D.L.R. (4th) 604 (C.A.)). Since the common-law privacy tort would not necessarily require a "substantial" violation of privacy, it might yet play a role in Manitoba. On this point, see E.F. Geddes, "The Private Investigator and the Right to Privacy" (1989) 27 Alta. L. Rev. 256 at 287-88.

¹²⁶ *Supra* note 14 at 428.

¹²⁷ La Forest J. adopted this formulation of privacy from *Privacy and Computers* (A Report of a Task Force Established Jointly by Department of Communications/Department of Justice) (Ottawa: Information Canada, 1972) at 12-14 [hereinafter *Privacy and Computers*].

that are typically considered to be private. Personal, or "corporeal", privacy is concerned with the human body. Finally, informational privacy

"... derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.¹²⁸

Of course, privacy in these three "zones" is not absolute. The principle of a "reasonable expectation of privacy" is controlling. Thus, while an invasion of one of the privacy zones will immediately raise concerns, the role of a court will be to determine whether, given all the circumstances, a reasonable person would have expected to enjoy privacy, and therefore should have been able to rely on her privacy right to repel the invasion.¹²⁹

The *Dymont* approach to privacy is valuable because it identifies the areas in which we should be vigilant in protecting private life, while also ensuring flexibility in privacy law to take into account diverse circumstances. The same approach should be adopted within Canadian common law. In fact, such an approach would be preferable to the simple importation of the American tort of invasion of privacy. The *Restatement (Second) of Torts*¹³⁰ describes the tort of invasion of privacy as "a complex of four distinct wrongs" which are related to each other because "each involves an interference with the interest of the individual in leading, to some reasonable extent, a secluded and private life."¹³¹ The four "wrongs" are: (1) unreasonable intrusion upon the seclusion of another (*i.e.*, intrusion); (2) appropriation of the other's name or likeness (*i.e.*, appropriation); (3) unreasonable publicity given to the other's private life (*i.e.*, publicity); and (4) publicity that unreasonably places the other in a false light (*i.e.*, false light).¹³²

When critically evaluated, these four wrongs are not mutually exclusive. The appropriation tort should properly be considered an aspect of publicity: an element of the plaintiff's personality has been thrust into the public eye against his will.¹³³ Additionally, the recognition of "false light" as a distinct privacy category tends to muddy the

¹²⁸ *Supra* note 14 at 429-30, citing *Privacy and Computers, ibid.* at 13.

¹²⁹ See *Dymont, ibid.* at 428, La Forest J. citing Dickson J. in *Hunter v. Southam Inc.*, *supra* note 65 at 159-60. La Forest J. stated that "[c]laims to privacy must, of course, be balanced against other societal needs", and agreed, as evidenced in his citation of Dickson J., that such balancing is central to the concept of a reasonable expectation of privacy.

¹³⁰ *Restatement (Second) of Torts* §652 (1977).

¹³¹ *Ibid.* at §652A.

¹³² *Ibid.*; this description of the tort comes from W.L. Prosser, "Privacy" (1960) 48 Cal. L. Rev. 383.

¹³³ Prosser has argued that "appropriation" is distinct from intrusion, publicity and false light because the interest protected is more proprietary than mental (see *ibid.* at 406). If this is the case, then "appropriation" is not in fact a category of invasion of privacy. However, Bloustein has strongly disagreed with Prosser, arguing that the interest protected in the "appropriation" cases is not proprietary, but is identical to that protected in the publicity cases: individual dignity (*supra* note 82 at 986).

waters by introducing an unnecessary element of falsity into the privacy equation. It would be preferable to treat "false light" cases either as defamation or publicity actions: defamation where the plaintiff's reputation is impugned by a statement alleged to be false, and publicity where the plaintiff complains that a statement, regardless of its veracity or falsity, has drawn unwanted public attention to him and thereby exposed his private life.¹³⁴ Furthermore, the "publicity" aspect of the privacy tort should be distinguished from the tort already recognized by the Ontario Court of Appeal in *Krouse v. Chrysler Canada*.¹³⁵ The *Restatement* can, however, provide guidance in defining the nature and scope of a Canadian common-law privacy tort by showing the different ways in which privacy can be invaded, thus triggering tort liability. Essentially, there are two modes of invasion: public *intrusion into* a zone of privacy, and public *exposure of* a zone of privacy. These will be elaborated upon below, in the attempt to develop the requirements of a Canadian common-law privacy tort.

2. An Unreasonable Invasion of a Private Object

In light of the principles from *Dymont*, the following three-part formulation seems appropriate for analyzing an invasion of privacy. A plaintiff may recover where:

1. The plaintiff has a personal interest falling within one of the zones of privacy (a private object);
2. The defendant has, intentionally or recklessly,¹³⁶ acted in a manner which has compromised the private object (an invasion of a private object); and
3. In the circumstances, the invasion of the private object was unreasonable (an unreasonable invasion of a private object).

Each of these three requirements will be discussed in turn.

¹³⁴ The Younger Committee stated, "We do not support the view of those who argue that the publication of an untruth about a person should be treated by the law as an invasion of privacy rather than under the heading of defamation ... We believe that the concepts of defamation and intrusion into privacy should be kept distinct from one another" (*supra* note 116 at 21). See also G. Dworkin, "The Common Law Protection of Privacy" (1967) 2 U. Tasmania L.R. 418 at 426; T.L. Yang, "Privacy: A Comparative Study of English and American Law" (1966) 15 I.C.L.Q. 175 at 185. Some American state courts have doubted that "false light" should be included as a distinct category of invasion of privacy (see e.g. *Hardge-Harris v. Pleban*, 741 F. Supp. 764 at 776 (E.D. Mo. 1990)).

¹³⁵ *Supra* note 24. The tort recognized in *Krouse* was of a proprietary nature, linked to an individual's exclusive right to exploit his personality commercially. However, with the recognition of a general common-law tort of invasion of privacy, a plaintiff in the position of *Krouse* would have an action for the unauthorized public exposure of his photograph, and could therefore avoid a claim based on the *commercial value* of his personality.

¹³⁶ Invasion of privacy is an intentional tort, like the other personal torts (i.e. assault, battery, etc.) (see generally *Linden*, *supra* note 37, c. 2). See also *Restatement*, *supra* note 130, §652B. I leave aside the possibility of a negligent invasion of privacy, grounded in the "neighbour principle". Some American states have recognized this, however (see *New Summit Associates v. Nistle*, 73 Md. App. 351 (Md. Ct. Spec. App. 1991)).

a. *Private Object*

When La Forest J. wrote of the “zones of privacy” in *Dyment*, his purpose was to identify the circumstances in which we should be particularly concerned about invasions of privacy. For greater specificity, certain private “things”, or “private objects”, fall within these zones, and can be identified. S.I. Benn has described the concept of private objects as follows:

“Private rooms”, “private affairs”, “private correspondence” belong to the category of objects of privacy rights. There are legal, moral or conventional norms that constitute reasons not to try to share or participate in such objects without the permission of the specified holder of the privacy right.¹³⁷

The following is an illustrative, though certainly not exhaustive, list of private objects within the three privacy zones:

- The territorial zone: the home, a hotel room, a hospital room, a public-washroom stall, a phone booth;
- The personal zone: the body, image (photographs or other representations), voice, name;
- The informational zone: matters related to a person’s health, age, sexual orientation, a diary, medical files, employment records.

The “subject” of privacy, namely the plaintiff in an invasion-of-privacy action, must be able to point to some “object” falling within a zone of privacy in order to succeed in her claim. To illustrate, the *Valiquette* case¹³⁸ involved the informational zone of privacy. The private object in *Valiquette* was personal information about the plaintiff’s health and sexual orientation, matters generally recognized as private and intimate. However, a case need not be limited to objects within a single zone of privacy. In *Kaye*,¹³⁹ for example, the invasion of privacy concerned objects within all three privacy zones. First, the actor’s hospital room, being a private object of a territorial nature, was invaded. Second, details about his health were obtained, and like *Valiquette*, he had a claim that such details fell within his informational zone of privacy. Third, reporters took photographs of him, thereby capturing his image, an object within the personal zone.

Ultimately, it may be possible to identify several private objects which have been implicated in a given case. It should be stressed, however, that the identification of a private object is necessary, but not itself sufficient, to ground liability for an invasion of privacy. It is simply the first step in the analysis, assisting in the determination of the aspect of private life which has allegedly been invaded. Whether or not a privacy invasion has occurred, and whether or not the plaintiff is entitled to rely on a reason-

¹³⁷ S.I. Benn, “The Protection and Limitation of Privacy” (1978) 52 *Austl. L.J.* 601 at 602. See also the sophisticated zonal approach of the California Court of Appeal in *Hill v. National Collegiate Athletic Association*, 26 *Cal. Rptr.* 2d 834 at 856 (1994).

¹³⁸ *Supra* note 30.

¹³⁹ *Supra* note 51.

able expectation of privacy in the circumstances, are separate questions to be considered.

b. Invasion

As noted above, the private nature of an object must be compromised intentionally (or recklessly) to ground "an invasion" of privacy. The *Restatement* assists in identifying the circumstances in which such an invasion, or compromise, will occur. There are two, public intrusion and public exposure. These are also found in the Quebec jurisprudence. In *Valiquette*, Viau J. observed that the right to respect of private life found in section 5 of the Quebec's *Charter of Human Rights and Freedoms*¹⁴⁰ comprehends two sub-rights: the right of solitude and the right of anonymity.¹⁴¹ This is simply another way of saying that an individual may assert his privacy right to repel a public intrusion into his private life (thereby protecting his solitude), or to block the public exposure of his private life (thereby protecting his anonymity).

i. Public Intrusion

The common law has traditionally afforded some protection against invasions of the territorial zone of privacy through actions based on property rights, like trespass and nuisance.¹⁴² However, the common law does not provide any protection against: (1) intangible intrusions into the territorial zone (e.g., eavesdropping on a private conversation taking place in the plaintiff's home through the use of an ultrasensitive microphone positioned some distance away) and (2) tangible intrusions into the territorial zone where the plaintiff has no property right on which to base a claim in trespass (e.g., the invasion of a hospital room, as in *Kaye*¹⁴³). Thus, in either of these cases, the tort of invasion of privacy would provide a welcome basis for relief.¹⁴⁴

In terms of the personal zone of privacy, the common-law tort of battery provides relief in cases of physical intrusion upon a plaintiff's body. However, the privacy tort would significantly expand the scope of legal protection in the personal zone, since it would move tort law away from a focus on physical harm, and refocus it on spiritual interests such as dignity and autonomy. Plaintiffs who have been subjected to harass-

¹⁴⁰ *Supra* note 2.

¹⁴¹ See *supra* note 30 at 312-13.

¹⁴² See e.g. *Motherwell*, *supra* note 39.

¹⁴³ *Supra* note 51.

¹⁴⁴ A case raising both situations is *Lee v. Jacobsen* ((1992), 87 D.L.R. (4th) 401 (B.C.S.C.), rev'd 99 B.C.L.R. (2d) 144 (C.A.) (new trial ordered) [hereinafter *Lee*]), decided under the British Columbia *Privacy Act*, *supra* note 2. There, the female plaintiffs had rented a cottage from the defendant, only to discover the existence of a peephole in an exterior wall, covered on the inside by a one-way mirror, looking into the cottage bedroom. The Court concluded that the plaintiffs' landlord had installed and used the peephole. On the proposed definition of the common-law tort of invasion of privacy, the plaintiffs could recover for an intangible intrusion of the cottage bedroom by the landlord, or for a tangible intrusion upon the curtilage surrounding the cottage (since the landlord would have been standing on the curtilage when looking through the peephole) (see *Lee, ibid.* at 404). This would be the case regardless of whether or not the plaintiffs could assert property rights in the cottage.

ment, surveillance and stalking would in particular benefit. Consider, for example, the situation of the plaintiff in *MacKay*,¹⁴⁵ who was harassed so intensely that she suffered severe emotional trauma. Her claim was essentially that her personal zone of privacy had been invaded by the defendant's calculated attack on her personal security.

Intrusions upon the informational zone, which would become actionable under the common-law privacy tort, are a subject not presently dealt with by the common law. Essentially, such an intrusion occurs whenever the defendant has obtained personal information about the plaintiff without the plaintiff's consent, with or without the involvement of a third party. The information might be obtained from the plaintiff himself, perhaps through the unauthorized taping of his private conversations, as was the case in *Saccone*.¹⁴⁶ Or, an informational intrusion will occur where the defendant has obtained personal information about the plaintiff from a third party, and the plaintiff did not consent to the release of the information to the defendant. A hacker who has broken into a computer database containing medical files would be an example of such a defendant. Another example is illustrated by the British Columbia decision of *I.C.B.C. v. Somosh*,¹⁴⁷ where the plaintiff hired a private investigator to investigate the married defendants' insurance claim. The investigator contacted staff at Mr. Somosh's office, and asked questions about his salary, drinking habits and morals. The defendants counterclaimed for invasion of privacy under the British Columbia *Privacy Act*. The Court considered the investigator's inquiries to be a clear violation of Mr. Somosh's statutory right of privacy, since the evidence revealed that the plaintiff never had a cause of action against him that could justify making such inquiries. The plaintiff was then held responsible for the actions of the private investigator whom it had engaged.

ii. Public Exposure

Publishing information about a person is not presently actionable at common law, unless the information is false and defamatory. The tort of invasion of privacy would allow recovery for the unauthorized publication of true — but private — facts. This is because a plaintiff's private life would be compromised in any case where the defendant has exposed an object within one of the privacy zones to unwanted public scrutiny. Often, public exposure will occur through the mass media, but there is no reason to make this a pre-condition for recovery in privacy.¹⁴⁸ It should be sufficient that the

¹⁴⁵ *Supra* note 62. See also *Pateman v. Ross* (1988), 68 Man. R. (2d) 181 (Q.B.), involving a similar claim under Manitoba's *The Privacy Act*, *supra* note 2; *Davis v. McArthur* (1970), [1971] 2 W.W.R. 142, 17 D.L.R. (3d) 760 (B.C.C.A.), where the plaintiff failed in a privacy action against a private investigator who had "tailed" him for weeks.

¹⁴⁶ *Supra* note 56. See also *Ferguson v. McBee Technographics Inc.*, [1989] 2 W.W.R. 499, 58 Man. R. (2d) 119 (Man. Q.B.), decided under Manitoba's *The Privacy Act*, *ibid.*; *Fultz v. Gilliam*, 942 F.2d 396 (6th Cir. 1991).

¹⁴⁷ (1983), 51 B.C.L.R. 344 (S.C.).

¹⁴⁸ See e.g. *Miller v. Motorola Inc.*, 560 N.E. 2d 900 (Ill. App. 1 Dist. 1990), where the plaintiff was held to have a cause of action against her employer after information about the mastectomy procedure she had undergone was disclosed to a few of her fellow employees.

defendant has disclosed private matters about the plaintiff to another person without the authorization of the plaintiff.¹⁴⁹

It is difficult to envisage a situation in which the territorial zone of privacy could be compromised through public exposure. This results from the fact that intrusions on territorial objects are most often committed for the purpose of obtaining information about a person, as opposed to a place; if that information is subsequently disseminated to others, then it seems most natural to connect the latter invasion of privacy to the informational zone. However, it is conceivable that the publication of photographs of the interior design of an individual's house could constitute public exposure of a territorial object, thereby supporting a privacy claim.¹⁵⁰ Nevertheless, public exposure generally concerns a compromise of private objects in the personal and informational zones.

Public exposure amounting to an invasion of privacy will thus commonly arise in two situations. First, concerning the informational zone, are those cases where the defendant has published true, but intensely personal, private facts about the plaintiff, thus publicly exposing the plaintiff. In *Valiquette*,¹⁵¹ for example, the publication of facts that identified the plaintiff as a homosexual and as an AIDS victim was actionable as an infringement of his right to anonymity.

A second situation in which a public exposure may amount to an invasion of privacy concerns the personal zone of privacy. Where a defendant has pirated the image, voice, name, or other distinguishing personal characteristic of the plaintiff, and has exposed that personal characteristic to the public, then an object in the plaintiff's personal zone of privacy will have been compromised. The American case of *Pavesich*¹⁵²

¹⁴⁹ Defining public exposure in this way is important in the case of computer database operators. If an operator is in possession of personal information about an individual, then any unauthorized disclosure of that information to a third party should attract liability as an invasion of privacy. In most cases, an intrusion into one of the privacy zones will necessarily precede and exacerbate the public exposure of the information or images obtained through the intrusion. In any case where an individual is videotaped, or his conversations are recorded, for example, there will have been an intrusion into his private life by the fact of recording, which might justify both an injunction against the public exposure of the tape, and/or a court order that the tape be destroyed. A tort claim prior to publication will be rare, however, since the person who has been recorded will likely be unaware that this has occurred until the record is made public. An American case illustrates this point: *Boyles v. Kerr* 806 S.W. 2d 255 (C.A. Texas 1991) [hereinafter *Boyles*]; see also *Saccone*, *supra* note 56. In *Boyles*, the defendant, with the aid of some friends, videotaped himself and the plaintiff engaging in sexual intercourse. The defendant showed the tape to ten people, resulting in considerable embarrassment to the plaintiff, who only learned of the existence of the tape after hearing rumours. She sued, and the jury awarded her \$1,000,000. The Court of Appeal affirmed the jury award, observing that on these facts, the defendant's actions amounted to both an intrusion upon the plaintiff's personal affairs, and a public disclosure of embarrassing private matters (see *Boyles*, *ibid.* at 258, 261).

¹⁵⁰ In *Robbins*, *supra* note 2, the C.B.C. broadcast the plaintiff's address, inviting the public to write to him. A person's address could, arguably, fall within the territorial zone of privacy, and therefore, the broadcasting of an address could constitute the public exposure of a territorial object. However, it seems more reasonable to classify an address as an object within the informational zone. This demonstrates that the zones of privacy are not watertight compartments, and that they may well overlap.

¹⁵¹ *Supra* note 30.

¹⁵² *Supra* note 89.

is an example. There, the plaintiff's photograph was used without his consent in an insurance advertisement. The Court held that

[t]he knowledge that one's features and form are being used for such a purpose, and displayed in such places as such advertisements are often liable to be found, brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him; and as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master.¹⁵³

Present-day situations in which ordinary citizens find that their personal characteristics have been publicly exposed are rare.¹⁵⁴ More common are cases where celebrities and public figures are exposed. This is simply because their identifiable personal characteristics are valuable to advertisers, and are therefore more likely to be appropriated for marketing purposes. In the German case of *H & W Journal*,¹⁵⁵ a well-known scientist discovered that his name had been used to endorse a ginseng formula advertised as an aphrodisiac. He successfully claimed for unlawful invasion of his personality right. Similarly, in *Cher v. Forum International, Ltd.*,¹⁵⁶ the actress-singer successfully sued the defendant for publishing an advertisement which implied that she was endorsing the defendant's magazine ("So join Cher and FORUM's hundreds of thousands of other adventurous readers today").

Even though public exposure of personal characteristics is more likely to involve persons whose images and names are publicly recognizable and therefore have marketing value, that does not mean that the interest being infringed is proprietary. Both Pavesich, an ordinary citizen, and Cher had an interest in controlling the public exposure to which they were subjected. By losing this control, their dignity and autonomy were undermined, and their personal zone of privacy was compromised.

c. Unreasonableness

The resolution of a privacy claim often depends on identifying and weighing the competing interests of plaintiff and defendant. For this reason, the principle of "reasonableness" is the linchpin of legal protection of privacy. In many if not most cases, it will be obvious when a private object has been compromised; thus, the real issue facing the court is whether, in the circumstances of the case, a reasonable person in the position of the plaintiff would have expected to repel an intrusion upon, or block

¹⁵³ *Ibid.* at 80.

¹⁵⁴ For one example, see *Schifano v. Greene County Greyhound Park*, 624 So. 2d 178 (Ala. 1993), where photographs which had been taken of the plaintiffs while they were seated in a greyhound racetrack grandstand were subsequently featured in an advertising brochure. The plaintiffs' action in privacy was dismissed on the theory that by sitting in a public grandstand, they had no expectation of privacy on which to base their claim.

¹⁵⁵ BGHZ 35, 363 (1961), trans. by F.H. Lawson & B.S. Markesinis in *The German Law of Torts*, *supra* note 53 at 386.

¹⁵⁶ 692 F. 2d 634 (9th Cir. 1982) [hereinafter *Cher*].

the exposure of, his private life. At this stage, it becomes necessary to focus the "reasonableness" analysis on the nature of the invasion, and to determine the interests and circumstances supporting both the plaintiff's and the defendant's positions. This entails a classic balancing between the plaintiff's right to control access to his private life, and the interests of the defendant in justifying his own access; the result determines what is reasonable in the circumstances.

The adoption of judicial balancing has been criticized because it creates uncertainty in the application of the law.¹⁵⁷ However, several points can be made in reply. First, since the Canadian system of human-rights protection is premised on the judicial balancing of competing interests (consider, for example, section 1 of the *Charter*¹⁵⁸), it would be most peculiar to reject a balancing approach for resolving privacy claims because of uncertainty. Second, judicial balancing is central to the privacy jurisprudence in civilian systems like Germany,¹⁵⁹ demonstrating that such an approach is legally viable. Third, in many cases, the result of the balancing will be obvious. For example, the unauthorized publication of health or medical records is so clearly an unreasonable public exposure of a private object that little analysis is required to find that the requirements of the privacy tort have been satisfied.¹⁶⁰ It is inappropriate to deny relief in egregious cases because certain borderline claims could pose difficulties in the balancing process.

i. Avoiding Liability: Justifications and Defences

Many commentators have written of certain defences or justifications that can be raised by a defendant to avoid liability for invasion of privacy. Prosser, for example, dedicated a considerable portion of his seminal 1960 article on the privacy tort to the defences of public interest and consent.¹⁶¹ The *Restatement* refers, among other defences, to the "public concern" exception to the "publicity" aspect of the privacy tort.¹⁶² The provincial privacy statutes also provide a list of defences. For example, the defences enumerated in Saskatchewan's *The Privacy Act*¹⁶³ include: express or implied consent (para. 4(1)(a)), lawful right of defence of person or property (para. 4(1)(b)), legal authorization (para. 4(1)(c)), and fair comment on a matter of public interest (para. 4(2)(a)).

Sources such as the *Restatement* and the provincial privacy statutes will serve as important guides for determining what can be raised in defending against a common-law privacy claim. Clearly, the two most controversial of the so-called "defences" are

¹⁵⁷ See e.g. T.I. Emerson, "The Right of Privacy and Freedom of the Press" (1979) 14 Harv. C.R.-C.L. L. Rev. 329 at 342.

¹⁵⁸ *Supra* note 4.

¹⁵⁹ See *Lebach*, *supra* note 105 at 393: "Consequently the opposing protected legal interests must be balanced against each other in each individual case in light of general and specific considerations."

¹⁶⁰ See e.g. *Doe v. Roe*, 307 N.E. 2d 823 (N.Y.C.A. 1973), where a psychiatrist published a case study without sufficiently concealing the subject-patient's identity.

¹⁶¹ See *supra* note 132 at 410-21.

¹⁶² See *supra* note 130 at §652.

¹⁶³ *Supra* note 2.

implied consent and public interest. However, it is a mistake to consider these only as defences, to be assessed after determining whether or not the plaintiff had a reasonable expectation of privacy in the circumstances. The concepts of "implied consent" and "public interest" go to the heart of the issue of whether a privacy expectation is itself reasonable. Both require an assessment of the circumstances in which a private object has been compromised, and thereby identify the factors to be weighed in the "reasonableness" balance. Implied consent focuses the analysis on whether, because of the plaintiff's behaviour and the context in which the invasion occurred, it is reasonable to allow him to assert an expectation of privacy. Public interest requires an assessment of whether some societal interest supporting the defendant's invasion can outweigh the plaintiff's individual interest in repelling the invasion. In other words, is it reasonable to allow the plaintiff to rely on an expectation of privacy despite the countervailing societal interest?

The following comments concerning public interest and implied consent are therefore intended to assist in the application of the "reasonableness" balancing test.

ii. Public Interest/Newsworthiness

Perhaps the most perplexing issue to be confronted in formulating the common-law tort of invasion of privacy concerns the relationship between the right of privacy and freedom of expression. This issue arises in the context of the public-exposure aspect of the tort where, typically, the defendant has "expressed" certain private things about the plaintiff to others, and claims that the public interest justified his doing so. Often, the defendant will be a member of the media, and will argue that the information published about the plaintiff was in the public interest because of its newsworthiness. Prosser describes the public-interest justification as follows:

The privilege of giving publicity to news, and other matters of public interest, arises out of the desire and the right of the public to know what is going on in the world, and the freedom of the press and other agencies of information to tell them. "News" includes all events and items of information which are out of the ordinary humdrum routine, and which have "that indefinable quality of information which arouses public attention".¹⁶⁴

In Western societies, where the press is both free and aggressive in its news-gathering function, a conflict is inevitable between the interest of individuals in remaining anonymous, and that of the media in reporting aspects of people's lives that are deemed newsworthy. The latter's position is bolstered by the fundamental value of freedom of expression. Some American commentators have argued that when the free-speech element is added to the balance, the defendant-"reporter" must prevail. They claim that the pre-eminent position granted to the First Amendment in American law is incompatible with the existence of a tort that imposes liability for the publication of *true facts*.¹⁶⁵ Diane Zimmerman has also argued that the distinction drawn by the

¹⁶⁴ *Supra* note 132 at 412.

¹⁶⁵ See D.L. Zimmerman, "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort" (1983) 68 Cornell L. Rev. 291; D. Bedingfield, "Privacy or Publicity? The Enduring Con-

“publicity” tort between private and newsworthy facts is too vague, and results in a chilling effect on the press.¹⁶⁶

It would be inappropriate, however, to allow the American jurisprudence to define the Canadian common-law position concerning the public-exposure aspect of invasion of privacy. Canadian constitutional jurisprudence does not recognize a hierarchy of rights:¹⁶⁷ freedom of expression thus has no greater status in our law than other constitutional rights, such as the right of privacy. Section 1 of the *Charter*¹⁶⁸ subjects the freedom of expression that is protected by section 2(b) to the reasonable limits of other societal values. This has placed the judiciary in the position of having to balance the free-speech right of one party with the competing interests advanced by the opposing party, for the purpose of determining whether these competing interests are sufficient to justify abridging the section 2(b) guarantee. When the *Charter*-values approach to the common law is employed, the judiciary must undertake a similar balancing.

In *Hill*,¹⁶⁹ the Supreme Court had to determine whether the common law of defamation was consistent with the fundamental value of freedom of expression, as embodied in section 2(b). A balancing of interests was undertaken: the free-speech interest of the defendant in a defamation action had to be balanced with the reputational interest of the plaintiff. Interestingly, Cory J. related this reputational interest to the right of privacy:

[R]eputation is intimately related to the right to privacy which has been accorded constitutional protection. As La Forest J. wrote in *R. v. Dymnt* ... privacy, including informational privacy, is “[g]rounded in man’s physical and moral autonomy” and “is essential for the well-being of the individual”. The publication of defamatory comments constitutes an invasion of the individual’s personal privacy and is an affront to that person’s dignity. The protection of a person’s reputation is indeed worthy of protection in our democratic society and must be carefully balanced against the equally important right of freedom of expression.¹⁷⁰

Cory J. concluded that the value of freedom of expression could justifiably be limited by the common law for the purpose of protecting the reputational and privacy interests of individuals.¹⁷¹

Although one may not agree with Cory J.’s assimilation of reputational and privacy interests, his judgment in *Hill* is conclusive that the common-law tort of invasion of privacy, which gives effect to the fundamental Canadian value of respecting pri-

fusion Surrounding the American Tort of Invasion of Privacy” (1992) 55 Mod. L. Rev. 111; H. Kalven Jr., “Privacy in Tort Law — Were Warren and Brandeis Wrong?” (1966) 31 L. & Contemp. Probs. 326; and generally, C.P. Work, “Whose Privacy?” (1994) 55:1 Mont. L. Rev. 209.

¹⁶⁶ See Zimmerman, *ibid.* at 305-306.

¹⁶⁷ See *Dagenais*, *supra* note 77 at 877.

¹⁶⁸ *Supra* note 4.

¹⁶⁹ *Supra* note 50.

¹⁷⁰ *Ibid.* at 1179.

¹⁷¹ See *ibid.* at 1177. He therefore endorsed the existing Canadian common-law position on defamation, and rejected the stricter “actual malice” rule from American law (see *ibid.* at 1182-84).

vacy, can co-exist with the fundamental value of freedom of expression. Therefore, in fashioning a common-law rule governing the public exposure of private life, a balance must be struck between these two values. The American argument made by Zimmerman and others — that the “publicity” tort should be swept aside — cannot succeed in the Canadian context for the simple reason that in the case of public exposure, freedom of expression must compete with another value of *equal* weight, namely privacy.

Matters concerning public interest and newsworthiness should be taken into account through the contextual balancing inherent to the reasonableness analysis, and in particular, should weigh on the side of the scales favouring the defendant. Such an approach would be similar to the one adopted in Germany, where the courts have developed a form of proportionality analysis to resolve conflicts between the right of personality and the freedom to broadcast. The rule that has been adopted is that

[while] the freedom to broadcast may have the effect of restricting any claims based on the right of personality ..., the damage to “personality” resulting from a public representation must not be out of proportion to the importance of the publication upholding the freedom of communication.¹⁷²

Proportionality analysis is also inherent to the reasonableness test adopted under the four provincial statutes for resolving the competing interests of the media (or any person claiming freedom of expression¹⁷³) and privacy claimants. Subsection 4(2) of the Saskatchewan *Act*, mentioned above, is an example, as is subparagraph 5(f)(i) of Manitoba’s *The Privacy Act*,¹⁷⁴ under which it is a defence to a public exposure claim that “there were reasonable grounds for the belief that the publication was in the public interest”.

In applying a proportionality analysis for the purpose of determining the reasonableness of a public exposure, various factors must be considered. These include: (1) the defendant’s objective; (2) alternatives available to the defendant; (3) the plaintiff’s status; and (4) the severity of the privacy intrusion.

1. The Defendant’s Objective — The first matter to be considered concerns the objective advanced by the defendant to justify publicly exposing an aspect of the plaintiff’s private life. The analysis should thus commence from the point of view of the defendant. What did the defendant hope to accomplish by placing the plaintiff in the public spotlight? In *Valiquette*,¹⁷⁵ the Court’s conclusion (that the

¹⁷² *Lebach*, *supra* note 105 at 394 [references already omitted in translation].

¹⁷³ It is important to keep in mind that a defendant in a public exposure case could be anyone, and not necessarily a member of the media. It has been suggested that the interests of the media have clouded the privacy debate in England, and that the rejection of the tort has been motivated primarily by concerns about restricting the media. This focus on the media has resulted in the denial of privacy protection to persons whose private life has been exposed by both media and non-media actors (see “Patchy Law”, *supra* note 53 at 806-808).

¹⁷⁴ *Supra* note 2. This kind of proportionality analysis is similar to that adopted in *Dagenais*, *supra* note 77, for resolving conflicts between rights under section 1 of the *Charter*. The *Dagenais* test requires consideration of the proportionality between the deleterious effects of limiting one right and the salutary effects of giving effect to another competing right (see *ibid.* at 888-89).

¹⁷⁵ *Supra* note 30.

defendant's purpose in exposing the plaintiff's illness was primarily commercial) proved fatal to the defendant's public-interest argument. This view is echoed in the law of Germany, as well as that of France, where the reproduction of photographs, or the publishing of private information, for "a purely commercial goal" constitutes an invasion of privacy.¹⁷⁶ Thus, in cases involving the public exposure of a person's name, voice or image, if the defendant was simply seeking to capitalize upon the marketing value of the plaintiff's personal characteristics (*i.e.*, the situation in *H & W Journal*¹⁷⁷ or *Cher*¹⁷⁸), then the reasonableness balance must tip in favour of the plaintiff. On the other hand, the defendant's position will be bolstered by pointing to some legitimate educational or political rationale underlying the impugned publication (*e.g.*, using the plaintiff's image as part of a political caricature).

2. Alternatives Available to the Defendant — A second factor concerns whether or not the impugned publication could reasonably have been made without the alleged privacy invasion, or with a less serious exposure of the plaintiff's private life. If so, then this is a strong indication that the public exposure was unreasonable. German law requires consideration of whether the specific interest being served by a broadcast could be satisfied "even without any interference — or a less far-reaching interference — with the protection of personality."¹⁷⁹ This point is central to the decision in *Valiquette*, where the Court concluded that if the purpose of the impugned newspaper story was simply to expose the hardships faced by persons with AIDS, as claimed by the defendant, then this could have been accomplished without providing details sufficient to identify the plaintiff as an AIDS victim.¹⁸⁰
3. The Status of the Plaintiff — Whether or not the plaintiff is a public figure will also be a relevant consideration. Prosser defines a "public figure" as a "person who, by his accomplishments, fame, or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a 'public personage'".¹⁸¹ Because such persons

¹⁷⁶ See *Princess Caroline*, BGH NJW 1996, 1128, 1130; *Philippe* (Paris), *supra* note 54.

¹⁷⁷ *Supra* note 155.

¹⁷⁸ *Supra* note 156.

¹⁷⁹ *Lebach*, *supra* note 105 at 395.

¹⁸⁰ See *supra* note 30 at 314.

¹⁸¹ *Supra* note 132 at 410. Public figures should be distinguished from those who do not seek public attention, but instead are thrust into the spotlight because of events of public concern in which they have been involved (*e.g.*, hostages taken during a bank robbery, survivors of a terrorist attack, or the spouse of an accident victim). In these cases, it seems unjust that the private lives of the individuals involved should be exposed to public scrutiny in the manner normally reserved for those who actually seek publicity. Consider *Sipple v. Chronicle Publishing Co.* (201 Cal. Rptr. 665 (Cal. App. 1 Dist. 1984) [hereinafter *Sipple*]), where the plaintiff foiled an assassination attempt on the life of President Ford, and was then revealed by the defendants to be homosexual. Sipple failed in his privacy claim for two reasons. First, because Sipple was a prominent member of the San Francisco gay community, the fact that he was homosexual was considered by the Court to be a public, as opposed to private, fact. Thus, the defendants' newspaper articles "did no more than to give further publicity to matters

tend to benefit from publicity, and often court it, their reasonable expectation of privacy is significantly lower than that of ordinary citizens. They can hardly revel in positive publicity, yet sue when true facts are published that portray them in a negative light. They have to take the good with the bad. That does not mean, however, that they are entitled to no expectation of privacy. The fact that a person is a public figure does not mean that even the most intimate aspects of their lives can be exposed to the public, or that their images and names can be exploited without their consent.

4. The Severity of the Privacy Intrusion — Another factor that is relevant to the reasonableness test is the value, or importance, of the private object that has been compromised by a public exposure. The need to determine the significance of an invasion of privacy for the purpose of the proportionality analysis has been recognized in both German and French law. The German Supreme Constitutional Court has held that “the required weighting of interests must take into account the intensity of the infringement of the personal sphere by the broadcast ...”¹⁸² Similarly, French law has recognized certain “danger zones”, or matters of intimacy, where public exposure will be difficult to justify. These include matters relating to health, sexual activities, and death. Generally, it will be presumed that reasonable persons can expect the most intimate of personal matters to remain private.¹⁸³ However, courts will be more deferential to public exposure of non-intimate matters, such as information concerning a person’s finances.¹⁸⁴ It is submitted that this approach should be adopted in the Canadian common law.

which [the] appellant left open to the eye of the public” (*ibid.* at 669). Second, the Court concluded that Sipple’s sexual orientation was newsworthy because the matter “was not so offensive ... as to shock the community notions of decency”, and the defendants “were not motivated by a morbid and sensational prying into appellant’s private life” (*ibid.* at 670). *Sipple* is indicative of the pre-eminence of the First Amendment in American law, and of the judiciary’s conservative approach when faced with a media defendant. If Sipple’s case had arisen in the jurisdictions of Germany or Quebec, where privacy analysis is premised on reasonableness, his chances of success would have been better (see text above, accompanying notes 26-33 and 96-105). If his case had been decided in France, he almost certainly would have succeeded (see *e.g.* Paris, 20 February 1986, D.S.1986.Inf.447 *somm.*, where the court held that an allegation, real or supposed, that a person is homosexual, no matter what the moral tone of the article, is an invasion of the right to privacy). Given this, and also in light of the fact that Sipple and others like him are, at best, *involuntary* public figures, it is submitted that the American “community shock” test is inappropriate, and should not be imported into Canadian law.

¹⁸² *Lebach*, *supra* note 105 at 394.

¹⁸³ See Hauch, *supra* note 33 at 1246-48.

¹⁸⁴ See *ibid.* at 1260; see Cass. civ. I, 28 May 1991, *Fressoz v. Lafleur*, D.1991.Inf.182. It should be observed that the severity of a privacy intrusion may well depend on the status of the plaintiff. A politician who campaigns on a platform of family values can hardly complain if a newspaper publishes true facts about her propensity for extra-marital affairs. As a public figure, she has courted publicity in a manner which makes the exposure of her private life, at least as it relates to the concept of family values, newsworthy and in the public interest. However, a similar revelation about an involuntary public figure, such as a crime victim, would likely be seen to run counter to that person’s reasonable expectation of privacy, while the publication of such facts about an “ordinary” citizen would almost certainly be considered a most serious invasion of privacy.

In summary, each public exposure case must be assessed on its own facts in light of the above four factors, and any other factors that might be relevant. Because both the plaintiff and the defendant in a public-exposure case are relying on fundamental values (privacy and freedom of expression, respectively) of equal constitutional weight, it is necessary to identify all the relevant circumstances and interests supporting each side's position. The plaintiff will prevail if she can demonstrate that one of her personal objects has been exposed to public scrutiny by the defendant, and that the reasonableness balance favours her right of privacy over the defendant's freedom of expression.

iii. Implied Consent

While public interest and newsworthiness considerations loom large in most public exposure cases, the significance of implied consent¹⁸⁵ is generally, though certainly not exclusively, felt in the realm of intrusions. Thus, it is open to a Court to conclude that, because of the circumstances in which a privacy intrusion has occurred, the plaintiff has impliedly consented to it, and the defendant has therefore not acted unreasonably. However, the concept of implied consent in privacy law is rife with pitfalls, and should be approached with great caution, lest technological development be allowed to obliterate our privacy expectations. Consider the hypothetical "surveillance suburb", a neighbourhood in which several of the households are equipped with a host of eavesdropping devices such as video cameras, parabolic microphones and telescopes, all trained on the other houses. The residents of the neighbourhood are all aware that their every action and spoken word could be monitored by the more "curious" among them. Does this mean that the residents of the "surveillance suburb", by continuing to live there, have impliedly consented to invasions of their private life by their neighbours?

The case of cellular-telephone scanners provides an example of how courts have equated general public knowledge that a conversation could be monitored electronically with implied consent to such monitoring. In *Edwards v. State Farm Insurance Co. and 'John Doe'*,¹⁸⁶ the plaintiff telephoned his lawyer using a mobile telephone. "John Doe" overheard the call on his radio scanner, came to believe that the conversation concerned criminal activities, made a tape recording, and delivered it to a United States attorney. The plaintiff sued, relying in part on Louisiana tort law.¹⁸⁷ He failed, however, because the court declined to find that he enjoyed an "objectively reasonable" expectation of privacy. Instead, the court preferred the view that a conversation from a car telephone constituted "material in the public view", and that scanning such a conversation was an intrusion upon public, as opposed to private, matters.¹⁸⁸

¹⁸⁵ Prosser discusses the distinct issue of express or actual consent, *supra* note 132 at 419-20.

¹⁸⁶ 833 F. 2d 535 (5th Cir. 1987) [hereinafter *Edwards*].

¹⁸⁷ More specifically, the plaintiff claimed for invasion of privacy, basing his claim on the right to privacy expressly recognized in the Louisiana Constitution (art. I, § 5) (see *Edwards, ibid.* at 540).

¹⁸⁸ See *Edwards, ibid.* at 540-41.

Edwards is a good example of the axiom that "bad facts make bad law".¹⁸⁹ The argument adopted by the court in holding that there is no reasonable expectation of privacy in mobile-telephone conversations could be applied to any conversation. Indeed, everyone knows that a telephone line *could* be tapped, or that a room *might* be bugged. Taking the court's reasoning to its logical conclusion, how could anyone have a reasonable expectation of privacy in a society where everyone should know that technology makes possible the surveillance of every action and spoken word? If the court in *Edwards* is correct, then a person impliedly consents to an invasion of privacy where he knows, or should know, that such monitoring is possible.

The "knowledge equals consent" approach is wrong for two reasons. First, knowledge and consent are very different things. While one cannot consent to an invasion of privacy without having knowledge of it, one can certainly have knowledge of it without consenting to it. Since the *Edwards* court found implied consent on the mere basis of knowledge, its reasonableness analysis was fundamentally flawed. Second, if a plaintiff's knowledge of surveillance means that she has impliedly consented to it, and has therefore lost any reasonable expectation of privacy in relation to that surveillance, then the scope of privacy that individuals reasonably expect to enjoy will decrease over time, as surveillance capabilities increase with technological development. On this reasoning, the characters of George Orwell's *Nineteen-Eighty-Four*¹⁹⁰ suffered no invasions of privacy, since technological development had reduced their privacy expectations to nil. The better view must be that privacy expectations should be assessed from a normative perspective.¹⁹¹ On this point, the *Edwards* court might well have turned its mind to the dangers posed to society by the John Does of this world, who have nothing better to do than sit in front of their scanners for the sole purpose of eavesdropping on other people's telephone conversations.

The real question, which the court in *Edwards* never confronted, is whether a reasonable person in *Edwards*' position *should expect* to engage in a telephone conversation without being subjected to surreptitious electronic scanning. This is obviously a normative issue, which goes beyond the simplistic determination of whether or not

¹⁸⁹ One wonders what the result would have been if *Edwards* had been having an intimate discussion with his wife, which "John Doe" had scanned, recorded, and then broadcast.

¹⁹⁰ (London: Secher & Warburg, 1949).

¹⁹¹ In *Bell v. Wolfish*, 441 U.S. 520 (1979), the United States Supreme Court was faced with a Fourth Amendment challenge to certain body-cavity searches in prisons. In dissent, Stevens J., referring to reasoning in *Katz*, *supra* note 94, warned of the dangers of relating a "reasonable expectation of privacy" to actual knowledge that an invasion of privacy is possible:

At first blush, the Court's rationale [in supporting body-cavity searches] appears to be that once the detainee is told that he will not be permitted to carry on any of his activities in private, he cannot "reasonably" expect otherwise. But "reasonable expectations of privacy" cannot have this purely subjective connotation lest we wake up one day to headlines announcing that henceforth the Government will not recognize the sanctity of the home but will instead enter residences at will. The reasonableness of the expectation must include an objective component that refers to those aspects of human activity that the "reasonable person" typically expects will be protected from unchecked Government observation (*ibid.* at 589).

monitoring is possible, or whether or not the plaintiff knew that it was possible. In short, implied consent should be approached from the point of view of a reasonable person, entitled to the full respect of his dignity and autonomy, and thereby entitled to enjoy the maximum privacy compatible with life in Canadian society. If, in the plaintiff's circumstances, a reasonable person should be entitled to expect to be secure against an invasion of privacy, then the plaintiff's consent to the invasion cannot be implied.

In identifying the factors to be considered in assessing the existence of implied consent, relevancy is the key. Any factor which would be relevant in justifying the defendant's actions in compromising a private object of the plaintiff may be considered.¹⁹² The factors that are most often relevant, at least in the intrusion cases, include not only the objective of the defendant and the severity of the intrusion (as discussed above in relation to public interest/newsworthiness), but also where the invasion of privacy occurred. This is illustrated by the case of *Silber v. B.C.T.V.*¹⁹³ There, the plaintiff was an employer involved in a bitter labour dispute. A television crew working for the defendant was filming a story about the dispute in the parking lot of the plaintiff's business, when the plaintiff confronted them and ordered them to leave the premises. The crew refused, and a scuffle ensued which was filmed, and broadcast on the evening news. The plaintiff sued in trespass, and for invasion of privacy. In considering the issue of whether the plaintiff's privacy was invaded in the circumstances of the filming of the scuffle in the parking lot, the court thought it determinative that the parking lot was in full public view, that the scuffle was easily visible to onlookers, and that the defendant's reporters did not set out to intrude upon the plaintiff's private life. Although the incident occurred on private property, the plaintiff could have no reasonable expectation of privacy in these circumstances. In essence, by engaging in a public fistfight, the plaintiff impliedly consented to it being publicly viewed and recorded.

One might compare the decision in *Silber* with that in *Edwards*, since in both cases the courts concluded that the objects involved (*i.e.*, Silber's image and Edward's telephone conversation) could be recorded without resulting in an invasion of privacy. If the reasonable-expectation analysis focuses on the *potential* for the monitoring of a private object, then neither Silber nor Edwards could have had such an expectation, since a reasonable person would have been aware that the potential existed. If the analysis focuses on the *likelihood* of monitoring, then Edwards had a stronger claim to a reasonable expectation of privacy than Silber, since Silber's fistfight was more likely to be seen and recorded (being in full public view) than Edwards' mobile-telephone conversation. That result could be different in the future, of course, if scanners were to become more common. However, a qualitative difference can be seen between the situations of Silber and Edwards when the analysis shifts to the normative considera-

¹⁹² From this point of view, it is difficult to identify a relevant factor which would justify an ordinary person eavesdropping on a mobile-telephone conversation, recording it, and making it available to others. The only factor motivating such activities is prurient curiosity, which is not relevant since reasonable persons are entitled to expect that others will keep their curiosity in check, and thereby respect privacy.

¹⁹³ (1985), [1986] 2 W.W.R. 609, 69 B.C.L.R. 34 (S.C.) [hereinafter *Silber*].

tion of whether or not either of them *should* have been entitled to expect privacy in the circumstances. In *Silber*, the plaintiff was in public view, and must have known that others could see his actions. It is therefore difficult to believe that anyone in his position could reasonably have expected his image to remain private. Moreover, those who witnessed and recorded the fistfight did so by pure happenstance. They were not lying in wait for an opportunity to see the plaintiff, or capture him on film, and they certainly did not set out to intrude upon, or expose, his private life. It therefore seems fair to conclude that Silber implicitly consented to the alleged privacy invasion. In contrast, Edwards' use of a telephone demonstrated his desire to maintain control over who had access to his communications, thus negating a finding of implied consent. Moreover, his conversation was intercepted by a defendant whose sole purpose was to eavesdrop. John Doe was hardly a bystander witnessing a public act by chance. Although it is difficult to conclude that a reasonable person in Silber's position should be entitled to assert an expectation of privacy, the circumstances in *Edwards* lead to the opposite conclusion.

A troubling case, which illustrates how consideration of irrelevant factors can result in a finding of implied consent, is *Milton v. Savinkoff*.¹⁹⁴ The plaintiff accidentally left a photograph of herself topless in the pocket of the defendant's coat. He discovered it, and proceeded to circulate it to his friends. Her suit under the British Columbia *Privacy Act* failed; the court concluded that she did not have a reasonable expectation of privacy. According to Cooper J., the plaintiff had no qualms about having the photograph taken, having it developed, or leaving it behind with the defendant. A person behaving in this manner cannot complain of an invasion of privacy, he reasoned, where the photograph is subsequently shown to other people.¹⁹⁵ In essence, he decided that such a person has impliedly consented to the public exposure of a private object.

That a defendant like Savinkoff, who has subjected another person to such a humiliating public exposure, could avoid liability under the law of privacy is rather astonishing. Cooper J.'s reasoning is flawed, however, because he found implied consent on the basis of factors that are entirely irrelevant to the real issue in the case, which is whether Milton impliedly consented to Savinkoff exhibiting the photograph to his friends. How is it relevant to that issue that Milton posed for the photograph, or had it developed? If Cooper J. is correct, then no one could ever have a reasonable expectation of privacy in their own photographs. Moreover, how could the fact that Milton accidentally left the photograph with Savinkoff justify his showing it in a manner calculated to embarrass her among her peers? Obviously, Milton could not have complained about the fact that Savinkoff saw the photograph. But surely she had a reasonable expectation that he would not take advantage of her forgetfulness to expose her to public ridicule.

Ultimately, Cooper J.'s "blame-the-victim" approach to implied consent demonstrates not only that irrelevancies can skew the privacy analysis, but also (and perhaps most importantly) that in determining the factors that are relevant to the existence of a

¹⁹⁴ (1993), 18 C.C.L.T. (2d) 288 (B.C.S.C.).

¹⁹⁵ See *ibid.* at 291.

reasonable expectation of privacy, it is essential to characterize the alleged invasion of privacy carefully.¹⁹⁶ Courts must avoid implying a plaintiff's consent by reasoning that the plaintiff left himself vulnerable by being less-than-vigilant in protecting his own privacy. Unscrupulous defendants should not be absolved of liability just because the plaintiff provided them with an opportunity to commit a privacy invasion.

Conclusion

The purpose of this article has been to argue for the recognition in Canada of the common-law tort of invasion of privacy and to recommend the *Charter*-values approach in its definition. With the constitutional entrenchment of the right of privacy in section 8 of the *Charter*, it is clear that respect for personal privacy must be considered a fundamental Canadian value. That value should now be given effect in the Canadian common law, through a principled development of the tort category that affords relief for intentional interferences with the person.

In developing the common-law privacy tort, Canadian courts should have recourse not only to the American jurisprudence, but also to the law in civilian jurisdictions. Quebec case law on the protection of private life has obvious relevance, but so too does German and French privacy law. Cases decided under the four provincial privacy statutes will also be of assistance. Moreover, *Charter* values will continue to assist in defining the requirements and scope of the privacy tort. The value of freedom of expression, for example, must be considered when assessing the reasonableness of an invasion of privacy through public exposure. Ultimately, a variety of sources should be relied upon by the Canadian common-law courts in developing a rich privacy tort premised on spiritual interests such as dignity, autonomy and security of the person.

This paper is certainly not an exhaustive treatment of the common-law tort of invasion of privacy. Other issues remain to be considered. Two, in particular, have not been touched upon here: the remedies, including injunctive relief, that should be available in a privacy claim, and the procedural protections that could be afforded to privacy claimants.¹⁹⁷ These issues, and others, will no doubt be raised as our courts elaborate the common-law privacy tort. What is most important at present, however, is to recognize the secure foundation that exists in Canadian common law for the legal protection of the fundamental value of privacy, and to move forward by developing a privacy tort which will serve the needs of Canadians in the information age.

¹⁹⁶ For a more detailed criticism of the case, see P.H. Osborne, "Case Comment on *Milton v. Savinkoff*" (1994) 18 C.C.L.T. (2d) 292 at 295-98.

¹⁹⁷ I am here referring to the problem of a privacy claimant having to go to court, a *public* forum, and thus having to face the potential of drawing even further public attention to her private life. Procedural safeguards might well be developed to protect a plaintiff from further public scrutiny during the litigation process.