# PATRONS

*We gratefully acknowledge the support of the following:*

Anniko, Hunter

Arvay Finlay

Blake, Cassels & Graydon

Boughton, Peterson, Yang, Anderson

Campney & Murphy

Carfra & Lawton

Cox Taylor

Farris, Vaughan, Wills & Murphy

Guild, Yule, Sullivan, Yule, Truscott & Slivinski

Jawl & Bundon

Lawson Lundell Lawson & McIntyre

MacKenzie, Fujisawa, Brewer, Stevenson, Koenig

McConnan Bion O'Connor & Peterson

Richards Buell Sutton

Smith Hutchison

Thorsteinssons

## SPECIAL THANKS

*to the following for their time, energy and commitment to the project:*

Professor John McLaren
Professor Lisa Philipps
Dean David Cohen
Professor M. Cheryl Crane
Ms. Pat Pitsula

***We would also like to thank the British Columbia Law Foundation, the Office of the Information and Privacy Commissioner of British Columbia, the University of Victoria Law Student's Society, and the Faculty of Law at the University of Victoria for their very generous support in the development of this project.***

***Thanks and gratitude to those who led the refereeing process.***

## Assistant Editors

Martin Allen
Katie Au
Amit Bir
Tracey Cook
Cristie Ford
Barb MacDonald
Mary MacDonald
David Mitchell
Terry Myers
Timothy Russell

## Canadian University Student Liaisons

Mary Abbott
Andree Blais
Ting-Ting Foong
Simon Helm
Paul Horowitz
Paula Kay
Stephen Lees
Sarbjit Nahal
Benson Rogers
Dana Schindelka
Lisa Wilde
Joseph Wong

## Production

Design and Layout: Indigo Sky Graphic Design
*Appeal* Logo Design: David Gruber
Photography: Brett Lowther
Illustrations: Ken Faulkes
Photography for "Privacy v. Freedom of the Press" article: Lawrence McLagen

## Reviewers

Diana Batts
Wendy Bernt
Jennifer Champion
Deborah Curran
Lisa Dumbrell
Robert Eberschlag
William Fraser
Andrew Gage
Rajiv Gandhi
John Gill
David Gruber
Marcus Hadley
Tara Hastings
Lori Ann Heckbert
Micheal Howcroft
Jeffrey Johnson
Jeffrey Joudrey
Freya Kodar
Nancy Leclair
Amanda Lord
Adrienne Mahaffey
Shafique Mohammed
Deirdre O'Connell
Mary O'Connor
Marie Anne Piche
Rene Peloquin
Errin Poyner
Kathleen Priestman
Gregory Rhone
Nola Ries
Jillian Stewart
George Waggott
Gerald Walsh
Lou Webster
Shannon Williams
Leanne Wood

# EDITORIAL ADDRESS

Welcome to the inaugural issue of *Appeal – review of current law and law reform.* The *Privacy* edition is the culmination of a year's efforts between the students, staff and faculty at the University of Victoria, Faculty of Law. Already we anticipate another year of hard work ahead as we continue production of the next edition of *Appeal* – the *Youth & Aging* issue. The idea for *Appeal* began with several law students who saw the possibility of producing a first-rate law journal run by students. However, it was quickly realized that for this project to be successful, *Appeal* would have to offer something different from the traditional law review. *Appeal* was created as an alternative.

From the start, our vision was to provide a forum for discussing the state of Canadian law and possibilities for its reform in a manner that was accessible, challenging, and representative of the views of tomorrow's law-makers. The students who designed *Appeal* sought to publish work that was highly critical, written from the point of view of those who are beginning their involvement in law. Coupling these fresh views with the real-life experiences and diverse backgrounds that today's students bring to their studies, *Appeal* was envisioned as a meeting-point for new and exciting perspectives. The intention was to publish work that would interest more than just the legal specialist.

Although the mandate of *Appeal* was designed to draw together these many different values and ideals, a common theme runs throughout: a commitment to publishing student work. It is our belief that there is a vast pool of intelligent, critical, and timely work being done in the law today that has too few forums for expression. For the most part, the research and writing that Canadian law students produce each year goes unrecognized and unpublished. *Appeal* was created to provide an outlet for that work, allowing law students to express their observations and ideas in a student-run, and student-written journal.

The *Privacy* edition of *Appeal* is the realization of these goals. Not only has our inaugural issue garnered insightful and informative papers on the present condition of Canadian law, but the material published also provides important and thought-provoking arguments dealing with new avenues of change and reform. In addition to the feature articles, this edition also presents many shorter, critically-reasoned articles in the *Trends and Developments* section. In these pieces, writers explore specialized areas of the law and develop arguments for reform. In conjunction with the readable style cultivated by the editors and writers, *Appeal* represents a law review that is accessible, interesting, and challenging.

It is our hope that by the time you have read the *Privacy* edition, you will be excited by Canadian law of today as written by those who will shape it tomorrow. We most definitely are. Additionally, we hope our student readers will recognize the potential of their own research and writing, and will be inspired to seek a broader audience for their work.

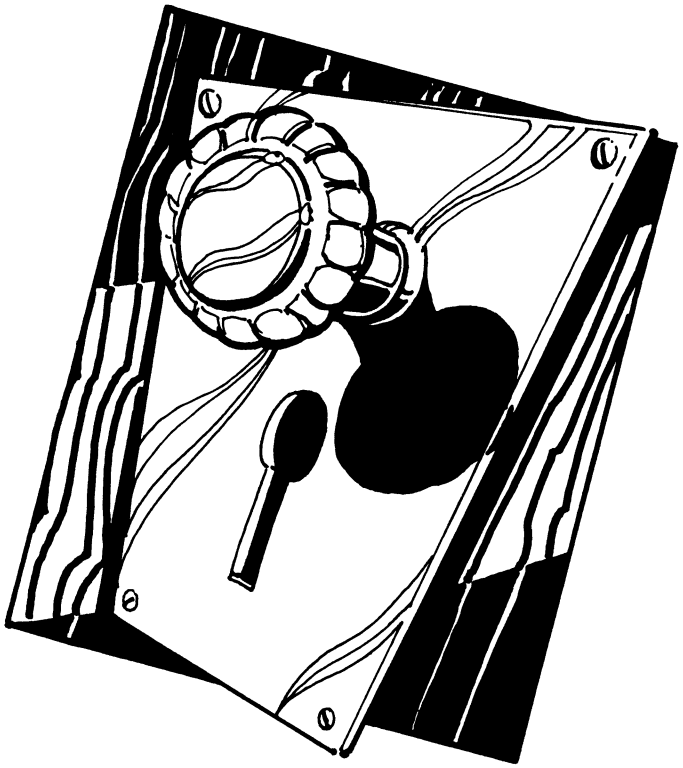
The *Appeal* Editorial Board.

# TABLE of CONTENTS

## FEATURES



## TRENDS & DEVELOPMENTS



# No Lock on the Door

## Privacy and Social Assistance Recipients

In 1928 Virginia Woolf, asked to address the subject of "women and fiction," wrote, "a woman must have money and a room of her own if she is to write."[1] In *A Room of One's Own*, Woolf posited wealth and privacy, privileges denied her sex, as keys to equality:

> And (pardon me the thought) I thought, too, of the admirable smoke and drink and the deep arm-chairs and the pleasant carpets: of the urbanity, the geniality, the dignity which are the offspring of luxury and privacy and space.[2]

Women did not have money to buy themselves time away from the daily struggle, to "escape a little from the common sitting room and see ... the sky, too, and the trees or whatever it may be in themselves."[3] Women had neither the physical nor mental "room" to observe the condition of their lives, let alone question that condition or work to change it. This "room" is a basic human need. It allows us to control our accessibility to others.[4] It allows us secrecy, anonymity and solitude.[5] Of these are born individual autonomy and personal dignity.

As this "room" was denied women in Woolf's England, it is denied Canada's poor. In particular, recipients of social assistance suffer incessant invasions of privacy. Ontario's General Welfare Assistance Act directs welfare administrators to "provide assistance ... to any person in need."[6] However, in assisting with recipients' economic needs, the administration of social assistance denies them the basic psychological need of privacy and the autonomy and dignity to which privacy is essential. The inequality of already disadvantaged individuals is thereby perpetuated; and, as it stands now, these individuals find little refuge in the law.

This inequality should be reason enough for reform. Were this not in itself persuasive, Canadian governments might be compelled to act in the interests of economy. While our governments maintain that the administration of welfare must be invasive in order to ensure that individuals capable of

**ELIZABETH MACFARLANE**

**Elizabeth Macfarlane received her Bachelor of Laws from Osgoode Hall Law School. She is presently articling with a law firm in Toronto.**

supporting themselves do not remain a "drain" on the public purse, the damage done by this invasiveness only promotes recipients' continued financial dependence on the state.

As in Woolf's "Oxbridge," the privileges of "luxury and privacy and space" and the dignity that is their "offspring" are much desired by, but denied to, the disadvantaged in Canada. A 1992 survey reported that 92 per cent of Canadians were at least moderately concerned about issues of privacy.[7] Furthermore, these concerns were highest in groups "which historically have been less powerful in Canadian society," including the elderly, those with less education, and women.[8] These are also among the most economically disadvantaged groups in Canada, and therefore the most vulnerable to privacy invasions. As social scientist Bruno Bettelheim observes, the negative correlation between poverty and privacy has deep historical roots:

> My home ought to be my castle where I am protected from anyone's intruding on my privacy. But my home is my castle only when it is my private possession. Understandably, it was the lord of the castle who first claimed privacy for himself and his doings. Thus from the very beginning, demands for privacy were closely connected with private property. Whoever owned no place of his own, owned no privacy either, and he has very little even today.[9]

The poor often find themselves quite literally without "a room of [their] own": the homeless without walls to shield them from the view of passers-by;[10] those in psychiatric hospitals, nursing homes, prisons and other institutions "never fully alone ... always within sight and often earshot of someone ...";[11] and those in subsidized and low-income housing, too many to a room, exposed to their neighbours by substandard construction.[12]

Between many Canadians and the street, the institution, and the slum stands social assistance. Shelter allowances provided for in regulations under Ontario's General Welfare Assistance Act[13] and Family Benefits Act[14] afford recipients housing. However, what the state gives with one hand it takes away with the other. Adequate housing does not ensure the privacy, nor protect the dignity of social assistance recipients. There is more to privacy than mere physical space.

What more there is has been the subject of endless debate. In *Privacy, Intimacy and Isolation*, Julie Inness was driven to conclude that "[e]xploring the concept of privacy resembles exploring an unknown swamp."[15] Such an exploration reveals myriad definitions. Social philosopher Erving Goffman describes privacy as an individual's ability to "hold objects of self-feeling — such as his body, his immediate actions, his thoughts, and some of his possessions — clear of contact with alien and contaminating things."[16] Legal theorist Richard Posner has defined it as an economic interest in the withholding of personal information.[17] Most legal scholarship, however, has inherited from Samuel Warren and Louis Brandeis' 19th century work, "The Right to Privacy," the proposition that privacy is "the right to be left alone."[18]

*" ... what the state gives with one hand it takes away with the other. Adequate housing does not ensure the privacy, nor protect the dignity of social assistance recipients. There is more to privacy than mere physical space."*

While there is no universally accepted definition of privacy, legal theorists Anita Allen and Ruth Gavison have noted some near-universal ground. In *Uneasy Access: Privacy for Women in a Free Society*, Allen distilled from the literature a definition which characterizes privacy as the ability to control our *accessibility* to others.[19] In "Privacy and the Limits of the Law" Gavison arrived at a similar definition, describing privacy as a "complex of ... three independent and irreducible elements: *secrecy, anonymity*, and *solitude*;"[20] respectively, restrictions on "the extent to which we are known to others," "the extent to which we are the subject of others' attention," and "the extent to which others have physical access to us."[21]

It is to the secrecy, anonymity, and solitude of social assistance recipients that the state does violence. In exchange for "a room of [their] own," social assistance recipients sign away their right to control their accessibility to others. Under Ontario's

social assistance legislation, a recipient's benefits may be cancelled or suspended where she "fails to provide ... information required to determine initial or continuing entitlement to or eligibility for a benefit or the amount of an allowance."[22] The broad working of this provision allows welfare workers a broad scope of inquiry and recipients little room to refuse to disclose personal information. Almost any question could be loosely linked to entitlement or eligibility. In Gavison's terms, recipients are unable to maintain *secrecy*. They are unable to control "the extent to which [they] are known to others." For example, one recipient described being grilled by a worker as to how quickly she went through sanitary napkins and how much she spent on lipstick and on an occasional coke at the mall: "It was a very humiliating experience. The questions were really, really indiscreet."[23]

On March 28, 1994, the Ontario government reinforced this legislated provision with a new policy called Enhanced Verification and Case File Investigation. By imposing more stringent disclosure requirements and more regular file reviews for both general welfare and family benefits recipients, the policy will further reduce their realm of secrecy. The policy's stated goal is to "maximize accountability, to ensure that clients are eligible and receiving accurate entitlements."[24] According to the government, it is just one in an "array of complementary initiatives" aimed at keeping costs down.[25]

Among these "complementary initiatives" were increases to the fraud investigation budget. On April 2, 1994, the Toronto Star reported:

> Under the much-trumpeted *crackdown* on welfare fraud launched Monday, Ontario will hire 270 people, at a cost of $21.5 million during the next 13 months, to conduct a systematic review of the 319,000 welfare cases it administers. Ontario will give a further $20 million to municipalities during the next two years to aid them in detecting fraud among the almost 370,000 social assistance cases they handle.[26] [emphasis added]

Even before this latest initiative was announced, social assistance recipients had begun to feel the effects of a "crackdown". The Legal Clinic Steering Committee on Social Assistance provides a few examples:

> ... in one case a welfare recipient met her Reeve in the local grocery store. He followed her through the store and finally looked in her cart and commented that she didn't really need to be on welfare if she could afford to eat so well. ... Another welfare recipient who had obtained a job bought a soft drink and candy bar for her break. A local politician who knew she was on welfare saw her castigated her 'that that was not the kind of food that GWA recipients should eat.'[27]

These recipients were unable to maintain *anonymity*, Gavison's second indicator of privacy. With 270 newly hired "Rae's Raiders"[28] whose mandate is to systematically review all welfare and family benefits files, recipients will probably have even less control over "the extent to which [they] are the subject of others' attention."

The Ontario government has stated that "home visits," the most invasive investigative technique, will only be conducted "where they are required." [29] Social assistance recipients, however, tell a different story. The Ontario Coalition Against Poverty's Toronto Direct Action Committee recorded, among many incidents of abuse, a case where a man was given only 20 minutes notice of such a visit:

> [He] says they have been most aggressive and rude. ... Malicious complaint by hostile relative the source of the problem. Man, who is just going into hospital to have third brain tumour removed, is not running business out of home as alleged.[30]

This story provides an example of why social assistance recipients are unable to maintain *solitude*. They are unable to control the extent to which others have physical access to them.

Finally, in June of 1994, the Ontario government revamped the Ministry of Community and Social Services' Form 3,[31] the Consent to Disclose and Verify Information, under the Family Benefits Act and the General Welfare Assistance Act. Now, for the purpose of determining and verifying eligibility, all recipients of social assistance in Ontario must consent to the release of their banking information, the possible disclosure to *anyone* of their personal information, and the exchange of information about them between all levels of government. In effect, recipients must sign away their right to control their *accessibility* to others.

In denying social assistance recipients privacy, the state may be perpetuating their disadvantage. Warren and Brandeis asserted that invasions of privacy such as the above can cause "mental pain and distress, far greater than could be inflicted by mere bodily injury."[32] Their assertion is supported by the observations of social scientists Bruno Bettelheim and Joseph Kupfer. Bettelheim remarked that too little privacy can lead to "feelings of incompetence, anomie, even violence."[33] Interestingly, these characteristics figure prominently in negative stereotypes of social assistance recipients. Kupfer noted, in particular, the experience of those in institutions who are "systematically, chronically denied privacy":

> The total loss of privacy characteristic of Orwell's totalitarian society is found in "total institutions" such as prisons. As Erving Goffman observes in *Asylums*: ... "in total institutions these *territories* of the *self* are *violated*. ..." As a result, the individual's self-concept shrinks to fit his powerless condition and his autonomy is diminished.[34]

The invasions of privacy suffered by social assistance recipients are systematic and chronic. Arguably, their "territories of the self" are violated in much the same way as those of institutional inmates. This "powerless condition" may, in some recipients, lead to a kind of learned helplessness, the kind of helplessness that might be mistaken for freeloading laziness.

Kupfer also observed: "Depending on the individual and the extent of privacy loss, the individual's sense of trustworthiness is threatened. Loss of privacy tends either to obstruct the formation of a sense of trustworthiness or erode one already formed."[35] This would suggest that the constant scrutiny, with its implied accusation of dishonesty, harms social assistance recipients. Everything they say must be verified and corroborated as if they are presumed to be lying. It would follow from Kupfer's observations that public suspicions, as expressed by the government, cause social assistance recipients to doubt themselves.

Like Virginia Woolf, Simone de Beauvoir, in *The Second Sex*, cited women's poverty and lack of privacy as one reason for their absence from the ranks of celebrated artists, writers, and philosophers. She wrote: "When the struggle to find one's place in the world is too arduous, there can be no question of getting away from it. Now, one must first emerge from it into a sovereign solitude ..." [36] In denying social assistance recipients privacy, the state may be denying them the opportunity for creative self-fulfillment. Gavison explained:

> By restricting physical access to an individual, privacy isolates that individual from distraction. ... Freedom from distraction is essential for all human activities that require concentration, such as learning, writing, and all forms of creativity.[37]

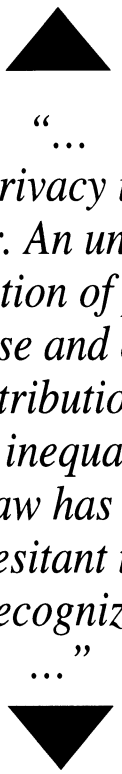
Indeed, the system does not allow social assistance recipients "the freedom from distraction" they would require to upgrade their education, for example. Bettelheim wrote of impoverished children: "To think the thoughts we want such children to think and make their own requires bigger spaces for interaction than are presently available to them and their parents."[38] The same arguably applies to social assistance recipients. In order to envision avenues out of financial crisis, recipients must have more room than the invasive administration of social assistance allows them.

These invasions of privacy are imposed on social assistance recipients in the name of "fiscal responsibility." On January 20, 1994, the Toronto Star quoted a Thunder Bay politician recommending welfare recipients be stripped of their privacy rights to prevent any unjustified dipping into public coffers. "The right of the public to protect its money must outweigh the right of an individual to privacy," Alderman Evelyn Dodds reportedly told a legislative committee reviewing Ontario's

Municipal Freedom of Information and Protection of Privacy Act.[39]

Ironically, a recent Quebec study concluded that measures to reduce welfare fraud in that province cost taxpayers far more than they uncovered in fraud.[40] Furthermore, the Legal Clinic Steering Committee on Social Assistance observed that "[p]eople living in deep poverty are already in a state of financial and emotional crisis."[41] The observations of social scientists like Bettelheim and Kupfer suggest that the harm done by invasions of privacy will only exacerbate that crisis, thereby increasing the barriers to recipients' financial self-sufficiency.

Kupfer writes that, "[t]he necessity of privacy for the development and maintenance of an autonomous self-concept ... grounds the *public policy* of privacy, arguing against a totalitarian state."[42] His use of the word "totalitarian" may seem, in the context of a discussion of privacy, alarmist. However, it derives from the understanding that privacy is essential to autonomy. Privacy is power. An unequal distribution of privacy is both cause and effect of an unequal distribution of power. Unfortunately, it is an inequality which the law has been hesitant to recognize and for which, as yet, there is no adequate legal remedy.



*"... Privacy is power. An unequal distribution of privacy is both cause and effect of an unequal distribution of power. ... it is an inequality which the law has been hesitant to recognize ..."*

## PRIVACY AND THE CHARTER

Privacy has been called "the most comprehensive of rights and the right most valued by civilized men."[43] In this light, it is perhaps surprising that the right to privacy is not explicitly provided for under the Charter and that the courts have been reluctant to find it implied there. In *Canada (D.I.R., Combines Investigation Branch)* v. *Southam*, the Supreme Court of Canada characterized the right against unreasonable search and seizure under section 8 as merely one aspect of a broader Charter right "to be secure against encroachment upon the citizen's reasonable expectation of privacy in a free and democratic society."[44] However, in the ten years since *Southam*, there has not been a great deal of judicial development of this broader right to privacy.

The right to privacy might have been situated under section 26, which provides that the guarantees of specific rights and freedoms under the Charter "shall not be construed as denying the existence of any other rights or freedoms that exist in Canada." The United States Supreme Court has upheld a right to privacy under the Ninth Amendment, a parallel provision of the United States Constitution. However, only the British Columbia County Court, in *R.* v. *Otto*,[45] and the Ontario Court, General Division, in *Roth* v. *Roth*,[46] have followed this American lead.

Given the detrimental impact of privacy invasions on individual autonomy and personal dignity, it would seem that privacy protection might, alternatively, be encompassed within section 7 of the Charter under the right to "life, liberty and security of the person." In *Morgentaler, Smoling and Scott* v. *The Queen*,[47] the Supreme Court of Canada noted:

> counsel for the appellants argued that the Court should recognize a very wide ambit for the rights protected under s. 7 of the *Charter*. Basing his argument largely on American constitutional theories and authorities, Mr. Manning submitted that the right to "life, liberty and security of the person" is a wide ranging right to control one's own life and promote one's individual autonomy. The right would therefore include a right to privacy ...[48]

However, Chief Justice Dickson held: "It is not necessary in this case to determine whether the right [to life, liberty and security of the person] extends further, to protect either interests central to personal autonomy, such as the right to privacy, or interests unrelated to criminal justice."[49] More

recently, in *Rodriguez* v. *British Columbia (Attorney General)*,[50] Justice Sopinka wrote for the majority of the Supreme Court that

> ... personal autonomy, *at least* with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.[51] [emphasis added]

However, he declined to discuss whether a broader right to privacy might, *at most*, be encompassed within security of the person.

Furthermore, a fundamental difficulty in advancing constitutional claims in the context of social assistance is the refusal of courts to recognize such assistance as a constitutionally protected interest. For example, in *Gosselin* v. *Quebec (Procureur Generale)*,[52] claimants brought a class action under section 7 of the Charter challenging a change in that province's social assistance scheme. Under the new policy, allowances for single employable people under 30 were reduced to one-third the amount allowed for people over 30, unless they participated in a "workfare" program. The Quebec Superior Court dismissed the claim on the ground that section 7 does not protect economic interests. The court failed to recognize that the reduction would deprive the claimants of a minimum standard of living, arguably rendering meaningless their Charter right to life, liberty and security of the person.[53]

In characterizing the receipt of social assistance as an economic interest outside the protection of the Charter, the courts are exhibiting a reluctance to interfere with governments' flexibility in balancing the needs of their constituents against fiscal restraints.[54] Martha Jackman criticizes this reluctance:

> ... [T]o the extent that social welfare dependence is the primary indicator of poverty, and poverty is the most pervasive manifestation of disadvantage in our society, I conclude that because courts are unwilling to address social welfare claims, they have deprived the Charter of meaning where it should have held the greatest promise.[55]

Were a right to privacy to be recognized under the Charter, the characterization of social assistance as a mere economic interest would allow a court considering a recipient's claim to privacy to invoke what amounts to a doctrine of waiver. If an individual has no constitutionally protected interest in receiving social assistance, it could be found under section 1 of the Charter that requiring recipients to "consent" to the relinquishment of their privacy rights in exchange for such assistance is reasonable in a "free and democratic society." Thus, the Charter is unlikely to remedy the invasions of privacy suffered by social assistance recipients.

## PROVINCIAL PRIVACY LEGISLATION

Some provinces, including British Columbia and Ontario, have enacted privacy protection legislation. Ontario, where social assistance is administered both by municipalities and the province, has two acts: the Freedom of Information and Protection of Privacy Act (FIPPA)[56] and the Municipal Freedom of Information and Protection of Privacy Act (MFIPPA).[57] The Ontario Information and Privacy Commissioner has described the scope of protection under the acts:

> When a government institution collects personal information from an individual, it may only use the personal information for the purpose for which it was collected, or a consistent purpose. In most cases, an individual should be able to see his or her own personal records, and a government institution may not disclose personal information unless permitted by this *Act*.[58]

The most obvious limitation of the Ontario acts is that they offer protection only against the release of personal information collected by government authorities, without recognizing the privacy interest in it's initial collection. Furthermore, the acts' protection against subsequent release is largely discretionary. Under section 21(1) of FIPPA, the government may not disclose personal information to third persons, unless one of six conditions is met, including that "disclosure does not constitute a justified invasion of privacy." Section 21(2) then sets out six criteria for determining when an "unjustified invasion of personal privacy" exists. Under section 21(3)(c), an "unjustified invasion" is presumed where the personal information relates to "eligibility for social services or welfare benefits or to the

determination of benefit levels," pursuant to section 23. However, the presumption will not apply where "a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption."

This complex structure of broadly worded conditions, criteria, presumptions and exceptions leaves a great deal of discretion in the hands of officials, and permits after-the-fact justifications of government action. In 1990, the Hastings County Council ordered its welfare administrator to release the names of all social assistance recipients to the council. The Legal Clinic Steering Committee on Social Assistance reports that "some Council members implied that this was to allow them to crack down on supposed fraud, while others suggested disingenuously that this would allow them to 'assist' welfare recipients to find work."[59] When the welfare administrator resisted, the council argued section 32(d) of MFIPPA:

> An institution shall not disclose personal information in its custody or under its control except,
>
> . . .
>
> (d) if the disclosure is made to an officer or employee of the institution who needs the record in the performance of his or her duties and if the disclosure is necessary and proper in the discharge of the institution's functions.

The Information and Privacy Commission accepted that council members were officers of the same institution as the welfare administrator, the municipality. It also accepted that council "needed to know" the names of social assistance recipients, despite the fact that no supporting evidence of such "need" was offered. Moreover, even if the commission had taken a stand against the council's order, it could have done no more than make non-binding recommendations to the welfare administrator and the council.

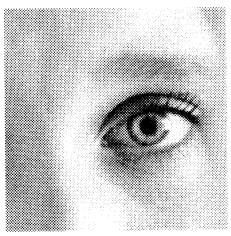
The Hastings County Legal Clinic brought a successful judicial application to prohibit the transfer of this information.[60] The judge denied the council access to the records because he determined that no need had been established: "... section 32(d) requires more than mere interest and concern on the part of the councilors."[61] However, he conceded that he saw "no reason why, in a proper case, the warden of the county could not be entitled to see the names of welfare recipients."[62] Furthermore, he did not elaborate the "proper case," leaving the privacy rights of welfare recipients in a state of uncertainty. The Ontario government finally responded to the Hastings County Council case with an amendment to section 11 of regulation 537 of the revised regulations under the General Welfare Assistance Act, which provides:

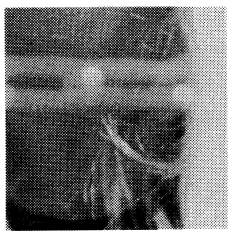
> 11(3) A person administering or enforcing this Act on behalf of [a municipality, an approved band or a district welfare administration board] shall not disclose the identity of a person who is eligible for or receives assistance to the head or a member of that body without the prior approval of the Director.[63]

This amendment appears to address the particular situation of intra-municipality disclosure. However, myriad other invasions remain inadequately addressed.[64] The absence of restrictions on the initial collection of personal information, the complexity of the legal framework, the commission's inability to make binding orders, and the uncertainty of litigation combine to make FIPPA and MFIPPA ineffective protection for social assistance recipients.

Virginia Woolf wrote that "a lock on the door means the power to think for oneself."[65] While social assistance recipients may physically have "a room of [their] own," the law, as it is now stands, affords them no "lock on the door" against persistent invasions of their privacy. The quantity and scope of the personal information recipients are required to provide, the regularity with which they must undergo reviews of this information, the scrutiny to which the spectre of fraud subjects them, and the invasions of their homes they must endure precludes their secrecy, anonymity and solitude. Recipients must sign away their ability to control their accessibility to others in order to receive assistance. Their "power to think for [themselves]" is undermined.

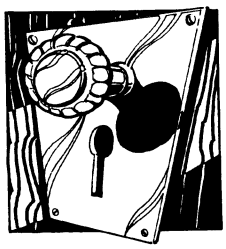
Prime Minister Jean Chretien recently declared social assistance "the safety net that guarantees the dignity of every Canadian."[66] While social assistance may ensure that the minimum financial needs of Canadians are met, it denies those who receive it the minimum psychological need of privacy. Without privacy there is no dignity. The inequality of already disadvantaged Canadians is perpetuated by the invasive administration of social assistance.





Moreover, neither the Charter nor Ontario's FIPPA and MFIPPA provide an adequate remedy.

The mandate for reform is clear. However, Ontario's government has been moving toward even more aggressive denials of recipients' privacy with "cost containment" measures like "Enhanced Verification" and the new Form 3. It is unlikely this pattern will change under the province's new government. Unhappily, invasive measures such as these will only inhibit recipients' ability to recover from the "financial and emotional crisis" that accompanies poverty, and promote their continued financial dependence on the state. Only greater guarantees of privacy for recipients would, in the long run, satisfy both the seemingly competing goals of equality and economy.



## ENDNOTES

1 Virginia Woolf, *A Room of One's Own* (London: Grafton, 1929) at 1.

2 See note 1 at 28.

3 See note 1 at 122-23.

4 Anita L. Allen, *Uneasy Access: Privacy for Women in a Free Society* (Tatowa: Rowman & Littlefield, 1988) at 11.

5 Ruth Gavison, "Privacy and the Limits of Law" (1980) 89 Yale L.J. 421.

6 General Welfare Assistance Act, R.S.O. 1990, c. G.6, s. 7(1).

7 Frank Graves, Nancy Porteous and Patrick Beauchamp, *Privacy Revealed: The Canadian Privacy Survey* (Ottawa: Ekos Research Associates Inc., 1993) at i.

8 Graves, see note 7 at iii.

9 Bruno Bettelheim, "Some Comments on Privacy" in *Surviving and Other Essays* (New York: Vintage Books, 1980) at 407-8.

10 A census by the Canadian Council on Social Development in 1987 indicates that in 1986 there were between 130,000 and 250,000 people in Canada who did not have housing or whose housing was grossly inadequate. See Patricia Begin, *Homelessness in Canada* (Ottawa: Library of Parliament, Research Branch, 1994) at 4-5.

11 Erving Goffman, *Asylums* (Garden City: Doubleday, 1961) at 25.

12 The federal government found in its 1985 "Consultation Paper on Housing" that more than 500,000 rental householders could not afford physically adequate and uncrowded accommodation. "The Federation of Canadian Municipalities reported in Housing and Homelessness that of Canada's 2.6 million renting households, 560,000 (one in five) were found to be in dwellings classified by the Canada Mortgage and Housing Corporation as inadequate or unsuitable." See *Homelessness in Canada*, note 10 at 10-13.

13 R.R.O. 1990, Reg. 537, s. 13.

14 R.R.O. 1990, Reg. 366, s. 12.

15 Julie C. Inness, *Privacy, Intimacy, and Isolation* (New York: Oxford University Press, 1992) at 3.

16 Goffman, see note 11 at 23.

17 Richard A. Posner, "An economic theory of privacy" in Ferdinand Schoeman, ed., *Philosophical Dimensions of Privacy* (Cambridge: Cambridge University Press, 1984) at 333-34.

18 Samuel Warren and Louis Brandeis, "The Right to Privacy" (1890) 4 Harv. L. Rev. 193 at 193.

19 Allen, see note 4 at 11.

20 Gavison, see note 5 at 433 (emphasis added).

21 Gavison, see note 5 at 423.

22 Section 12(c) of Ontario's Family Benefits Act, R.S.O. 1990, c. F.2. See also s. 10(2)(b) of Ontario's General Welfare Assistance Act, at note 6.

23 Konrad Yakabuski, "How Ontario's Welfare Police Could Work" *The Toronto Star* (2 April 1994) A8.

24 Ontario, *Enhanced Verification and case file investigation for general welfare assistance* (Toronto: Queen's Printer for Ontario, 1994) at 1.

25 See note 24.

26 Yakabuski, see note 23.

27 Ontario, Legal Clinic Steering Committee on Social Assistance, *Municipal Freedom of Information and Privacy Act* (Toronto: 20 January 1994) at 4 (Presentation to the Standing Committee of the Legislative Assembly).

28 Yakabuski, see note 23.

29 Yakabuski, see note 23.

30 The Toronto Direct Action Committee, *Report on the Ontario Coalition Against Poverty's Toronto Direct Action Committee after First Full Month of Work* (Toronto: 18 October 1994) at 2.

31 O. Reg. 318/94, s. 6.

32 Warren and Brandeis, see note 18 at 196.

33 Bruno Bettelheim, "Mental Health and Urban Design" in *Surviving and Other Essays* (New York: Vintage Books, 1980) at 205.

34 Joseph Kupfer, "Privacy, Autonomy, and Self-Concept" (1987) 24 American Philosophical Quarterly 81 at 83.

35 Kupfer, see note 34 at 85.

36 Simone de Beauvoir, *The Second Sex* as cited in Allen, see note 4 at 36.

[37] Gavison, see note 5 at 446-47.

[38] Bettelheim, "Mental Health and Urban Design," see note 33 at 207.

[39] Kelly Toughill, "Welfare users should lose privacy rights, politician says" *The Toronto Star* (20 January 1994) A15.

[40] Legal Clinic Steering Committee on Social Assistance, see note 27 at 5.

[41] Legal Clinic Steering Committee on Social Assistance, see note 27 at 4.

[42] Kupfer, see note 34 at 87.

[43] *Olmstead* v. *U.S.*, 277 U.S. 439 (1928) at 478.

[44] *Canada (D.I.R. Combines Investigation Branch)* v. *Southam*, [1984] 2 S.C.R. 145 at 159.

[45] *R.* v. *Otto* (1984), 16 C.C.C. (3d) 289.

[46] *Roth* v. *Roth* (1991), 9 C.C.L.T. (2d) 141.

[47] *Morgentaler, Smoling and Scott* v. *The Queen* (1988), 44 D.L.R. (4th) 385.

[48] *Morgentaler*, see note 47 at 397.

[49] *Morgentaler*, see note 47 at 401.

[50] *Rodriguez* v. *British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.

[51] *Rodriguez*, see note 50 at 521.

[52] *Gosselin* v. *Quebec (Procureur Generale)*, [1992] R.J.Q. 1647 (C.S.).

[53] Martha Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993) 19 Queen's L.J. 65 at 78.

[54] Jackman, see note 53 at 86-87.

[55] Jackman, see note 53 at 67.

[56] R.S.O. 1990, c. F.31.

[57] R.S.O. 1990, c. M.56.

[58] Information and Privacy Commissioner/Ontario, "Local Government and the Municipal Freedom of Information and Protection of Privacy Act" (1990) 24 L. Soc. Gaz. 247 at 247.

[59] Legal Clinic Steering Committee on Social Assistance, see note 27 at 6.

[60] *H.(J.)* v. *Hastings (County)* (1992), 8 Admin. L.R. 157.

[61] *Hastings*, see note 60 at 160.

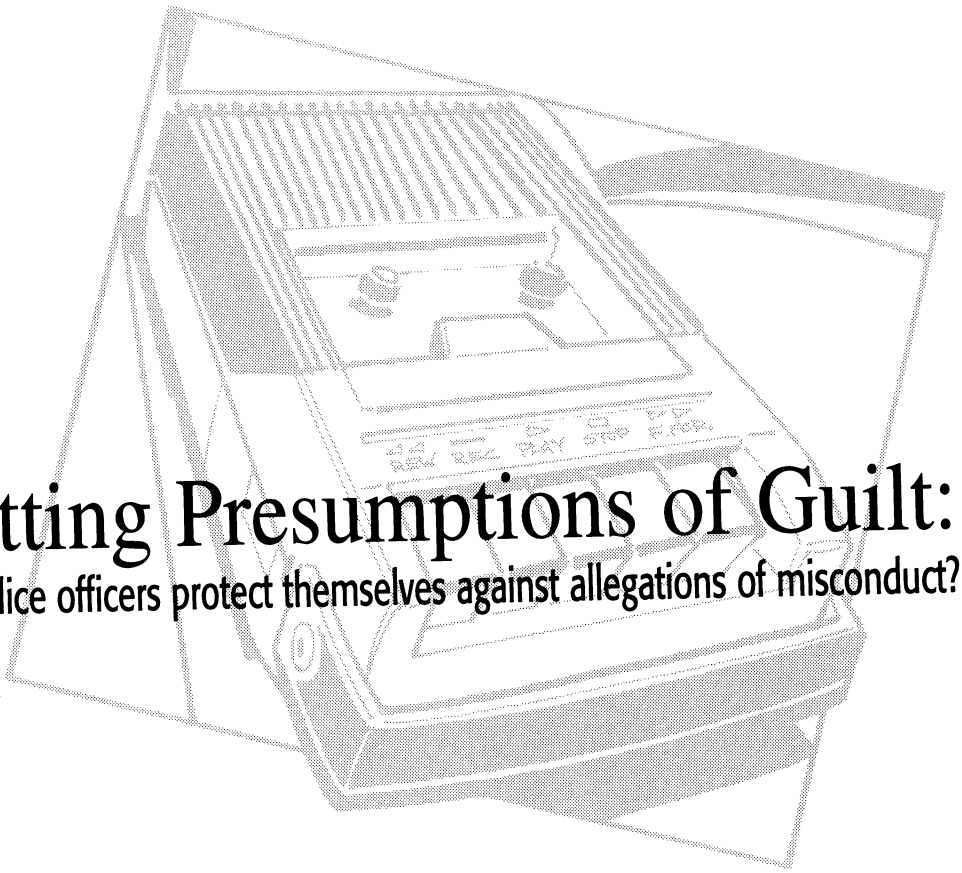
[62] *Hastings*, see note 60 at 160.

[63] O. Reg. 640/94.

[64] For example, the exchange of information between Ontario's Ministry of Community and Social Services and the federal Ministry of Citizenship and Immigration regarding refugees and new immigrants who are in receipt of social assistance.

[65] Woolf, see note 1 at 115.

[66] Interview with Jean Chretien on "Morningside," C.B.C. Radio (1 March 1995).



# Rebutting Presumptions of Guilt:

## How can police officers protect themselves against allegations of misconduct?

*This article is dedicated to the memory of Constable Paul M. Kenney of the R.C.M.P.*


**CRAIG S. MACMILLAN**

**Craig S. MacMillan has a Diploma in Law Enforcement, a Bachelor of Arts in Legal Studies, and a Master of Arts in Legal Administration. He received his Bachelor of Laws from Dalhousie University, and is currently doing his Ph.D. in Law at the University of British Columbia in Vancouver. Craig has thirteen years experience in policing.**


## 1. INTRODUCTION

Public accountability of police officers is of fundamental importance in Canadian society. However, after a recent police-involved shooting it was apparent that some journalists, politicians, and citizens are prepared to publicly pre-judge and condemn a police officer's action before all the facts are known.[1] For example, *within hours* of this shooting, and *before* an investigation was completed, the (then) federal Minister of Justice made statements in the House of Commons that raised considerable doubt about whether the presumption of innocence was operating.[2]

Another Member of Parliament stated that the officer, when confronted by the suspect, who was wielding a butcher knife, should have shot the suspect in the arm or leg.[3] Such an expectation is unrealistic, as the difficulty in hitting a moving target is common wisdom among persons knowledgeable in the use of firearms. This type of response indicates that some individuals, for ideological, political, or other reasons, operate on the *presumption* that officers have engaged in misconduct, regardless of the specific circumstances of each case. As a result, police officers may want to consider measures that will assist in protecting their *personal interests* should an allegation of "misconduct" arise. One such measure is to tape record interactions with the public that could potentially lead to allegations of wrongdoing. This is not to say that the conduct of police officers should not be held to a high standard or criticized; rather, the concern is whether an individual officer can be certain that he or she will be treated in accordance with fundamental legal principles when a serious allegation arises (*e.g.*, presumption of innocence).

A police officer may want to make a personal interest recording for a number of reasons, the most important of which would be to provide an accurate account of an incident that could lead to an allegation, investigation, or charge against the officer. The

purpose of the recording is not to pursue an investigation, but to protect the personal interests of the officer.

The following two cases illustrate the usefulness of personal interest recordings when dealing with allegations of misconduct. In 1989, four R.C.M.P. officers were reported to have used excessive force against a woman during the execution of a search warrant by "holding [the complainant] by the throat and putting a knee to her stomach."[4] The preliminary investigation revealed that there were only two officers present during the execution of the search warrant. A tape recording made at the scene by one of the officers established that the complainant had fabricated the allegations of use of force.[5] More recently, in 1993, two municipal officers in Nova Scotia were able to rely on a recording made while a complainant was being escorted to jail to establish that the complainant made death and other verbal threats against the officers and their families.[6] The complainant denied threatening the officers, even when confronted with the tape at a subsequent public hearing into the complainant's allegations that he was assaulted by the officers. The tape provided persuasive evidence of what transpired, which accorded with the officers' (and not the complainant's) version of events.[7]

Until recently, the Criminal Code[8] permitted police to intercept or record a communication to which they were party, or where they had the "consent" of one of the participants in the conversation. Known as "participant" or "one-party consents,"[9] this statutory authority was routinely relied on by police to intercept communications for investigative purposes.[10] These provisions also permitted police officers to make personal interest recordings.

In 1990, however, the Supreme Court of Canada ruled in *R.* v. *Duarte*[11], *R.* v. *Wiggins*,[12] and *R.* v. *Wong*,[13] ("the Trilogy") that it was unconstitutional for the police to intercept private communications based on consent without prior judicial authorization. Asserting that "agents of the state" were engaging in unreasonable search and seizure, the Supreme Court found that consent interceptions were a violation of the "reasonable expectation of privacy" under section 8 of the Charter. Thus, investigative one-party consents by agents of the state became unconstitutional.

On August 1, 1993, the federal government amended the Criminal Code[14] in an attempt to bring the interception provisions into constitutional conformity. The amendments require the police, except in limited circumstances (*e.g.,* emergency), to obtain judicial authorization to intercept communications.

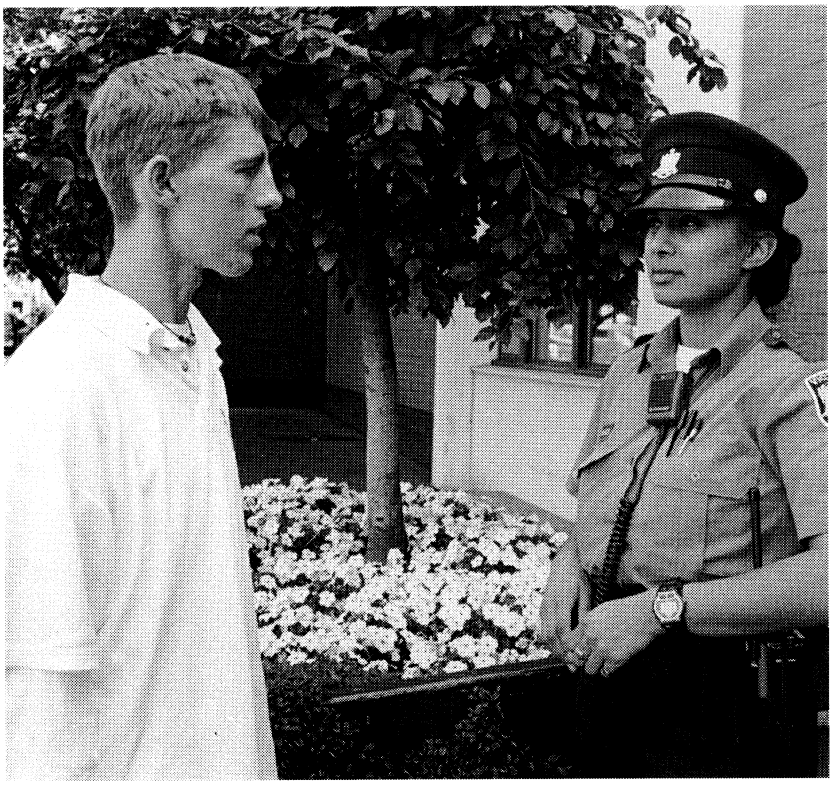
The issue of personal interest recordings by police officers was not raised in the Trilogy, nor was it directly addressed by the amendments to the Criminal Code. Consequently, whether a police officer can record communications with the public to protect her or himself against allegations of misconduct remains an unanswered question. An examination of the recent amendments to the Criminal Code and the principles that arise from the Trilogy may assist in determining the answer.

## 2. THE CRIMINAL CODE PROVISIONS ON INTERCEPTING COMMUNICATIONS

The recent amendments to the Criminal Code do not resolve the issue of personal interest recordings by police officers. Section 183 of the Code defines a "private communication" as a communication in which the originator, under the circumstances, has a reasonable expectation that the communication will not be intercepted. Wilfully intercepting a private communication is an offence under section 184(1). However, under section 184(2)(a), if "a person has the consent to intercept, express or implied" of the originator or intended recipient, it is not an offence. Thus, it appears that any person (*except* possibly a police officer) can continue to intercept communications without judicial authorization, provided he or she is a party to the communication or has the consent of one of the parties.

A closer examination of the Code's provisions is required to determine the statutory impact on personal interest recordings. First, section 184.1(1) permits consent interceptions, without prior judicial authorization, where the agent of the state has reasonable grounds to believe that the person consenting is at risk of bodily harm, and the purpose of the interception is to prevent that harm (*i.e.,* bodily harm interception). Subsection (2) makes the contents of the interception "inadmissible as evidence except for the purposes of proceedings in which actual, attempted or threatened bodily harm is alleged ..." Subsection (3) directs the intercepting agent to

destroy any recording, notes, and transcripts arising from a bodily harm intercept, provided it is not needed to prove harm under subsection (2). This measure is primarily intended to ensure the police have an ability to adequately protect undercover operators. In effect, it authorizes an "electronic life line between undercover operatives and back-up teams."[15]



Second, section 184.2(1) states "A person may intercept. ... a private communication where either the originator of the private communication or the person intended by the originator to receive it has consented and an authorization has been obtained ..." (*i.e.,* consent and authorization interception). Subsection 2 restricts applications for an authorization to peace or designated public officers. To obtain an authorization the officer must make an application in writing, along with an affidavit which outlines, among other things, the reasonable grounds for believing an offence will be committed, the particulars of the offence, and the period for which the authorization is requested.

Neither section 184.1 (bodily harm) nor section 184.2 (consent and authorization) appear to provide a basis for an officer to make a personal interest recording. Under section 184.1, officers will not always have reasonable grounds in advance to believe that "bodily harm" may arise out of a public interaction. For instance, some police-civilian encounters where there is no concern of risk of bodily harm to the consenting officer can lead to allegations (*e.g.*, routine arrest where it is alleged the officer did not tell the accused of the right to retain counsel). Further, the "purpose" of the personal interest recording is not to prevent bodily harm. This may be an indirect result, but a recording to protect personal interests is directed more to providing exonerative evidence. Bodily harm intercepts also require the officer to destroy the recording "as soon as is practicable," well before the expiry of limitation of action periods for civil, administrative, or criminal proceedings which might be brought against the officer and thus defeating the "personal interest" purpose of the recording.

In relation to a consent and authorization interception (section 184.2), it is impractical to expect police officers to swear an affidavit in order to obtain judicial authorization to record communications in the circumstances of a personal interest recording. For example, an officer dispatched to a violent domestic dispute could not justify delaying attendance to obtain an authorization, yet this type of call can lead to serious allegations against officers (*e.g.*, excessive use of force). Even if a delay could be justified, the officer would not be able to categorically identify the offence involved or the time frame in which it might occur, since each incident has to be judged individually on the spot.

Third, police officers under section 184.4 can make an interception in "exceptional circumstances" where:

(a) the officer believes on reasonable grounds that the urgency of the situation is such that *an authorization could not, with reasonable diligence*, be obtained under any other provision of this Part;

(b) the peace officer believes on reasonable grounds that such an interception is *immediately necessary to prevent an unlawful act that would cause serious harm* to any person or to property; and

(c) either the originator of the private communication or the person intended by

the originator to receive it is the person who would perform the act that is likely to cause the harm or is the victim, or intended victim, of the harm. [Emphasis added.]

The threshold of "serious harm" makes a personal interest recording impossible under this section. If the officer waited until he or she had formed reasonable grounds to turn on the recorder, it might be too late. A prudent officer would initiate the recorder before entering the scene, since it can easily be turned off if there is no further need for a recording.

Fourth, section 487.01 outlines the authority for a judge to issue a "general warrant" to the police to utilize a device, investigative technique, procedure, or do anything described in the warrant that would otherwise constitute an unreasonable search or seizure of a person or property. The judge must be satisfied that an offence has been, or will be, committed against an Act of Parliament, and that the evidence will be obtained through the technique or device. The judge must also be satisfied that issuing the warrant is in the best interests of the administration of justice, and that there is no other provision that would provide authorization to conduct the procedure. The issuance of a warrant shall be on such terms and conditions as the judge considers necessary to ensure it is reasonable. This section contemplates the use of video surveillance, and requires the terms and conditions to be imposed by the judge to ensure that privacy is minimally impaired.

Personal interest recordings cannot be dealt with under section 487.01 for the simple reason that a warrant to intercept personal interest communications would have to be issued in perpetuity to allow officers to record situations while they are agents of the state. There is also some question that the authority for the judge to issue a general warrant is too vague to withstand Charter scrutiny.[16]

It is evident that the above exceptions allowing police, as agents of the state, to intercept communications are not really applicable to personal interest recordings. The four provisions reviewed do not deal with interceptions by police other than for investigative purposes. On the other hand, under section 184(2)(a) it appears that consent interceptions by police officers to protect personal interests are *probably* exempt from criminal sanction. The issue, then, is whether the courts will be prepared to find that personal interest interceptions are constitutional.

*"... 'agents of the state' cannot use one party consents to intercept communications of citizens where the citizen has a 'reasonable expectation of privacy' unless they have prior judicial authorization."*

In addressing the constitutionality of such interceptions, two issues must be examined: is the police officer acting as an agent of the state? and if so, does the citizen have a reasonable expectation of privacy in the circumstances? Since it appears that the issue of a personal interest recording cannot be completely resolved under the Criminal Code, it may be useful to return to the Trilogy to determine whether or not police officers can record communications to protect their personal interests.

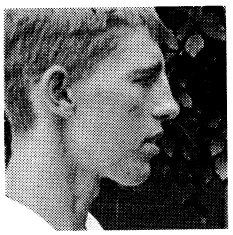
## 3. SECTION 8 OF THE CHARTER: AGENTS OF THE STATE AND EXPECTATIONS OF PRIVACY

Section 8 of the Charter protects citizens against "unreasonable search and seizure" by the state. The Trilogy found that "agents of the state" cannot use one party consents to intercept communications of citizens where the citizen has a "reasonable expectation of privacy" unless they have prior judicial authorization. Thus, determining whether or not a police officer can use a personal interest recording requires an analysis of the two thresholds created by the Supreme Court of Canada under section 8 to establish an unreasonable search or seizure.

First, is a police officer an "agent of the state" for the purposes of a personal exonerative record-

ing? In the Trilogy the Supreme Court did not define an "instrumentality of the state" or provide any guidance on the scope of this status. The problem is that section 8 is attached to the agent, yet fails to recognize the personal interests of that agent. Will a court be prepared to discern between the individual and state interests of an agent?

Second, when is there a "reasonable expectation of privacy"? The onus is on the person alleging a violation of section 8 to establish that he or she had a "reasonable expectation of privacy" that was violated by the state.[17] Judicial and academic scrutiny has only focused on situations involving the use of surreptitious recordings where the person being recorded was *unaware* he or she was dealing with an agent of the state.[18] If this veil is removed, and an individual is aware he or she is dealing directly with an agent of the state, is the expectation of privacy sufficiently reduced to make personal interest recordings by police officers reasonable? Moreover, does the location of the personal interest recording, or the number of participants involved, also impact on the expectation of privacy?



There are two possible ways to approach the constitutional analysis of personal interest recordings. The first is to assert that section 8 is not applicable to a scenario where a police officer records communications to protect personal interests. The officer is merely recording his or her communications with third parties to protect private interests. It can be argued that this is unrelated to the officer's function as an agent of the state, since the officer is not conducting an investigation or actively seeking to gather evidence for a state prosecution. The second approach, if an officer *is* found to be an agent of the state for the purposes of a personal interest recording, is to assert that, based on the *Hunter* and *Duarte* analysis of section 8, there is no reasonable expectation of privacy in communications with *known* agents of the state. In *Duarte*, it was clear that the officers who intercepted the communication were acting as agents of the state conducting an investigation. However, the court found that under section 8 of the Charter, it is also necessary for a party to have a reasonable expectation of privacy for a search or seizure to be declared unreasonable.

Beginning with the agent of the state analysis, several factors highlight the personal interests at stake for an officer when an allegation of misconduct is filed. For instance, R.C.M.P. officers under investigation for an allegation of misconduct can be "ordered" to answer questions.[19] Failure to provide an ordered statement can lead to further charges and sanctions against the officer.[20] Although there is a statutory "use immunity" with respect to the statement — that is, the ordered statement cannot be used against the officer in subsequent proceedings — there is no "derivative use immunity"[21]: evidence identified based on the officer's compelled answers is admissible in subsequent proceedings against the officer. In addition, the recent decisions of the Supreme Court of Canada in *R.* v. *Kuldip*[22] (use of testimony) and *R.* v. *Stinchcombe*[23] (disclosure) have cast some doubt on the effectiveness of "use immunity" to prevent ordered statements from being used in proceedings against an officer.

The former commissioner of the R.C.M.P., R.H. Simmonds, clearly stated the force's purpose behind requiring ordered statements:

> What we can do as a result of the ordered statement — and even this causes us problems from time to time before the courts and with members — is go out and get what you might call independent evidence.[24]

Even more disturbing is the fact that there is *no* right to counsel during the taking of an ordered statement:

> During a Code of Conduct [*i.e.*, internal] investigation, legal counsel or representative may be *excluded* when a statement is being taken or during the *questioning of a suspect member* ...[emphasis added].[25]

The result is that R.C.M.P. officers can be faced with having to disprove a charge (criminal, civil or internal) based on evidence derived from the statement they were forced to provide, without the benefit of legal counsel.[26] With a personal interest recording, the officer may be able to avoid giving a statement at all, since the recording would reveal what transpired.

When a police officer is charged, it is the individual officer who is named in any information alleging a criminal or disciplinary offence, not the department. Further, if it is concluded that the officer was acting outside the scope of his or her duties

there may be no funded counsel available from the department at the investigative or trial stage,[27] which can leave individual officers vulnerable. Even Alan Borovoy, a noted proponent of civil rights in Canada and police watchdog, has recognized that police officers are particularly vulnerable to criminal charges as a result of public complaints.[28]

These observations highlight some of the significant personal interests that can be at stake for an officer when there is an allegation of misconduct. The distinction between the personal and agent capacity of an officer is an important one, and, if accepted, would place the officer (as an individual) within the consent exception of the Criminal Code, thereby avoiding the application of section 8 of the Charter. Without such a distinction, the courts would

*"The distinction between the personal and agent capacity of an officer is an important one ... Without such a distinction, the courts would be unfairly requiring strict accountability of officers, while denying them the ability to protect their interests when subjected to the rigours of a ... misconduct review."*

be unfairly requiring strict accountability of officers, while denying them the ability to protect their interests when subjected to the rigours of a (criminal, administrative, public, or civil) misconduct review. The need for such a distinction is particularly striking when one considers that some police officers (*e.g.*, R.C.M.P.) can be the target of an evidence gathering process (*i.e.*, ordered statements) that is not subject to judicial or public review. When determining the constitutionality of personal interest recordings, the courts should not overlook the human interests of "instrumentalities of the state."

The second analysis under section 8 is expectation of privacy. One of the underlying themes of the Trilogy was the state's clandestine recording of private communications without the knowledge of all of the parties. Does the public have the same expectation of privacy when they know they are communicating with an agent of the state? Further, how is the expectation of privacy affected by a known agent of the state surreptitiously recording a party's communication with the officer?

Quigley and Colvin, in their review of decisions under section 8, note that the courts have not been entirely clear on when a person can depart from the section 8 criteria established in *Hunter,* and that the criteria themselves are not a very satisfactory way to analyse all problems.[29] In *Hunter*, Justice Dickson (as he then was) held that the minimum requirement under section 8 for a reasonable search or seizure is prior judicial authorization. To obtain that authorization, an agent of the state is required to establish on reasonable and probable grounds, under oath, that they believe an offence has been committed, or is about to be committed, and the evidence sought is located on the premises to be searched. In *Duarte*, Justice LaForest reinforced these threshold requirements by finding that a consent-based interception of a private communication by the state, without judicial authorization, is unreasonable. He concluded that Parliament "succeeded in striking the appropriate balance" with the Part VI (then Part IV.1) provisions that required the issuance of judicial authorizations to intercept communications.[30]

Similar to the observations made above regarding the recent amendments to the Criminal Code, it would be impossible for an officer to meet the strict constitutional requirement to obtain an authorization for a personal interest recording. There is no ability to predict where or when an authorization would be necessary, or to provide it in an expeditious fashion. A second problem is that an officer will not always have reasonable and probable grounds in advance upon which to request an authorization. The judicial requirements arising from *Hunter* and *Duarte* are too impractical to apply to personal interest recordings. The comments of Stanley Cohen, in relation to the state intercepting communications, are apt:

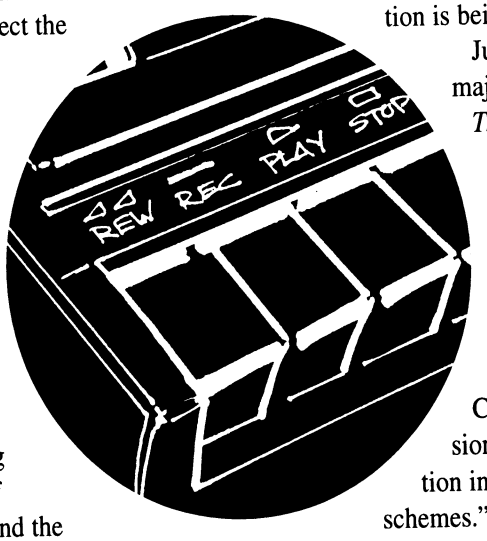
> [A] blanket warrant requirement is neither desirable as a matter of policy, nor practical in the context of the *real world of law enforcement* ... [31] [emphasis added].

In *Hunter,* Dickson did concede that a warrant may not be necessary in every instance, indicating there may be instances where prior judicial authorization would not be "feasible."[32] Despite the findings in *Duarte* that a consent-based interception of a

private communication by the state is unreasonable without prior judicial authorization, it may be argued that it is not "feasible" for an officer to obtain prior judicial authorization to make a personal interest recording.

Considering the purposive approach to the Charter, it can be argued that the courts cannot effectively "balance the interests" under section 8 unless they recognize that agents of the state also have private interests in need of protection. It is not always a bilateral question of state versus individual, since a police officer also has important private interests worthy of constitutional recognition. Allegations of misconduct against an officer may involve a trilateral balancing of interests: the state, the complainant, and the individual police officer. It should be noted that the interests of these parties are not all the same.

The Supreme Court has shown some willingness to find certain actions by the state reasonable despite their failure to meet the standards elucidated in *Hunter* for section 8. For example, in *R. v. Simmons*, Chief Justice Dickson noted that "[t]he Charter [sic] does not protect the individual from all searches, but only from those deemed unreasonable."[33] In *Simmons*, the majority found that "the degree of personal privacy reasonably expected at customs is lower than in most other situations."[34] Persons who attend at a border entry point cannot expect to be free from a certain level of scrutiny. As a result, "routine questioning by customs officers, searches of luggage, frisk or pat searches, and the requirement to remove such articles of clothing as will permit investigation of suspicious bodily bulges. . .are not unreasonable within the meaning of section 8."[35] Can the reasoning of *Simmons* be applied in the context of personal interest recordings? In other words, can a reduced expectation of privacy be shown in communications with known agents of the state?




Generally, any person who speaks with a known agent of the state (*e.g.*, a police officer), particularly one that enforces laws, understands that the agent is under an obligation to report communications made to him or her. As a result, there is little, if any, expectation of privacy in communications with a known agent of the state. If it is common knowledge that police officers investigate and charge people, and make reports based on what is said to them, it can be argued that the expectation of privacy is significantly reduced.

Further, Marc Rosenberg, writing in the wake of *Duarte* and *Wong*, argues that the application of section 8 is not unlimited in that "[t]he authorities must do something, *use some means of investigation*, which engages its terms"[36] [emphasis added]. An officer is not investigating pursuant to the state's interests when recording a personal interest communication, unless, of course, the officer has informed the individual that they are under investigation, and informs the person the "statement" is being recorded. At this point the officer is no longer relying on the personal interest purpose (to refute any possible allegations) but has adopted a state purpose (investigative) for the recording. Section 8 of the Charter, however, would not arise for the (now) investigative recording because the person will have been advised that their communication is being recorded.

Justice Wilson, writing for the majority in *R.* v. *McKinlay Transport Ltd*,[37] set out another consideration when interpreting the Charter. She indicated that "flexibility" is important; that it would be incorrect "for the courts to apply a rigid approach to a particular section of the Charter [sic], since the provision must be capable of application in a vast variety of legislative schemes."[38] Further, Wilson concluded:

> Since individuals have different expectations of privacy in *different contexts* and with regard to *different kinds of information and documents, it follows that the standard of what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful* [39] [emphasis added].

In *McKinlay Transport* the majority drew a distinction between a criminal or quasi-criminal context, where the rigours of *Hunter* will rarely be avoided, and "the administrative or regulatory context, to which a lesser standard may apply depend-

ing upon the legislative scheme under review."[40] The court recognized that "there will be instances in which an individual will *have no privacy interest or expectation* in a particular document or article required by the state to be disclosed"[41] [emphasis added].

This view coincides with the observation that when a person knows he or she is communicating with an agent of the state there is little, or no, expectation of privacy in that context. Individuals may expect that certain personal information provided to the agent is private (*e.g.,* a phone number); but this could not reasonably be expected to extend to any communications upon which they are *basing* a complaint against the officer. There is also a distinction to be made between criminal and internal allegations of misconduct, in that the former involves a criminal context, and the latter an administrative context. Since allegations of misconduct can involve criminal, internal, public, and civil contexts, the courts may have to recognize that a lesser standard of privacy exists in communications with known agents of the state because of the priority placed on police accountability.

Two other factors should also be considered. First, most personal interest recordings will be made in public locations. Certain locations, and actions of civilians, are so completely public that it would impossible to argue there was a reasonable expectation of privacy either objectively, subjectively, or socially.[42] As a result, it may not be reasonable for someone to expect that their communications with an officer would be heard only by that officer. Second, many communications cannot be considered "private" based on the number of participants. If a person is communicating in the presence of the police and several other people, is there any reason for that person to believe he or she is engaging in a "private conversation"?

These two additional factors would impose a very onerous burden on a party trying to assert that a personal interest recording breaches a reasonable expectation of privacy. The objective and subjective expectancy tests discussed by the Supreme Court in the Trilogy could not be met. It remains to be seen, however, whether the court will rely on the social expectation test[43] to erect a constitutional barrier under section 8 against personal interest recordings. To sustain Justice LaForest's social expectation position, the Supreme Court will have to maintain that individuals in society never expect an agent of the state with whom they are dealing to "record" communications. It should be noted, however, that the police already record communications (frequently in the presence of citizens) in notebooks, forms, reports, court briefs, statements, and on interview tapes.

The above analysis suggests it would be difficult for a party to argue that he or she has an expectation of privacy in the usual or routine communications that occur with known agents of the state. A privacy issue may arise, however, if an undisclosed personal interest recording is made of a communication between an officer and a civilian (*i.e.,* only two parties) in a non-public location. The question may be merely academic, since the officer could simply advise the other party, if it is necessary to make a recording, that a tape recorder is being used. The critical element is probably that the person is *aware* they are communicating with an agent of the state. That citizens know they are speaking to an agent of the state, usually in a public or semi-public location, sometimes with several people present, tends to remove any appreciable subjective or objective expectation of privacy under section 8 of the Charter. If, however, the courts elect to follow the social expectation path of Justice LaForest, an undisclosed officer-civilian personal interest recording made in a non-public location could possibly be susceptible to an unreasonableness finding under section 8 of the Charter.[44]

## 4. OBSERVATIONS

This article has attempted to consider the legal and constitutional position of an officer who utilizes a tape recorder as a means of protecting his or her personal interests against allegations of misconduct. Current trends in police accountability may make individual officers' interests susceptible to abuse by the accountability "system." Many police critics fail to recognize that the individual officer is not always protected, or adequately represented, in a process that can be abused by complainants, journalists, civilians, and management, all of whom have their own vision of accountability. [45]

It should be noted that police officers may not have significant latitude in determining their course of action in a given situation. A police officer may have to act without time for reflection on what are

sometimes finite legal distinctions that can separate criminal or disciplinary conduct from permissible conduct. Sometimes officers are operating in an area of conflicting and contradictory legal, policy, and social demands. It is important to remember that "law," by its very nature, can create situations that require the police to operate in grey areas, with no clearly defined expectations or consensus, until such time as the judiciary, legislators or the public provide direction.[46] On the other hand, when police officers do act improperly they must be held accountable. The problem is that accountability can become a manipulative and amorphous concept, particularly when some journalists, politicians, interest groups, and other members of the public are prepared to presume police wrongdoing when allegations of misconduct arise. Personal interest recordings are one measure that may assist officers, *and* the public, to ensure the accountability process is fair and effective.

*"Sometimes officers are operating in an area of conflicting and contradictory legal, policy, and social demands. ... 'law,' by its very nature, can create situations that require the police to operate in grey areas..."*

The recent amendments to the interception provisions of the Criminal Code do not deal directly with personal interest recordings. However, based on section 184(2)(a), it appears that personal interest recordings are not a statutory violation. If Parliament is prepared to protect the physical integrity of officers by enacting the bodily harm exception, it may want to clarify the issue of personal interest recordings by expressly protecting the legal/private integrity of police officers. For example, a provision could be enacted that permits an officer to intercept communications to protect his or her personal interest. If there are objections to such a measure, consideration could also be given to limiting the admissibility of such recordings to situations where the officer is accused of misconduct or charged with an offence. Another possibility is for Parliament to expressly exclude communications with *known* agents of the state from the definition of "private communication."

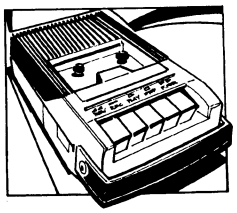
After reviewing the requirements of section 8 of the Charter and the Trilogy, a strong argument can be made that police officers can rely on personal interest recordings in most instances. This is so because a personal interest recording is not made in the "agent" capacity, or because there is no expectation of privacy in most communications with known police officers. If the non-agent argument is rejected, it appears the only unresolved question under the no-expectation-of-privacy argument is whether a citizen's privacy expectation, in the limited circumstances of a non-public communication between a known agent and a civilian that is recorded without the knowledge of the civilian, is reduced to such a level that a personal interest recording is a reasonable search or seizure. The officer, in this scenario, will be relying on the fact that the citizen knew that he or she was communicating with an agent of the state, regardless of whether or not the person knew a recording was being made. In order to answer this question, the conflict among the three forms of the expectation of privacy test (objective, subjective, and social) utilized by the various members of the Supreme Court will have to be resolved. For advocates of personal interest recordings it will be important to emphasize that the purpose of the recording is not investigative, but is intended to protect the private interests of the officer.

It is interesting that the current statutory provisions and Trilogy decisions seem to permit a citizen to record communications without authorization, but police officers may be denied the ability to protect their personal interests because they are identified as agents of the state, regardless of the purpose behind recording the communication. Considerable weight can be given to the fact that a recording can accurately reproduce events and thus assist in settling important questions of accountability. In light of the fact that personal interest recordings would only be instituted as a protective non-investigative measure against allegations of misconduct, the general concern regarding privacy interests of citizens is somewhat dissipated.

Officers should not expect that they will always have the final say with respect to a recording. If a recording is made which identifies a situation where the officer has engaged in a criminal or disciplinary offence, there is no reason to believe the investigating agency, at least with respect to a criminal allegation, could not seize the tape. The tape would be evidence in a criminal investigation, and the department could certainly obtain a search warrant to

search the officer's locker, private vehicle, or home for the tape.

In addition, as acknowledged by Glanville Williams, introducing recorders may lead some parties to be sceptical if a recorder is not utilized in every instance.[47] If officers begin to make common use of recordings to rebut allegations, there may be questions raised if an incident goes unrecorded. Further, tape recordings may not be conducive to the betterment, or maintenance, of relations with the public. It should be understood, however, that a personal interest recording would only occur where the officer believes that a situation could give rise to an allegation. Moreover, the recording of an incident assures that everyone's interests are treated fairly, based on reliable evidence. Even sceptics of the police accountability process cannot deny that personal interest recordings have the potential to provide valuable and reliable evidence when an allegation of misconduct arises.



## ENDNOTES

1 "Pattern Disturbing, Rae says" *Globe and Mail* (4 May 1992) A1; "Ottawa Pledges to curb police use of deadly force: Concerns that rules are *too* broad" *Globe and Mail* (5 May 1992) A1; "Campbell pledges limits on use of deadly force" *Globe and Mail* (5 May 1992) A2.

2 *House of Commons Debates* (4 May 1992) at 10042 (see Kim Campbell).

3 See note 1.

4 "RCMP face complaints" *The Chilliwack Times* (2 May 1989).

5 Personal Communication by the author with one of the named officers and review of the tape recording.

6 See *Purcell* v. *Smith and McKenna* (1993), Nova Scotia Police Commission Civilian Review Board.

7 The author was present for the testimony at the *Purcell* hearing into the allegations against the officers.

8 See Part VI of the Criminal Code, "Invasion of Privacy" provisions.

9 David Watt, *Law of Electronic Surveillance in Canada* (Toronto: Carswell Co., 1979) c. 2; Ronald J. Delisle and Don Stuart, *Learning Canadian Criminal Procedure,* 2d ed. (Scarborough: Thomson Professional Publishing, 1991) at 188-89.

10 Law Reform Commission of Canada, *Electronic Surveillance* (Working Paper No. 47) (Ottawa: L.R.C.C., 1986) at 27.

11 *R.* v. *Duarte* (1990), 74 C.R. (3d) 281.

12 *R.* v. *Wiggins* (1990), 74 C.R. (3d) 311.

13 *R.* v. *Wong* (1990), 1 C.R. (4th) 1.

14 An Act to Amend the Criminal Code, the Crown Liability and Proceedings Act and the Radio Communication Act, S.C. 1993, c. 40 in force by O.I.C. 1 August 1993, SI/93 154.

15 "Bill Presented to Parliament To Ease Up On Police Surveillance Restrictions" (January, 1993) Blue Line Magazine at 8.

16 Canadian Police Association, *Submission to the Legislative Committee on Bill C-109 Wiretap* (Ottawa: 1993).

17 *R.* v. *Hunter*, [1984] 2 S.C.R. 145.

18 For example, see Marc Rosenberg, "Controlling Intrusive Police Investigative Techniques Under Section 8" (1991), 1 C.R. (4th) 32.

19 Section 40(2) of the Royal Canadian Mounted Police Act, R.S.C. 1985 (2nd Supp), c. 8 states that officers must answer questions when under investigation for a conduct offense.

20 See note 19; also see, for example, s. 40 of the Code of Conduct (contained in the regulations of the R.C.M.P. Act), which states that it is a disciplinary offence to disobey a lawful order, and dismissal is a sanction that could ultimately be imposed against an officer for a disciplinary offence.

21 See note 19, s. 40(3).

22 *R.* v. *Kuldip*, [1990] 3 S.C.R. 618.

23 *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326.

24 House of Commons, Legislative Committee on Bill C-65 – An Act to Amend the Royal Canadian Mounted Police Act and Other Acts in Consequence Thereof, Minutes of Proceedings and Evidence, Issue No. 7, (27 November 1985) at 7:16.

25 R.C.M.P. Administration Manual: "Code of Conduct (Part IV) Investigations," XII.4.E.3. (17 November 1994).

26 For further discussion on other possible issues, see Craig S. MacMillan, "Lilburn in Uniform? A Charter Analysis of 'Ordered Statements' Under the *R.C.M.P. Act*" (1993) 2 Dalhousie J. Legal Studies 93.

27 For example, see R.C.M.P. External Review Committee, *Decisions*, G-63 Summary, (16 October 1992) where it was concluded by the R.C.M.P. Commissioner that public funds should not be used for defence of an officer facing a criminal charge.

28 Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-65, see note 24 at 6:7-8; more generally, see Laurence Lustgarten, *The Governance of Police* (London: Sweet & Maxwell, 1986); Ian Freckelton, "Shooting the Messenger: The Trial and Execution of the Victorian Police Complaints Authority" in Andrew Goldsmith, ed., *Complaints Against the Police: The Trend to External Review* (New York: Oxford University Press, 1991) at 94.

29 Tim Quigley and Eric Colvin, "Developments in Criminal Law and Procedure: The 1989-90 Term" (1991) 2 Supreme Court L.R. 265 at 274.

30 See note 11 at 292.

31 Stanley Cohen, "Not As Easy As It Seems: Closing the Consent Loophole" (1990), 74 C.R. (3d) 304 at 306.

32 See note 17.

33 *R.* v. *Simmons* (1989), 66 C.R. (3d) 297 at 318.

34 See note 33 at 321.

35 See note 33 at 321.

36 See note 18 at 35.

37 *R.* v. *McKinlay Transport Ltd.* (1990), 76 C.R. (3d) 283.

38 See note 37 at 298.

39 See note 37 at 298.

40 See note 37 at 300.

41 See note 37 at 296.

42 These were the competing tests that arose out of the Trilogy as to the basis of a reasonable expectation of privacy.

43 *Wong,* see note 13 at 9.

44 Unfortunately, space restrictions do not permit an examination of s. 1 (i.e. whether personal interests statements are justified in a free and democratic society) and s. 24(2) of the *Charter* (whether a personal interest recording brings the administration of justice into disrepute) in relation to the ultimate outcome of non-public officer-civilian contacts under the social expectation test of privacy.

45 See Jerome Skolnick and James Fyfe, *Above the Law: Police and the Excessive Use of Force* (New York: The Free Press, MacMillan Inc., 1993); Mike Maguire and Claire Corbett, *A Study of the Police Complaints System* (London: H.M.S.O., 1991).

46 Craig S. MacMillan, "Who Will Protect Those Who Protect?" (December, 1989) Blue Line Magazine.

47 Glanville Williams, "The Authentication of Statements To The Police", [1979] Crim. L.R. 6 at 16.

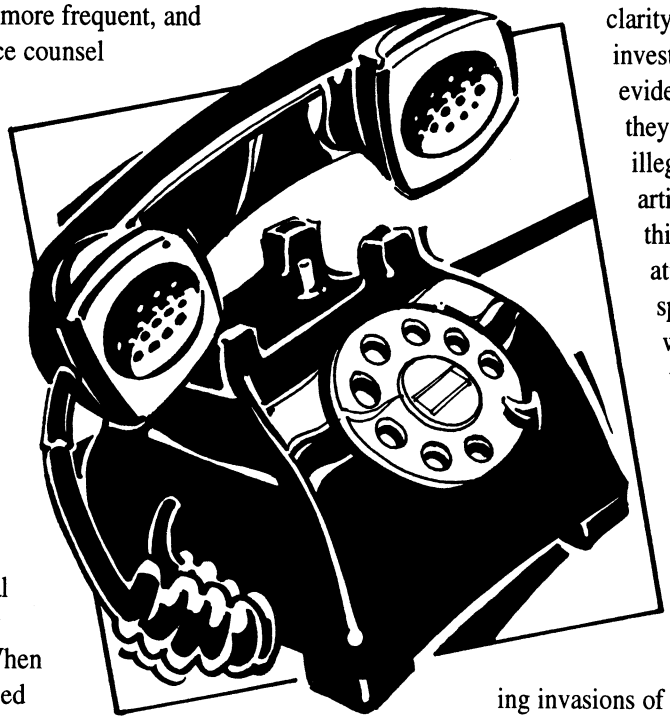
# Listening In:

## Should the state benefit from evidence derived from illegal wiretaps?

*Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much.* *Pearse v. Pearse (1846), 1 De. G. & S. at 28, Knight Bruce*

## I. INTRODUCTION

In recent years, the Supreme Court of Canada has been tightening the courts' control on the use of electronic eavesdropping by law enforcement officials. The exclusion at trial of illegal wiretap evidence has grown more frequent, and challenges by defence counsel to judicial authorizations of these wiretaps have become more successful. The exclusionary rules of evidence, which determine what information courts will *not* consider in making decisions, can be an important safeguard for privacy, one of the most fundamental freedoms enjoyed by Canadian citizens. When information is obtained by means that involve unacceptable intrusions into people's privacy, one protection of that freedom is to ensure that evidence is not later used in court. Increased control over electronic eavesdropping does restrict the invasion of individuals' privacy.



However, courts are still unclear on which wiretap evidence will be admissible in a criminal proceeding. This lack of clarity is exacerbated when investigators legally obtain evidence using information they *originally* procured illegally. The focus of this article is on evidence of this type, known as "derivative evidence." More specifically, this article will examine evidence which is derived from information obtained by police wiretaps for which the necessary judicial authorization was not obtained or was fraudulently obtained. Arguably, the courts are sanctioning invasions of privacy by law enforcement officers by letting them profit, directly or indirectly, from these illegal activities.

This article will consider the need to exclude

PAUL ARVISAIS

**Paul Arvisais received his Bachelor of Arts in English, Philosophy and Political Science at the University of Toronto. He recently graduated from the University of British Columbia Faculty of Law. Paul is currently working at the Federal Court, Trial Division in Ottawa.**

such evidence from consideration at trial, and will suggest the precise circumstances in which it should be excluded. Based on those conclusions, this article will assess the current jurisprudence on derivative evidence to determine how effectively courts are dealing with the issue. It will be shown that, at least as far as the decisions of the Supreme Court of Canada in recent years are concerned, the rules which apply to the exclusion of derivative evidence are confusing and ineffective.

**FACTS & FIGURES**

**Table I - Number of Criminal Charges in which Information Obtained as a Result of an Authorization to Intercept a Private Communication was Used (1989-93)**

| | 1989 | 1990 | 1991 | 1992 | 1993 |
|---|---|---|---|---|---|
| A) | 425 | 277 | 127 | 25 | 10 |
| B) | 367 | 368 | 144 | 72 | 14 |

Source: Canada, Solicitor General, Annual Report on the Use of Electronic Surveillance, 1993 (Ottawa: Supply and Services Canada, 1995) Tables 13 and 14 at 24-25.

**Row A of Table I shows the number of charges laid between 1989 and 1993 in which wiretap evidence was introduced at trial. Row B shows the number of charges laid following wiretap authorizations in which the evidence obtained from wiretaps ("primary evidence") was not placed before the court or the defence for examination. It must be noted that these figures include cases in which the suspects either were apprehended while committing a crime as a result of the information obtained, or confessed when confronted with the wiretap evidence. While these situations do not fall within most categorizations of derivative evidence, the table does serve to illustrate the number of charges obtained on the basis of wiretap authorizations which could not be examined at trial without some rule excluding all derivative evidence obtained from initial illegal wiretaps.**

## II. THE SCOPE OF THE PROBLEM

Although the admissibility of the evidence obtained from illegal wiretaps ("primary evidence") is subject to increasing judicial scrutiny, illegal wiretaps are still not subject to a great deal of legal control. (See sidebar above entitled "Facts and Figures".) There seems to be little difference in the likelihood of obtaining a conviction where the primary evidence is introduced relative to cases where wiretap evidence is *used* but *not introduced* in court. The average conviction rate over five years for cases where the wiretap is introduced is 82.1%.[1] Where the wiretap evidence is not used in court, the average conviction rate is 90.1%[2], an increase of eight per cent. Where wiretap evidence is not introduced at trial, the police actually have a greater chance of obtaining a conviction. In these cases, the police may engage in the interception of private communications even if the judicial authorization for the wiretap was obtained on the basis of fraudulent or misleading evidence.

Consequently, it is not surprising that from 1989 to 1993, of the total number of criminal charges brought using information obtained through a wiretap, an average of 54 per cent never introduced the wiretap evidence at trial.[3] This complete lack of subsequent judicial examination of more than half of wiretap authorizations suggests that they are being used *primarily* as investigative tools. In these cases, the defence has no way of challenging the legality of the wiretap or even knowing of its existence.[4] If judicial control over electronic eavesdropping is to be taken seriously, some steps must be taken towards allowing the defence to question the method by which police investigations have been conducted.

## III. THEORETICAL FRAMEWORK - PURPOSE OF EXCLUSION

There are four main arguments raised by those who seek to justify rules which govern the exclusion of evidence at trial. First, exclusion of evidence at trial may control police behaviour by deterring future misuse of wiretaps. Second, exclusion may guarantee due process and the fairness of the trial. Third, the primacy of the right against unreasonable invasions of privacy might be ensured if the evidence is excluded. Finally, exclusion may preserve the integrity of the administration of justice. However, some of these arguments may be problematic or even tangential to the goal of protecting individuals from illegal invasions of privacy. Understanding the strengths and weaknesses of the different rationales gives us a better grasp on the means by which we attempt to protect our right to privacy and the interests at stake in doing so.

### i) Control of Police Behaviour

The basis of this rationale for exclusion is that it signals to the police that unlawful investigations

will not be tolerated. This justification is common in the United States. According to this argument, even if no evidence directly obtained from an unlawful investigation is entered into court, *any* evidence which flows from the initial illegal act should be excluded.[5] To turn a blind eye to illegal wiretaps would be an indication that the courts sanction unlawful conduct so long as they are not directly confronted with the ill-gotten gains.

Surveys done on the effectiveness of excluding evidence as a deterrent to police misbehaviour show ambiguous results. Some surveys indicate that exclusion promotes police caution in observing individual rights, while others indicate the effect of exclusion is limited at best.[6] At the very least, it cannot be proven that exclusion works as an effective deterrent. But conversely, "it is not unreasonable to suggest that

an inclusionary rule such as we [had] in Canada positively encourages illegal and improper police practices."[7] Regardless of whether the exclusion has a noticeable effect on police conduct, strict rules of admissibility and legality communicate clear guidelines to police on how to appropriately conduct an investigation.[8] If the police choose in practice to ignore clear guidelines, then the problem is indeed beyond the reach of mere evidentiary rules to correct. However, the possibility that police may choose to ignore the law on a regular basis does not justify the courts remaining silent as to police conduct.

**ii) Due Process and Fairness of Trial**

The exclusion of evidence which the police have obtained unlawfully is supposed to preserve the fairness of the trial process. Such an exclusionary rule is often said to restore the status quo preceding the unlawful surveillance. In *R.* v. *Duarte* the Supreme Court of Canada pointed out that there is a "much more insidious danger" in intercepting a communication if a "permanent electronic recording" is made[9]. Unlike many investigative techniques in which illegality threatens to produce unreliable evidence[10], wiretaps provide a foolproof informer. The insidious danger to which Justice LaForest must have been referring is precisely that too much accurate information will be available. Unlike informants, wiretaps may be preserved indefinitely, and remain as credible as the day they were recorded. The database of personal information which authorities could compile about an individual would not only facilitate the accumulation of relevant evidence for trial, but would facilitate virtually any manipulation of the individual which an immoral police officer might devise. With informants, the police knowledge base is limited to that which the individual chooses to disclose to a few persons; a wiretap can collect all information which the suspect ever expresses. It seems, therefore, that the point that wiretaps are more insidious and should be excluded if they are illegal goes more to the protection of the need for privacy. Thus, neither due process nor the fairness of the trial are advanced through an exclusionary rule.

*"Unlike many investigative techniques in which illegality threatens to produce unreliable evidence wiretaps provide a foolproof informer. The insidious danger ... is precisely that too much accurate information will be available."*

However, it can be argued that due process is advanced if the exclusion of evidence at trial has an effect on judges who authorize wiretaps. Due process might in this manner be protected at the earlier stage of the application for a wiretap authorization. Correct attention at this stage must be given to an individual's privacy, as a wiretap authorization can be more intrusive than a physical search.[11] This intrusiveness arises because a wiretap authorization cannot specify the precise item sought and must therefore permit a much broader search. Also, the invasion of privacy is much less likely to be noticed by the suspect and thus he or she cannot protest its illegality, if at all, until long after the right has been extensively violated. Therefore, a wiretap ought only to be used as an investigative mechanism of last resort.[12] However, the exclusionary rule operates to the detriment of the prosecutor only. Since the judge granting the authorization has no particular interest in securing a conviction, he or she will not be influenced by such a rule when deciding whether to authorize a wiretap.[13] Thus, the exclusion of derivative evidence

cannot protect due process on this basis either.

In fact, fairness of the trial itself may not even be compromised by the use of wiretaps. For example, the fairness of the trial can only be affected by the evidence actually introduced there. Is the trial made unfair by the introduction of evidence discovered as a result of an initial unlawful act? If the evidence would not have existed if the police had not acted unlawfully, then it is unfair to the accused to admit it. A wiretap, however, can


be distinguished from other evidence in two ways: it cannot actually bring into existence any new evidence other than the recording itself; and, it is a foolproof informant.[14]

The first issue, where no new evidence is brought into existence, has been (uneasily) dealt with by Canadian courts through a distinction between "real" (pre-existing) evidence and "constructed" evidence. It is often said that real/pre-existing evidence should be admissible because it does not owe its physical existence to an unlawful act. This reasoning applies to real evidence which is obtained directly from the illegal act (*e.g.* what is found during an illegal search), and real evidence which is obtained indirectly from the illegal act (derivative evidence). (A gun found as the result of an illegal confession, for example, would be derivative evidence.) This analysis, which generally has been accepted by the Canadian courts, suggests that the inclusion of real evidence does not affect the fairness of the trial.[15]

Secondly, since a wiretap does not create new physical evidence or new witnesses, allowing police to gather more information brings more of the truth to the attention of the court. One cannot argue that it is unfair for the court to know too much of the truth (unless its probative value is grossly outweighed by its prejudicial effect, in which case it should be excluded on that ground).[16] To limit the evidence which the prosecution can gather does not make the trial any more fair — unless one believes the trial to be an elaborate game of hide and seek. Making information more difficult to obtain does not benefit an innocent accused, since it reduces the chances of the court arriving at a correct verdict. By making an investigation more onerous, the only beneficiary appears to be the guilty person who happens to be good at concealing his or her crime.

Thus, we have seen that the exclusion of evidence does not protect due process or the fairness of the trial in the case of evidence derived from electronic eavesdropping. Exclusion cannot cure the misuse of the information obtained, nor can it correct the use of wiretaps when another means of investigation is preferable. In particular, exclusion cannot protect the fairness of the trial since it only increases the chances of a correct verdict. It must be concluded, therefore, that ensuring the fairness of the trial is not actually a goal of the exclusionary rule where derivative evidence is concerned. Instead, the arguments usually made under the guise of guaranteeing the fairness of the trial have much more to do with guarding against the insidious danger of police misconduct overrunning the individual's need for privacy.

### iii)Primacy of the Right to Privacy

Canada has followed the United States in constitutionalizing the right to be secure against unreasonable searches.[17] Presumably, the right to privacy in this context has been raised to the same

level as the government's constitutional right to enforce its criminal laws.[18] As a legal right, there is an inherent value in the right to privacy being inviolate:

> The guarantees to legal rights are breached each time that a Court ignores the sanctity of a right and considers only the evidentiary result. A guarantee secures one from risk; the extent to which one may rely on it is diminished each time it has no consequent effect.[19]

The introduction of derivative evidence at trial does not, in itself, threaten the individual's right of privacy; the method of obtaining the evidence has already violated the right. But how should the courts ensure that appropriate effect is given to the guaranteed right to privacy? Should a person whose rights have been violated be compensated? It is simplistic to argue that the exclusion of derivative evidence provides full compensation by restoring the accused to his or her pre-violation position. Unlike torts or contractual breaches, placing a value on an invasion of privacy by attempting to restore individuals to their original position serves only to devalue the invasion. As compensation for an infringement of a right to privacy, the higher probability of receiving an acquittal is no more appropriate than a cash award. Human rights have an inherent value which has nothing to do with criminal guilt or innocence. Thus, excluding evidence is only partial compensation for a breach of a person's right to privacy. It removes some of the consequences of the breach rather than making up for the value of the right itself.

Inadequate means of compensation, however, do not justify denial of compensation and so, once the right is violated, a remedy must be sought. Section 8 of the Charter of Rights and Freedoms does not guarantee a right to have the police stripped of the fruits of an unreasonable search. It guarantees security against such searches in every respect. The ideal remedy is to ensure that such a breach does not happen. To do this, police conduct must be controlled before the breach. Once breached, however, the right to be secure cannot be restored. It is artificial to attempt to precisely quantify the consequences. If one wants to compensate for a lost right, the causal chain following it is irrelevant. If an arbitrary rule is needed to quantify the loss, automatic acquittal would be a step closer to compensating for something priceless and would save the courts enormous time and expense. Simply put, the exclusionary rule as a remedy for the violation of a human right is arbitrary in that it is unrelated to the loss of the right. If the courts were to attempt to compensate the victim for his or her legal injury, a much larger inquiry into the circumstances would be appropriate. This is not a goal of the exclusionary rule. The rule must seek to assert the right by forcing police to respect it in the first place.

### iv) Preserving the Integrity of the Administration of Justice

Since the purpose of an illegal search is to obtain evidence, its success depends on the courts' reaction. For the courts to involve themselves in an unlawful act would make the court an accomplice to precisely that which they are charged with condemning. It would be incongruous for the state to condone illegal conduct on the part of the police, and at the same time to require adherence to the law by others. Such incongruity would seriously undermine the perceived legitimacy of the courts[20] and would send the wrong message to the public: that it is acceptable to break the law when the end justifies the means.

The courts must ensure not only that police misbehaviour does not soil the appearance of purity in the judicial process, but also that such misbehaviour is not permitted.[21] Legitimization of the courts is only a valid objective if it is achieved through substantive legitimacy. That is, the courts must do as much as possible to protect the legal rights of which they are the guardians, and not simply appear to protect those rights. Thus, the question of whether or not to exclude derivative evidence must be approached with a view to deterring as much unlawfulness as possible, whether inside or outside of the courtroom.

A failure to exclude evidence derived from an illegal wiretap will not always impinge on the integrity of the administration of justice.[22] The argument that exclusion would bring the administration of justice into disrepute would only apply to those situations where the police did not know, and could not be expected to know, that they were violating a right of the accused. Thus, not all Charter violations will require exclusion of derivative evidence. Exclusion will be appropriate only if the police conduct was either deliberate or negligent and so could be deterred.

There is yet another argument in favour of inclusion of the evidence. The freeing of an *obviously* guilty person on the basis of the "operation of a technical rule of evidence" not related to the offence or the accused's guilt or innocence would bring the administration of justice into disrepute.[23] The argument has been made that "[r]outine exclusion of evidence necessary to substantiate charges may itself bring the administration of justice into disrepute".[24] However, such an argument, based as it is on the premise that there will be "routine" violations of constitutional rights by law enforcement officials (a premise one hopes is ill-founded) is not a justifiable reason for denying the exclusion of evidence. While it is clear the liberation of criminals is not likely to be popular, the characterization of the deterrence of deliberate police violations as a "technical rule of evidence" needs to be contested. The argument that criminals must be convicted at all costs has "too much of the philosophy of the end justifying the means."[25]

Canadian common law has long recognized several social and legal imperatives overriding society's need to convict the guilty; for example, attorney-client privilege.[26] In granting legal rights, we recognize that these imperatives are a cost society should bear in order to justify the title "rights" and give moral authority to the law.[27] Furthermore, allowing judges to decide whether or not society should bear this cost on a case-by-case basis would bring the administration of justice into even greater disrepute. To argue that we must not acquit the "obviously guilty" clearly violates the presumption of innocence,[28] precisely the value which our judicial system is supposed to protect against popular opinion.

The administration of justice, even if we incorrectly reduce this concept in scope to consider only the trial process,[29] will be brought into disrepute by a failure to apply a strict exclusionary rule to deliberate or negligent violations of individuals' rights by law enforcement officials. In order to preserve the legitimacy of the courts in the long term, rather than merely in tomorrow's news, they must preserve their role as an impartial defender of the law, broadly understood. To enforce one law by allowing another to be broken hearkens back to the days when there were no codified legal rights. It ensures that "justice" is done in the case in question, while "Justice" remains a privilege reserved for a select few. To allow the right to privacy to be overridden if a judge feels it is politically expedient to do so is contrary to the fundamental principle of the rule of law. The protection of the right in this way becomes merely a discourse to conceal the fact that the right does not exist at all.

### v) Conclusions with Respect to the Goals of Exclusion

We must conclude that the exclusionary rule rests on two solid theoretical premises. First, the courts must act to deter unlawful police conduct. Second, failure to do so would seriously harm the courts' substantive, and thus perceived, legitimacy. The fairness argument is merely an outgrowth of these two goals. Further, exclusion of illegally obtained evidence cannot fully compensate an individual's lost privacy. The only instance in which derivative evidence should not be excluded is if the police conduct in question could not have been deterred. Thus, admission of the evidence is appropriate only if the police were reasonable in their efforts to respect the rights of the suspect. With this framework in mind, we might now proceed to assess the treatment of derivative evidence in our legal system.

## IV. CANADIAN LAW UNDER THE CHARTER

Section 24(2) of the Charter deals with the exclusion of evidence. It states that:

> Where ... a court concludes that evidence has been obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it into the proceedings would bring the administration of justice into disrepute.

Given that an illegal wiretap is an unreasonable search in violation of section 8,[30] evidence obtained from such a violation may be ruled inadmissible.[31] It will be helpful to recall in this examination that only *real* evidence may be derived from a wiretap, and so the treatment of coerced statements and the like will only peripherally be noted. With this caveat, we can proceed to consider two issues: first, what evidence has been considered derivative under the Charter? and second, what are the circumstances

in which its admission is said to bring the administration of justice into disrepute?

**i) What evidence is derivative under the Charter?**

It is not immediately clear what evidence is covered by the words "has been obtained in a manner that infringes or denies any rights or freedoms. . ." in section 24(2). Early Supreme Court of Canada consideration of the scope of evidence covered by this section provided little in the way of guidance. In *R.* v. *Therens*, only Justice McIntyre gave much consideration to the issue, finding that it was "sufficient if the infringement or denial of the right or freedom has preceded, or occurred in the course of, the obtaining of the evidence."[32] McIntyre's exclusion provides authorities with the incentive to conduct themselves in an extremely careful manner when their acts could result in the "intrinsic harm that is caused by a violation of a Charter right." However, he proceeded to suggest that "relative remoteness" may be a necessary qualification on the exclusion of derivative evidence. Why this criterion is chosen, unrelated as it is to the intrinsic harm done to the right, is not explained.

Early lower court decisions required a "causal nexus" between the violation of the right and the discovery of the evidence. This requirement prevented almost all derivative evidence from falling within the exclusionary scope of 24(2). A British Columbia Supreme Court trial judge initially identified the purpose of the exclusionary rule in a manner consistent with the arguments made above in this article, namely, that police deterrence is a duty of the courts in such matters. The reasons, from which the Crown appealed, stated:

> The fact is, the Courts, as well as other bodies, have been somewhat remiss in the past in castigating this very common form of search. [The officer] was doing, I am quite sure, what has been done for years, and has been accepted, either explicitly or implicitly by persons in authority. One thing the Charter has done, I think, is to make us all direct our attention to conduct that may or may not be acceptable in our society.[33]

However, a majority of the British Columbia Court of Appeal found that the methods used to conduct the search and the fact of actually finding the object were sufficiently unrelated. The court found that the evidence was not derived from the violation, admitting that the "distinction is a fine one."[34]

When the Supreme Court of Canada finally considered this point directly in *R.* v. *Strachan* Chief Justice Dickson, speaking for a unanimous court, stated that:

> [s]o long as a violation of one of these rights precedes the discovery of evidence, for the purposes of the first stage of s. 24(2) it makes little sense to draw distinctions based on the circumstances surrounding the violation or the type of evidence recovered.[35]

The rejection of the causal requirement was affirmed in *R.* v. *Black* the following year, which explained that causality was not a necessary connection between the violation and obtaining the evidence[36]. Although both Supreme Court pronouncements defined the scope of derivative evidence covered by section 24(2) quite broadly, they accepted McIntyre's view in *Therens* (above) that some degree of proximity was a requirement.

Proximity/remoteness is not the only factor examined by the courts. The test applied in *R.* v. *Collins* and *R.* v. *Clarkson* allows real evidence to be admitted despite the existence of section 24(2). In those cases, the Supreme Court decided that real evidence should generally not be excluded.

*"... there is almost no deterrence imposed by section 24(2) on the illegal use of wiretaps as an investigatory technique. ... its use in locating real evidence may be completely free of judicial scrutiny."*

Put more succinctly, the first factor of proximity between the violation and the discovery of the evidence guides what derivative evidence may be excluded. The second factor of the pre-existence of the evidence determines whether real evidence will be excluded. The evidence with which this paper is concerned is *real* evidence which is *derived* from a wiretap. However, when the two factors of proximity and pre-existence of the evidence are taken together, it is unclear whether the scope of derivative evidence excluded by section 24(2) extends to real evidence. If it is accepted that the only real purpose of the exclusion of derivative evidence should be to deter police misconduct, the




considerations in the *Collins* and *Clarkson* cases of whether or not the evidence pre-existed the violation should be irrelevant.[37]

Recently a more defensible distinction has been made which is based on the concept of "inevitable discovery."[38] The principle of inevitable discovery holds that evidence should not be excluded if it would have been discovered even without the constitutional violation. This principle has been strengthened by cases in which physical evidence was found to fall within the scope of 24(2) protection because it did not exist *as evidence* prior to the Charter violation.[39] The inevitable discovery principle makes a distinction between evidence which was illegally *discovered* by the police, and evidence which was illegally *created* by the police. The principle holds that it is not unfair to introduce into court evidence which was merely discovered illegally, but that it would be unfair to introduce evidence which was actually created by the violation. However, such a distinction is still not consistent with the purpose of exclusion suggested in this article. That is, deterring police conduct which is unconstitutional should be the goal of exclusion. The police conduct is not made any more constitutional or acceptable if the evidence would have been discovered were it not for the violation. In fact, deterrence is more likely to be effective if the police stand to lose evidence which they otherwise would certainly have obtained.

Charter jurisprudence relating to which evidence will fall within the scope of 24(2) protection seems initially to include derivative evidence. This protection has been limited by a proximity requirement, which serves no purpose other than to limit the deterrent effect of exclusion. The requirement also leads courts to conduct an artificial exercise in determining remoteness. The protection may be limited by a further requirement that excludable evidence must be intangible. If this is the case, there is almost no deterrence imposed by section 24(2) on the illegal use of wiretaps as an investigatory technique. Police may not use the wiretap to extract a confession from the suspect, but its use in locating real evidence may be completely free of judicial scrutiny. Thus, it is to be hoped that the courts will do away with this distinction altogether.

**ii) When is the administration of justice brought into disrepute?**

With the advent of the Charter, the relevant question for the courts in relation to the administration of justice became whether they would be forced to *expressly* approve of disreputable police conduct. However, the question of whether the conduct itself would bring the administration of justice into disrepute was not actively pursued.[40] Instead of considering how shocking the police misconduct was, the Supreme Court of Canada in *Collins* clearly stated that the only disrepute to be considered was that which might result from the court's exclusion of the evidence, taken together with the seriousness of the offence.[41] This development has been the source of enormous confusion, since it bars most consideration of police misconduct when applying the 24(2) exclusionary rule. However, as has been argued above, the deterrence of police misconduct is the only purpose effectively served by the exclusion of derivative evidence.

Although early cases had focused on punishing "deliberate, wilful or flagrant" violations of the Charter,[42] *Collins* expressly reduced the deliberateness of the violation to a minor consideration to be weighed along with the disrepute resulting from the acquittal of a serious offender. However, the decision in *Collins* to adopt a fragmentary consideration of police and court conduct has been called problematic, particularly because Justice Lamer proceeded to base that decision primarily on the grounds of reprehensible police conduct.[43]

When considering real evidence which would not have been discovered but for the illegally obtained information, good faith conduct in obtaining it emerged for a time as a determinative factor. In *R.* v. *Simmons*[44] and *R.* v. *Jacoy*[45], the Supreme Court adopted the view that real evidence could be excluded having regard to nothing but the wrongfulness of police conduct. It seems, however, police negligence will only be grounds for exclusion[46] if it was gross negligence[47] or if the behaviour was part of "an established pattern of conduct."[48] This emphasis on deterrable police conduct is in keeping with what has been argued above regarding the purpose of the exclusionary rule. It is to be hoped that the emphasis placed on deterring police conduct in *Simmons* and *Jacoy* continues and remains a separate question from that of the effect of exclusion on the trial itself[49].

The issue which continues to confuse this useful consideration, however, is that of the "fairness of the trial." As has been argued above, this factor is not directly at issue in the case of evidence derived from that which is illegally obtained; the more the finder of fact knows, the more likely it is the finder of fact will be able to deliver the correct verdict. However, some illegally obtained evidence is said to "render the trial unfair, for it did not exist prior to the violation."[50] The majority of the Supreme Court of Canada in *R.* v. *Leclair* excluded "any evidence that could not have been obtained but for the participation of the accused in the construction of the evidence."[51] If this principle is supposed to flow from the protection of an individual against compelled self-incrimination, the concept has been stretched enormously so as not to require any consideration of whether the evidence is indeed incriminatory. Rather than granting "fairness" to the individual before them, the courts should be ensuring that police act fairly towards all suspects. As the Law Reform Commission of Canada has stated:

> . . . the problem of illegality is more than simply the sum of those individual conflicts brought before the courts. Rather, it may involve patterns of practice within police and judicial organizations as a whole.[52]

Instead, the Supreme Court has followed a fallacious line of reasoning and decided that if the evidence would inevitably have been discovered, penalizing the police would not have a deterrent effect.

In Canada, courts tend not to discuss the issue of police deterrence (although they may consider it as one factor among many in the test for exclusion) since it was so clearly ruled out as a goal of exclusion in *Collins*. The manner in which police investigations are conducted will bring the administration of justice into disrepute only if the accused has participated in producing the evidence, or if the evidence was obtained through an extremely serious violation of the accused's rights. The latter consideration, enunciated in *Simmons* and *Jacoy*, is a step towards attaining the goal of forcing police to respect the Constitution. However, the former consideration leads to enormous confusion by seeking to protect fairness to the individual on a case-by-case basis, with the effect that fairness to all accused is undermined in the long term by the courts' failure to prevent constitutional violations before they occur. Thus, rather than engage in absurd catalogues of as many as eighteen factors which may be relevant to the decision on exclusion,[53] courts should move instead towards making the categorical suppression of illegal police conduct its goal. This is accomplished by focusing on wilful or negligent conduct on the part of police.

## IV. OBSERVATIONS

In recent years Canadian police have been making extensive use of wiretaps as an investigative tool.[54] There is both instrumental and inherent value in protecting the right of Canadians to control the information that becomes known about them. Thus, there is a need to effectively open police use of these wiretaps to judicial scrutiny. There must be a context in which an accused can at least make the case that his or her right to privacy has been infringed. Direct judicial monitoring of all wiretaps is simply not feasible. However, scrutiny of authorizations in those cases where police eventually lay charges is both practical and just. A *voir dire* to inquire into the means of investigation can be a great expense to the court,[55] but the trial itself is an even larger expense. The inquiry into guilt or innocence is such a fundamental right that Canadian society has chosen to expend the resources on a trial. The right to privacy is no less fundamental and requires significantly less expense. Society would be grossly remiss in its protection of citizens were it not to protect individuals' privacy for financial reasons.

The exclusion of evidence is an effective means of protecting this right if correctly applied with a view to its purpose. That purpose is to control police behaviour. This behaviour must be controlled not only because the law enforcement arm of the state is no more above the law than any other citizen, but because the protection of rights requires an attempt to prevent violations before they occur. The right to privacy must be protected before it is violated, by deterring police behaviour that will bring the administration of justice into disrepute. The administration of justice (including both the courts and the police) must be seen as protecting not only the innocent victim of crime, but the victim of violations of constitutional rights. The latter protection will only be effective if we protect the guilty along with the innocent.

The Charter of Rights and Freedoms sought to protect the right to privacy through section 8, in

part, by excluding evidence under section 24(2). The scope of derivative evidence within this exclusionary clause has been variously interpreted, but seems to be fairly broad. However, considerable confusion has resulted from Supreme Court decisions stating that the relevant issue in exclusion is the fairness of the trial. This confusion cannot be resolved easily since, simply put, the fairness of the trial is not affected by the exclusionary rule. The principal factor in the fairness of the trial has been the question of whether the evidence was created by the illegal act. In excluding only this type of evidence, the trial is condoning the police overriding rights if the conduct is merely an investigative shortcut to further evidence. The violation of a fundamental right is forbidden if anything new is created, but gets reduced to a technicality if done for the purposes of expediency. However the evidence is obtained, once it is obtained the damage is done. The only effective way to prevent that damage from being done is to deter those who knowingly cause it.

Therefore, the approach adopted by the Supreme Court in *Simmons* and *Jacoy* is a sound one. In those cases the court decided that real evidence could be excluded having regard to nothing but the wrongfulness of police conduct. The single goal of the exclusion of derivative evidence should be police deterrence, and the test of what evidence should be excluded to accomplish this is a relatively simple one. The courts should merely inquire whether the violation was done in a manner such that the officer knew, or ought to have known, that a constitutional right was being violated. Such an inquiry allows a certain discretion to the courts. It is not a discretion as to whether there is a great enough chance that the accused is guilty and that the evidence ought not be excluded. Rather, the inquiry focuses on whether society should accept this sort of police behaviour. Such a focus is in the interests of the administration of justice since it would allow citizens to go about their business more confident that their rights will not be trodden upon at the drop of a hat. Furthermore, it would present the police and the public with understandable and defensible criteria of what is, and what is not, going to be found to be admissible evidence. Finally, it would allow the courts to go about their legitimizing function, confident in the knowledge they are admitting evidence and convicting criminals as often as possible without victimizing the innocent and encouraging the police to break the law.

Clearly, these are desirable goals for the exclusionary rule, and one can only hope that our highest court picks up on these principles. Although they have not been expressly excluded, we have seen that the bulk of the court's analysis has been focused elsewhere. These important goals must be reaffirmed quickly before the exclusionary rule, which we have constitutionally enshrined, becomes an incomprehensible and unjustifiable maze of rules.

## ENDNOTES

1 Canada, Solicitor General, *Annual Report on the Use of Electronic Surveillance, 1993* (Ottawa: Supply and Services Canada, 1995) Table 13 at 24.

2 See note 1, Table 14 at p. 25.

3 Table I (see sidebar entitled "Facts and Figures" on page 22) shows a total of 1829 cases over 5 years in which a wiretap had been used in the criminal investigation. In only 864 of these cases was the wiretap itself ever introduced as evidence.

4 *R.* v. *Chaplin*, [1995] 1 S.C.R. 727.

5 D.A. Wollin, "Policing the Police: Should *Miranda* Violations Bear Fruit?" (1992) 53 Ohio St. L.J. 805 at 843.

6 Exclusion as an effective deterrent: M.W. Orfield, "The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers" (1987) 54 U. Chi. L. Rev. 1016, cited in M.T. MacCrimmon, "Developments in the Law of Evidence: The 1986-87 Term" (1988) 10 Supreme Court L.R. 225 at 231n.

Exclusion as ineffective: J.D. Hirschel, *Fourth Amendment Rights* (Lexington: D.C. Heath, 1979) cited in Law Reform Commission of Canada, *Police Powers – Search and Seizure in Criminal Law Enforcement* (Working Paper 30) (Ottawa: Supply and Services Canada, 1983) at 309.

7 R. Penner, "Illegally Obtained Evidence and the Right to Privacy: Some Policy Considerations" in D. Gibson, ed., *Aspects of Privacy Law* (Toronto: Butterworths, 1980) at 358.

8 Wollin, see note 5 at 857-58.

9 *R.* v. *Duarte*, [1990] 1 S.C.R. 30, LaForest J.

[10] S.J. Whitley, *Criminal Justice and the Constitution* (Toronto: Carswell, 1989) at 339. For example, confessions extracted prior to the right to counsel may be coerced and thus are not conclusive of guilt.

[11] L. Schwartz, "On Current Proposals to Legalize Wiretapping" in M.G. Paulsen, ed., *The Problems of Electronic Eavesdropping* (Philadelphia: ALI-ABA, 1977) 11 at 12.

[12] *R.* v. *Playford* (1987), 40 C.C.C. (3d) 142 (Ont. C.A.).

[13] Law Reform Commission of Canada (Working Paper 30), see note 6 at 309.

[14] S.J. Whitley, *Criminal Justice and the Constitution* (Toronto: Carswell, 1989) at 339.

[15] J. A. Fontana, *The Law of Search & Seizure in Canada* (Vancouver: Butterworths, 1992) at 814; *R.* v. *Debot*, [1989] 2 S.C.R. 1140; *R.* v. *Clarkson*, [1986] 1 S.C.R. 383; *R.* v. *Collins*, [1987] 1 S.C.R. 265; *R.* v. *Black* [1989] 2 S.C.R. 138.

[16] *R.* v. *Wray*, [1971] S.C.R. 272.

[17] See section 8 of the Canadian Charter of Rights and Freedoms.

[18] See section 92(14) of the Constitution Act, 1982.

[19] Whitley, see note 14 at 337.

[20] Penner, see note 7 at 355.

[21] M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989) at 143.

[22] *Collins*, Lamer J, see note 15.

[23] Otto Lang, Minister of Justice, *House of Commons Debates* (27 November 1973) at 8205 in Penner, see note 7 at 357.

[24] *R.* v. *Strachan* (1988), 67 C.R. (3d) 87 at 109 (S.C.C.), Dickson C.J.

[25] *R.* v. *Hogan*, [1975] 2 S.C.R. 574 at 597, Laskin C.J.

[26] Penner, see note 7 at 360.

[27] T. Quigley and E. Colvin, "Developments in Criminal Law and Procedure: The 1988-89 Term" (1990) 1 Supreme Court L.R. (2d) 187 at 236.

[28] F. Chevrette and A. Morel, "La protection constitutionelle contre les abus de la police" in *Droits de la police: actes du colloque conjoint des Facultés de droit de l'Université de Poitiers et de L'Université de Montréal tenu à Poitiers en mai 1988* (Éditions Thémis: Poitiers, 1990) at 201.

[29] C.A. Lachance, "L'exclusion de la preuve illégalement obtenue et la Charte" (1984) 62 Can. Bar Rev. 278 at 279 citing F. McGarr, "The Exclusionary Rule: An Ill Conceived and Ineffective Remedy" (1961) 52 J. Crim L.C. & P.S. 266 at 267.

[30] *Duarte*, see note 9.

[31] *Collins*, Lamer J., see note 15.

[32] *R.* v. *Therens*, [1985] 1 S.C.R. 613 at 649.

[33] *R.* v. *Cohen* (1983), 33 C.R. (3d) 151 at 158 (B.C.C.A.).

[34] See note 33 at 162-63.

[35] In [1988] 2 S.C.R. 980 at 1005.

[36] See note 15 at 162-3.

[37] Quigley and Colvin, see note 27; R.J. Delisle, "*Collins*: An Unjustified Distinction" (1987), 56 C.R. (3d) 216.

[38] *R.* v. *Mellenthin*, [1992] 3 S.C.R. 615; *R.* v. *Wise*, [1992] 1 S.C.R. 527.

[39] *R.* v. *S.(R.J.)*, [1995] 1 S.C.R. 451.; *R.* v. *Pohoretsky*, [1987] 1 S.C.R. 945; *R.* v. *Erickson* (1989), 49 C.C.C. (3d) 33 (B.C.C.A.).

[40] The "community standards" test was quickly rejected as an interpretation of the Charter version of the administration of justice. See *R.* v. *Simmons* (1984), 39 C.R. (3d) 223 (Ont. C.A.), affirmed [1988] 2 S.C.R. 495; see also *Therens*.

[41] In 56 C.R. (3d) 193 at 213, Lamer J.

[42] *Therens*, S.C.C. unanimous on this point.

[43] MacCrimmon, see note 6 at 232-33.

[44] See note 40 at 535.

[45] *R.* v. *Jacoy* (1988), 66 C.R. (3d) 336 at 341 (S.C.C.).

[46] *Strachan*, see note 24.

[47] *R.* v. *Dyment* (1988), 66 C.R. (3d) 348 at 369 (S.C.C.).

[48] *R.* v. *Genest* (1989), 45 C.C.C. (3d) 385 at 406-07 (S.C.C.).

[49] *R.* v. *Greffe*, (1990) 75 C.R. (3d) 257 (S.C.C.), Lamer J.; *R.* v. *Kokesch* (1990), 1 C.R. (4th) 62 (S.C.C.).

[50] *Collins* and *Debot*, see note 15.

[51] *R.* v. *Leclair* (1989), 67 C.R. (3d) 209 at 220-21, Lamer J.

[52] Law Reform Commission of Canada, (Working Paper 30), see note 6 at 309-10.

[53] *R.* v. *Gladstone* (1985), 22 C.C.C. (3d) 151 (B.C.C.A.) .

[54] See Section II, "The Scope of the Problem", at the beginning of this article.

[55] A *voir dire* in these circumstances would be a hearing to determine whether certain evidence, such as confessions or wiretaps, may be legally presented as evidence to the trier of fact, (i.e., the jury, or the judge if there is no jury).

TRENDS DEVELOPMENTS

# MEDICAL RECORDS

## *Access, Ownership and Obligations*

Picture yourself at your doctor's office. Your appointment concerns the effects of a recent bout of food poisoning on your pregnancy. You have recently switched physicians because you felt that your previous doctor was dismissive of your concerns. Now you want to know what the relevant statistics say about your condition, as well as the subjective opinion of your physician, and the information your previous doctor had kept in her files. Thinking that this information will be kept in your personal medical file, you ask for access to these files. Does your doctor have the discretion to refuse that access? Can she give you certain records, but not others? What are your rights?

Access to medical records allows you to assess treatment your physician is proposing, to have informed opinions about her competence, and to correct mistaken or misrecorded information. Most importantly, access to the medical records helps address the imbalance in knowledge and power that exists between you and your physician. With these concerns in mind, the Supreme Court of Canada has found that privacy interests extend to control over personal information. In *McInerney* v. *MacDonald* [1] the Supreme Court of Canada held that access to medical files kept by physicians is instrumental in allowing patients to make informed decisions about proposed and ongoing medical treatment, and to ensure the "healthy maintenance" of the doctor-patient relationship. For these reasons, the court held that a physician cannot, generally, refuse you access to your own medical files.

In light of this decision, can you leave your doctor's office with all the notes, recommendations and information that have been kept in your personal file, including any reports passed on by previous physicians? The brief answer is "no," due to the curious nature of the medical record itself.

In *McInerney*, Elizabeth McInerney wanted copies of the information in her medical file. The physician, Margaret MacDonald, provided McInerney with all the medical information that she herself had collected, but withheld records that had been given to her by McInerney's previous physicians. MacDonald argued that these other records were the property of the other physicians, and that she therefore had no right to provide the records to McInerney. The court held that McInerney was entitled to access her medical records, for the purpose of examining and copying the contents. The right of access included records prepared by other physicians.

According to the court in *McInerney*, medical records are an amalgam of personal and professional property, held in quasi-trust by a physician. That is, the physical records themselves (the file, notes, references, etc.) are the "property" of the physician with all the benefits and responsibilities that this entails, while the *information* contained in the same records remains the property of the patient and may only be used for the patient's benefit. In practice, patients have no right to take the records from a physician. Because the practitioner physically retains the records, this can limit a patient's access to her own medical information.

However, the doctor's control of the medical records is limited by her quasi-trust or "fiduciary" relationship with a patient. That is, a physician, either because of the inherent power and control that she exercises over a patient or because of the patient's reasonable expectations, has a duty to act in her patient's best interests. In other words, you have a personal interest in what a physician does on your behalf, which has the practical effect of imposing certain duties on your physician. A physician owes a patient duties of loyalty, good faith, and avoidance of conflict between duty and self-interest.[2] In *McInerney*, the court found that acting in the best interests of a patient includes allowing patient access to medical records.[3]

However, the fiduciary relationship may also limit some patients' access to information. The court in *McInerney* held that acting in the "best interests" of a patient could also mean denial of this

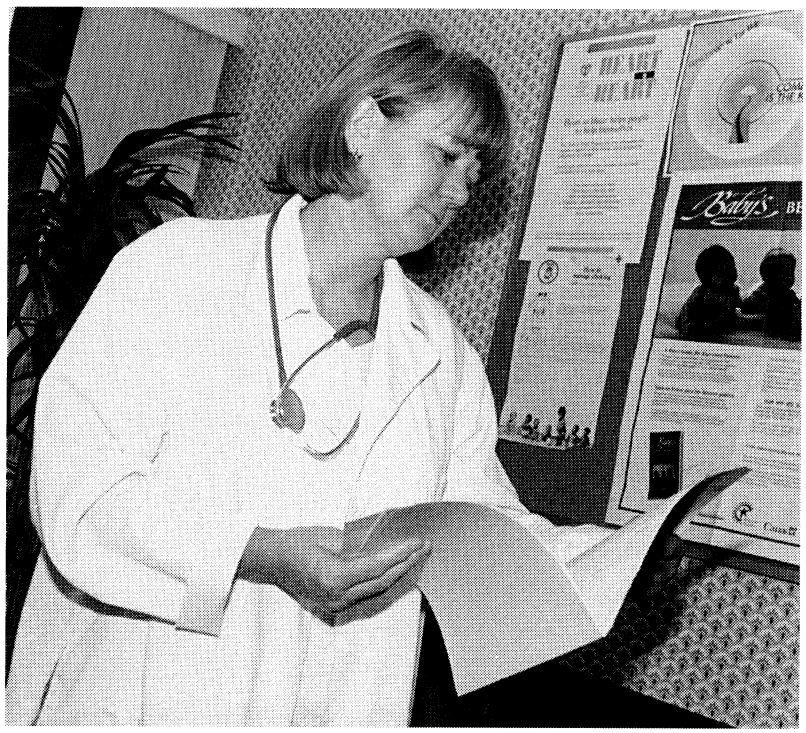
**Lucas Corwin is a third year law student at the University of Victoria. He received his Bachelor of Arts in Political Science and Sociology from Carelton University.**

access, and provided two circumstances where access could be refused. First, if a physician can prove that allowing a patient to read and copy her medical records would seriously affect the patient's physical, mental or emotional health, the physician may refuse to allow access to the records. Second, the physician may deny access if she can prove that access might result in harm to another person. Despite the relatively high legal threshold — in both instances, the physician must show "significant likelihood of substantial adverse effect"[4] — this provision is another limit on a patient's free access to her medical records.

Returning to the problem of gaining access to your own medical records, if your physician can prove that allowing you to see the personal written reflections she has made on your condition would seriously affect your mental health, or seriously affect the health of another person, she can deny you access to these specific parts of your records. The rest of the records, however, remain yours to access and copy unless there is a further limit in specific legislation. As it stands, no province or territory in Canada has enacted legislation to this effect.

The Supreme Court of Canada in *McInerney* defines the conditions under which access to information should be guaranteed in a doctor-patient relationship. As noted in the above introductory comments, the court in *McInerney* characterized control of this personal information as part of a larger right to privacy. However, in subsequent jurisprudence, the contest over access to information has related not to patient access to their own medical information but to patients making personal information available for court proceedings. Ironically, in some circumstances, expanded access to information has resulted in a greater loss of privacy.

In July 1994 the Supreme Court of British Columbia in *Seller* v. *Grizzle*[5] determined whether the patient right of access to medical documents amounted to patient "control" over those documents. This case concerned a personal injury claim arising from a car accident and medical reports concerning the plaintiff. According to the British Columbia rules of civil procedure[6] a person who is in "possession or control" of a document can be ordered by the court to produce it at the discovery of documents stage of the proceedings, for the purposes of scrutiny. The court found that because the "right" of a patient was limited to simple access, and did not constitute ownership, the patient did not have "control" or "possession" over the records. The court decided that any "control" rested in the hands of the physician who owned the medical records, and, therefore, the patient could not be required to produce them. Further, the court determined that the patient "right" to access also did not constitute "power" over those documents. The end result for the defendant in *Seller* was not too onerous as he had other avenues through which he could obtain the records. In particular, the defendant could demand that the plaintiff's physician produce the records for scrutiny at the examination for discovery stage of the proceedings,[7] based on the court's finding that a physician had "possession and control" of medical documents concerning her patients.



Such was not the case in *Saunders* v. *Nelson*[8] (decided in December 1994). In this case, the medical records of a patient, relating to a personal injury charge, were held by a clinic outside British Columbia. Unlike in *Seller,* the defendant had no recourse to rule 26(11), as the clinic was out of province.[9] However, rule 27(20) requires a person involved in an examination for discovery to produce all relevant documents in their "power." The question in the case, therefore, was whether the

patient involved had "power" over the medical documents kept by her physician. Four months after the British Columbia Supreme Court had noted in *Seller* that patient access to medical records did not equal "power" over those records, the same court found that the patient *did* effectively have this "power." The British Columbia Supreme Court was therefore able to order the documents produced. A right to access private information had effectively resulted in a duty to publicly produce that private information.

**RECORDS FOR PROFIT:**

**Medical practitioners' and hospitals' ownership of medical records have realizable economic benefits, so long as the records are treated in accordance with the best interests of the patients concerned in the documents. Patients' best interests include their right to privacy. If this privacy interest is protected, records may be used for security or profit. The Ontario Court of Appeal decided that a dentist could pledge his records as a security interest in a general security agreement. Ultimately, the records could be handed over to the insurer for transfer to another dentist. Because the agreement specifically accounted for the maintenance of patient confidentiality, the value of the records as property could be realized. However, debtors must specify an intention to use the records as security. In a different case, also involving a dentist, where the security agreement did not specifically refer to the use of dental records, the records could not be traded or used as collateral.**

**See: Re: Axelrod (1994), 111 D.L.R. (4th) 540 (Ont. Gen. Div.), affirmed (1994) 20 O.R. (3d) 133 (C.A.); Re: Josephine v. Wilson Family Trust & Swartz (1993), 107 D.L.R. (4th) 160 (Ont. Gen. Div.); Strazdins v. Orthopaedic & Arthritic Hospital of Toronto (1978), 22 O.R. (2d) 47 (Ont. H.C.).**

In attempting to explain the inconsistency of these cases, one could observe that, on the one hand, the *Seller* decision did not leave the party demanding production of the records without other avenues of obtaining the records. On the other hand, had the *Saunders* court found that patient access to medical records did not constitute "power" in the words of rule 27(20), the party demanding production of the documents would have been completely cut off from other means of obtaining the documents. The conclusion here is that the court engaged in semantic gymnastics in order to protect a defendant's right to access information important to his case.

Is it cause for concern that a patient's right to access has resulted in positive duties imposed on that patient? Should not privacy rights come without strings attached? In *Saunders*, the court's concern that the defendant be able to use the plaintiff's medical records in mounting his case resulted in a compromise of a patient's privacy rights. This raises the larger issue of the state of patient-physician privilege in Canadian law today. Specifically, does a patient or her physician have the right to keep her medical records out of court proceedings? There is no patient-physician privilege in Canadian common-law provinces today,[10] although courts may be willing to recognize such privilege on a case-by case basis.[11] Because medical records are not privileged, courts can have more or less unlimited access to the records of physicians. Seen in this light, *Saunders* can be characterized as an extension of an already broad judicial power allowing courts to get access to documents that might have been protected because the doctors were outside of the court's jurisdiction.

As for the right to access your own medical information, the law appears to favour you as a patient. You can access this information and even copy it. Yet because of your ability to access your medical records you can be required by the court to produce this information, should you be involved in a law suit. This duty comes from the judicial characterization of what your rights of access mean: namely, that access gives you "power" over your medical records. Ironically, your privacy rights have been used to give public access to your private information.

**ENDNOTES**

1 *McInerney* v. *MacDonald*, [1992] 2 S.C.R. 138.

2 *Norberg* v. *Wynrib*, [1992] 2 S.C.R. 226.

3 This general principle has been followed more recently in *Hodgkinson* v *Simms*, [1994] 3 S.C.R. 377.

4 *McInerney*, see note 1 at 158.

5 *Seller* v. *Grizzle*, (1994) 95 B.C.L.R. (2d) 297 (S.C.).

6 Rule 26 (1) of the British Columbia Supreme Court Rules.

7 See Rule 26 (11).

8 *Saunders* v. *Nelson*, [1994] B.C.J. No. 3039 (QL) (S.C.).

9 Rule 26 (11) of the British Columbia Supreme Court Rules only allows a party to demand production of documents from a third party who is in its jurisdiction — *United Services Funds (Trustee of)* v. *Richardson Greenshields of Canada Ltd.* (1987), 18 B.C.L.R. (2d) 360 (S.C.), affirmed (1988) 23 B.C.L.R. (2d) 1 (C.A.).

[10] *R.* v. *Burgess*, [1974] 4 W.W.R. 310 (B.C. Co. Ct.) is the British Columbia enunciation of this principle. The following is a brief glossary of some of the most recent cases in this area:

- *Brand* v. *British Columbia (Worker's Compensation Board)*, [1993] B.C.J. No. 2330 (QL) (S.C.).
- *R.* v. *Dersch*, [1993] S.C.R. 768.
- *G.M.M.* v *S.A.M.*, [1992] N.W.T.R. 249 (S.C.).
- *R.* v. *Osolin*, [1993] 4 S.C.R. 595.
- *A.M.* v. *Ryan*, [1994] B.C.J. No. 2313 (QL) (C.A.).
- *R.* v. *Weagle* (1993), 128 N.S.R. (2d) 254 (S.C.T.D.).
- *R.* v. *O'Connor* (1993), 105 D.L.R. (4th) 110 (B.C.C.A.).

[11] *R.* v. *Gruenke*, [1991] 3 S.C.R. 263.

TRENDS & DEVELOPMENTS

# THE EMPTY PROMISE OF PRIVACY:

## *pregnancy and HIV testing*

**Kelly Gallagher-Mackay is a third year law student at the University of Victoria. She completed her Bachelor of Arts in History and Political Science, with a minor in Women's Studies, at McGill University.**

Until recently there was no known way to prevent some babies of HIV-infected mothers from also being born with the virus linked to AIDS (acquired immune deficiency syndrome). But in the spring of 1994, the results of a major U.S. clinical trial (see sidebar entitled "Known Benefits, Unknown Risks" on page 37) offered the possibility of controlling maternal-foetal transmission of the human immunodeficiency virus.[1] The possibility of a somewhat effective means to prevent the transmission of the virus to foetuses in the womb has added steam to efforts to test and identify HIV positive women before they give birth. Such testing may put women at risk of discrimination and interference with their reproductive and parenting decisions.


In the United States there has been significant pressure to institute mandatory testing for all pregnant women. However, mandatory testing has been linked both to eugenic[2] efforts to stop HIV positive women from having babies at all, and to efforts to criminalize HIV positive women who infect their "innocent" foetuses.[3] Needless to say, such an approach has met with some resistance from women's rights and AIDS activists. This resistance reflects the ongoing problem of how to adequately protect women's individual interests while assuring access to a treatment that may prove very beneficial to many women and their foetuses.

In Canada, the approach to identifying HIV positive women during pregnancy has been quite different than in the U.S. The government is not proposing mandatory testing. Instead, there has been a strong public emphasis on attaining consent to testing and maintaining confidentiality of test results.[4] One example of the approach to testing in Canada is British Columbia's policy of recommending that all pregnant women have an HIV test as part of their routine prenatal care.[5] Nevertheless, this policy does not include adequate protection for the privacy of HIV positive women nor for their reproductive

decision-making more generally. However, it is far from clear that it would be possible to provide such protection in the context of an HIV diagnosis during pregnancy. Acting on a positive diagnosis necessarily involves significant compromises of a woman's privacy, even though there are other highly valued social interests which may "justify" overriding it. In fact it seems that the promise of confidentiality may primarily work to pacify critics rather than to protect HIV positive women.

Promising privacy is a particularly effective means of mollifying those who might otherwise object to the policy as interference with reproductive rights. "Privacy" is the American constitutional doctrine under which women's reproductive rights are protected, so protection of privacy tends to imply, by association, acceptance of reproductive freedom and women's decision-making.[6] Although Canadian constitutional doctrine is less explicit in its deference to individual privacy, the convergence of privacy rhetoric with notions of individual liberty is, in general, characteristic of rights documents such as the Canadian Charter of Rights and Freedoms. Privacy's importance as a core value in our society is based on a visceral sentiment that holds opposition to government authority as a central part of individual liberty, while remaining fundamentally abstract. The unstable, appealing and contradictory nature of the value tends to displace critical thinking about the potential negative effects of a policy intended to be helpful.

Testing all pregnant women for HIV is a policy which seems to offer the irresistible possibility of "preserving life and preventing suffering"[7] of foetuses which might otherwise be born with HIV. However, although test results seem very hopeful, positive trial results do not necessarily mean that any routine testing program is appropriate or justified. As well, there may be some risks to pregnant women who test positive which are overlooked in a policy that is geared almost exclusively towards foetal health. The failure to examine the policy's negative effects for pregnant women may be rooted in the assumption that women will welcome the testing since they themselves want their children to be healthy, and, in pursuit of that end, "good mothers" should be willing to put aside their own concerns.[8]

One might expect that affected women's distinct interests will be safeguarded by the protection of their right to privacy. This may be misleading. The government neither does, nor promises to do, much more than protect confidentiality in official contexts. At the same time, there is a presumption that confidentiality protection will be an effective means to prevent unwanted disclosure of women's health status and any resulting loss of control by the women. As such, the promise of confidentiality relies on our broader notions of privacy without providing much content for that promise.

## KNOWN BENEFIT, UNKNOWN RISKS

**The National Institute of Allergy and Infectious Diseases conducted a clinical trial among a group of six hundred HIV positive women who had taken a drug called zidovudine, better known as AZT, during pregnancy and labour. In that group, the statistical average of births of infected babies was reduced by two-thirds. Without this medical treatment, an HIV positive woman has about a 25 per cent chance of giving birth to an infected baby. With AZT the rate of transmission was reduced to about eight per cent.**

**Although the test results seem very hopeful, some critics have urged a cautious approach to the results. The trial was relatively limited. For ethical reasons, women on the placebo were given the genuine medication before the end of the trial, so there was no control group. None of the women who participated in the trial were at a sufficiently advanced stage in their HIV illness to show the symptoms of AIDS. For these reasons, medical authorities and health activists have criticized the trial. Health Canada, for example, urged caution in any recommendations about treating pregnant women with AZT to prevent transmission of HIV to their foetuses.**

*Possible risks of AZT treatment to women include:*

- **Will women who use AZT during pregnancy – before they are themselves ill with AIDS – develop increased resistance to the drug?**
- **Will there be presence of "viral strain", that is, will the progress of the women's own disease be accelerated by taking the drugs during pregnancy?**
- **U.S. Food and Drug Administration studies produced some evidence of the presence of vaginal tumours and "developmental malformations" when rodents received heavy dosages of AZT during pregnancy.**
- **Women who took AZT during the clinical trial did not seem to have suffered from side effects (ranging from anemia to liver chemistry abnormalities) at any greater rate than women who took the placebo.**

Sources: M.J. Oxtoby, "Perinatally acquired human immunodeficiency virus infection" (1990) 9 Paediatric Infectious Diseases Journal 690; Health Canada, (1994) 20:12 Canada Communicable Disease Report 97; Centre for Disease Control and Prevention, "Recommendations for the use of zidovudine to reduce perinatal transmission of human immunodeficiency virus" (1994) 43 M.M.W.R. RR-11; "Zidovudine for mother, foetus and child: hope or poison?" (editorial) (1994) 344 The Lancet 207, Brenda Macevicius, "Women and AIDS Project: Routine HIV Testing for Pregnant Women" in AIDS Vancouver Island Update (Fall, 1994).

Despite the promise of confidentiality, HIV positive women may be subject to unwanted intervention as a result of testing and diagnosis. It is important to recognize that confidentiality protections do nothing to help an HIV positive woman deal with the extreme personal stress, depression and crisis that often follow diagnosis. Privacy protection is useless to prevent a loss of control over the timing of one's illness and dealing with it.

Furthermore, in an intimate context, a woman's need or desire to keep her health status confidential is seen to be in direct conflict with her partner's right to know his or her own status. Whether or not women tell their partners directly of their condition, their actions will make any kind of privacy within their household almost impossible, exacerbating the feelings and real experience of loss of control. If women choose to act on their HIV diagnosis to get medical care, they will likely face changes in diet, regular medical visits and a course of medication, none of which are easy to conceal and all of which may increase the significant risk of violence in these women's lives. A recent American study shows HIV diagnosis in women is often followed by abuse or the end of significant relationships.[9] A British Columbia study found that more than half (54%) of the HIV positive women surveyed had been sexually assaulted or abused as adults.[10] It cannot be safely assumed that women's need for confidentiality is only in relation to the government, employers or members of the general public. Their safety may be significantly jeopardized within the family, an area where an assumption of privacy operates and which is consequently often ignored by legislators and policy makers.

There are a number of reasons, in addition to concerns about safety within their familial relationships, why HIV positive women might refuse treatment. AZT and the related family of drugs (called retrovirals) are controversial as a means of treating HIV, despite their widespread support in the medical community.[11] The AZT treatment during pregnancy is highly intrusive (medication five times a day and intravenously during labour) and may increase the woman's resistance to the drug during her own treatment when (presumptively) she develops AIDS. In practice, more than half of the women with AIDS in the B.C. study of HIV positive women were not taking retrovirals for their illness, contrary to their doctor's orders. Because women may be pressured by medical and child protection authorities, there is clearly a need for rigorous safeguards to ensure that they are not forced into treatments they do not want.

Legislative protection for women's medical decisions in the context of treatment for HIV may also be inadequate. The confidentiality provisions in Canada's Privacy Act,[12] B.C.'s Freedom of Information and Protection of Privacy Act[13] and the Communicable Disease Regulations under B.C.'s Health Act,[14] when read together, seem to offer comprehensive protection against the use of medical information, particularly voluntary test results, without permission of the individual. However, in contrast, the Child and Family Services Act explicitly overrides every confidentiality obligation (except solicitor-client privilege) when a person suspects that a child may be being abused or neglected. Doctors routinely report to the director of Family and Children's Services when they think a child may be at any degree of risk.[15] If her physician had recommended the AZT treatment for the benefit of the foetus, and the woman declined it, it is highly likely that child welfare authorities would be informed at the time of birth, if not earlier.[16] There are no reported cases specifically on HIV illness; however, where parents' (usually single mother's) mental or physical illness is in question as a factor in reported Canadian child protection cases, extensive use is made of medical and psychiatric records.[17] In the overwhelming number of these contested cases guardianship is awarded to the child welfare agency, foster parents, or adoptive parents.

The collapse of mothers' privacy protection to ensure adequacy in reporting child abuse seems to be only the first step in the ideological separation of the interests of mother and child. Allowing state

**FACTS & FIGURES**

**Several studies of HIV positive women have revealed the precarious social position of people with HIV.**

**Lack of Support: Numerous studies of HIV positive women report loneliness and isolation as the most important problem these women face in dealing with their illness. In an Ontario study of nearly seven hundred women with HIV about sixty percent of the women had children, while only one third were married or cohabiting.**

**Poverty: Only about 16% of the women in the Ontario study were working full time in the paid employment market; a further 13% characterized themselves as full time home-makers. The rest, whether or not "disabled" by their illness, were unemployed or working part time. Since disability payments under GAIN (Guaranteed Available Income for Need Act) are only available to individuals with AIDS symptoms, it is significant that only 27% of people who are HIV positive have been diagnosed with AIDS. A B.C. study of sixty HIV positive women showed that well over half of them, including those with children, had annual incomes under $20,000; 45% did not have high school education. Drug Use: More women than men contract HIV through dirty needles. In 11% of reported Canadian cases, women's use of injection drugs is listed as the cause of infection.**

Sources: Strathdee, "A Sociodemographic Profile of Known HIV Positive Women in Ontario, Canada" HIV Infection in Women Conference Abstracts (Washington: 1995); Lobb & Kirkham, "Measuring the Impact: Sociodemographic Characteristics of Women with HIV/AIDS" (8th Annual British Columbia HIV/AIDS Conference Syllabus, 1994); Health Canada, Laboratory Centre for Disease Control, "Risk Factors for Reported AIDS Cases, Females, all ages (n=586)" (June 1994).

authorities to keep a preventative eye on a potentially needy child seems eminently justifiable, but it is not always clear what the consequences will be. It should be remembered that the higher level of scrutiny these women's parenting can be subject to may be a direct result of the breach of the confidentiality promised as a part of the earlier testing regime.

As a general rule, women with HIV are already precariously situated socially (see sidebar entitled "Facts and Figures" on page 38). They may or may not have had positive interactions with social welfare agencies and may already object to state interference in their lives and decision-making. "Help" from social welfare agencies can be interpreted as threatening, undermining, or directly antagonistic. In many cases, the women may be worried that their children will be taken away from them if they do not follow the directions of their doctors or social workers. In such a context, women may be forced into accepting treatment and services that are intrusive and/or unwanted.[18]

Fear alone may affect treatment decisions and dealings with social service agencies if women are worried about losing their children. In fact, such anxieties are not unreasonable. It is highly unlikely that a woman's HIV status alone would form the basis of a child protection decision: all child protection cases apply the same standard, the best interest of the child.[19] But one effect of a program to test all pregnant women for HIV might be to institute a standard that presumes treatment is in the best interest of the child. For a woman to refuse the AZT treatment may be seen to represent a significant departure from that standard, especially if in caring for a child her actions are coupled with other problems that may accompany poverty and illness.[20]

## PROMISE OF PRIVACY: DISARMING CRITICS

If it is accepted that women's privacy is not — and perhaps cannot be — protected where a routine testing program is set in place, then one may wonder why privacy would be a heavily emphasized part of a health policy. It can be argued that privacy functions in a complex way to assure potential critics that the testing program is not going to be oppressive or coercive for the women who are its subjects. To some extent, this succeeds because of the ambivalent nature of privacy as a value in our society. The value of privacy is at once instrumental – seen as a *pre-condition* to the development of the self – and an end in itself. As an end in itself, privacy seems to offer the promise of state non-interference and the scope to make fundamental personal decisions. In particular, privacy is linked to an idea of moral agency that suggests responsible people need not be accountable to authorities for their life decisions. Furthermore, as an end in itself, privacy is characterized both in the highly abstract terms of autonomy, self-hood and liberty as well as in the visceral and concrete imagery of a locked door, a man's moated castle, or escape from Big Brother. In its former manifestation, as an abstraction, privacy presents itself as an obvious and fundamental component of liberal democracy. In its latter manifestation, as an image, it presents itself as a personal necessity. Due to its unique character as an abstraction that we can easily visualize as well as personalize, the promise of privacy may displace accountability for the consequences of a policy that could otherwise be considered highly intrusive.

*"Due to its unique character as an abstraction that we can easily visualize ... the promise of privacy may displace accountability for the consequences of a policy that could otherwise be considered highly intrusive."*

In the area of reproduction, privacy is a particularly powerful way to displace alarm. Without the "reassurances" of privacy the testing policy can easily be conceived as a major interference with women's reproductive rights. The promotion of AZT treatment for the "baby's good" must be placed in the context of wider patterns of foetal health movements and medicalization of pregnancies — both trends which take women's health decisions out of their hands. Furthermore, there are problems with defining "fit" mothers. HIV positive women are often counselled by their physicians and others to have abortions.[21] This "advice" is based on the notion that the women are sick and therefore unfit to be mothers or, perhaps more fundamentally, that they represent the source of their babies' illness rather than the giver of life.

In the United States, the rhetoric of privacy has played a central role in the development of constitutional and political protections for women's

reproductive rights. Most importantly, constitutional protection is based on the fourteenth amendment, where decisions relating to family and reproduction have been characterized as a part of the individual right to privacy. However, feminists in the United States have criticized privacy as a way of protecting women's reproductive rights. First, it is unequally distributed in a country riven by class, race and gender privilege or disadvantage. Second, it provides no positive guarantee of the material conditions that will allow the exercise of the rights protected. (Though privacy protects the right to abortion it does not mandate state funding of the service.) Third, it individualizes issues of reproductive choice, presenting them as women's personal decisions and thus ignoring the way that women's "choices" may be structured for them by their position in society. For example, compare the history of the 1960s where black women were fighting a battle for reproductive freedom against forced sterilization while white middle class women were fighting to have the right to terminate a pregnancy.[22]

These criticisms are very relevant to the effectiveness of privacy protection as a way of ensuring HIV testing does not put women at risk. The array of social disadvantages faced by most HIV positive women means that their privacy is more difficult to protect and more often overridden in the name of public interests associated with the various social and medical services they may use. In addition, protection of women's privacy with respect to their test results will have no effect on their health, nor on their control of their treatment. An HIV diagnosis does not guarantee them access to social support systems such as family benefits,[23] nor would a program change the widespread pattern of underestimating the HIV risk of women who are not pregnant.[24]

The American criticisms of constructing women's equality issues in terms of women's privacy are particularly important in the context of HIV positive pregnant women. The emphasis on the private choices of women with respect to treatment ignores the circumstances which may limit those choices and the conflicting expectations the women may face.[25] Pressures to abort or to participate in a health program that is difficult to maintain without the necessary material and emotional support will certainly have an effect on women's "choices" in this situation. Despite, or because of, the anti-government appeal of privacy rhetoric, these constraints are more likely to remain unaddressed where responsibility and decision-making is individualized. Nor is privacy a satisfactory answer to the problems faced by HIV positive people — gay and straight, pregnant or not — in terms of social stigma. People with HIV diagnoses face discrimination whether attempting to buy insurance, seeking to rent or maintain housing, or using public services. The promise of confidentiality is meant to address the legitimate fear that being diagnosed with HIV means a life of isolation. Arguably, while privacy may be viewed as a requirement for the personal security of affected individuals, more often it is a way out for governments which have failed to deal effectively with embedded prejudices.

## ENDNOTES

1 Centre for Disease Control and Prevention, "Recommendations of the U.S. Public Health Service Task Force on the use of Zidovudine to reduce Perinatal Transmission of Human Immunodeficiency Virus" (1994) 43 M.M.W.R. RR-11 at 1-4.

2 "Eugenic" is a term that generally applies to attempts to control reproduction in order to select for or against certain genetically-carried traits (e.g., race, sex selection, Down's Syndrome). HIV is a virus and is not part of the genetic material passed from mother to foetus; however, the principle of selecting for "healthy" or "normal" children based on a pre-natal diagnosis makes the use of the term appropriate in this context.

3 Working Group on HIV Testing of Pregnant Women and Newborns, "HIV Infection, Pregnant Women and Newborns: A Policy Proposal for Information and Testing" (1990) 264C J. Am. Medical Assoc. at 2416; J. Terry, "The Body Invaded: Medical Surveillance of Women as Reproducers" (1989) 3 Socialist Review at 131-38.

4 See, for example, Health Canada, (1994) 20:12 Canada Communicable Disease Report 97 at 100; British Columbia Centre for Disease Control - C.D.C. Advisory Committee on HIV in Pregnancy, "Bulletin #1" (1994); Canadian Medical Association, *Counselling Guidelines for Human Immunodeficiency Virus Serologic Testing* (Ottawa: 1993).

5 B.C. Center for Disease Control, see note 4.

6 Particularly in conjunction with a promise of consent to treatment, which will not be the subject of this paper.

7 Office of the Provincial Health Officer, Press Release 1994/109 (28 June 1994).

8 See C. Smart, *Feminism and the Power of Law* (London: Routledge, 1990) at 99-100.

9 Working Group on HIV Testing of Pregnant Women and Newborns, see note 3 at 2418.

[10] D. Lobb and C. Kirkham, "Measuring the Impact: Sociodemographic Characteristics of Women with HIV/AIDS" (8th Annual British Columbia HIV/AIDS Conference Syllabus, 1994) at 63.

[11] Zidovudine is the drug most frequently prescribed to AIDS patients. For more information see *The AIDS Practice Manual: A Legal and Educational Guide*, 3rd ed. (New York: National Lawyers Guild AIDS Network, 1992).

[12] R.S.C. 1985, c. P-21, s. 2.3(a)(viii).

[13] S.B.C. 1992, c. 61.

[14] B.C.Reg. 4/83, s. 4.3(a)(i).

[15] *New Brunswick (Minister of Health and Community Services)* v. *L.(D.M.)* (1987), 78 N.B.R. (2d) 151 (Q.B.).

[16] *Re: Baby R* (1988), 53 D.L.R. (4th) 69 (B.C.S.C.).

[17] See, for example, *Catholic Children's Aid Society of Metro Toronto* v. *M. (C.)*, [1994] 2 S.C.R. 165; *Superintendent of Child Welfare for British Columbia* v. *P.(J.)* (1988), 15 R.F.L. (3d) 216 (B.C.C.A.); *New Brunswick (Minister of Health and Community Services)* v. *L.(S.) and R.L.* (1988), 81 N.B.R. (2d) 13 (Q.B.).

[18] See the article "No Lock on the Door" in this volume of Appeal – Review of Current Law & Law Reform.

[19] In the United States, courts have found that HIV infection, AIDS illness, or even AIDS dementia were not in themselves relevant to determinations of parental fitness or the child's best interests. See L.O. Gostin, "The AIDS Litigation Project: A National Review of Court and Human Rights Commission Decisions, Part 1: The Social Impact of AIDS" (1990) 264B J. Am. Medical Assoc. 1961 at 1965.

[20] National Council on Welfare, *In the Best Interests of the Child* (Ottawa: 1979) at 4.

[21] See C. Levine and N.N. Dubler, "HIV and Childbearing: Uncertain Risks and Bitter Realities: the reproductive choices of HIV infected women" 68 Millbank Quarterly 300 at 321.

[22] See A. Davis, "Racism, Birth Control and Reproductive Rights," in M. Gerber-Fried, *From Abortion to Reproductive Freedom: Transforming a Movement* (Boston: South End Press, 1990) at 15.

[23] See K. Bastow, "Women, AIDS and Family Benefits: A Case Study" (1994) 7 C.J.W.L. at 173.

[24] C.Devine, "The Epidemiology of HIV/AIDS in Women" (1993) 13:3 Canadian Woman Studies/Les Cahiers de la Femme at 17.

[25] J. Williams, "Selfless Women in the Republic of Choice" (1991) 66 N.Y.U. L.Rev. at 1559.

TRENDS & DEVELOPMENTS

# PRIVATE LAW ENFORCEMENT – *Dodging the Charter*

## INTRODUCTION

You are a university student whose residence room was searched for stolen goods by campus security without a search warrant. You are an employee whose actions in a public washroom were surreptitiously videotaped by your employer without prior judicial authorization. You are an employee who made incriminating statements to a private investigator hired by your employer, without first having been informed of your right to a lawyer. Could the evidence gathered be used against you in a criminal trial? Recent cases suggest that it can be, and that the Canadian Charter of Rights and Freedoms will not guarantee protection from such invasions of privacy.

Evidence gathered in violation of an individual's Charter rights may be excluded on the basis of section 24(2) of the Charter which states that the court may exclude evidence if admitting it in the proceedings would bring the administration of justice into disrepute. However, section 24(2) can only be invoked if it is first shown that the Charter has application. The Charter will only apply if the person gathering the evidence was acting as an agent of the state, or performing a government function. Purely private activities are not covered by the Charter. Consequently it is important to look at whom the courts have considered to be agents of the state, aside from police officers, and by what criteria these decisions have been made.

In a criminal trial, a finding that the person gathering evidence is not an agent of the state has two implications. First, such findings condone a private system of law enforcement which escapes the scrutiny of the Charter. The importance of not allowing this private, unregulated system to develop has been recognized by the courts. For example, it has been asserted recently that:

> ... there is good reason for the *Charter of Rights and Freedoms* to apply to the actions of a private individual who is acting under the authority of a statute. ... If the *Charter* did not apply in that circumstance, the application of the *Charter* could be circumvented by a government that chose to authorize private individuals to do what the *Charter* prohibited it from doing.[1]

The second implication is that the privacy interests of the individuals who are subject to an investigation may be violated. Two Charter rights most commonly violated during criminal investigations are sections 8 and 10(b). Section 8 guarantees that "everyone has the right to be secure against unreasonable search or seizure." This section can be viewed as the "privacy" provision of the Charter. Section 10(b) provides that everyone has the right, upon arrest or detention, "to retain and instruct counsel without delay, and to be informed of that right." Although both these rights might be infringed by private actors, the case law suggests that individuals' privacy interests are more often violated. If the evidence which is gathered through such a violation cannot be excluded at trial, the individual may be left with only a civil remedy for the violation.

## ARRESTS AND DETENTIONS

Several recent cases suggests that this system of private law enforcement is developing in Canada. While in an early influential case, *R.* v. *Lerke*,[2] it was decided that the Charter does apply to "citizens' arrests,"[3] private investigations have not been held to be government functions when they occur outside of the scope of citizens' arrests. In the leading case of *R.* v. *Shafie*,[4] an employee was suspected of theft. After unsuccessful attempts to have the police investigate the matter, the employer hired a private investigator.[5] The employee was led to an office by his supervisor, believing that refusal to comply would have been an act of insubordination, and interviewed

**Tanya Scharbach is a third year law student at the University of Victoria. She received her Bachelor of Arts in History from the University of Toronto.**

by the private investigator behind a closed door. He made incriminating statements which were tape recorded. At no time was the suspect informed of his right to a lawyer.

The issue in this case was whether the employee's section 10(b) rights had been violated, and therefore the question arose of whether the private investigator was bound by the Charter. The court considered citizen's arrest cases such as *Lerke* and agreed that the Charter applied in those cases since an *arrest* is essentially a government function. However, the court found:

> ... actions that, at the hands of the police or other state or government agents, would be a detention, *do not amount to a detention within the meaning of section 10(b) ... when done by private or non-governmental persons.*[6] [emphasis added]

The court was concerned that "any other conclusion would result in the judicialization of private relationships beyond the point that society could tolerate."[7] However, it can be argued that society could and should tolerate the judicial scrutiny of a situation in which an employee is coerced by his employer into providing incriminating statements.[8] It can also be argued that a detention — which ultimately leads to an arrest — is as much of a government action as the making of a citizen's arrest.

Since *Shafie* was decided in 1989, it has been accepted in several jurisdictions,[9] including British Columbia as recently as 1994. The proposition that the Charter does not apply to situations where one private citizen detains another was reviewed and accepted by the British Columbia Supreme Court in *R.* v. *Wilson.*[10] A second B.C. case has adopted *Wilson*, firmly restating the idea that "where a private person merely detains another the detention is not affected by the Charter, and the detainee is not protected by the Charter".[11] These cases indicate that this reasoning may be extended to similar situations in the future.

## SEARCHES

In the case of *R.* v. *Swanarchuk*[12] the reasoning of *Shafie* was applied to a situation in which a search, rather than a detention, had been conducted by a private citizen. *Swanarchuk* extends the reasoning in *Shafie* (that a *detention* by a private individual is not a government action) to *searches* by private individuals. In *Swanarchuk*, management at a Safeway outlet made surreptitious video recordings of their employees in a public washroom located on the store premises, because they suspected employees were using the washroom to hide

merchandise before stealing it. Monitoring took place during the night shift, when only the grocery store's employees had access. When a staff member entered the washroom, security personnel activated the video. If it became apparent that the person was there simply to use the washroom for its normal purpose, the recording equipment was deactivated but the video monitoring continued.

In its decision, the court noted that if these actions had been taken by agents of the state, the search would have been unreasonable. However, it rejected the accused's argument that since a citizen's arrest is a government function, a search is also a governmental function. Instead, the court affirmed *Shafie* and declared that the Charter does not apply to searches carried out by a strictly private actor, such as Safeway. The decision illustrates the threat which an application of *Shafie* can pose to an individual's privacy interests. Since the Charter does not apply to this type of evidence when it is introduced into a criminal trial, an accused is doubly disadvantaged: first, her privacy

is violated; and second, she is left with no Charter remedy for such a violation.[13]

In *Swanarchuk*, the court held that the state's subsequent role in tendering the evidence obtained by a private actor as part of a criminal prosecution does not trigger the operation of the Charter. It reached this conclusion despite the fact that a criminal trial is most certainly a government function. This raises a second issue when addressing searches conducted by private actors. If the protection of the Charter is not triggered simply because evidence is only *later* handed over to the police, what role does the *purpose* of the search play in determining whether or not a private actor is carrying out a government function? In other words, does it make a difference that the investigation was begun with the purpose of providing evidence to the police?

In *R.* v. *Meyers*[14] a warrantless search of staff lockers was conducted in a hospital. The hospital management initiated the investigation, but later worked in consultation with the police. The court stated that an otherwise private act will be converted into a government act where the primary purpose of the search is to discover evidence in order to press charges.[15] In addition, the court held that where a search is carried out by a private citizen at the instigation of, or in collusion with, the police or other government agencies, the private act will be converted into a government act.

However, the British Columbia Court of Appeal recently examined similar issues in *R.* v. *Fitch*[16] and came to a different conclusion. In that instance, University of Victoria security officers entered a student's residence room for the legitimate purpose of determining whether the student had abandoned the room. While making this inquiry, the security officers noted what appeared to be equipment that had been reported as stolen. The next morning, a second officer entered the room and conducted a search, opening a drawer under the bed. The police were called, and accompanied the security officers for a further search of the room. No warrants were obtained for these searches.

The Court of Appeal decided that university security personnel conducting a warrantless search for stolen property in a student's residence room were not state agents. Although not clearly articulated, it seems the court was following *Meyers,* in that the security guards would be state agents *if* they had been found to be working in concert with the police. However, despite the fact that the police were called in and accompanied the security personnel in a warrantless search, it was determined that the security guards and the police were not working in tandem. It is hard to imagine what more would be required to find that the security officers and the police were working together. However, in one important respect the court limited the decision in *Meyers*. The court in *Meyers* held that if the purpose of the search was to collect evidence in order to press charges, then the person conducting the search would be considered an agent of the state. Yet the court in *Fitch* held that the purpose was not important, and that simply embarking on a criminal investigation prior to involving the police did not make the security personnel state agents.

*"The distinction between 'arrest' on the one hand, and 'detention' or 'search' on the other hand, has the potential to create two separate systems of law enforcement within Canada. The first is a public system which is regulated by the Charter. ... The second is a private system which is not regulated by the Charter."*

Investigations, such as the one discussed above, have been grouped together with private detentions and searches as non-government functions. While there may be some room to argue that detentions and searches are not inherently government functions (especially if they do not result in the laying of charges), it is more difficult to see how this could be the case for private criminal investigations. On the contrary, such investigations should be viewed in the same light as citizens' arrests, which have been held to be a government function by their very nature.

## OBSERVATIONS

The distinction between "arrest" on the one hand, and "detention" or "search" on the other hand, has the potential to create two separate systems of law enforcement within Canada. The

first is a public system which is regulated by the Charter. Under this system, violations of rights may be remedied by exclusion of evidence. The second is a private system which is not regulated by the Charter. Under this system, there is no possibility of exclusion of evidence under the Charter. In the end, it does not matter even that the infringement occurred for the express purpose of providing the police with evidence for use in a criminal prosecution. Unfortunately, the lesson to be learned from the above cases seems to be that private actors should conduct their own investigations before calling the police. In this way, evidence may be gathered in a manner unavailable to the police. Further, such evidence is admissible in a criminal trial, whereas it would be excluded if gathered by the police.

Finally, private actors who conduct their own investigations must have the financial resources to do so. Therefore, only those who can afford investigations will be in a position to present the police with evidence of criminal activity. As demonstrated in the cases examined above, certain private actors — those with financial resources — will find it easier to circumvent the Charter. For example, employers who are investigating theft by employees may collect evidence that the police either will not, or cannot, gather. Employers would be placed in a difficult position if they could not gather proof that employees were stealing. However, the police are put in an equally difficult position every day when gathering evidence of criminal activity. This difficulty has not been held to justify overriding individual rights in the pursuit of gathering evidence for criminal charges. Should employees' rights be sacrificed for the purpose of securing a criminal conviction? Such an unregulated, private system of law enforcement would leave parties vulnerable to precisely those abuses that the Charter is designed to prevent, including unreasonable searches or seizures.

## ENDNOTES

1 *R.* v. *Wilson,* (1994) 29 C.R. (4th) 302 (B.C.S.C.) at 309.

2 *R.* v. *Lerke* (1986), 24 C.C.C. (3d) 129 at 134 (Alta C.A.). The reasoning behind the decision was that "the arrest of a citizen is a governmental function whether the person making the arrest is a peace officer or a private citizen."

3 The authority to execute a citizen's arrest can be found in several statutes, including the Criminal Code of Canada, and the Summary Convictions Act (now pt. XXVII of the Criminal Code).

4 *R.* v. *Shafie* (1989), 47 C.C.C. (3d) 27 (Ont. C.A.).

5 An argument could be made that private investigators, licensed by the government, should be considered government actors by the fact that they are government regulated and operate under a statutory regime.

6 *Shafie*, see note 4 at 34.

7 See note 4 at 34.

8 The issue of voluntariness of a confession at common law is beyond the scope of this paper.

9 *R.* v. *J.A.*, [1992] O.J. No. 182 (QL) (Unif. Fam. Ct.); *R.* v. *Sawler* (1991), 104 N.S.R. (2d) 408 (S.C.A.D.).

10 See note 1. Originally it seemed as if the courts in British Columbia would not be following *Shafie*. In an early case, *R.* v. *Deacon*, [1993] B.C.J. No. 973 (QL), the B.C. provincial court seemed to be moving toward broader Charter coverage of private detentions. In that case it was stated that "...when one citizen arrests another, the arrest is carried out on behalf of the state and must be done in accordance with the Charter ... The same must be said for a detention that is covered by section 10(b) ..." Unfortunately for those detained, *Wilson*, a later decision by a higher court, came to the opposite conclusion.

11 *R.* v. *J.C.*, [1994] B.C.J. No. 1861 (QL) (Prov. Ct. Youth Div.).

12 *R.* v. *Swanarchuk*, [1990] M.J. No. 686 (QL) (Q.B.).

13 Violations of privacy under the common law are beyond the scope of this paper.

14 *R.* v. *Meyers* (1987), 52 Alta. L.R. (2d) 156 (Q.B.).

15 However, the Court in this case did reach the same conclusion as *Swanarchuk* in deciding that where the search began for other purposes and *then* led to evidence being presented to the police, the search will not be considered a government action.

16 *R.* v. *Fitch*, [1994] B.C.J. No. 2027 (QL) (C.A.).

TRENDS & DEVELOPMENTS

# PRIVACY v. FREEDOM OF THE PRESS

It sounds like the plot of a suspense novel: a handicapped woman from northern British Columbia witnesses a murder in the parking lot outside her doctor's office in Vancouver. She is interviewed by a member of the press who publishes details of the interview including her name, address and appearance. She is afraid for her life because the murderer has not been caught.

This is not a novel. It is a true story and the murder witness is suing the press for invasion of privacy and negligent infliction of psychological injury. The case, *Pierre* v. *Pacific Press*,[1] raises the important issue of how to balance the privacy of individuals and freedom of the press.

Under the common law, there is no well-accepted tort of invasion of privacy, although other actions can be used to address the issue.[2] In response to the failure of the common law, many jurisdictions have created a statutory tort of invasion of privacy.[3] The first of these was the Privacy Act of British Columbia, which provides in section 1 that "it is a tort, actionable without proof of damage, for a person wilfully and without a claim of right, to violate the privacy of another."

Deciding whether the statutory tort of invasion of privacy has occurred is a two-stage process. The first stage is to determine whether there was a violation of another's privacy. At this point, there are a variety of exceptions in the act which negate an invasion of privacy. The second stage is to ascertain whether the defendant had a "claim of right" under section 1 to commit the act in question. The term "claim of right" is neither defined in the act nor has it been the subject of judicial interpretation. This lack of judicial scrutiny may be a result of the generous exceptions which operate to negate an invasion of privacy at the first stage. It is therefore usually unnecessary to resort to the second stage to avoid liability for invasion of privacy.

At the first stage of inquiry, the act excepts the publication of matters that are deemed to be in the public interest, or are fair comment on a matter of public interest. In this manner, an acknowledgement of the important role that the media play in our society is combined with a recognition that the press should not be able to publish with impunity everything it believes will sell papers. To evaluate whether published material fits into these exceptions, information in which the public has a true interest must be differentiated from information that is trivial or peripheral to the issue at hand.

For example, in the case of *Valiquette* c. *The Gazette*,[4] a newspaper reported information which revealed the identity of a teacher who was suffering from AIDS (acquired immune deficiency syndrome). Although the defendant had argued that the information was in the public interest, the court held that while disseminating knowledge about AIDS or the actions of authorities in dealing with the situation is in the public interest, the identity of the teacher was not information that was useful to society and accordingly found a breach of the privacy provisions under the Quebec Charter of Rights and Freedoms.

In the *Pierre* case, the fact a murder had occurred and that there was a witness should be considered matters of public interest. The public's "right to know" would certainly include the publication of that information. The identity of the witness, however, may not be of public interest. It is arguable that the only interest the public would have in the woman's identity is to satisfy its own curiosity. Thus, in this case it is unlikely the media would be able to rely on the exception granted to them for matters of public interest.[5]

## DOES THE CHARTER GIVE THE MEDIA A "CLAIM OF RIGHT"?

The defendants in the *Pierre* case are not willing to rely on the media exception. Instead, Pacific

**Sandra Lawson is a recent graduate of the University of Victoria Faculty of Law. She received her Bachelor of Business Administration from Simon Fraser University. Sandra is currently working in Vancouver.**

Press and the CBC are asserting that the protection of freedom of the press included in the Charter of Rights and Freedoms gives them a "claim of right" to publish the contested information, thereby exempting the media from liability under the second stage of section 1 of the Privacy Act. Although they are not attempting to strike down the provisions as an unconstitutional violation of their freedom, the press is arguing that the "spirit of the Charter" should be read into the act to ensure that the press is not limited in its news-gathering activities by the chill that may follow a finding of liability for invasion of privacy.

The argument that the "spirit of the Charter" should be read into the Privacy Act follows the same reasoning which holds that this spirit should be present in decisions relating to the common law. While the Charter does not strictly apply to the common law, the courts have displayed a willingness to interpret and develop the common law in such a way as to promote the ideals embraced by the Charter.[6] The press in the *Pierre* case is arguing that the courts should show a similar willingness to interpret statutory instruments such as the Privacy Act in a manner consistent with the Charter. As a result, it is possible that Charter rights may be included as "claims of right" under the Privacy Act.

Imposing liability on the press for publishing truthful information may indeed be contrary to this "spirit of the Charter." This reluctance to impose liability is consistent with the traditional role of the press in facilitating the dissemination of ideas and encouraging participation in social and democratic decision-making. Given the importance of this role, it is well established that freedom of the press should only be restricted in the clearest circumstances.[7]

On the other hand, Canadian courts have made it clear that an individual's interest in his or her personal privacy is also an important Charter value. The right to be secure against unreasonable search and seizure, codified in section 8 of the Charter, has been rationalized as protecting privacy interests.[8] In the Supreme Court of Canada case of *R* v. *Dyment*, Justice LaForest stated that the courts should be alert to privacy considerations with respect to personal information:

> 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.[9]

Individuals' privacy has also been explored in relation to the freedom of the press. In *Edmonton Journal* v. *Canada*, the Supreme Court of Canada determined that the protection of privacy was a pressing and substantial concern which, under section 1 of the Charter, could override the right to freedom of the press in the appropriate circumstances.[10] The difficulty in applying a Charter analysis to the Privacy Act lies in balancing the rights of the press with the privacy rights of the individual.

The Supreme Court of Canada has extended the protection of section 2(b) of the Charter, which guarantees "freedom of thought, belief, opinion, and expression, including freedom of the press," to almost all expressive activity. Therefore, only a very low threshold is required before freedom of expression (which includes freedom of the press) is violated.[11] Under a Charter analysis, imposing a penalty on the press for publishing truthful information such as the name, address and photograph of a

murder witness would certainly be a violation of freedom of the press.

However, the rights guaranteed in the Charter are not absolute. They are subject to a balancing designed to ensure that any limitations that the state may impose on those rights are "justifiable in a free and democratic society." When a Charter right is violated, the burden shifts to the party seeking to uphold the impugned provision to show that the limitations are justified. In most Charter litigation, this latter role is assumed by the government. However, in the Pierre case, because it is the *interpretation* of the Privacy Act that is in question, not its constitutionality, the government likely will not be a party to the proceedings.

As a result, if the press succeeds in asserting that freedom of the press gives them a "claim of right," and that such a right would be violated if they were not permitted to publish the contested information, the burden will be placed on the individual who is attempting to limit that Charter right. In the *Pierre* case, therefore, the onus would fall on the murder witness to step into the shoes of the government when the press asserts they have a "claim of right" under the Privacy Act to publish personal information about her. The person whose privacy is violated must show that the restrictions on the freedom of the press contained in the Privacy Act are justifiable under the fact situation in question.

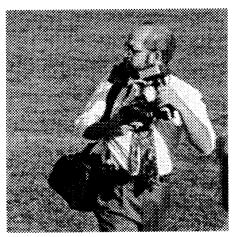
The transfer of this burden to private individuals is inappropriate given the power imbalances which often exist between the media and individual citizens. The media is increasingly controlled by large corporate entities with access to considerable amounts of capital, as well as sophisticated new technologies with which to gather and disseminate information. Such inequality of resources poses a major difficulty for individuals whose privacy has been violated. In addition, the privacy rights of an *individual* will necessarily be weighed against the interest of the *public* in the free dissemination of information. This may be a difficult burden to overcome in many cases where the information does not place the plaintiff at physical risk but may cause serious harm in other ways, such as the publication of the name of a victim of sexual assault where criminal charges have not been laid.

## CONCLUSION

The Privacy Act was intended to protect individuals such as Ms. Pierre from having their personal privacy violated without a compelling reason. In making the argument that it has a constitutional right to publish personal information whether or not the information is in the public interest, the press is seeking to undermine the zone of privacy which individuals hold dear. While the *Pierre* case may never make it to trial, the defence asserted by the media creates a great deal of uncertainty which must be addressed. Although written in a different context, LaForest's words in *Dyment* apply to this situation: "Invasions of privacy must be prevented, and where privacy is outweighed by other societal claims, there must be clear rules setting forth the conditions in which it can be violated."[12]

It is clear that until the apparent conflict between the media's Charter rights and the Privacy Act is resolved, an uncomfortable uncertainty will remain. The job of reviewing and confirming the boundaries of the freedom of the press should be taken on by government. Such a burden is too complex, too important, and likely too expensive to be left to individual private citizens.



## ENDNOTES

1 This case is in the preliminary motion stage: See *Pierre* v. *Pacific Press Ltd.* (1994), 92 B.C.L.R. (2d) 223 (C.A.) affirming (1992), 8 C.P.C. (3d) 146 for the motion to deny a jury trial. See also *Pierre* v. *Canadian Broadcasting Corporation* (1994), 20 C.P.C. (3d) 337 (B.C.S.C.).

2 For example, trespass, nuisance, and intentional infliction of emotional distress.

3 These include the Privacy Acts of: British Columbia, R.S.B.C. 1979, c. 336; Newfoundland, R.S.N. 1990, c. P-22; Manitoba, R.S.M. 1987, c. P-125; and Saskatchewan, R.S.S. 1978, c. P-24.

4 *Valiquette* v. *The Gazette* (1991), 8 C.C.L.T. (2d) 302 (Que. Sup. Ct.).

5 However, it is important to note that the media may be able to take advantage of other exceptions in the Act. In particular, the fact that she voluntarily gave information to the reporter leads to the argument that she had consented to the publication of the data (s. 2(1)(a)) or that she could not reasonably expect the information to remain private (s. 1(2)). These arguments are beyond the scope of this paper.

6 *Dolphin Delivery Ltd.* v. *R.W.D.S.U., Local 580,* [1986] 2 S.C.R. 573; *R.* v. *Saliturno*, [1991] 3 S.C.R. 654; *Dagenais* v. *Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835.

7 See *Edmonton Journal* v. *Alberta*, [1989] 2 S.C.R. 1326. In the U.S., the courts have held that the press may publish any truthful information which is lawfully obtained. This is only subject to state interests of the highest order: *Florida Star* v. *F.(B.J.)*, 491 U.S. 524 (1989).

8 *Hunter* v. *Southam*, [1984] 2 S.C.R. 145 at 159.

9 *R.* v. *Dyment* (1988), 55 D.L.R. (4th) 503 at 515 (S.C.C.).

10 *Edmonton Journal*, see note 7. However, the provision was struck down because the ban was wider than necessary to protect privacy interests. See also *The Town of Amherst* v. *C.B.C.* (1994), 111 D.L.R. (4th) 301 at 309 (N.S.S.C.), affirmed (1995) 133 N.S.R. (2d) 277 (C.A.).

11 See *Irwin Toy* v. *Quebec*, [1989] 1 S.C.R. 927; *Dolphin Delivery,* see note 6 ; *R* v. *Keegstra*, [1990] 3 S.C.R. 697.

12 *Dyment,* see note 9 at 515.

TRENDS & DEVELOPMENTS

# A NEW OPENNESS:

## *Freedom of Information in British Columbia*

**Rob Botterell is currently a Director with the Ministry of Government Services in British Columbia. Rob recently completed his articles with a law firm in Victoria. Prior to this he held several senior positions with the British Columbia government. While with the provincial government, he was the senior government official who led the development of the Freedom of Information and Protection of Privacy legislation. Rob is a graduate of the University of Victoria Faculty of Law.**

## INTRODUCTION

In June 1992, the British Columbia legislature unanimously passed the Freedom of Information and Protection of Privacy Act (the "act").[1] It is widely acknowledged as the most effective information rights legislation in Canada, while at the same time maintaining strong safeguards for personal privacy.[2] It is intended to change the relationship between government and the public by opening up government files. As the minister responsible for the legislation, Attorney General Colin Gabelman noted:

> Whereas previously a citizen had to justify a request for information in government hands, this bill requires government to justify any refusal to provide such information ... We want to create a 'culture of openness' within government so that public information is routinely released. If we are successful, the public will not even need to use the legislation.[3]

As in other major jurisdictions, the act makes an *independent* Information and Privacy Commissioner (the "commissioner") responsible for monitoring this commitment to openness.

The act covers over 200 government ministries, provincial Crown Corporations, boards, commissions, and agencies (collectively known as "Provincial Public Bodies").[4] A year later, it was amended to cover a broader range of public bodies including municipalities, school boards, universities, colleges, hospitals, municipal police forces and professional governing bodies, such as the Law Society of British Columbia, (collectively known as "Local Public Bodies"). Unlike Quebec, the privacy provisions of the act do not extend to the private sector.

More than a year has passed since the act was proclaimed for provincial public bodies, more than six months has passed since the act was proclaimed in November 1994 for most local public bodies, and the act is due to be proclaimed for self-governing professions in 1995. It is therefore timely to assess the effectiveness of the legislation across the public sector.

## OVERVIEW OF LEGISLATION

Public bodies have extensive holdings of information recorded in many different forms, including correspondence, documents, maps, photographs, videotapes, and electronic mail. It is estimated that records held by government ministries alone would fill the legislative chamber in Victoria 15 times over.[5] The expressly stated purpose of the act is to give the public a legal right of access to records in the custody or control of public bodies (section 2), subject to limited exceptions (sections 12 to 22).

The act is administered by the office of the Information and Privacy Commissioner. The commissioner is an independent officer of the legislature, appointed for a six-year non-renewable term on the unanimous recommendation of a special committee of the legislative assembly (section 37). The office also employs portfolio officers to mediate and settle disputes and independently verify adequacy of disclosure.

The act provides for both reactive and proactive disclosure of information.

### Reactive Disclosure: Freedom of Information ("FOI") Requests

If an individual is unable to obtain information through routine channels, then she or he can make a written FOI application under the act. The public body is required to "make every reasonable effort to assist applicants" and to "respond without delay to each applicant openly, accurately and completely" (section 6(1)).

In most cases the time limit for response is 30 days (s. 7). Before responding, the public body

should locate the record and review it in order to determine if it can be released in its entirety. The public body will sever (that is, not release, or "white-out") the information in the record exempted from disclosure by the twelve exceptions contained in sections 12 to 22 of the act.

There are two types of exceptions, mandatory and discretionary. In the case of mandatory exceptions, the public body *must* refuse to disclose the information. In the case of discretionary exceptions, the public body *may* refuse to disclose the information. The twelve exceptions are:

MANDATORY EXCEPTIONS

- Cabinet confidences — section 12
- Harm to business interests of a third party — section 21
- Harm to personal privacy of a third party — section 22

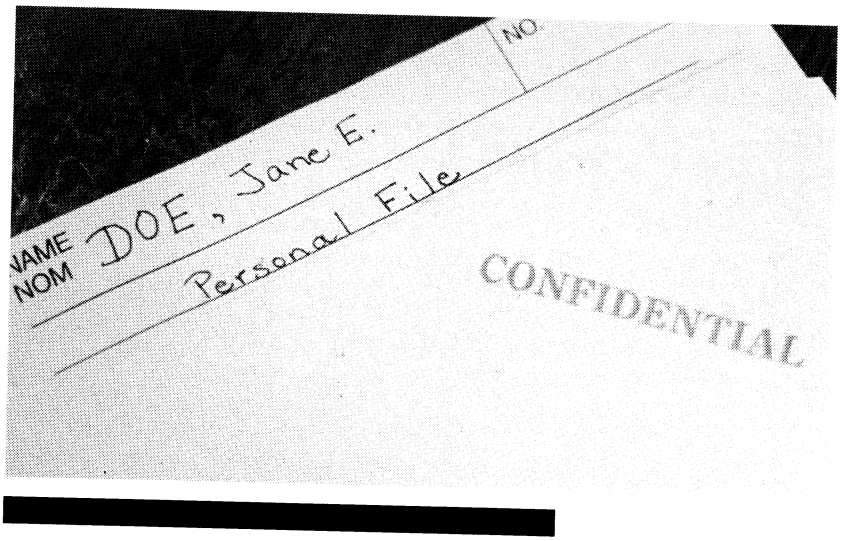
DISCRETIONARY EXCEPTIONS

- Local public body confidences - section 12.1
- Policy advice or recommendations — section 13
- Legal advice — section 14
- Harm to law enforcement —section 15
- Harm to intergovernmental relations or negotiations — section 16
- Harm to financial or economic interest of a public body — section 17
- Harm to conservation of heritage sites — section 18
- Harm to individual or public safety — section 19
- Information soon to be published or released within 60 days — section 20

**Reactive Powers of Commissioner**

Under section 53 of the act, an applicant may ask the commissioner to review a decision of the public body within 30 days of being notified of the decision. The commissioner has the power to overrule the public body (section 58). Grounds for review are broad and include any decision, act or failure to act that relates to the request (section 52). Usually a portfolio officer will attempt to mediate and settle the matter. If mediation is unsuccessful, then an oral or written inquiry must be held within 90 days (section 56). The public body almost always has the burden of proving on a balance of probabilities that the applicant has no right of access to the record, or the part "whited out" (section 57).

Under section 58 of the act, the commissioner must make an order which either confirms the decision of the public body to refuse disclosure, orders the information disclosed, or, in the case of discretionary exceptions, requires the public body to reconsider its refusal. Once an order is issued, the public body has 30 days to comply or bring an application for judicial review (section 59).




**Use of the Act - An Overview**

The public is making heavy use of the act and is being rewarded with information which would have never seen the "sunshine" under previous governments. Examples are numerous and include:

- Public opinion polls
- Hospital severance packages
- Audit reports
- Complaint letters about teachers
- Premier's telephone records
- Portions of cabinet submissions
- Government contract details.

At the provincial level, government ministries and Crown corporations received approximately 9,400 FOI requests in the first year following proclamation of the act.[6] Most FOI requests were made by individuals, while political parties and the media made approximately 450 FOI requests. One noteworthy individual filed 1,789 FOI requests with the B.C. Lottery Corporation.[7] Even if those requests are excluded, British Columbia provincial public bodies still received more than four times the number of requests, per capita, of their Ontario counterparts in their first year.[8]

The Ministry of Social Services receives more requests than any other ministry. Applicants often seek information from the ministry about their past.

Providing that information is complicated by the intermingling of the applicant's personal information with that of other individuals. In the first year, the ministry processed 1,788 FOI requests, "whited out" other individuals' information, and disclosed approximately 500,000 pages of documents to applicants. Only two decisions of the ministry resulted in commissioner's orders, and in both cases the commissioner upheld the ministry's original decision.

**FACTS AND FIGURES**

What information do British Columbians want?

**A statistical overview of the first year FOI legislation was in force shows that only eight public bodies received 82% of requests.**

| Ministry/Crown Corporation | FOI Requests Received | Orders Issued To Dec/94 |
|---|---|---|
| Attorney General | 558 | 3 |
| Environment | 333 | 1 |
| Health | 979 | 6 |
| Social Services | 1788 | 2 |
| Transportation and Highways | 403 | 1 |
| B.C. Lottery Corporation | 2617 | 0 |
| Workers' Compensation Board | 390 | 1 |
| Insurance Corporation of B.C. | 613 | 6 |
| Sub-total | 7681 | 20 |
| Other Ministries/Crowns | 1719 | 9 |
| Total | 9400 | 29 |

Source: Information and Privacy Branch, Ministry of Government Services, Government of British Columbia.

Looking at all requests, only a small percentage of applicants are dissatisfied (or dissatisfied enough) with the information they are receiving that they request the intervention of the commissioner. Of the 9,400 FOI requests received in the first year there were approximately 500 requests for review, representing seven per cent of total FOI requests. As of December 31, 1994 only 29 requests for review were not successfully mediated and required commissioner's orders. In the majority of orders the commissioner upheld the original decision of the public body.

The reason for the small percentage of FOI decisions which are successfully challenged is likely quite simple; provincial public bodies are largely complying with the act. A less likely explanation is that applicants are unable to judge when they are not receiving information to which they are entitled, or are unaware they can appeal. However, any applicant who receives a document with large parts "whited out" will probably be curious or even suspicious. Furthermore, section 8 of the act provides that every applicant must be advised of their right to appeal to the commissioner when they receive the reply to their request.

As a result, an applicant can appeal — at no cost to themselves — and enlist the expertise and mediation services of a portfolio officer at the office of the Information and Privacy Commissioner to independently verify the applicant is not being "short-changed." There is no evidence to suggest that portfolio officers are mediating and settling cases in a manner which frustrates the applicants' desire to access information. Perhaps a more interesting question, and one which remains to be answered, is whether this pattern of high numbers of FOI requests, low numbers of reviews, and low numbers of commissioner's orders will be repeated in the case of local public bodies.

### Trends in Commissioner's Orders

The commissioner's orders have consistently interpreted the exceptions to disclosure narrowly, thereby respecting "... the presumption of openness and accountability for governmental processes and non-personal information that a unanimous legislature built into the act."[9] A review of case law and orders in other Canadian provinces reveals that this trend is consistent with other jurisdictions.

To date, the most significant aspect of commissioner's orders is the degree to which interpretations of the act draw on Ontario commissioners' orders ("Ontario orders") and the British Columbia Policy and Procedures Manual (the "manual").[10] For example, in one order affecting third party business information, the commissioner found the Ontario interpretation of "supplied in confidence" provided a reasonable basis for application in British Columbia.[11] In another order, the commissioner decided that a public body must prove harm on a balance of probabilities using detailed and convincing evidence in order to refuse disclosure. In his decision, the commissioner relied on the manual:

> Although the language of the manual is not binding on the head of the public body or the

> Commissioner in the interpretation and application of the *Act*, I find it supportive in this specific instance, especially absent a body of commissioner's orders to guide interpretation.[12]

The Ontario orders and the manual are useful starting points for interpreting the act when a new issue arises. But because the Ontario act and the manual may not provide for the same degree of openness as the new B.C. act, this reliance may hinder the potential scope of the act.

One such example is the issue of disclosure by private institutions funded by government. Drawing on Ontario orders and the manual, the commissioner held that policy manuals created by Dogwood Lodge, an intermediate care facility partially funded by the Ministry of Health, are not under the control of the ministry and therefore need not be disclosed under the act. The commissioner states:

> In my view, where a public body does not have the right to have custody of a record, "control" ... must derive from a contractual or specific statutory right to review records of a contractor which relate to the services being provided, as well as a right to have a say in the content, use, or disposition of the document.[13]

In a single order, the commissioner has potentially exempted thousands of records otherwise covered by the act. The other clear implication of this order from an "openness" perspective is that public bodies can "contract out" of the provisions of the act. This can be accomplished by contracting services out, then ensuring that the contract is silent on the "content, use or disposition" of the records in question and ensuring that the public body has limited or no power to access and inspect the records.

An approach more in keeping with the intent of the act would be to adopt an expansive definition of control which would cover contractors' records such as policy manuals (especially when the contractor receives funding from government), and allow the exceptions in the act to govern what portions of the record are disclosed. The Freedom of Information and Privacy Association argued in its submissions relating to that order, "the absence of explicit contractual provisions regarding control over records ... should be accorded little, if any weight."[14]

### Proactive Disclosure

Processing large numbers of FOI requests can be time consuming and costly. The act has several provisions which are designed to encourage routine disclosure and avoid the need for an FOI request. For example:

- section 69 provides for a Freedom of Information Directory which is an index to all government information holdings, including routinely available information.
- section 70 of the act requires that policy manuals and guidelines be made available to the public.
- section 71 of the act allows for the designation of public records (e.g., public opinion polls) which are available without a request for access under the act. To encourage dissemination of this information, section 72 provides for publication of a Public Record Index of records designated under section 71.

## JURISDICTIONAL ISSUES FACING BRITISH COLUMBIA'S FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

**Almost two years after enacting the Freedom of Information and Protection of Privacy Act (FOIPPA), the government of British Columbia is still trying to figure out just how this legislation will work. The confusion as to what the act covers – and what it does not – persists. Section 78 of FOIPPA outlines the relationship between FOIPPA and any other acts which prohibit or restrict the disclosure of information. This section provides for both an interim and a long term structure for addressing conflicts between FOIPPA and other statutes.**

**In the interim, section 78 states that "... the head of a public body must refuse to disclose information to an applicant if the disclosure is prohibited or restricted by or under another Act." This provision was designed to give the legislature a two-year transition period to review the disclosure restrictions found within other acts. These sections were either to be removed or reinforced against FOIPPA scrutiny through the addition of a notwithstanding clause. This limitation will be repealed in October 1995, the same time that sub-section (2) comes into force. Sub-section (2) states that in cases involving a conflict between FOIPPA and another statute, "... unless the other Act expressly provides that it, or a provision of it, applies despite this Act ...", FOIPPA will prevail.**

**There is debate as to just how easy it should be for the legislature to remove a particular statute from FOIPPA scrutiny. This debate has led to questions about the effects of section 78 and what kinds of discretionary powers the Information and Privacy Commissioner has in connection to the application of this section. During a similar interim period in Ontario, the commissioner in that province made it clear that he would not assume that a statute contained a restrictive confidentiality clause simply because the public body had interpreted the clause in that way. Two recent decisions of British Columbia's commissioner (orders #35 and #37) suggest that the commissioner in this province has adopted a similarly protective interpretation of FOIPPA's jurisdiction.**

**The fundamental issue appears to be whether or not the legislature should have the ability to create confidentiality provisions which will operate independently of information and privacy legislation. The cautious interpretation the commissioner has given to this question so far encourages government to be explicit when amending or drafting legislation it wants to stand in spite of FOIPPA.**

**Nicole Rhodes is a third year law student at the University of Victoria. She received her Bachelor of Arts in History, with a minor in Canadian Studies, from the University of Calgary.**

- section 67 of the act provides for the establishment of a consultative committee to make recommendations to government about the operation of the act, including opportunities for routine disclosure.

Public bodies are required to disclose information in certain circumstances under the public interest override (section 25). The override applies even if the information has not been requested or if an exception would ordinarily apply. For example, public bodies must disclose information about a "risk of significant harm to the environment or to the health or safety of the public or a group of people." Public bodies must also disclose information which is for any other reason "clearly in the public interest." The addition of the phrase "clearly in the public interest" is intended to make the act more open than equivalent legislation in other jurisdictions.

The commissioner has broad general powers to foster a "culture of openness" (section 42). These include the power to conduct an investigation or audit of a public body or process to ensure compliance with the act. For example, rather than waiting for a request for review, the commissioner could investigate disclosure policies with respect to a class of documents and suggest ways to expand routine access. The act also envisages proactive measures to inform the public and obtain public input on the operation of the act.

Unlike section 58 orders, the commissioner's exercise of his section 42 powers often involves a large element of moral suasion. In this respect, the commissioner's role is more akin to that of the ombudsman. The willingness of public bodies to comply with the commissioner's section 42 recommendations will depend, to a large extent, on the inherent fairness and logic of the commissioner's position. Needless to say, if the commissioner's relationship with public bodies is adversarial or if the office of the commissioner does not enjoy widespread respect, then recommendations for change are unlikely to be followed.

The single most important challenge the commissioner faces in the remainder of his mandate is to be more proactive in promoting openness. To date, the primary focus of portfolio officers and the commissioner has been the successful resolution of requests for review. In the medium term, the only way to minimize the cost of freedom of information is to create a "culture of openness" using the proactive tools already in the act. Ideally, the commissioners' office should have less, not more, to do with respect to freedom of information as the years go by.

Examples of the types of proactive measures the commissioner could take abound. These measures should complement, not displace, FOI policy formulation by government. The commissioner could:

- study the types of records. e.g., public opinion polls, policy manuals, contracts, that could be included in a public record index and distributed on the Internet,
- encourage government to establish a consultative committee to act as a "sounding board" on the operation of the act,
- propose non-binding standards for the duty of public bodies to assist applicants and encourage government to adopt these standards by way of regulation,
- expand methods of informing the public about their rights, while soliciting public input on what "core records" are essential to public accountability, and
- examine ways to ensure that the public interest override is used to its full potential.

Most importantly, the commissioner could investigate or more actively participate in reviews of the life-cycle of particular types of records such as cabinet records, audits, and health care records to find ways to restructure these records to maximize routine public disclosure, minimize time-consuming "whiting-out" and at the same time maintain informative content. These types of measures are envisaged by the act and the challenge facing the commissioner is to use the full range of his "moral suasion" powers to proactively foster a "culture of openness." If he does, then surely we will see a new openness and accountability in the public sector.

## HAS BRITISH COLUMBIA'S INFORMATION AND PRIVACY LEGISLATION BECOME A NEW ARENA FOR OLD GRIEVANCES?

**Most complaints regarding a public body's refusal to disclose requested information are settled by the Information and Privacy Commissioner's office though a mediation process. Complaints which, for any number of reasons, cannot be resolved by this process end up in a hearing before the commissioner. It is at this level that an unanticipated category of applicant has repeatedly appeared. These applicants are either private citizens or groups who are using the act as a new arena for old battles.**

**An interesting use of the commissioner's office as a new venue for an old issue occurred in the events leading up to order #34, issued in January, 1995. This hearing essentially dealt with a feud between two neighbours. The applicant wanted the Ministry of Transportation and Highways to release a letter of complaint written by a neighbour about the applicant in regard to an ongoing parking dispute.**

**Another example of the act being used as a new forum for an ongoing dispute occurred in a recent hearing involving the Ministry of the Attorney General. The applicant had been battling the government over a variety of issues for more than twenty years, the most recent being the appropriation of an island owned by the applicant. The issue for the applicant could have been the applicant's long standing frustration with government, and not the Ministry's refusal to disclose four documents out of the 2200 which had originally been requested.**

**Realistically, it does not appear that there are any easy solutions to this "creative" use of the Freedom of Information and Protection of Privacy Act. Indeed it is unclear where the line falls between making a full presentation of one's case and merely venting about an old grievance. However, when arguments for disclosure are based on submissions complaining, as one applicant did, about "God damned feminists," "bloody murderers" and the "Morgue & Dollar" (Morgentaler) decision, one may question whether the processes of information access are being used for a motive other than proper disclosure. The wording used in the above situation suggests that a desire to express one's political views in an official forum may be an additional motive to that of proper disclosure.**

**British Columbia's Freedom of Information and Protection of Privacy Act was enacted to regulate proper information disclosure in the public sector. Technically, it appears to offer little to applicants waging old battles other than to provide them with a new forum for expressing their displeasure. However, if the above examples are any indication, this may be exactly what some people are looking for.**

**By Nicole Rhodes**

### ENDNOTES

1 S.B.C. 1992, c. 61.

2 For example, the Freedom of Information and Privacy Association stated in a June 1992 letter to the Attorney General of British Columbia, "this is the most open, balanced and effective information rights legislation in Canada." Mr. Tom Riley, an International Information Consultant, stated in the June 1992 edition of Access Reports, "The B.C. Freedom of Information and Protection of Privacy Act. ... is now considered the best possible piece of legislation and the best in North America..."

3 Ministry of the Attorney General, Press Release (22 May 1992) at 1.

4 Only a few provincial boards, commissions, and agencies are not covered by the Act. An example is B.C. Rail. Members and officers of the Legislative Assembly and the Court of Appeal, Supreme Court and Provincial Court are also excluded from the Act (see section 1).

5 See note 3.

6 The source of the British Columbia statistics in this section is the Information and Privacy Branch, Ministry of Government Services, Government of British Columbia. It should be remembered that numbers are only a rough indicator of activity. One request could involve thousands of pages of records, while another request could involve one page of information. Data on requests received by Local Public Bodies is not yet available.

7 Section 43 of the act enables a public body to apply to the commissioner for permission to disregard requests of a systematic and repetitious nature which would unreasonably interfere with the operations of the public body. The Information and Privacy Branch confirmed to the author that this provision was used in this case.

8 *Annual Report of the Information and Privacy Commissioner of Ontario* (Toronto: 1988) Table 3.

9 British Columbia Information and Privacy Commissioner Order No. 1 (1994) at 10.

10 British Columbia Information and Privacy Branch, Ministry of Government Services, Government of British Columbia.

11 British Columbia Information and Privacy Commissioner Order No. 26 (1994) at 7.

12 Order No. 1, see note 9 at 10.

13 British Columbia Information and Privacy Commissioner Order No. 11 (1994) at 12.

14 Order No. 11, see note 13 at 10.