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.

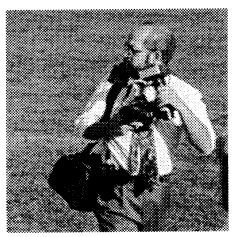
The transfer of this burden to private individuals is inappropriate given the power imbalances which often exist between the media and individual citizens. The media is increasingly controlled by large corporate entities with access to considerable amounts of capital, as well as sophisticated new technologies 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.