INTRODUCTION

WAYNE N. RENKE* AND MARC-AURÈLE RACICOT**

Privacy law does not exist. What does exist are privacy *laws*. If one wishes to pursue the protection of "privacy interests," a context must be specified: which interests, which legal regime, what procedure, what remedy?

"Privacy" itself is an equivocal notion. It may refer to an individual's claim to make important personal choices by himself or herself, without interference by the State or others. It may refer to an individual's claim to control the access of the State, other individuals or businesses to the individual's real property, personal property, body, image or representation, or to information about the individual. If the individual does not assert a personal authority to control access, it may refer to an individual's claim that access to such "private" matters be controlled by State agencies through rational procedures. It may refer to an individual's claim that information communicated in certain relationships should remain secret, confidential or privileged.

The justifications for these privacy claims may be founded on the inherent value of individual dignity, autonomy or self-determination; on the need to protect individuals from interference by the State, other individuals, or businesses; or on the need to preserve non-public spaces as conditions for authentic human life and democratic public and political interactions.

Our laws have, for centuries, protected various privacy interests. Somewhat like Molière's M. Jourdan, who was pleased to find that he had been speaking prose, we might be surprised to find that our laws have long been "speaking privacy." Privacy has been protected by the laws of torts, contracts and evidence; in the legal and ethical obligations of confidentiality that govern many relationships; and in our substantive criminal law. More recently, privacy interests have been protected by statutes applying to the provincial and federal public sectors, the provincial and federal private sectors, and to health information; by statutory provisions governing criminal procedures; and by national policies governing research ethics. The law is becoming increasingly self-conscious of its privacy-protecting role.

The articles in this issue of the *Alberta Law Review* should aid readers in their appreciation of the diversity and complexity of privacy issues. The contributors address many facets of the theory and the legal protection of privacy:

Richard B. Bruyer provides a review and critique of prevailing accounts of privacy — privacy as the right to be left alone, to limit access to the self, to control access to discreditable information, to control access to personal information, to create one's self and preserve one's dignity, and to preserve intimacy and personal relationships. Bruyer offers two main criticisms of the prevailing accounts — their flawed "intuitionism," and their

* B.A. (Hons), M.A., LL.B., LL.M., Professor, Faculty of Law, University of Alberta.
** B.Sc., LL.B., Assistant Adjunct Professor and Manager of the Information Access and Protection of Privacy (IAPP) Certificate Program, Government Studies, Faculty of Extension, University of Alberta.

presupposition of a flawed conception of liberty as licence. Bruyer also discusses conceptions of privacy in Canadian jurisprudence and Daniel Solove's "pragmatic" approach to privacy.

Russell Brown considers whether Canadian tort law should be extended to protect "privacy" expressly, beyond the current scope of tort law protection — particularly in light of some other Commonwealth jurisdictions' expansions of tort law protections for privacy interests. Brown seeks to determine whether such an extension would be justified as a development of tort law's fundamental norms. He examines two main types of proposed justifications: first, those based on privacy conceived as relating to persons' entitlement to exclude others from certain personal "resources"; second, those based on privacy conceived as relating to human dignity.

Through her assessment of non-party disclosure issues in copyright infringement litigation, Jane Bailey shows that procedural law cannot be meaningfully separated from substantive legal outcomes or from public respect for the justice system. The music recording industry is engaged in litigation in the U.S. and Canada against Internet subscribers. To obtain identifying and other personal information about subscribers, the industry must seek disclosure from non-party Internet service providers. Bailey reviews U.S. and Canadian procedures for the disclosure of identities of prospective defendants, and links procedural stringencies to the protection of privacy rights and the promotion of substantive justice.

Sandra M. Anderson discusses the impact of Alberta's statutory privacy regime on the workplace, and deals with such issues as the nature of employees' protected personal information, the accessibility of this information to third parties, workplace surveillance, drug testing and electronic monitoring.

Nola M. Ries examines consent issues in the electronic health records (EHR) context and makes recommendations for dealing with consent in the collection, use and disclosure of patient information in EHRs. Privacy is often described as a consent-based right; to respect the privacy of personal health information, then, what consent rights should a patient have in regard to EHRs? Debate has arisen in Canada and other jurisdictions about whether explicit patient consent is required before a patient's information is put onto an EHR and whether a patient should be able to limit who has access to their electronic records.

Chris Sprysak confronts issues arising when private financial information, provided to the State for one purpose, is used and disclosed by the State for other purposes. We may be legally required to provide information about our income and expenses to the State to confirm our income tax liabilities. When is the State entitled to disclose that information to enforcement authorities for the purposes of prosecution — without being compelled to disclose by a warrant? Why should enforcement authorities be entitled to access private information about us, without being required to obtain a warrant first?

Lise Gotell interrogates the judicial interpretations of the *Criminal Code*[1] provisions regulating the admissibility of sexual history evidence and defence access to complainants'

---

[1] R.S.C. 1985, c. C-46.

confidential records. She situates privacy claims in the gendered history of the public/private distinction and reviews the development and conceptual framework of the *Criminal Code* provisions. She then traces the transformation and erosion of the legislated protections for women and children by judicial interpretations of those provisions.

Wayne N. Renke discusses "data mining" as a tool for collecting information for counter-terrorism purposes, identifies the risks that data mining poses to privacy and recommends procedures to mitigate and manage those risks.

Marc-Aurèle Racicot examines the Federal Court of Appeal decision of *Englander v. TELUS Communications Inc.*,[2] a case resulting from the first complaint made under the *Personal Information Protection and Electronic Documents Act*.[3] In a world where the transfer of personal information can be beneficial for both customers and organizations, care must be taken not to ignore the carefully crafted balance between privacy and commercial needs. Racicot makes suggestions to improve and facilitate the application of *PIPEDA* pertinent to the upcoming review of this *Act*.

Broad as may be these articles' coverage, they do not begin to exhaust the intricacies of the relationship of privacy and our laws. This volume is but a slim contribution to the study of a subject that thrives in multiplicity.

---

2 (2004), [2005] 2 F.C. 572, 2004 FCA 387.

3 S.C. 2000, c. 5 [*PIPEDA*].