

4-1-2002

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Recommended Citation

Mussett, Anne (2002) "Book Review: Privacy Law in Canad by Colin H.H. McNairn and Alexander K. Scott," *Canadian Journal of Law and Technology*: Vol. 1 : No. 2 , Article 6.

Available at: <https://digitalcommons.schulichlaw.dal.ca/cjlt/vol1/iss2/6>

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Privacy Law in Canada

by Colin H.H. McNair and Alexander K. Scott. (Markham: Butterworths, 2001)

Anne Mussett†

According to Humpty Dumpty, when he uses a word “it means just what I choose it to mean, neither more nor less”.¹ And so begins *Privacy Law in Canada*. The terms “privacy” and “private”, say the authors, are used so loosely in everyday conversation that anyone who uses them may claim, as Humpty Dumpty does, that they mean whatever the person chooses them to mean.² Quite aside from being an amusing introduction, the apt reference captures the essence of a very common, yet hugely complex concept. Over the years, legal and philosophic scholars have grappled with conceptualizing privacy and still it remains an ill-defined and illusive term. While most would agree that privacy is a condition which is highly valued, once attempts are made to define privacy beyond the most general and abstract level, discussion inevitably becomes lost in a quagmire of competing claims, expectations and experiences. With the advent of the electronic age, the notion of privacy has increasingly become a topic of fascination, debate, controversy and concern. The potential for the collection, use and disclosure of personal information, and for sophisticated technology enhanced intrusions into what were traditionally viewed as the private spheres of citizens, has ignited a steady stream of reports citing new and growing threats to our privacy.³ Whether it is as fatalistic as some might have us believe is debatable. But one thing is certain: as we enter the 21st century courts and legislators will increasingly be called on to address challenging privacy issues.

There has then been no better time for an explanation of the law of privacy in Canada, particularly given the lack of Canadian content in this area.⁴ But the authors have set an ambitious task for themselves given the vast scope of privacy law and its application to the rapidly evolving online environment in which consumers, citizens, individuals, employees, corporations, government and the e-industry interact globally. Smart cards, spy software, aggregated databases, thermal imaging, biometric technology, electronic tracking and

surveillance are only a sample of why privacy has emerged as one of the most interesting and difficult issues. In response, there is a complex web of federal and provincial privacy legislation, the common law, the *Canadian Charter of Rights and Freedoms*,⁵ and most recently, the *Personal Information Protection and Electronic Documents Act* (PIPEDA),⁶ a new federal statute for the protection of personal information. The mix of constitutional, common law, and federal and provincial legislation protects intrusions in both the public and private sector. Keeping this legal framework (or more accurately, legal patchwork) of protection in mind, the authors provide a comprehensive and practical discussion of a full range of privacy issues and developments in a clear and concise format.

Privacy Law in Canada is a 360-page work that broadly covers legislation at both the federal and provincial level, and criminal and civil liability for privacy intrusions in the context of case law from across Canada. Particular focus is given to privacy issues associated with the workplace, personal health information, technological surveillance, and protecting consumers and debtors. The authors take a practical approach in examining challenging questions, such as whether a consumer’s consent is required to obtain a credit report; disclosure of medical information; monitoring an employee’s computer use and voice mail; how the PIPEDA affects businesses; the status of a common law tort of privacy; and when a person, who is subject to a search or surveillance, has a reasonable expectation of privacy. Informative, timely and straightforward, *Privacy Law in Canada*, is a very useful reference for practitioners and other professionals, as well as a good course supplement for law students or faculty studying, researching or interested in this area.

The meaning of privacy as the object of legal protection is covered in the introductory Chapter. Including a discussion of the legal and philosophical definitions of privacy is not only an excellent beginning, but also a welcome and necessary preface to a consideration of the

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legal right. The authors resist the temptation, given its capacity for a variety of meanings, to give only cursory impressions on the notion of privacy. To their credit, the authors disentangle the legal debates about the nature and value of privacy highlighting what they refer to as the seven “leading definitions”⁷ of privacy. Of these, four in particular have been employed by Canadian courts and legislatures to assist in defining the nature of the privacy interest entitled to legal protection.⁸ It comes as no surprise to see Warren and Brandeis’s “right to be let alone”, Alan Westin’s privacy as information control, William L. Prosser’s invasion of privacy as a composite right or even Edward Bloustein’s “inviolable personality”. But the remaining three are interesting additions, in that they have been subject to greater criticism: a Private Member’s Bill introduced to U.K. Parliament,⁹ containing a comprehensive definition of privacy, which was later withdrawn; Judith Jarvis Thomson’s highly controversial position that there is no right of privacy, rather it is derivative of other rights and has no independent force;¹⁰ and finally, the most recent privacy theory cited by the authors, Ruth Gavinson’s limit on informational and physical access.¹¹ While other concepts such as secrecy, autonomy and anonymity have been used in connection with privacy, the authors have done a good job in covering all the legally significant bases.

The *Canadian Charter of Rights and Freedoms*¹² has changed the privacy landscape in Canada. While there is no express right of privacy under the Charter, sections 7 and 8 have been found to encompass a right of privacy.¹³ In Chapter 2, the authors choose to concentrate primarily on section 8, giving only a summary reference to section 7 near the end of the Chapter. This makes sense given the overall theme of the book and their admission that the search and seizure provision has been the principal focus for “recognition of privacy as a value to be protected in the Canadian legal system”.¹⁴ In doing so, the authors are better able to provide a thorough, practical and detailed section 8 analysis; specifically, the reasonable expectation of privacy standard first enunciated in *Hunter*, by which privacy interests are assessed. Providing this in-depth discussion of the reasonable expectation of privacy, including subsections on spatial, informational, personal and proprietary privacy is both logical and essential; logical because the reasonableness standard is rooted in the remaining material in the book and essential given the potential significance of Charter rights and values relating to the development of privacy law in Canada.

Unlike their English and American counterparts, Canadian courts have, the authors point out, “puzzled for many years over whether to recognize a common law tort of invasion of privacy”.¹⁵ This is reflected in the statutory differences provincially and the varying judicial perspectives across Canada, all of which are sufficiently covered in Chapter 3. The addition, in this Chapter, of civil law approaches to actions for breach of privacy is a useful context for Canada’s privacy law. References are

made to the English and American approaches to privacy protection and there is some limited coverage of American jurisprudence. However, a subsection highlighting in some depth the more recent major American developments in the area of privacy and technology would complement the Chapter. It would also show the source of the Supreme Court of Canada’s early thinking on privacy as it relates to the impact of technology. Otherwise, the authors’ more than adequately cover what is necessary with respect to privacy and civil liability.

No book on Canadian privacy law would be complete without a review of the *Personal Information Protection and Electronic Documents Act* (PIPEDA). Chapter 4 is, as noted, “a revised and updated version of Chapter 1”¹⁶ of previous work by the same authors.¹⁷ Unfortunately, *Privacy Law in Canada* was published less than two months after the Privacy Commissioner of Canada began posting his Findings¹⁸ under the PIPEDA so we do not have the benefit of the authors’ expertise in the area of informational privacy with respect to their interpretations and analysis of the Commissioner’s Findings. A subsequent related Chapter on personal health information is a timely and significant addition to the book. Chapter 6 is comprehensive, ranging from the duty of confidentiality of personal health information at common law to federal and provincial health information statutory obligations in both the public and private sectors. It is, however, disappointing to the extent that the authors do not address the application and impact of the PIPEDA with respect to personal health information. In particular, the consent requirements for disclosure and use of personal health information relating to third-parties, information technology and the increasing use of computerized medical record systems are areas of concern perhaps warranting at least some discussion. As well, a whole field, known as “telemedicine”, is developing to make use of communications technology. Its impact on privacy in the health sector would complement the detailed coverage of the provincial statutory regimes relating to personal health information practices and protections. In fairness to the authors, however, Chapter 6 is already lengthy and to cover even more issues arising from the protection of health information privacy may not have been manageable at this point, especially considering the timeliness of publication.

The topic of informational privacy is also covered in Chapter 8, dealing with privacy protection of consumers and debtors. The placement of this Chapter at the end of the book is somewhat odd. It would seem to make more sense, and perhaps be less disruptive to the flow of the book, to have the Chapters relating to personal information privacy following one another rather than separated by intervening Chapters covering essentially different topics. As well, Chapter 8 deals primarily with personal credit information and the debt collection privacy issues are a brief add-on. That being said, these observations are relatively minor organizational queries. The authors stick closely to describing enacted legislation and, albeit lim-

ited, judicial precedents in the area. As in most of the Chapters in the book, the use of charts is valuable in providing a handy, snapshot guide to provincial frameworks. The chart with respect to consumer reporting statutes across Canada¹⁹ is particularly helpful because it provides a comparative schedule of where to find similar provisions in different provincial Acts. Reference is made to the PIPEDA, but again there have been a number of Findings issued by the Privacy Commissioner of Canada dealing with credit information and alleged violations of the Act by Canadian banks. This is unfortunate, but we can expect to see an expanded discussion and analysis of the PIPEDA when a revised and updated version of this book is published.

Areas that received considerable attention during the mid-1990's, but were sidelined to a certain extent by the focus on informational privacy, are privacy issues in the employment and criminal contexts. Both, however, are re-emerging as significant challenges for the legal community, privacy advocates and government. Private sector employees, and particularly those working in non-unionized settings, are increasingly vulnerable to employers' virtually unregulated utilization of monitoring and surveillance within and outside the traditional workplace. As well, retention and access to employee personal information has been placed on the human resource management agenda. As for the criminal context, security issues for Canadian citizens in the advent of September 11th have resulted in a series of proposed "anti-terrorism" enactments, most recently Bill C-55.²⁰ The current debate between the federal Privacy Commissioner together with his provincial counterparts and the Government of Canada reflects the divergence of opinion on the extent to which citizens are willing to sacrifice their privacy to combat terrorism. Obviously, this is not covered in the book, but should be borne in mind when reading Chapter 7 as it relates to criminal law protection of privacy in communications and computer networks, and Chapter 4 as it relates to the consent and knowledge provisions *vis-à-vis* the collection, use and disclosure of personal information under the PIPEDA. What may have been an interesting addition to both these Chapters, particularly the criminal context in Chapter 7 is the topical issue of surveillance in public places.

Although one of the shortest Chapters, Chapter 5 is perhaps the best for several reasons. First and foremost, privacy related issues in the employment context are about to explode as employers have, essentially, a free reign on practicing more extensive and intensive intrusions on employee privacy. This has triggered, the authors confirm "widespread public concern".²¹ Employees have always been subject to some level of scrutiny and observation, but the degree and kind has substantially changed over time to the point that employees are faced with a creeping erosion of their privacy interests in the workplace. The authors, therefore,

would have been remiss not to include this Chapter. Second, privacy law in the employment context is cumbersome, complex and possibly, the least straightforward area of privacy law. Privacy interests in the workplace encompass so much, but at the same time privacy protection is so uncertain. The authors successfully present the vast scope, yet inconsistent material, in a well-organized format and coherent style. As well, the Chapter neatly ties in the relevant material from other Chapters, such as the application and impact of the Charter, the common law, provincial privacy legislation and criminal liability. Adding subsections on arbitral and human rights jurisprudence, and principles with respect to access to employee medical information rounds out the Chapter, all of which gives a concise picture of a multifaceted area. Third, both employers and employees have legitimate claims in the workplace and within the employment relationship in which neither "hold a monopoly on the moral high ground in this area".²² Ultimately, reconciling these competing interests requires a balanced approach by decision-makers. The authors, citing numerous search cases at the arbitral level, give what is an extremely useful and practical discussion by clearly setting out the factors to be considered in reaching a balanced determination and setting the foundation for extension of these principles to the subsequent examination of cases involving video and electronic surveillance of employees. And finally, where some parts of the book are largely descriptive, the privacy and employment Chapter is appreciably insightful, perceptive and analytical, making for interesting and thought-provoking reading. In this regard, it is a shame it is one of the shortest Chapters in the book.

Canadian content, at least anything substantial, comprehensive and current on the law of privacy is sparse.²³ It is an understatement to say McNair and Scott's *Privacy Law in Canada* is a much-needed publication. That it is well done overall, includes an analytical discussion of the theoretical notion of privacy as an introduction to the subject, covers a broad range of privacy issues and provides relevant legislation in detail, are added bonuses. If there is one major flaw of the book, it is the authors' ambitious attempt to cover too much material. Most of the Chapters could effectively be separate books in themselves. At the same time, the amount of information contained in the book is also one of its strengths. In providing an abundance of practical material with several sub-topics, the book serves as an ideal point of departure for further research or an essential desk reference for those working or interested in the area of Canadian privacy law. Unavoidably, given the rapidly evolving technology that may continue to raise privacy challenges, resulting in the inevitable legislative and judicial responses, the authors' may be looking at a second edition sooner than expected to ensure a good text is kept current.

Notes:

- ¹ Lewis Carroll, *Alice's Adventure's in Wonderland* (London: MacMillan and Co., 1866) quoted in C.H.H. McNair and A.K. Scott, *Privacy Law in Canada* (Markham: Butterworths, 2001) at 1.
- ² McNair and Scott, *Ibid.*
- ³ See for example, "The End of Privacy" *The Economist* 351:8117 (1-7 May 1999); R. Whitaker, *The End of Privacy: How Total Surveillance is Becoming a Reality* (New York: New Press, 1999); S. Garfinkel, *Database Nation: The Death of Privacy in America* (Sebastopol, Cal.: O'Reilly and Associates, 2000); and, of course, Sun Microsystems, Inc., CEO Scott McNealy's infamous quote: "You already have zero privacy. Get over it."
- ⁴ Another comparable recent work is Barbara McIsaac, Rick Shields and Kris Klein, *The Law of Privacy in Canada*, looseleaf (Scarborough: Carswell, 2000) a substantial reference work on personal information privacy.
- ⁵ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
- ⁶ S.C. 2000, c. 5.
- ⁷ McNair and Scott, *supra* note 1 at 4.
- ⁸ See, for example, *Davis v. McArthur* (1969), 10 D.L.R. (3rd) 250 at 254 referring to Samuel D. Warren and Louis D. Brandeis seminal definition "the right to be let alone" in "The Right to Privacy" (1890) 4 Harv. L. Rev. 193 at 195; William Prosser's four-part definition articulated in "Privacy" (1960) 48 Cal. L. Rev. 383 at 389 referred to in *Pierre v. Pacific Press Ltd.* (1993), 83 B.C.L.R. (2d) 1 (C.A.); Edward Bloustein's "inviolate personality" in "Privacy as an Aspect of Human Dignity" (1964) 39 N.Y.U. L. Rev. 962 in *R. v. Plant*, [1993] 3 S.C.R. 282 at 293; and the definition used by legislative committees and most often referred to by courts is Alan Westin's right to control personal information in *Privacy and Freedom* (New York: Atheneum, 1968) at 7, see *R. v. Edwards* (1996), 132 D.L.R. (4th) 31 at 50 (S.C.C.).
- ⁹ 792 *Hansard*, col. 430 (Nov. 26, 1969) H.C.
- ¹⁰ "The Right to Privacy" (1975) 4 *Philosophy & Pub. Aff.* 295.
- ¹¹ "Privacy and the Limits of the Law" (1980) 89 *Yale L. J.* 421 at 423.
- ¹² *Supra* note 5.
- ¹³ See, for example, with respect to section 7, *R. v. O'Connor* (1995), 130 D.L.R. (4th) 235 (S.C.C.); and for the purposes of section 8, see, for example, *Hunter v. Southam Inc.*, (1984), 11 D.L.R. (4th) 641 at 652 (S.C.C.) [hereinafter *Hunter*]
- ¹⁴ McNair and Scott, *supra* note 1 at 18.
- ¹⁵ *Ibid.* at 42.
- ¹⁶ *Supra* note 14 at 87.
- ¹⁷ C.H.H. McNair and A.K. Scott, *A Guide to the Personal Information Protection and Electronic Documents Act* (Toronto: Butterworths, 2000).
- ¹⁸ See <http://www.privcom.gc.ca>.
- ¹⁹ McNair and Scott, *supra* note 1 at 295.
- ²⁰ *Public Safety Act, 2002*.
- ²¹ *Supra* note 19 at 134. See also at page 134, footnote 2 citing several surveys, the results of which show there is a high level of concern about privacy in the workplace.
- ²² *Ibid.* at 137.
- ²³ See *supra* note 4, B. McIsaac, R. Shields and K. Klein, looseleaf volume.