

THE LAW OF PRIVACY IN CANADA. By Barbara McIsaac, Rick Shields & Kris Klein. Scarborough: Carswell, 2000. Looseleaf (\$190.00).

"Privacy has emerged as one of the most interesting and difficult issues" of the twenty-first century, as the authors preface their work.¹ Over the last few years, privacy stories have been in the spotlight, inspired in part by a series of high-profile miscalculations about the public's tolerance for privacy incursions. A sample of the stories includes: the globally unique identifier numbers in Intel's Pentium III processor, the Microsoft Office program, the RealNetworks jukebox program, and the Comet Cursors program, which can monitor data about the computer user, and the merger of DoubleClick with Abacus, Internet and offline marketing companies respectively, whose aggregated databases could retroactively identify anonymous browsing. Meanwhile, in the public sector over the last year, there was the news of Human Resources Development Canada's detailed database on Canadians' personal and financial information and proposals for government to employ smart card technology. *Business Week*, *Harper's*, *The Economist*, *Atlantic Monthly*, and *Forbes*, among others, have all featured cover stories on privacy.² There has been a steady supply of Cassandras stridently predicting the end of privacy.³ Perhaps most notoriously, Sun Microsystems CEO Scott McNealy bluntly advised people to resign themselves to the fact that privacy was a mirage: "You already have zero privacy. Get over it."⁴ Most significant of the developments, a new federal statute, the *Personal Information Protection and Electronic Documents Act*,⁵ enacted in April 2000, extends information privacy protection to personal information that is collected and used by the private sector.

There is then an acute need for a measured and comprehensive reference work on the law of privacy in Canada. But the task that the authors have set for themselves is becoming increasingly difficult to meet given the ever-widening scope of privacy law. The law of privacy comes from constitutional, common law, and federal and provincial legislation, and it protects against privacy incursions in the public and private sectors. National policy, particularly for information privacy, is heavily influenced by international developments. Finally, new technologies present more ways to invade and to enhance privacy, while changing public expectations about what is reasonable and what legislative reform is needed.

¹ B. McIsaac, R. Shields & K. Klein, *The Law of Privacy in Canada*, looseleaf (Scarborough: Carswell, 2000) at iii.

² "It's Time for Rules in Wonderland" *Business Week* No. 3673 (20 March 2000) 82; M. Costello *et al.*, "The Searchable Soul: Privacy in the Age of Information Technology" *Harper's* 300:1796 (1 January 2000) 57; "The End of Privacy" *The Economist* 351:8117 (1-7 May 1999) 15; A.L. Penenberg "The End of Privacy" *Forbes* 164:13 (29 November 1999) 182; T. Lester, "The Reinvention of Privacy" *Atlantic Monthly* 287:3 (1 March 2001) 27.

³ See e.g. R. Whitaker, *The End of Privacy: How Total Surveillance is Becoming a Reality* (New York: New Press, 1999); M. Froomkin, "The Death of Privacy?" (2000) 52 *Stan. L. Rev.* 1461; S. Garfinkel, *Database Nation: The Death of Privacy in America* (Sebastopol, Cal.: O'Reilly and Associates, 2000).

⁴ Quoted in E.C. Baig, M. Stepanek & N. Gross, "Privacy: The Internet wants your personal info. What's in it for you?" *Business Week* No. 3623 (5 April 1999) 84 at 84.

⁵ S.C. 2000, c. 5.

The Law of Privacy in Canada is a one-volume, looseleaf reference work that broadly covers constitutional, statutory and common-law protection for privacy in Canada, and highlights some aspects of the international context. Part One describes the “challenges” and “solutions” for privacy that technology promises, or forebodes. Part Two covers privacy protection under sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*,⁶ criminal law, tort law and the scope of workplace privacy. Part Three discusses the protection of personal information in the public sector, including the federal *Privacy Act*⁷ and the provincial statutes on freedom of information and privacy. This section also describes the roles of the federal and provincial privacy commissioners. Part Four describes the *Personal Information Protection and Electronic Documents Act*, last year’s federal legislation (formerly Bill C-6), which expanded fair information practices to personal information that is held by the private sector. Quebec’s *Act Respecting the Protection of Personal Information in the Private Sector*,⁸ which preceded the federal legislation in regulating the private sector, is also covered in detail. Finally, Part Five highlights some of the international privacy developments on personal information handling principles, including the Organization for Economic Cooperation and Development (OECD) Guidelines,⁹ the Council of Europe (COE) Convention,¹⁰ and the European Union’s *Directive on the Protection of Personal Data With Regard to the Protection of Personal Data and the Free Movement of Such Data*,¹¹ as well as a brief discussion on the contrasting approach in the United States. The appendices include the full texts of the Federal *Privacy Act*, the *Personal Information Protection and Electronic Documents Act*, the provincial freedom of information and privacy acts and the European Directive.

The Law of Privacy in Canada is undoubtedly a handy desk reference. The text aptly highlights the major Supreme Court of Canada decisions and the major pieces of legislation. As the description of the contents suggests, however, the focus has been on breadth of coverage rather than on depth of analysis. Thus, under criminal law, one can find separate sub-sections for the case law on hydroelectric, banking, medical, and social records, and sub-sections on luggage and lockers. Yet the authors do not include an analytical discussion of the legal and philosophical definitions of privacy as an introduction to the subject. While it is true that much ink has already been spilled in considering the “elusive and ill-defined” notion of privacy,¹² and that it remains, in Alan Westin’s familiar phrasing, “part philosophy, some semantics, and much pure

⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁷ R.S.C. 1985, c. P-21.

⁸ R.S.Q., c. P-39.1.

⁹ *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, online: OECD <<http://www.oecd.org/dsti/sti/it/secur/index.htm>> (date accessed: 26 March 2001).

¹⁰ *Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data*, Council of Europe Convention No. 108 of September, 1980, Strasbourg, online: Council of Europe <<http://www.conventions.coe.int/treaty/EN/cadreprincipal.htm>> (date accessed: 26 March 2001).

¹¹ *EC Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data*, [1995] O.J. L. 281/0031.

¹² R.A. Posner, “The Right of Privacy” (1978) 12 Ga. L. Rev. 393 at 393.

passion,"¹³ nevertheless the debate is a necessary preface to a consideration of the legal right. Privacy has been variously conceptualized as being based in dignity and control, as limiting access to a person's body and limiting information about a person, as a human right and as an instrumental right. It has been variously defended on normative and utilitarian grounds. In addition, there are a number of satellite concepts which are legally significant and, in part, overlap with privacy, including confidentiality, secrecy, anonymity, and autonomy. When new technologies are creating new opportunities for privacy invasions and new demands that the right of privacy be expanded to accommodate them, a concise summary of the legal debates about the nature and value of privacy would complement the book's competent discussion of the legislation and precedents. The differences between civil and common law traditions with respect to defining the compensable injury and remedies for privacy invasions would also be a useful context for Canada's privacy law.¹⁴

The Supreme Court of Canada has laid out three "zones" of privacy: spatial, dignity of the person and information privacy.¹⁵ Although *The Law of Privacy in Canada* purports to cover the law of privacy comprehensively, it overwhelmingly focuses on the third realm of informational privacy. This is not surprising. Privacy's own history is inextricably linked with technological developments. Current privacy debates have largely centred on the automatic data collection, processing and storage of personal information. In the 1970s, privacy anxieties were directed toward centralized databases held by government and by large financial institutions.¹⁶ Federal and provincial privacy acts protecting personal information held by the public sector, discussed in Part Three of the book, addressed this concern. Today, privacy concerns centre more on decentralized private databases and the commodification of personal information as it is exchanged and disseminated as a good between third parties. The *Personal Information Protection and Electronic Documents Act* and Quebec's *Act Respecting the Protection of Personal Information in the Private Sector*, covered in Part Four, both address this latter concern that private entities be regulated. These laws follow the model of the European Union's Directive, discussed in Part Five, which packages fair information principles with oversight by a data commissioner. The international consensus on this particular method for protecting personal information has been remarkable. The most notable holdout has been the United States, which has touted a combination of industry regulation, self-help, and targeted legislation rather than omnibus legislation, and has assiduously restrained from establishing a privacy bureaucracy.

There is nothing unusual about focusing on information privacy, nor in using the European Union's Directive as the prime example of legislation protecting personal information. However, the authors do not provide a critical evaluation of fair information principles in practice or a detailed discussion of how successful such principles as notice, access and accuracy can be expected to be as a protection of personal information. Among the countries which have implemented fair information

¹³ A. Westin, *Privacy and Freedom* (New York: Atheneum, 1970) at x.

¹⁴ See e.g. J.R. Reidenberg "Resolving Conflicting International Data Privacy Rules in Cyberspace" (2000) 52 Stan. L. Rev. 1315 at 1340 (discussing differences in privacy ideology between the United States and Europe).

¹⁵ *R. v. Dyment*, [1988] 2 S.C.R. 417 at 428, 55 D.L.R. (4th) 503 at 514.

¹⁶ See e.g. A.R. Miller, *The Assault on Privacy: Computers, Data Banks, and Dossiers* (Ann Arbor: University of Michigan Press, 1971).

principles, there has been a striking divergence in interpretation, implementation and enforcement.¹⁷ This result then means the EU Directive's objective of harmonizing protection for transborder data flows may not be attainable by a convergence of legislative wording. Opening up the international section in Part Five would be a welcome addition to the book as it is supplemented. Although *The Law of Privacy in Canada*'s focus is on Canadian law, the authors are correct in their preface that the focus also requires that the book be contextualized with international developments in the European Union and the United States; the same argument can convincingly be made that other jurisdictions' data protection legislation also be considered.

As for the United States, the book's coverage of its privacy law is decidedly more quixotic and so brief as to be misleading. The only piece of legislation to receive extended treatment is the *Children's Online Privacy Protection Act of 1998*,¹⁸ a federal statute regulating websites' collection of information from children under age 13 and requiring parental notice and consent. Other significant legislation dealing with information privacy is handled only in a footnote listing statutes which illustrate the American sector-specific approach to privacy. These include the *Electronic Communications Privacy Act of 1986*,¹⁹ *Video Privacy Protection Act of 1988*²⁰ and the *Cable Communications Policy Act of 1984*.²¹ Such a difference in treatment would make sense only if the book were explicitly about the more narrow topic of information privacy in the context of the Internet.

The book sticks closely to describing enacted legislation and judicial precedents. Given the rapidly changing technological developments, and the room for more reform in the area of protecting personal information, the absence of predictions about emerging areas of privacy law is missed. The tort section briefly addresses the common law right of privacy and misappropriation of personality, but an expanded discussion of how William Prosser's other three tort actions, namely intrusion on physical solitude, public disclosure of private facts and false light, can be expected to fare and a description of their lineage in the United States, would help to formulate strategies for privacy causes of action.²² Other legal means for protecting privacy, and in particular personal information, such as property, contract, licensing, and intellectual property would also enrich the discussion.

All that wishful thinking aside about the perfect law of privacy reference book, this volume provides broad coverage of the major privacy legislation in Canada, the primary cases, and highlights the international context for privacy law. Recharacterized as a reference work on personal information privacy, it is a successful addition to the

¹⁷ Reidenberg, *supra* note 14; C.J. Bennett, "Convergence Revisited: Toward a Global Policy for the Protection of Personal Data?" in P.E. Agre & M. Rotenberg, eds., *Technology and Privacy: The New Landscape* (Cambridge, Mass: MIT Press, 1997) 99 at 119.

¹⁸ Pub. L. 105-277, Div. C, Title XIII, §1301, 112 Stat. 2681 (codified at 15 U.S.C.A. §6501 *et seq.* (West 2000)).

¹⁹ Pub. L. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.A (West 2000)).

²⁰ Pub. L. 100-618, 102 Stat. 3195 (codified as amended at 18 U.S.C.A. § 2710 (West 2000)).

²¹ Pub. L. 98-549, 98 Stat. 2779 (codified as amended at 47 U.S.C.A. § 551 (West 2000)).

²² W.L. Prosser, "Privacy" (1960) 48 Cal. L. Rev. 383; *Restatement (Second) of Torts* §652A (1977).

privacy literature.

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