

A Commentary on the *Privacy Act*

Department of Justice

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Executive Summary

This Commentary is designed to assist the Law Amendments Committee and the public in their consideration of the proposed *Privacy Act*. The Act was introduced in the Legislative Assembly in December 2000, and was referred to the Committee for review. Referring an Act to the Law Amendments Committee allows the public to become directly involved in the legislative process. The Committee typically invites the public to make oral or written presentations on the topics it reviews.

The *Privacy Act* is designed to establish a 'tort' of invasion of privacy. That is to say, it makes an 'invasion of privacy' a wrongful act and enables a person whose privacy has been invaded to sue the wrongdoer, seeking remedies such as damages, declarations and injunctions. The proposed Act is short. Most of it deals with establishing the legal test that the courts will apply when determining whether an invasion of privacy has occurred. The remedies will be the ordinary remedies that apply to 'torts' in general, adjusted slightly by the provisions of this Act.

This Commentary sets out the full text of the proposed Act, and provides explanatory notes to each section. It also includes as an Appendix an extract from an earlier discussion paper in which the Department of Justice examined in detail the questions of (a) whether legislation of this sort should be enacted, and (b) if so, what it should say.

Both of these questions are still open. Though the government favours the enactment of a *Privacy Act* along the lines presented here, no final decisions have yet been taken. Similar legislation exists in five other provinces, yet the argument is still sometimes made that legislation like this, though admirable in its objectives, is not really necessary and may end up causing more problems than it solves.

The government wishes New Brunswickers to have the opportunity to comment upon the proposed *Privacy Act*. This is why the Act has been referred to the Law Amendments Committee for review. Anyone who wishes to comment on the Act should therefore contact the Clerk of the Legislative Assembly to make sure they know when and how to make their views known. The address is:

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A Commentary on the *Privacy Act*

Introduction and Background

This Commentary is designed to assist the Law Amendments Committee and the public in their consideration of the proposed *Privacy Act*. The Act was introduced in the Legislative Assembly in December 2000, and was referred to the Committee for review. Referring an Act to the Law Amendments Committee allows the public to become directly involved in the legislative process. The Committee typically invites the public to make oral or written presentations on the topics it reviews.

The *Privacy Act* is designed to establish a ‘tort’ of invasion of privacy. That is to say, it makes an ‘invasion of privacy’ a wrongful act and enables a person whose privacy has been invaded to sue the wrongdoer, seeking remedies such as damages, declarations and injunctions. Legislation of this sort exists in British Columbia, Saskatchewan, Manitoba, Quebec and Newfoundland, and a *Uniform Privacy Act* has been developed by the Uniform Law Conference of Canada. The Department of Justice has reviewed all of these models carefully while preparing the proposed *Privacy Act*.

The Department has also reviewed the arguments that are sometimes made *against* enacting legislation of this sort. For some time there has been a debate in legal circles about whether such legislation is desirable. The debate is not about whether protection of privacy is important; everyone agrees that it is. Rather, the debate is about (a) whether a *new* legal remedy like this is needed, or whether other legal remedies already protect people’s privacy sufficiently, and (b) whether legislation designed to protect people’s privacy may be harmful to other important social values such as freedom of speech and action, or to the ability of police forces and other investigative bodies to perform their functions.

The Department of Justice described the two sides of this debate (along with other privacy law issues) in *Privacy: Discussion Paper #2*, a paper that it submitted to the Law Amendments Committee in 1998. The Committee, however, was unable to deal with the paper at that time, and later the Legislative Assembly was dissolved for the 1999 provincial election. This Commentary is therefore carrying forward a discussion that was launched two years ago.

The relevant passages of *Privacy: Discussion Paper #2* are attached as an Appendix to this Commentary. The paper started by explaining that ‘privacy’ is a broad concept that people naturally associate with things like the peace and quiet of their homes, their ability to communicate without third parties listening in, and protecting the details of their lives from unwanted publicity. It then described the existing legal remedies by which some forms of invasions of privacy may be dealt with – actions for trespass and for defamation were among the examples. It used the Uniform Law Conference of Canada’s *Uniform Privacy Act* as a basis for a detailed discussion of what

a *Privacy Act* in New Brunswick might say, and it closed by asking for comments on whether legislation of this sort should be enacted.

The discussion paper did not come down on one side or the other of the debate about whether a tort of invasion of privacy should be created. It simply presented legislative options for public discussion. The paper took the same non-committal approach to the other privacy law issues it examined. The first of these was whether protection of personal information legislation like New Brunswick's *Protection of Personal Information Act* (which only applies in the public sector) should be extended to the private sector. 'Protection of personal information' legislation provides detailed rules about one particular privacy law issue: what kinds of information organizations large or small should obtain about individuals, and how those organizations should handle and use it. The second issue discussed in the paper was whether non-judicial remedies for infringements of privacy should also be established. Such remedies would cover the full range of privacy issues, rather than just the protection of personal information, but they would not set out detailed rules. The remedies would be non-judicial in the sense that it would be an administrative agency, rather than the courts, that was given the authority to resolve privacy disputes and develop privacy standards.

These last two issues are no longer under consideration in New Brunswick. In both cases, this is because of the federal government's *Personal Information Protection and Electronic Documents Act*, the relevant sections of which are expected to begin to come into force on January 1, 2001. The Act covers a substantial part of the ground reviewed in *Privacy: Discussion Paper #2*, and does so in a way that makes further provincial legislation on these subjects problematic.

Part 1 of the *Personal Information Protection and Electronic Documents Act* sets out protection of personal information rules that are to apply to all commercial activities throughout Canada. It is much broader than had been expected when *Privacy: Discussion Paper #2* was prepared. Questions were raised throughout the Parliamentary process about whether the Act's full range falls within the federal Parliament's constitutional authority. However, the fact is that the Act has now been passed, and any legislative developments in New Brunswick must take that into account.

The federal Act obviously covers much of the ground that provincial protection of personal information legislation for the private sector would cover. It also has a major impact on the broader topic of non-judicial remedies for infringements of privacy. This is because a surprising number of privacy concerns involve at least *some element* that can be linked to protection of personal information rules. For example, when people complain about practices such as video surveillance, aggressive telemarketing and mandatory drug-testing, their concern is about the 'privacy' issues of being watched, pestered and coerced. At the same time, however, part of what is going on is that an organization is trying to obtain information about them; this is a 'protection of personal information' issue. In New South Wales (Australia), where a statutory Committee with a wide-ranging privacy mandate has existed for roughly 25 years, the experience has

apparently been that most of the issues the Committee has dealt with have involved protection of personal information principles in one way or another.

If the legislative field were clear, there might well be something to be said for giving an agency such as the New Brunswick Human Rights Commission a wide-ranging privacy mandate that allowed it to deal with protection of personal information issues along with other privacy matters. With the federal Act in place, however, doing so becomes problematic. The federal Act deals with protection of personal information alone. A provincial Act cannot realistically confine itself to other privacy matters, since protection of personal information cannot be segregated from other privacy matters. If, on the other hand, provincial legislation dealt with protection of personal information as well as other privacy matters, it would create overlap and confusion with the federal Act. The federal Act tries to deal with this by allowing the federal government to exempt activities within a province from the federal Act if the province has substantially similar legislation in place (section 26). An exemption, however, would not replace the federal Act with the provincial Act entirely. Instead, its effect would apparently be that the private sector would have to comply with both the federal *and* the provincial Acts in relation to different sets of information, or sometimes in relation to different uses of the same information. Double-regulation of this sort seems highly unsatisfactory.

It is possible that the government may reconsider the position in relation to the protection of personal information as experience develops under the federal Act. At present, however, of the three items in relation to the protection of personal information discussed in *Privacy: Discussion Paper #2*, only the creation of a tort of invasion of privacy remains a serious policy option. Legislation like the proposed *Privacy Act* would create little conflict, if any, with the federal Act. It would be wide-ranging, based on a broad and natural meaning of the word privacy rather than analyzing everything in terms of personal information and its uses. It would apply to social activities as well as commercial ones, and would create rights between individuals as well as between individuals and organizations. It would, in short, provide a broad, legally enforceable, baseline for the protection of individuals' privacy in New Brunswick.

The government has decided to pursue this option by presenting a Bill for review by the Law Amendments Committee. This Commentary sets out the text of the Bill, and provides some explanation to accompany each section. It is hoped that this will lead to a productive and informed public discussion before the Committee.

The government currently favours the enactment of the *Privacy Act*. However, it will pay careful attention to any recommendations that the Law Amendments Committee makes after reviewing the Bill and considering representations from the public. People who wish to comment on the Bill should therefore contact the Clerk of the Legislative Assembly to make sure they know when and how to make their views known. The Clerk's address is P.O. Box 6000 (706 Queen Street), Fredericton, N.B., Canada E3B 5H1 (tel.: (506) 453-2506; fax: (506) 453-7154; e-mail: wwwleg@gnb.ca).

Text and Commentary

The pages that follow set out the full text of the proposed *Privacy Act*, with some explanatory notes on each section. The Act is short, and is very similar in substance to the *Uniform Privacy Act* and the Privacy Acts of British Columbia, Saskatchewan, Manitoba and Newfoundland. In style, though, it is more condensed. The Department of Justice's analysis of those Acts suggested that the essence of what they were saying could be expressed more simply, and the text that follows attempts to do this. (The *Uniform Privacy Act* is set out in full in the attached extracts from *Privacy: Discussion Paper #2*.)

Privacy Act

Chapter Outline

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Her Majesty, by and with the advice and consent of the Legislative Assembly of New Brunswick, enacts as follows:

Tort

1 An invasion of the privacy of an individual is a tort and is actionable without proof of damage.

Section 1 contains the fundamental legal statement in this Act – namely, that “an invasion of the privacy of an individual is a tort.” Sections 2, 3 and 4 provide additional detail on what kinds of conduct will or will not amount to an “invasion of privacy.”

Making an invasion of privacy a tort means that it is a wrongful act for which an individual can sue. Adding that it is “actionable without proof of damage” means that the individual does not have to prove that he or she has suffered or will suffer harm or damage in order to be able to bring an action. It is the invasion of privacy itself that is actionable.

Note that under section 1, only an individual can bring an action for invasion of privacy. Organizations such as corporations will not therefore be able to do so.

Invasion of Privacy

- 2** An act is an invasion of privacy if
- (a) it unduly intrudes into the personal affairs of an individual or into his or her activities, whether in a public or a private place, or
 - (b) it gives undue publicity to information concerning an individual.

This section provides the legal description of what an invasion of privacy is. Most of the comparable legislation in other Canadian provinces does not contain a provision of this sort, but Privacy: Discussion Paper #2 suggested that a general description might be useful if suitable wording could be devised. It proposed the wording that is now in section 2. Sections 3 and 4 of the Act supplement section 2 by providing, respectively, (a) some examples of conduct that may amount to an invasion of privacy, and (b) a list of situations in which conduct will not be an invasion of privacy.

The key concepts in section 2 are undue intrusion and undue publicity. The words “undue,” or “unduly,” make it clear that there is a question of degree involved in determining whether an invasion of privacy has occurred. Some degree of intrusion, and some degree of publicity may often have to be accepted as part of the give-and-take of living in society. When that degree becomes excessive, however, or “undue,” it may amount to an invasion of privacy.

It will be up to the courts to determine in individual cases when the threshold of ‘undueness’ (so to speak) has been crossed. In some cases reasonable opinions may differ. This, though, is a normal feature of many kinds of tort actions that the courts deal with. Issues such as whether a defendant has exercised reasonable care when driving or has engaged in an unreasonable use of his or her land involve similar questions of degree. Courts determine them on a case by case basis, and each case serves as an example in future cases of what kinds of conduct are or are not acceptable.

Examples

3 Without limiting the generality of section 2, an invasion of privacy may arise from conduct such as the following if it occurs to the degree described in section 2:

- (a) watching or following an individual;
- (b) disturbing an individual in his or her home or any other private place;
- (c) listening to or intercepting private communications; or
- (d) disclosing information of a personal nature about an individual.

This section provides examples of kinds of conduct which may give rise to an invasion of privacy if they cross the threshold of 'undueness' that section 2 sets. This is not an exhaustive list. Any conduct which meets the test in section 2 is an invasion of privacy, whether or not it is listed in section 3 or is similar to something listed there. Section 3 is designed to indicate some of the kinds of conduct from which an invasion of privacy may result.

"Watching or following an individual" would include doing so physically or by electronic or other means. It would therefore include things like stalking individuals as well as high-tech surveillance of their activities.

"Disturbing an individual in his or her home or any other private place" might include such things as over-aggressive telemarketing or serious aggravations arising out of disputes between neighbours. It might also include cases arising out of unwelcome physical entrances onto the plaintiff's property if a substantial degree of intrusion took the case beyond being simply a trespass.

"Listening to or intercepting private communications" would extend to all forms of communications, including such things as conversations, letters, telephone calls and e-mails. How far any particular communication could be considered "private" would be a matter of degree. People can normally expect a high degree of privacy in the content of their letters, and a lower degree of privacy in relation to conversations that they knowingly conduct within earshot of others. With something like e-mails, there is currently quite an active discussion of how much privacy a person can reasonably expect. One's expectations in the office, for example, may well be different from one's expectations in the home. Generally speaking, the less private the nature of the communication, the more intrusion a

plaintiff would have to show in order to establish that an invasion of privacy had occurred.

“Disclosing information of a personal nature about an individual” differs from the other examples in section 3 in that it connects with paragraph 2(b), (giving undue publicity to information concerning an individual,) rather than to paragraph 2(a) (unduly intruding into his or her activities). “Information of a personal nature” might well be found in things like diaries and private correspondence. The paragraph indicates that a disclosure of information that is “of a personal nature” is more apt to give rise to an invasion of privacy than a disclosure of less personal information. However, the wording of section 2 leaves open the possibility that an invasion of privacy can also arise from giving “undue publicity” to information that is not “of a personal nature.”

Before leaving section 3, it is worth repeating that the kinds of conduct described in the section do not in themselves amount to an invasion of privacy. It is only when they occur to the degree described in section 2 that this will be the result.

Exclusions

- 4(1)** An act is not an invasion of privacy if
- (a) the individual consented to it,
 - (b) it was done in the reasonable exercise of a lawful right of defence of person or property,
 - (c) it was authorized or required by law,
 - (d) it was done by a peace officer or other public officer acting in good faith and in the course of his or her duty,
 - (e) the person doing the act neither knew nor reasonably should have known that the act would constitute an invasion of privacy,
 - (f) the person doing the act reasonably believed it was done in the public interest, or
 - (g) the act would be privileged under the law of defamation.

4(2) In determining whether an act is an invasion of privacy, the court shall have regard to all the circumstances, including any domestic or other relationship between the parties.

This section performs two functions. Subsection (1) sets out a variety of factors which negative the existence of an invasion of privacy. An act which could in some circumstances be an invasion of privacy will not be one if one of the listed factors is present. Subsection (2) is designed to ensure that when a court decides whether an invasion of privacy has occurred, it looks at the situation in an all-encompassing way. The existence of things like family relationships, employment relationships and even adversarial relationships can be relevant to deciding what kinds of conduct will amount to an invasion of privacy in a particular situation.

The factors listed in subsection (1) can be divided into three groups: paragraphs (a) to (d), paragraphs (e) and (f), and paragraph (g)

Paragraphs (a) to (d) are typical features of the Privacy Acts of other Canadian provinces. Paragraph (a) means that a person cannot complain that an act is an invasion of his or her privacy if he or she has consented to it. Consent might be given verbally or in writing, but often it may be inferred from the person's actions. For example, by allowing guests in one's house one impliedly consents to activities that, done by someone else, might well be considered an invasion of privacy. Paragraph (b) allows people to take reasonable acts to defend their persons or property. The "defence of person or property" that is perhaps the most likely to give rise to a possible invasion of privacy is an investigation into the conduct of a person with whom one may be in a legal dispute. An insurance company, for example, which believed it was dealing with a possibly fraudulent claim would be able to defend its person or property by taking reasonable steps to investigate whether the claim was truthful. Paragraph (c) simply permits people to do the things that they are authorized or required to do by things such as legislation, common law rules, and orders from courts or administrative tribunals. Paragraph (d) provides protection to agencies such as police forces, government inspectorates and social work agencies as long as they are acting in good faith and in the course of their duties.

The second group of factors in subsection 4(1) are in paragraphs (e) and (f). These are modelled on provisions in some of the other Canadian Privacy Acts, but they are not standard features in their own right. Their effect, generally, is that people who have acted reasonably will not be held liable in actions for invasion of privacy. Thus paragraph (e) provides a defence to people whose actions do in fact unduly intrude or give undue publicity, but who had no reason to foresee this result. A newspaper, for

example, might publish information that appeared harmless but turned out to be deeply embarrassing to an individual for personal reasons. Paragraph (f) protects people who “reasonably believe” they are acting in the public interest – perhaps by whistle-blowing or something of the sort – but who turn out to be mistaken.

Paragraph (g), which refers to acts that would be “privileged under the law of defamation,” requires more explanation. This paragraph relates specifically to invasions of privacy that arise from giving undue publicity to information concerning an individual. Giving publicity to information about an individual will normally amount to defamation if the information is untrue and is damaging to the individual’s reputation. The person sued, however, has a defence if the statement was “privileged.” There are two major categories of privilege. “Absolute privilege” applies primarily in court proceedings and in the Legislative Assembly. It protects judges and MLAs, for example, from being sued for defamation for anything they say there in the course of their duties. “Qualified privilege” is a broader defence, available to anybody. A person who believes that what he or she says is true, and who says it to a person who has a legitimate interest in receiving it, will not be liable for defamation even if what he or she says turns out to be incorrect and damaging to another person’s reputation. An example is a statement made to the police during the investigation of a crime. The effect of paragraph (g) is that where a person would be protected from an action for defamation by one or other of these privileges, he or she will also be protected from an action for invasion of privacy.

Damages

5 In assessing damages in an action for invasion of privacy, the court may take into account

- (a) the seriousness of the invasion of privacy, and
- (b) any financial benefit that the defendant derived from the act complained of.

This section provides some small adjustments to the law relating to the calculation of damages. If invasion of privacy is made a tort, as it is under section 1 of the Act, the standard remedies of tort law naturally apply. The major ones are damages, declarations and injunctions. Section 5 fine-tunes the law on damages, making it clear that the amount of the award can include an assessment of other things than simply the loss that the invasion of privacy causes to the plaintiff.

The effect of paragraph 5(a) is that, whenever an invasion of privacy occurs, the court can set the damages at an amount that reflects the severity of the invasion of privacy. This would be separate from, and independent of, the question of whether exemplary or punitive damages might be awarded. Courts in Canada are traditionally reticent about giving punitive or exemplary damages, but in relation to invasions of privacy, the nature of the wrongdoer's conduct is often a key element in determining how seriously the plaintiff's privacy has been invaded. Paragraph 5(a) therefore allows the court to consider the nature of the wrongdoer's conduct in all cases, whether or not that conduct satisfies the traditionally strict test that the courts have set for awarding exemplary or punitive damages.

Paragraph 5(b) is narrower in application. It reflects the fact that invasions of privacy may in some cases produce a gain for the wrongdoer that is greater than the loss to the person whose privacy is invaded. An example might be when the wrongdoer tries to sell photographs or other material that has been obtained by an invasion of privacy. Under paragraph 5(b), if the wrongdoer had in fact sold the material, an award of damages could take into account the price received. If the wrongdoer had not yet sold the material, but was planning to, it would be more likely that an injunction would prevent the sale, so the award of damages would not need to take the sale price into account.

Crown is bound

6 This Act binds the Crown.

Section 6 is included for purely technical reasons. Under Section 32 of the Interpretation Act, "No Act or regulation impairs or adversely affects the rights of the Crown unless it is expressly stated therein that the Crown is bound thereby." Section 6 therefore makes it clear that this Act does bind the Crown and that the Crown can therefore be sued for invasion of privacy.

Privacy: Discussion Paper #2 also mentioned some other technical details that were referred to in some of the legislation in other Canadian provinces, but are not mentioned in the Privacy Act. The main ones were (1) whether an action could be brought or continued after the plaintiff had died, and (2) what the limitation period for an action for invasion of privacy should be.

As to item (1), the legislation in some other provinces says that an action for invasion of privacy cannot be continued by the estate of an individual if the individual dies before judgment has been obtained. Such a rule would seem out of place in New Brunswick. Under the Survival of Actions Act the general rule is that if a person who has a right to bring a civil action dies, his or her estate can continue an action that has already begun, or may begin one if it has not. There is no obvious reason to make an exception to this in the Privacy Act by saying that the individual must live until judgment is received. The individual will, however, need to be alive at the time that the invasion of privacy occurs; otherwise, no invasion of privacy within the meaning of section 2 can arise.

As to item (2), the general limitation period for actions in tort is “six years after the cause of action arose” (section 9, Limitation of Actions Act). After that period, a plaintiff can no longer sue. The six year period is nowadays interpreted as starting from the date when the plaintiff either knew or should have known that a tort had occurred. Again, there is no obvious reason for creating a separate rule for actions for invasions of privacy, and since the Privacy Act says nothing on the subject, the general rule will apply.

The Act also contains no provisions on commencement (i.e., when the Act comes into force) or on transition (i.e., how the Act applies to things that happen before it comes into force). The result is (a) that the Act will come into force as soon as it receives Royal Assent, and (b) that people will only be able to sue for invasions of privacy that occur from that time on.

APPENDIX

Extract from *Privacy: Discussion Paper #2*

[*Note:* The expression “data protection” in this extract means the same as “protection of personal information” in the introductory section of this Commentary.]

II. Privacy in General

As was pointed out in the Introduction to this Paper, "privacy" is a much broader concept than "data protection". When people speak of their privacy they would normally think of things like the peace and quiet of their homes, their ability to communicate without third parties listening in, and protecting the details of their lives from unwanted publicity. Article 17 of the International Covenant on Civil and Political Rights, which establishes privacy as one of the internationally recognized human rights, and to which Canada is a party, catches the general flavour of this:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attack upon his honour and reputation. Every one has the right to the protection of the law against such interference or attacks.

In its 1997 report *Privacy: Where Do We Draw the Line?* the House of Commons Standing Committee on Human Rights and the Status of Persons with Disabilities offered the following as its key statement of "fundamental privacy rights" (p.35):

Everyone is entitled to expect and enjoy:

- physical privacy;
- privacy of personal information;
- freedom from surveillance;
- privacy of personal communications;
- privacy of personal space.

Data protection is evidently only one part of this. It falls primarily into the realm of "privacy of personal information", but even there, data protection, with its focus on "recorded information" and "organizations," and its exclusion of personal and household activities, does not cover all of the ground.

The purpose of this Part of this Paper, therefore, is to consider whether New Brunswick should adopt legislative measures to protect 'privacy' in the more general sense. Two specific approaches are identified. One is to expand the existing *judicial* remedies by establishing a 'tort' of invasion of privacy. A 'tort' is a wrongful act for which an aggrieved individual can seek the normal civil remedies of damages, declarations and injunctions. The other is to establish *non-judicial* (or administrative) remedies for infringements of privacy. These two approaches are the natural extensions of the discussion in Part I of possible "civil remedies" and "administrative remedies" under data protection legislation. The House of Commons Standing Committee, though it clearly supported non-judicial remedies for infringements of privacy, paid little attention to judicial remedies. This is surprising. The

Committee's principal recommendation was that Parliament adopt in the federal sphere a "Charter of Privacy Rights" that would have a quasi-constitutional status (p.45). As will be seen, however, the key elements of the Committee's "fundamental privacy rights" (quoted above) are very much the kind of things that some provinces do, and New Brunswick might, assert by way of a 'tort' of invasion of privacy.

A. Judicial Remedies for Invasion of Privacy

The path that the next few pages will take is relatively well-trodden. In countries such as England, Australia and Canada there have been several studies of the similar judicial remedies that are available for the protection of privacy interests. The shared background of these studies is that there is no established remedy for an invasion of privacy as such, but that privacy interests can be protected through a number of other remedies such as actions for trespass or for breach of confidence. The discussion, therefore, is of the scope of the established remedies, of how much more could or should be done to ensure that privacy can be adequately protected, of whether the best way forward, if more should be done, is through legislation or through judge-made law, and of whether, under either of those two approaches, the sounder legal framework is to develop the existing remedies or to create a new tort of "invasion of privacy".

That discussion also refers to experience in the USA for contrast. There the courts have recognized a common law right of privacy for many years. The case-law has been analyzed as recognizing four main categories of actionable invasion of privacy: (1) intrusion upon the plaintiff's seclusion or solitude, or into his or her private affairs; (2) public disclosure of embarrassing facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

In Canada, where the position is described at length by Ian Lawson in his book *Privacy and Free Enterprise* (1993, Public Interest Advocacy Centre), the discussion has some special features. One is that five Provinces have in fact legislated to create a specific tort of invasion of privacy. Four of these -- B.C., Saskatchewan, Manitoba and Newfoundland -- are common law provinces where the remedy was new. The fifth is Quebec, where the remedy originally evolved through interpretation of general provisions of civil responsibility in the former *Civil Code*, but has now been expressly included in the new one. Quebec's *Charter of Human Rights and Freedoms* also contains, as art.5, a provision that "Every person has a right to respect for his private life." Unlike the Canadian *Charter*, this provision is directly enforceable between citizens.

Another special feature of the Canadian debate is that in the common law provinces where there is at present no legislation, the courts have recently become more willing to consider that perhaps a general tort of invasion of privacy may exist at common law. In a few cases in Ontario damages have been awarded on this account. A recent decision of the Court of Appeal of Prince Edward Island commented that "the courts in Canada are not far

from recognizing a common law right of privacy, if they have not already done so" (Carruthers CJPEI, *Dyne Holdings Ltd. et al v Royal Insurance Co. of Canada* (1996) 138 Nfld. & PEI R, 318). These developments complicate the issue of whether it is *legislators*, specifically, who should take action to establish invasion of privacy as a tort, or whether the courts should be left to develop, case by case, this new field of liability. If the case law were clearer that there either is or is not a general tort, it would be easier to assess the contribution that legislative measures might appropriately make.

So far as the judicial remedies are concerned, the key issue is whether New Brunswick should enact legislation that makes an invasion of privacy a tort. As with the data protection section of the Paper, there is a specific legislative model around which the discussion will centre. This is the *Uniform Privacy Act* adopted by the Uniform Law Conference of Canada in 1994. The *Uniform Act* draws upon and attempts to improve the existing provincial statutes, all of which are similar in substance, though different in some of their details. There is no obvious reason for this Paper to attempt to invent something completely different. The Paper will therefore describe the Act, and present three major policy options in relation to judicial remedies for invasions of privacy. One is to adopt legislation substantially similar to the *Uniform Act*. Another is to decide that there should not be a tort of invasion of privacy at all. The third is to say that *if* there is to be a tort of invasion of privacy, it should be left to be developed by the courts rather than established by legislation.

Proposition #34

Discussion of a statutory tort of invasion of privacy should be based on the *Uniform Privacy Act* prepared by the Uniform Law Conference of Canada, set against the background of existing judicial remedies that may protect privacy interests.

A.1 Existing Remedies

The existing legal remedies for invasion of privacy are found under the *Canadian Charter of Rights and Freedoms*, under various federal and provincial Acts and in various existing torts. None of these contains an established and general remedy for 'invasions of privacy' as such. As was mentioned above, there is currently a theoretical debate as to whether, at common law, a general tort of 'invasion of privacy' exists, but if it does, it is certainly not yet "established." By contrast, the other remedies that will be referred to are clearly "established," and can be used to protect *some* privacy interests, but they are not "general."

a. The Canadian Charter of Rights and Freedoms

Privacy under the *Canadian Charter of Rights and Freedoms* can be dealt with fairly briefly. The *Charter* contains no express right of privacy. The courts, however, including the Supreme Court of Canada, have held that a right of privacy is implicit in other express provisions of the *Charter*, notably s.7 and s.8. They appear to talk quite freely of a

"constitutional right of privacy" despite the absence of any express provision on the subject in the *Charter*.

S.7 of the *Charter* says that "Everyone has the right to life, liberty and the security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The courts have held that privacy can be an element of "liberty" and of "security of the person." They have held that there is at least a "biographical core of personal information," which may tend to reveal "intimate details of lifestyle and personal choice," that is entitled to protection under this section. Arguably there may be more, but there is at least this much.

S.8 of the *Charter*, says that "Everyone has the right to be free against unreasonable search and seizure." The courts have held the test of whether a search or seizure is "unreasonable" is whether it violates a "reasonable expectation of privacy". "Searches" and "seizures" have been held to include not only physical searches and seizures in the obvious context of criminal law enforcement, but also other forms of mandatory information-gathering. Obtaining information from willing third parties has also been held to be a search or a seizure in some cases -- e.g. *R v Dymnt* (1988) 89 N.R. 249, where a doctor voluntarily provided the police with a blood sample from an injured driver which showed that the driver had been impaired at the time of an accident, and *R v Plant* [1993] S.C.R. 281, where a power company voluntarily made electricity consumption records available to the police. (In the latter case, the police "search" by checking the records was held not to be an "unreasonable" one, since in the view of most of the Supreme Court justices, though not all, records of electricity consumption did not disclose "intimate details of lifestyle and personal choice" in which the householder could have a "reasonable expectation of privacy.")

Charter protection, however, is not absolute. Under s.7, for example, a person *can* be deprived of "life, liberty and security of the person" if this is done "in accordance with the principles of fundamental justice." Under s.8, what it protected is a "*reasonable* expectation of privacy." Under s.1, moreover, all *Charter* rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." More important than this, though, in terms of the availability of *general* remedies for invasions of privacy, is that the *Charter* only applies to the actions of governments. It will not normally apply to privacy issues as between citizens. As a remedy in the private sphere, therefore, any *Charter* right of privacy is of limited application.

b. Federal and provincial Acts

Protection of privacy under federal and provincial Acts can be dealt with even more briefly. Unlike the provisions of the *Charter*, which, though general, only apply as between the citizen and the government, federal and provincial Acts are specific. They may provide privacy protection, but only in relation to a particular subject-matter.

At the federal level, legislation such as the *Criminal Code* and the *Privacy Act* obviously come to mind. The procedural provisions of the *Criminal Code* regulate the powers

of the police in investigating offences, and substantive offences under the *Code* cover things such as interception of private communications (s.184) and 'watching and besetting' (s.423). The *Privacy Act* deals with data protection in the institutions of the federal government, and the legislation that the federal government is currently developing for the private sector will apply data protection rules to those elements of the private sector that fall under federal legislative competence.

General legislation on privacy does not exist at the federal level. Normally speaking, privacy would be considered to be a subject that falls within provincial legislative competence under s.92 of the *Constitution Act 1867* as a matter of "property and civil rights" within the province. Even if wide-ranging privacy protection legislation were available under one head or another of federal legislative competence -- perhaps the Criminal Law power -- it might still be legitimate to ask, in a paper such as this one, whether civil remedies should be available to individuals under provincial legislation, in addition to whatever protections might be available under the federal laws.

As for privacy protection under provincial Acts, the position is that some specific New Brunswick Acts deal with subject-matter that is often identified as raising privacy concerns, but that there is no general legislation dealing with invasions of privacy as such, either through civil remedies or through the province's power to create so-called 'quasi-criminal' offences on matters within its legislative competence. Existing provincial legislation covering areas that are often of concern from a privacy point of view includes the *Direct Sellers Act*, the *Collection Agencies Act* and the *Private Investigators and Security Services Act*.

c. Common Law

In his book *Privacy and Free Enterprise*, Ian Lawson describes at length a number established common law remedies that may be available when privacy is invaded, depending in each case on the nature of the conduct complained of. He also discusses the possibly emerging tort of invasion of privacy. Among the many established torts that Lawson mentions, the following appear to be the most important.

(i) *Trespass to land*. This tort permits an occupier of land to decide who is or is not allowed to enter the property. This is obviously an important instrument for preserving 'spatial privacy'. Less familiar is the tort of 'watching and besetting' a person's house or business in order to compel the occupier to do something, which extends the protection of tort law to some actions done *off* the occupier's property. Extended applications of the tort of *nuisance* have also provided protection against some actions done without entry to an occupier's premises. Examples include *Poole & Poole v Ragen and the Toronto Harbour Commissioners* [1958] O.W.N.77, where the plaintiffs won damages and an injunction against the Toronto Harbour police, who for three months had followed the plaintiffs' boat back and forth through the harbour, and *Motherwell v Motherwell* (1976) 73 D.L.R. (3rd) 62, a dispute among family members in which the plaintiff harassed the defendants by telephoning them an inordinate number of times with complaints about another family member.

(ii) *Assault and trespass to the person.* Under these torts it is wrongful to touch another person without consent. These torts are the basic protections of 'personal privacy', the privacy of one's body.

(iii) *Defamation and breach of confidence.* The long-established tort of defamation involves the publication of false information that harms the reputation of the plaintiff. Breach of confidence, a tort which is itself in the course of evolving, provides a remedy against the disclosure of confidential information which one person obtains from another, and in which the person providing the information has a reasonable expectation of privacy. Both torts obviously apply in the area of 'information privacy'. Another tort that may apply is *injurious falsehood*, the making of untrue statements with a view to causing pecuniary damage. As with defamation, the information must be false, but unlike defamation, it is not necessary that the statements be harmful to the reputation of the plaintiff.

Traditionally, in countries such as Canada, Australia and the United Kingdom, the question of whether legislative measures are required for the protection of privacy has depended on an assessment of the adequacy of torts such as these. More recently in Canada the question has been complicated by the emergence of a small number of cases suggesting that invasion of privacy may be in the course of becoming established as a tort by virtue of judicial decisions, without the need for *legislative* intervention. Cases include *Saccone v Orr* (1981) 34 OR (2d) 317, where the defendant secretly recorded a telephone conversation with the plaintiff and subsequently played it at a town council meeting, and *Roth v Roth* (1991) 4 OR (3d) 740, where a dispute between neighbours over the use of an access road led to a general campaign of harrassment that was held to include an infringement of the plaintiffs' privacy.

On the question of whether the established tort remedies are sufficient there are two schools of thought. One says that they are. The argument here accepts that there is no specific right of action for invasion of privacy, but points out that there is no express remedy for other important human rights such as "liberty" or "security of the person" either. Rights such as these, it is said, are abstract, and like the right to privacy, they are generally enforced through a variety of specific remedies, with different remedies -- an action for false imprisonment, an application for *habeas corpus*, and so on -- being available in different situations.

The existing remedies, on this argument, are substantially adequate to the task of protecting privacy, and if specific inadequacies in them can be demonstrated, the better approach is to revise the existing remedy rather than to invent a completely new one. Experience in America is referred to as suggesting that an apparently broad 'right of privacy' will in fact resolve itself into a small number of claims which are similar in nature to existing torts. Concern is expressed that a tort of invasion of privacy would be an unknown quantity, and might interfere with other important values such as freedom of expression and the freedom of the press.

The other side of the argument is that privacy is a clear enough concept that it can be satisfactorily defined, and that it is an important enough value that it should be protected expressly. On this view the existing tort remedies would be considered inadequate to the task, because each has its own conceptual framework, and each will fall short in particular situations. A classic example might be a case such as the English case of *Kaye v Robertson* (Appendix I to the *Report of the Committee on Privacy and Related Matters* -- the "Calcutt Committee" -- 1990, HMSO). Here newspaper reporters entered a hospital room where a celebrity was recovering from brain surgery after a serious accident. The reporters ignored notices to keep out. They interviewed the patient and took photographs. They said that the patient did not object, though in the view of the Court of Appeal, it was and should have been obvious to the reporters that the patient was in no condition to consent. The reporters then proposed to publish the photographs and an article based on the interview. In the absence of a cause of action for invasion of privacy, the patient tried to prevent publication on grounds of libel, malicious falsehood, trespass to the person and passing off. All he succeeded in getting, however, was an injunction to the effect that the newspaper could not publish anything implying that he had consented to the interview. Bingham L.J. commented:

The Defendants' conduct towards the Plaintiff here was a "monstrous invasion of his privacy" (to adopt the language of Griffiths J in *Bernstein v Skyviews Ltd.* [1978] QB 479 at 489G). If ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties. It is this invasion of his privacy which underlies the Plaintiff's complaint. Yet it alone, however gross, does not entitle him to relief in English law.

Both sides of the argument about a tort of invasion of privacy are credible. Both also depend to a large extent on their proponents' differing views as to the ability of legislators or the courts to find a definition of 'invasion of privacy' that is both clear and manifestly useful. Those who would prefer to work with the established torts fear that establishing a broad concept of invasion of privacy would raise more questions than it answered. Among these was the Calcutt Committee, which, despite cases such as *Kaye v Robertson*, felt that other measures, including the establishment of some focused criminal and civil remedies, was preferable to creating a wide-ranging tort of invasion of privacy. On the other hand, those who prefer an express remedy for invasion of privacy consider that a workable definition can be established, and that without it the law will never be able to focus directly on the real problem.

A.2. A Tort of Invasion of Privacy?

To provide the material on which this discussion can reach a conclusion, this Paper will take much the same approach as it took in relation to data protection and the CSA Code. On the basis of the *Uniform Privacy Act* it will state a number of propositions about how legislation establishing a tort of invasion of privacy might be expressed. There can then be public debate about whether legislation in these or similar terms would be desirable. The

Uniform Act is presented in its entirety in Appendix C. A slightly revised approach derived from the propositions in this Part of this Paper is presented in summary form in Appendix D.

a. "Invasion of privacy"

The key elements of the *Uniform Act* are (a) a broad statement that "Violation of the privacy of an individual by a person is a tort that is actionable without proof of damage" (s.2); (b) a list of specific activities that will "in the absence of evidence to the contrary" be considered to be a violation of privacy (s.3); and (c) a list of defences (s.4). This general framework is common to the other Canadian legislation as well -- though the statutes vary on the question of whether it is only individuals (as opposed to corporations, for example) who can sue for an invasion of privacy.

The activities that the *Uniform Act* identifies as presumed invasions of privacy are (in abbreviated form) (a) auditory or visual surveillance of the individual, (b) listening to or recording another person's conversations, (c) publication of letters, diaries or other personal documents, and (d) wrongful dissemination of information concerning an individual. This list is not exhaustive; other unlisted acts may also be found to amount to an invasion of privacy.

The defences (similarly abbreviated) are (a) that the plaintiff consented to the activity, (b) that the defendant acted in lawful defence of person or property, (c) that the activity was authorized or required by law, (d) that the defendant was lawfully investigating an offence, (e) that the defendant's action was reasonable, having regard to any relationship, domestic or otherwise, between the parties, (f) that the defendant neither knew nor reasonably should have known that his or her act would violate the privacy of any individual, and (g) that the act complained of was a reasonable publication in the public interest.

One thing that this approach does not contain is a general description or definition of what an invasion of privacy is. The defences identify things that are *not* an invasion of privacy, and the examples identify some specific activities that are *likely* to be an invasion of privacy, but beyond that the key statement in the legislation is simply the open-ended statement that a "violation of the privacy of an individual . . . is a tort."

Is this acceptable, or should legislation try to be more explicit? The calculation of the *Uniform Act*, and others like it, is presumably that if legislation tries to explain what an "invasion of privacy" is, it will restrict the ability of the courts to develop this new tort in the context of the specific cases that come before them. The argument on the other side is that without at least some sort of definition, the new tort is unacceptably vague.

In principle, one would think, a general description of what an "invasion of privacy" is would be a useful feature of legislation. The following Proposition therefore suggests one. If the definition is satisfactory, it could be part of an enactment. If it is not, approaches more like that of the *Uniform Act* might be more acceptable.

This definition, one should note, would not have to be complete in the sense of, say, the 'fundamental privacy rights' described by the House of Commons Standing Committee on Human Rights and the Status of Disabled Persons. The definition would be intended as a description of an actionable wrong rather than of a human right, and would proceed on the basis that other torts will continue to exist, so that invasions of privacy by trespass, assault, libel, breach of confidence, and so forth, would continue to be dealt with by other means. The purpose of the definition would be to describe the essence of the new tort that the legislation was to add to the existing catalogue.

Proposition #35

An invasion of privacy might be defined as follows:

An act is an invasion of privacy

- (a) if it unduly intrudes into the personal affairs of an individual, or into his or her activities, whether in a public or a private place, or**
- (b) if it gives undue publicity to personal information concerning an individual.**

If a definition along these lines would be too limiting, is an approach like that of the *Uniform Act* acceptable, or is it too uncertain? It should be noted here that some of the existing provincial Acts spell out in more detail the 'unreasonableness' criterion that the *Uniform Act* mentions briefly as a defence under s.4(1)(e). British Columbia's Act, for example, says:

1(2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

1(3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

Other existing legislation in the common law provinces (but not Quebec) is also more cautious than the *Uniform Act* in describing the kind of conduct that will amount to an invasion of privacy. In B.C., Saskatchewan and Newfoundland it is only where a person "wilfully and without a claim of right" violates the privacy of another that he or she commits a tort. In Saskatchewan the expression is "substantially, unreasonably and without claim of right".

Whether qualifiers of this sort would be necessary in legislation establishing a tort of invasion of privacy would depend to a considerable extent on whether the legislation

contained a general definition of an invasion of privacy along the lines of Proposition #35. Generally speaking, one would have thought that a 'reasonableness' test would be an appropriate element of the legislation. Establishing a 'wilfulness' threshold, however, might well seem excessive.

Proposition #36

If a definition along the lines of Proposition #35 would be too limiting, invasion of privacy legislation should at least contain an 'unreasonableness' threshold before conduct would be considered to amount to an invasion of privacy.

One of the specific examples of invasion of privacy in s.3 of the *Uniform Act* is this:

- (d) dissemination of information concerning the individual that has been gathered for commercial or governmental purposes if
 - (i) the dissemination is contrary to a statute or regulation, or
 - (ii) the information was provided by the individual in confidence, and the dissemination is made for a purpose other than the purpose for which the information was provided.

The general defences in the Act would apply, of course, including 'consent' and 'reasonableness' (see below).

There is an obvious link here to data protection issues. S.3(d) can be seen as a demonstration of how a tort statute might attempt to get to the essence of data protection legislation in a few short words that might perhaps make more extensive legislation unnecessary. S.3(d) does not have a counterpart in the Privacy Acts of B.C., Alberta, Saskatchewan or Newfoundland. In Quebec, however, basic data protection principles are found in arts.37 to 41 of the *Civil Code*; the more extensive public sector and private sector data protection statutes are an extension of the *Civil Code* provisions.

One would obviously have to think carefully about a provision like s.3(d) before deciding that it should be included in an invasion of privacy statute. If New Brunswick adopts data protection legislation along the lines described in Part I of this Paper, the data protection Act would presumably be the place where the legislative policy on civil remedies was set out -- whether, ultimately, that policy included them or deliberately excluded them. If, however, data protection legislation is not eventually adopted, s.3(d) might deserve further study. It appears to be narrower in scope than a data protection Act, which might make it more acceptable. On the other hand, if the present consultation indicates that private sector data protection legislation is not desirable, the reasons may be such that s.3(d) would be equally undesirable.

Proposition #37

A decision on whether 'wrongful dissemination of information about an individual' might amount to a tort of invasion of privacy should await the outcome of the consultation on private sector data protection legislation.

b. Defences

Next comes the question of whether the specific defences in s.4 of the *Uniform Act* are appropriate and need to be stated. Here again there is substantial consistency between the provincial Acts. It is common ground that there should be a defence against actions for invasion of privacy if the defendant acted with consent, or in lawful defence of person or property, or was authorized by law, or acted for law-enforcement purposes, or published information in the public interest. Two features of the *Uniform Act* that are less standard, though, are s.4(1)(d) -- that the conduct is "reasonable, having regard to any relationship, domestic or otherwise, between the parties" -- and s.4(1)(e) -- that the defendant "neither knew nor reasonably should have known that the act, conduct or publication would violate the privacy of an individual." Both of these seem acceptable in substance, though exactly where they belong in legislation would depend on whether a general definition of 'invasion of privacy' or a 'reasonableness threshold' were a part of the legislation.

One other small point is that the *Uniform Act* deliberately omitted one specific defence that appears in the Saskatchewan Act alone. This is that the act complained of "was that of a person engaged in news gathering . . . for any newspaper . . . or . . . broadcaster . . . and such act was reasonable in the circumstances and was necessary for or incidental to ordinary news gathering activities." The report prepared for the Uniform Law Conference argued that a special provision for news-gatherers was not appropriate: that if such a provision gave news-gatherers any real protection it was, in effect, giving them a special privilege that allows them to violate the privacy of individuals.

Proposition #38

In substance, the defences listed in s.4 of the *Uniform Act* are appropriate.

c. Remedies

S.5 of the *Uniform Act* deals with remedies. It spells out that a court can award damages and grant injunctions, can order the defendant to account for any profits arising out of the invasion of privacy or to return any items obtained from it, and can grant any other relief to the plaintiff that the court considers necessary in the circumstances.

These remedies are substantially common to the Saskatchewan, Manitoba and Newfoundland Privacy Acts. By contrast, B.C.'s Act and the privacy provisions of Quebec's *Civil Code* say nothing about remedies, relying on the general law on the subject. Which approach is preferable is largely a matter of technical judgment, based on one's best assessment of what the courts will do either with or without statutory guidance on the subject.

In substance, however, s.5 seems to contain a reasonable statement of what the available remedies should be.

Proposition #39

The remedies described in s.5 of the *Uniform Act* should be available for an invasion of privacy, though they may not need to be expressly stated in legislation.

S. 6 of the *Uniform Act* goes on to mention a variety of things that a court can consider in assessing damages for an invasion of privacy. These include things like "the nature of the act . . . and the context in which it occurs" and "the conduct of the plaintiff and of the defendant before and after the act . . . including any apology or offer of amends made by the defendant." The section also makes clear that the court may award punitive damages in appropriate cases.

Though the section does not seem objectionable, this is probably one of those cases in which the less the legislation says, the better. The main effect of s.6 is to make it clear that the conduct of the defendant can be relevant to the calculation of damages for an invasion of privacy, but it is doubtful that this really needs to be said -- or more importantly, perhaps, it is doubtful that it should be highlighted as compared to other factors that might be equally important. The courts in Quebec have several years' experience of developing damage awards for invasions of privacy, and in the few recent cases from Ontario, figures have been developed in which the harm done was not measured simply in terms of financial loss. The actual level at which damage awards would be set would probably take some time to become settled, whether under a provision like s.6 or without such a provision, but even without such a provision the courts could be relied on to develop appropriate measures.

Proposition #40

The rules on calculation of damages for a tort of invasion of privacy could satisfactorily be left to be developed by the courts.

d. Technical matters

The *Uniform Act* closes with some provisions on technical legal matters -- the relation of this tort to other torts, and whether the Act binds the Crown. Other existing provincial Acts deal with things like limitation periods, precedence as between this Act and other Acts, the inadmissibility in civil proceedings of evidence obtained in violation of the Act and the question of whether it is possible to 'invade the privacy' of a person who is deceased.

Technical issues of this sort do not need to be discussed in any detail here. The best approach to dealing with them seems to be to adopt the general policy that the tort of invasion of privacy, if established by legislation, should be a tort like any other. From this general principle answers to most of these technical issues would follow. The one item that has more

substance, though, is the question of whether one can 'invade the privacy' of a person who is deceased. The most natural answer seems to be "no," especially following the idea set out in relation to s.2 of the *Act* that only individuals can sue for an invasion of privacy. B.C., Saskatchewan and Newfoundland appear to take this one step further, and say that if an invasion of privacy occurs before a person dies, the right of action is extinguished by his or her death. Whether this is the right approach would require further consideration.

Proposition #41

Technical questions on matters such as limitation periods, binding the Crown, precedence of Acts and admissibility of evidence should be decided on the basis that the tort of invasion of privacy, if established by statute, would be established as a tort like any other. There should be no right of action for an invasion of the privacy of a person who is deceased.

A.3 To Legislate or Not?

With the assistance of the discussion of the *Uniform Act* one can now return to the main question that this Section considers. Should there be legislation to establish a tort of invasion of privacy or not? Two possible legislative models are presented in the appendices. Appendix C is the *Uniform Act*. Appendix D states in summary form a slightly different approach based on the propositions in this paper. The two would be similar in effect. The main differences are (1) that Appendix D includes a generic definition of 'invasion of privacy', while Appendix C does not, and (2) that Appendix D excludes the material on remedies that Appendix C contains. In their outlines, however, the two are comparable. A decision to enact invasion of privacy legislation requires a decision that legislation substantially along these lines is desirable.

As was stated earlier, there are three main conclusions that the present consultation could reach. One is that legislation substantially similar to the *Uniform Act* should be adopted. Another is to decide that there should not be a tort of invasion of privacy at all. The third is to say that *if* there is to be a tort of invasion of privacy, it should be left to be developed by the courts rather than established by legislation. The arguments for these last two positions have not been mentioned for some time. They therefore deserve a brief review before the discussion closes.

"There should not be a tort of invasion of privacy."

The general argument against a tort of invasion of privacy is, in short, that the tort is unnecessary, undefinable, inappropriate and misconceived. It is unnecessary because other established tort remedies are substantially adequate to protect privacy interests. It is undefinable because privacy is too subjective a concept to support a workable legal definition. It is inappropriate because it presents too great a threat to desirable activities (e.g. legitimate reporting) to counter too small a problem. It is misconceived because it ignores the necessary

give and take of everyday life, assuming too readily that any insult to one's dignity must necessarily give rise to a legal remedy.

These are issues on which the legislative models discussed in this Paper can cast some light. One can start with the question of definability: discussion of the legislative models will determine whether the tort is satisfactorily described. One can then move to the question of appropriateness: does legislation along these lines actually pose a threat to desirable activities, or does it not? Whether the tort is misconceived also depends heavily on the way in which the legislation is expressed: does it accurately capture those kinds of insults to dignity that *should* be the subject of a legal remedy, or does it go too far. Whether the tort is necessary, however, cannot be assessed by considering the terms of the tort alone. There are certainly some gaps in the established tort remedies that a tort of invasion of privacy might fill. For the opponents of the tort, however, those gaps are small and tolerable.

One should probably add that if the present consultation leads to the conclusion that there should *not* be a tort of invasion of privacy, it would presumably be appropriate to look again at the common law on the subject, and to consider whether its further development in New Brunswick should be nipped in the bud. That, however, is a decision for another day.

"If there is to be a tort of invasion of privacy, it should be developed by the courts, not by legislation."

The argument here is primarily one of method, but issues of substance are also involved.

When torts are developed by the courts, the process evolves step by step, one case at a time. As more cases are decided, similarities and connecting principles emerge. Sometimes new principles evolve as courts look at old decisions in a new light. The advantage of this is that the law develops gradually, and each decision comes with a particular set of facts that illustrate what, in practical terms, the tort really amounts to. The disadvantage is that development by this method can be slow and unpredictable. It depends on the facts that litigants present to the courts and on the decisions that judges reach on those facts.

In Canada there appears to be enough case-law now that the courts in New Brunswick could develop a tort of invasion of privacy if suitable cases were presented to them. On the other hand, it is also possible that they might decide not to. They might, for example, accept the argument that a general tort of 'invasion of privacy' is just too vague to be acceptable. They might decide that other existing torts provided more appropriate legal frameworks for deciding the disputes that were litigated. Each case would contain a reasoned explanation of why the court decided as it did. If a tort of invasion of privacy failed to become established through the case-law, it would presumably be because experience suggested that the potential tort contained inherent difficulties that were too great to be resolved.

A decision that a tort of invasion of privacy should be developed by the courts (if at all) reflects a preference for a gradual approach to the development of the law in this area, a preparedness to 'wait and see', and to accept that perhaps the results of the process may be different from what, at the outset, one might think to be desirable. This would apply not only to the question of whether the tort should be recognized at all, but also to its details if it were. On matters such as whether a corporation could have 'privacy' that could be 'invaded', for example, a court might reach a different conclusion from the one suggested in this Paper.

If there is substantial ambivalence about whether a tort of invasion of privacy should exist, and if so, how it might be described, taking a 'wait and see' approach might be sensible. As things stand, it seems more likely than not that a tort of invasion of privacy will become established through case law -- some would argue that the tort is already established, though not yet developed -- but one cannot predict the future. The only way of making it certain, now, that the tort exists is to enact legislation. The risk, though, is that if legislation is poorly expressed, it may restrict developments that would otherwise occur more satisfactorily through the case-law. This is a criticism that has been made of, for example, the expression "wilfully and without claim of right" that determines which "violations of privacy" are actionable under some of the existing Canadian Privacy Acts.

Proposition #42

Key issues for public discussion are

- (a) whether an invasion of privacy should be a tort at all,**
- (b) whether legislation based on the *Uniform Act* would adequately describe an 'invasion of privacy' and pose no threat to desirable activities,**
- (c) whether caution dictates that the development of the tort should be left to the courts rather than undertaken by legislation.**

APPENDIX C

UNIFORM PRIVACY ACT

Definition

1. In this Act, "court" means [The Court of Queen's Bench of New Brunswick].

Tort

2. Violation of the privacy of an individual by a person is a tort that is actionable without proof of damage.

Proof in absence of contrary evidence

3. Without limiting the generality of section 2, proof of any of the following, in the absence of evidence to the contrary, is proof of a violation of the privacy of an individual:

(a) auditory or visual surveillance of the individual or the individual's residence or vehicle by any means, including eavesdropping, watching, spying, besetting and following, whether the surveillance is accomplished by trespass or not;

(b) listening to or recording a conversation in which the individual participates, or listening to or recording a message to or from the individual that passes by means of telecommunications, by a person who is not a lawful party to the conversation or message;

(c) publication of letters, diaries or other personal documents of the individual;

(d) dissemination of information concerning the individual that has been gathered for commercial or governmental purposes if

(i) the dissemination is contrary to a statute or regulation, or

(ii) the information was provided by the individual in confidence, and the dissemination is made for a purpose other than the purpose for which the information was provided.

Defences

4.(1) An Act, conduct or publication does not constitute a violation of the privacy of an individual if

(a) it is specifically consented to, expressly or impliedly, by the individual, the

individual is entitled to consent to it, and the court is satisfied that the consent is freely given;

(b) it is reasonably incidental to the exercise of a lawful right of defence of person or property;

(c) subject to subsection (2), it is authorized or required

(i) under a statute or regulation,

(ii) by a court or by a person, tribunal or agency, other than a commissioner for oaths or a notary public, that is authorized by law to administer an oath for the purposes for which the person, tribunal or agency is authorized to take evidence, or

(iii) by any process of a court, person, tribunal or agency mentioned in subclause (ii);

(d) it is an act, conduct or publication of a peace officer or a public officer engaged in an investigation who is acting in the course and within the scope of his or her duty, it is not disproportionate to the gravity of the matter that is the subject of the investigation and it is not committed in the course of trespass or other unlawful act;

(e) it is reasonable, having regard to any relationship, domestic or otherwise, between the parties to the action; or

(f) the defendant neither knew nor reasonably should have known that the act, conduct or publication would violate the privacy of any individual.

(2) No authorization or requirement under a statute or regulation provides a defence to an action for violation of privacy unless the statute or regulation specifically authorizes or requires the act, conduct or publication for the purpose for which it is undertaken.

(3) A publication of a matter is not a violation of the privacy of an individual if

(a) there are reasonable grounds for belief that the publication is in the public interest; or

(b) the publication is privileged under the law relating to defamation.

(4) Subsection (3) does not apply to any act or conduct by which the matter published is obtained if that act or conduct constitutes a violation of privacy.

Remedies

5. *In an action for violation of privacy, the court may do one or more of the following:*

- (a) *award damages;*
- (b) *grant an injunction;*
- (c) *order the defendant to account to the plaintiff for any profits that have accrued or may accrue to the defendant as a result of the violation of privacy;*
- (d) *order the defendant to deliver up to the plaintiff all articles or documents that have come into the defendant's possession as a result of the violation of privacy;*
- (e) *grant any other relief to the plaintiff that the court considers necessary in the circumstances.*

Damages

6.(1) *In awarding damages in an action for violation of privacy, the court shall consider all the circumstances of the case, including*

- (a) *the nature of the act, conduct or publication and the context in which it occurs;*
- (b) *the effect of the act, conduct or publication on the health and welfare or on the social, business or financial position of the plaintiff or relatives of the plaintiff; and*
- (c) *the conduct of the plaintiff and of the defendant before and after the act, conduct or publication, including any apology or offer of amends made by the defendant.*

(2) *In an action for violation of privacy, the court may award punitive damages, taking into account the flagrancy of the violation of privacy and the conduct of the defendant.*

Right of action in addition to other rights

7.(1) *The right of action for violation of privacy conferred by this Act and the remedies available under this Act are in addition to, and not in derogation of, any other right or remedy available under any other law.*

(2) *Subsection (1) does not require damages awarded in an action for violation of privacy to be disregarded in assessing damages in any other proceedings arising out of the same act, conduct or publication that constitutes the violation of privacy.*

Crown bound

8. *The Crown is bound by this Act.*

APPENDIX D**ALTERNATIVE APPROACH (SUMMARY)**

- 1 *An invasion of the privacy of an individual is a tort that is actionable without proof of damage.*
- 2 *An act is an invasion of privacy*
 - (a) *if it unduly intrudes into the personal affairs of an individual, or into his or her activities, whether in a public or a private place, or*
 - (b) *if it gives undue publicity to personal information concerning an individual.*
- 3 *Without limiting sections 1 and 2, an invasion of privacy may arise from*
 - (a) *surveillance of the individual,*
 - (b) *eavesdropping or intercepting an individual's communications, or*
 - (c) *publication of the personal documents of an individual.*
- 4 *The defences to an action for invasion of privacy are*
 - (a) *that the individual consented to the action complained of,*
 - (b) *that the action complained of was done in the exercise of a lawful right of defence of person or property,*
 - (c) *that the action complained of was authorized or required by law,*
 - (d) *that the action complained of was done by a peace officer when acting in good faith and in the course of his or her duty,*
 - (e) *that the action complained of was reasonable in all of the circumstances, and having regard to any relationship, domestic or otherwise, between the parties to the action,*
 - (f) *that the defendant neither knew nor reasonably should have known that the act, conduct or publication would violate the privacy of any individual, and*

- (g) *that the action complained of was a publication that*
 - (a) *the defendant reasonably believed to be in the public interest; or*
 - (b) *was privileged under the law of defamation.*

[No provisions on remedies are included.]

