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## Privacy and the Canadian Media: Developing the New Tort of "Intrusion Upon Seclusion" with Charter Values

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# Privacy and the Canadian Media: Developing the New Tort of "Intrusion Upon Seclusion" with Charter Values

## **Abstract**

With the recent recognition of the new tort of "intrusion upon seclusion", Canadian privacy law has experienced a fundamental and modernizing shift. In *Jones v Tsige*, the Ontario Court of Appeal held that a person is liable for an invasion of privacy, if "he or she intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns [...] if the invasion would be highly offensive to a reasonable person." This new tort has the potential to dramatically impact society, media, and our core conceptions of individual privacy. In this paper, I engage the perspective of the Canadian media to analyze this legal shift against the competing *Charter* values of freedom of expression, free press, and individual privacy. I argue that in order to achieve a proper balance in this context, Canadian courts should be guided by the recent defamation law analysis from the Supreme Court of Canada in *Grant v Torstar Corp.* To this end, I propose a two-stage framework for principled application of the tort and suggest that in the media context, Canadian courts should recognize a principled defence of "Responsible Newsgathering on Matters of Public Interest." This analysis only begins the debate. The introduction of this tort should encourage immediate discussion of how to best foster its growth with *Charter* values.

## **Keywords**

Privacy, Intrusion Upon Seclusion, Media, Communications, Charter

## **PRIVACY AND THE CANADIAN MEDIA: DEVELOPING THE NEW TORT OF "INTRUSION UPON SECLUSION" WITH *CHARTER* VALUES**

JARED MACKEY\*

### INTRODUCTION

The flow of information from private and public sectors to the population at large is critical for the development of any free and democratic society.<sup>1</sup> When gathering news information, journalists must often balance the public's desire for interesting, informative, and truthful stories, with individual privacy interests. In today's complex society, striking this delicate balance requires an understanding of privacy law in constantly evolving legal and practical frameworks.

With the recent recognition of an independent tort for invasion of privacy, termed an "intrusion upon seclusion", Canadian privacy law has experienced a fundamental and modernizing shift. In the 2012 decision *Jones v Tsige* [*Jones*],<sup>2</sup> the Ontario Court of Appeal held that a person is liable for an invasion of privacy, if "he or she intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns [...] if the invasion would be highly offensive to a reasonable person."<sup>3</sup> Although the Court justified its decision as an incremental step in the common law, this new tort has the potential to dramatically impact society, media, and our core conceptions of individual privacy.

In this paper, I engage the perspective of the Canadian media to analyze this legal shift against the competing values of freedom of expression, free press, and individual privacy.<sup>4</sup> I argue that in order to achieve a proper balance in this context, Canadian courts should engage a two-stage analysis in media intrusion cases and recognize a principled defence of "Responsible Newsgathering on Matters of Public

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<sup>1</sup> Gordon Proudfoot, *Privacy Law and the Media in Canada* (Ottawa: The Canadian Bar Foundation, 1984) at 1 [Proudfoot].

<sup>2</sup> *Jones v Tsige*, 2012 ONCA 32, [2012] OJ No 148 [*Jones*].

<sup>3</sup> *Restatement (Second) of Torts* (2010), § 652B [*Restatement*], cited in *Jones*, *ibid.*

<sup>4</sup> My discussion is not restricted to the institutional media, but applies to all people and businesses that gather and disseminate information to inform, advertise, or entertain, including free-lance journalists, academic researchers, and public interest organizations. See Daniel J Solove & Paul M Schwartz, *Information Privacy Law*, 3d ed (New York: Aspen Publishers, 2009) at 77 [Solove & Schwartz].

Interest.”<sup>5</sup> In Part I of the paper, I explore the origins of a right to privacy and the traditional Canadian approach to privacy protection. Against this backdrop, in Part II, I review the landmark decision of *Jones* and discuss its impact on the Canadian privacy law framework. In Part III, I introduce the need to develop this new common law tort in a manner consistent with values enshrined in the *Canadian Charter of Rights and Freedoms* [*Charter*].<sup>6</sup> In particular, I suggest that the Canadian approach to reconciling conflicting values can foster principled development of the tort of intrusion upon seclusion. In Part IV, I propose a working two-stage framework for the intrusion tort, drawn from the Supreme Court’s 2009 defamation law analysis in *Grant v Torstar Corp.*<sup>7</sup> In the final part, I set out the two-stage framework in further detail from the media perspective and apply it to two examples of investigative reporting in Canada.

This paper does not attempt to provide a comprehensive review of all the legal and practical implications of a tort of invasion of privacy in Canadian law. In the future, new suggestions and approaches are sure to arise in applications of the tort. Nevertheless, by focusing on this new shift and considering its potentially significant impact on Canadian media and investigative reporting practices, I hope to engage an initial debate on the future development of the tort in light of the competing interests of individual privacy and freedom of the press.

## PART I: TRADITIONAL PRIVACY PROTECTION

### A. Emergence of a Right to Privacy and the Privacy Torts

American courts have recognized a right of privacy for over a century.<sup>8</sup> In their landmark article, “The Right to Privacy,”<sup>9</sup> Samuel Warren and Louis Brandeis expressed their outrage towards a press that could overstep the bounds of propriety and decency. The article was prompted by Warren’s disgust with media coverage of a family wedding in the local gossip columns. When the authors discovered no legal remedy existed, they wrote the article to address what they perceived was a significant gap in the law.<sup>10</sup> They articulated and are credited for sparking the creation of the “right to privacy” and the ability to sue for an “invasion of privacy.”<sup>11</sup>

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<sup>5</sup> While not foreclosing the potential existence of other, more broadly based defences such as Implied Consent and Government Invitations. See Rex S Heinke, *Media Law* (Washington: BNA Books, 1994) at 193–198.

<sup>6</sup> *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

<sup>7</sup> *Grant v Torstar Corp*, 2009 SCC 61, [2009] 3 SCR 640 [*Grant*].

<sup>8</sup> The first case recognizing the right was *Pavesich v New England Life Insurance*, 122 Ga 190; 50 SE 68 (Ga Sup Ct 1905).

<sup>9</sup> Samuel Warren & Louis Brandeis, “The Right to Privacy” (1890) 4 Harv LR 193.

<sup>10</sup> Proudfoot, *supra* note 1 at 4.

<sup>11</sup> Ellen Alderman & Caroline Kennedy, *The Right to Privacy* (New York: Vintage Books, 1997) at 154.

By 1960, the private law privacy tort came of age in the United States. Dean William Prosser compiled an assortment of privacy cases and argued that the tort referred to as "invasion of privacy" could be categorized into four distinct and related causes of action.<sup>12</sup> He described these four torts as: (1) intrusion upon an individual's private affairs; (2) public disclosure of embarrassing or private facts; (3) publicity which places a person in a false light in the public eye, and; (4) appropriation for one's own benefit of another's name or likeness.<sup>13</sup> A growing body of U.S. case law has delineated the scope of these actions.<sup>14</sup>

## **B. Private Law Privacy Protection in Canada<sup>15</sup>**

Modern Canadian private law privacy protection remains a patchwork of legislative and common law protections. Personal information and data privacy is largely governed by the *Personal Information Protection and Electronic Documents Act (PIPEDA)*.<sup>16</sup> This federal statute regulates the collection, use and disclosure of personal information in the hands of private organizations engaged in commercial activity. If they feel that their personal information has been misused, individuals can file a complaint with the Privacy Commissioner, who then generally attempts to resolve disputes by means of negotiation, mediation, and conciliation.<sup>17</sup> While the statute does not enable the Commissioner directly to award compensation for damages suffered, the complaint may be further pursued in the Federal Court.<sup>18</sup> However, in practice, damage awards are extremely rare and are limited to the most egregious situations.<sup>19</sup> More typically, the Commissioner will simply recommend, or the Court will order, that the offending organization correct inaccuracies or change its personal information-handling

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<sup>12</sup> William L Prosser, "Privacy" (1960) 48 Cal LR 383 [Prosser].

<sup>13</sup> *Ibid* at 389.

<sup>14</sup> See, e.g., *Pearson v Dodd*, 410 F 2d 701 (DC Cir 1969); *Nader v General Motors Corp*, 255 NE 2d 765 (NY Ct App 1970) [*Nader*]; *Dietemann v Time, Inc*, 449 F 2d 245 (9th Cir 1971) [*Dietemann*]; *Galella v Onassis*, 487 F 2d 986 (2d Cir 1973) [*Galella*]; *Cassidy v ABC*, 60 Ill App 3d 831, 377 NE 2d 126 (1978) [*Cassidy*]; *Desnick v American Broadcasting Co, Inc*, 44 F 3d 1345 (7th Cir 1995); *Wolfson v Lewis*, 924 F Supp 1413 (ED Pa 1996) [*Wolfson*]; *Berger v Hanlon*, 129 F 3d 505 (9th Cir 1997); *Deteresa v American Broadcasting Companies, Inc*, 121 F 3d 460 (9th Cir 1997) [*Deteresa*]; *Shulman v Group W Productions, Inc*, 955 P 2d 469 (Cal 1998) [*Shulman*]; *Food Lion, Inc v Capital Cities/ABC, Inc*, 194 F 3d 505 (4th Cir 1999).

<sup>15</sup> The right to privacy articulated in the following section is applicable to private actors and must be distinguished from constitutional rights to privacy protecting individuals from government action, discussed in Part III. Federal and provincial public sector privacy legislation is not addressed in this article; see, e.g.: *Privacy Act*, RSC 1985, c P-21, regulating how government institutions collect, use, and disclose personal information; and *Access to Information Act*, RSC 1985, c A-1, providing citizens with a right of access to information under the control of government institutions.

<sup>16</sup> *Personal Information Protection and Electronic Documents Act*, SO 2000, c 5, s 4(1)(a) [*PIPEDA*].

<sup>17</sup> "A Guide for Individuals: Your Guide to PIPEDA", Office of the Privacy Commissioner of Canada (April 2009), online: Office of the Privacy Commissioner of Canada <[http://www.priv.gc.ca/information/02\\_05\\_d\\_08\\_e.asp](http://www.priv.gc.ca/information/02_05_d_08_e.asp)>.

<sup>18</sup> *PIPEDA*, *supra* note 16 at s 16(c).

<sup>19</sup> See *Randell v Nubodys Fitness Centres*, 2010 FC 681 at paras 55, 56.

practices.<sup>20</sup> As a default federal statute, *PIPEDA* may also be supplanted by substantially similar provincial legislation, as is the case in British Columbia, Alberta, and Quebec.<sup>21</sup> None of this legislation, however, addresses private law rights between individuals.

In contrast to the American experience discussed above, courts in many Commonwealth countries, including Canada, have taken a conservative approach to the common law development of private law privacy torts.<sup>22</sup> This reluctance prompted four provinces—British Columbia, Saskatchewan, Manitoba, and Newfoundland and Labrador—to enact legislation in order to expand the scope of privacy law.<sup>23</sup> All four provincial *Privacy Acts* provide potentially broad definitions of what could constitute an invasion of privacy. For example, British Columbia's *Privacy Act* declares, "it is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another."<sup>24</sup> Thus, liability will only be found in cases where the defendant acted wilfully, and without a claim of right.<sup>25</sup> The legislation further circumscribes the plaintiff's privacy entitlement to what is "reasonable in the circumstances,"<sup>26</sup> leaving room for judicial discretion in crafting the scope of the statutory tort.

In the remaining provinces and territories, victims of invasions of privacy must rely on the common law. While some sympathetic courts have refused to strike actions alleging invasions of privacy,<sup>27</sup> no provincial appellate court, until recently, has acknowledged the existence of a stand-alone tort of invasion of privacy. Instead, the right to privacy has been an important value underlying other, more specific, causes of action, including trespass, nuisance, defamation, injurious falsehood, appropriation of

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<sup>20</sup> *PIPEDA*, *supra* note 16 at s 16(a), (b).

<sup>21</sup> *Ibid* s 26(2)(b). Alberta: *Personal Information Protection Act*, SA 2003, c. P-6.5; *Organizations in the Province of Alberta Exemption Order*, SOR/2004-219, (2004) C Gaz II, 1636. British Columbia: *Personal Information Protection Act*, SBC 2003, c 63; *Organizations in the Province of British Columbia Exemption Order*, SOR/2004-220, (2004) C Gaz II, 1640. Quebec: *An Act respecting the protection of personal information in the private sector*, RSQ, c P-39.1; *Organizations in the Province of Quebec Exemption Order*, SOR/2003-374, (2003) C Gaz II, 2917. Several provinces have also enacted personal health information legislation. See, e.g., Ontario's *Personal Health Information Protection Act*, SO 2004, c 3, Sch A.

<sup>22</sup> In *Wainwright v Home Office*, [2003] 3 WLR 1137 (UK HL), the House of Lords held that there is no general tort of invasion of privacy. English courts instead have developed the law of confidentiality in such a way as to protect private information (*OBG v Allen*, [2007] UKHL 21 [*OBG*]).

<sup>23</sup> *Privacy Act*, RSBC 1996 c 373 (British Columbia) [BCPA]; *Privacy Act*, RSS 1978, c P-24 (Saskatchewan) [SPA]; *The Privacy Act*, CCSM c P125 (Manitoba) [MPA]; *Privacy Act*, RSNL 1990, c P-22 (Newfoundland and Labrador) [NFLDPA].

<sup>24</sup> BCPA, *ibid*, s 1(1); see also SPA, *ibid*, s 2; MPA, s 2(1); NFLDPA, *ibid*, s 3(1).

<sup>25</sup> There is no similar requirement of wilfulness in the Manitoba statute.

<sup>26</sup> BCPA, *supra* note 23, s 1(2); SPA, *supra* note 23, s 4(1)(e); MPA, *supra* note 23, s 2(1); NFLDPA, *supra* note 23, s 3(2).

<sup>27</sup> *Somwar v McDonald's Restaurants of Canada Ltd* (2006), 79 OR (3d) 172 (SC); *Nitsopoulos v Wong* (2008), 298 DLR (4th) 265, 60 CCLT (3d) 318.

personality, and breach of confidence.<sup>28</sup> Unfortunately, these actions only address privacy interests indirectly, leaving many plaintiffs without relief.<sup>29</sup> This status quo underwent complete revision with the recent Ontario Court of Appeal decision in *Jones*.

## PART II: THE ONTARIO COURT OF APPEAL DECISION IN *JONES v TSIGE*

### A. Background

The facts of the case are relatively straightforward. Sandra Jones and Winnie Tsige worked at different branches of the Bank of Montreal (BMO).<sup>30</sup> The two employees did not know each other directly, but Tsige had formed a common-law relationship with Jones' former husband.<sup>31</sup> As an employee of BMO, Tsige was in a position to access Jones' personal BMO bank accounts. Using her workplace computer, Tsige looked into Jones' banking records at least 174 times over the course of four years.<sup>32</sup> The records contained a history of transactions and other personal information.

Jones complained to BMO after becoming suspicious that Tsige was accessing her account. Tsige admitted to viewing the account, but said that she was involved in a financial dispute with Jones' former husband and wanted to confirm whether he was paying child support to Jones. BMO suspended Tsige for one week without pay and denied her bonus. Jones filed a claim alleging her privacy interest in her confidential banking information was "irreversibly destroyed" and sought damages of \$70,000 for invasion of privacy, breach of fiduciary duty, and punitive and exemplary damages of \$20,000.

The motions judge dismissed Jones' motion for summary judgment and granted the cross-motion by Tsige to dismiss the action.<sup>33</sup> He relied heavily on the decision in *Euteneier v Lee*, in which Cronk JA observed that "there is no 'free-standing' right to dignity or privacy under the *Charter* or at common law."<sup>34</sup> The motions judge also held that because legislation already protected certain aspects of privacy, an expansion of that protection should be dealt with by statute rather than common law.<sup>35</sup>

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<sup>28</sup> Peter Burns, "The Law and Privacy: The Canadian Experience" (1976) 54 Can Bar Rev 1 at 14–24. See, e.g., *Motherwell v Motherwell* (1976), 1 AR 47, 73 DLR (3d) 62; *Campbell v MGN Limited*, [2004] UKHL 22 at para 43 [*Campbell*].

<sup>29</sup> John Craig, "Invasion of Privacy and Charter Values: The Common Law Tort Awakes" (1997) 42 McGill LJ 355 at 8 (Lexis).

<sup>30</sup> *Jones*, *supra* note 2 at para 4.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Jones v Tsige*, 2011 ONSC 1475 at para 65; 333 DLR (4th) 566 [*Jones Ont SC*].

<sup>34</sup> *Euteneier v Lee* (2005), 77 OR (3d) 621 (CA) at para 63.

<sup>35</sup> *Jones Ont SC*, *supra* note 27 at paras 54–56.

## B. The New Tort of Intrusion upon Seclusion

On appeal, the Court was squarely faced with the question of whether to recognize a cause of action in tort for invasion of privacy. Writing for a unanimous court, Sharpe JA confirmed the existence of a right of action for intrusion upon seclusion in Canadian common law. Drawing from Prosser's American privacy tort categorizations and the American *Restatement (Second) of Torts*, Sharpe JA held that:

One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the invasion would be highly offensive to a reasonable person.<sup>36</sup>

Notably, under this formulation, the tort of intrusion upon seclusion does not require an element of publicity.<sup>37</sup> The intrusion itself subjects the defendant to liability whether or not there is publication or use of the information gathered.<sup>38</sup> The tort captures "physical intrusions into private places," "listening or looking, with or without mechanical aids, into the plaintiff's private affairs," and "non-physical forms of investigation or examination into private concerns," such as opening mail or examining bank accounts.<sup>39</sup> Applying these new principles, the Court of Appeal held that Tsige had intruded on Jones' seclusion.

On the issue of damages, the Court was faced with a victorious plaintiff who had suffered no pecuniary loss. Nevertheless, noting that the tort of intrusion upon seclusion does not require proof of actual loss, the Court engaged an analysis of "symbolic" damages to vindicate the plaintiff's right to privacy.<sup>40</sup> After a review of damages under Ontario case law and provincial legislation on this point, the Court held that symbolic damages for an intrusion upon seclusion "should be modest but sufficient to mark the wrong that has been done."<sup>41</sup> To that end, the Court fixed a range of up to \$20,000. In the Court's view, Tsige's intrusion upon Jones' seclusion fell towards the middle of the range, deserving an award of \$10,000.<sup>42</sup> While this relatively low award likely dissuaded an appeal by Tsige to the Supreme Court of Canada and muted concern among commentators, the Court of Appeal expressly left open the possibility of

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<sup>36</sup> *Jones*, *supra* note 2 at para 19.

<sup>37</sup> *Jones*, *supra* note 2 at para 20.

<sup>38</sup> *Restatement*, *supra* note 3.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Jones*, *supra* note 2 at para 75, citing Stephen M Waddams, *The Law of Damages*, looseleaf ed (Toronto: Canada Law Book, 2011) at para 10.50.

<sup>41</sup> *Jones*, *ibid* at para 87.

<sup>42</sup> *Ibid* at para 90.



aggravated and punitive damage awards.<sup>43</sup> Undoubtedly, more “exceptional cases” will arise and call for more “exceptional remedies.”<sup>44</sup>

### C. An Incremental Change with Broad Implications

Roscoe Pound famously said that the “law must be stable, and yet it cannot stand still.”<sup>45</sup> These words capture the tension between the need for certainty, and the pressure for growth and change.<sup>46</sup> In *Jones*, the Court justified its decision, in part, on the basis that recognizing the tort of intrusion upon seclusion was an incremental change in the law necessary to keep step with the evolving needs of society.<sup>47</sup> On a narrow frame of reference, this change was supported by both precedent and policy, and clearly followed a trend of increasing privacy protections in Canada and other Commonwealth countries.<sup>48</sup> Sharpe JA expressed unequivocally that “this cause of action will not open the floodgates.”<sup>49</sup> He continued, noting:

A claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy [...] it is only intrusions into matters such as one’s financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive.<sup>50</sup>

From a broader perspective, however, creation of the tort has caused a major shift in Canadian common law, which should be recognized for its potentially radical ramifications in diverse sectors of the population. Despite the Court of Appeal’s limiting words, it seems likely that the tort will be engaged in a broad array of potential intrusions in the personal, commercial, and even governmental spheres.<sup>51</sup> Theoretically, future actions could arise from: landlords spying on tenants; private investigators following targets; employers monitoring their employees; police searching without authority; persons accessing their spouses’ or children’s correspondence without

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<sup>43</sup> *Ibid* at para 88.

<sup>44</sup> *Ibid*.

<sup>45</sup> Roscoe Pound, *Interpretations of Legal History* (Cambridge: Mass Harvard University Press, 1923) at 1.

<sup>46</sup> Gérard V La Forest, “Judicial Lawmaking, Creativity and Constraints”, in R Johnson et al, eds, *Gérard V La Forest at the Supreme Court of Canada, 1985-1997* (Winnipeg: Canadian Legal Historic Project, Faculty of Law, University of Manitoba, 2000) 3 at 6.

<sup>47</sup> *Jones*, *supra* note 2 at para 65.

<sup>48</sup> English courts have recognized privacy interests indirectly through the tort of breach of confidence. See *Campbell*, *supra* note 28; *Douglas and Others v Hello! Ltd and Others (No 3)*, [2005] EWCA Civ 595.

<sup>49</sup> *Jones*, *supra* note 2 at para 72.

<sup>50</sup> *Ibid*.

<sup>51</sup> Cristin Schmitz, “Privacy poachers take big hit”, *The Lawyers Weekly* (3 February 2012).

permission, including e-mail, Facebook accounts, and banking information, and; businesses misusing or failing to protect personal information.<sup>52</sup>

*Jones* will also have important implications for members of the Canadian media who investigate and report on individuals' private affairs. *PIPEDA* and its provincial counterpart legislation are not directed to curtail invasive newsgathering or reporting practices. In fact, this legislation contains broad and open-ended exceptions for the collection, use, and disclosure of an individual's personal information for journalistic purposes.<sup>53</sup>

In recent years the expansion of the media has heightened the tension between newsgathering and individual privacy. The public continues to demand new images, video, and stories about the personal lives of individuals, famous or not.<sup>54</sup> In response, the market is flooded with newspapers, magazines, tabloids, 24-hour news channels, talk shows, and reality TV. Furthermore, with the onset of online social media, anyone can instantly transmit information around the world.<sup>55</sup> New and sophisticated technologies have also dramatically changed the means of information gathering.<sup>56</sup> Video cameras are prevalent and can be easily concealed.<sup>57</sup> High-powered telephoto lenses and shotgun microphones enable filming and photography from great distances. Even cell phones contain built-in cameras.

Unlike their American and British counterparts, the Canadian media are not generally known for going to extreme lengths to garner a story of interest to the public.<sup>58</sup> Nevertheless, members of the Canadian media are increasingly faced with balancing the inevitable conflicts between an individual's right to privacy and the right of all citizens to be informed of matters of public interest.<sup>59</sup> The new tort of intrusion upon seclusion will necessarily change the dynamic of this balance and impact the media's ability to gather news information. Conversely, the scope and application of this new tort will also likely be defined in litigation sparked by media newsgathering and investigative methods.

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<sup>52</sup> *Ibid.*

<sup>53</sup> See, e.g., *PIPEDA*, *supra* note 16, s 4(2)(c).

<sup>54</sup> Solove & Schwartz, *supra* note 4 at 77.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> Dean Jobb, "Fewer Media Sins Means Fewer Cases", *The Lawyer's Weekly* (11 November 2011).

<sup>59</sup> See, e.g., "Right to Privacy" in The Canadian Association of Journalists Ethics Advisory Committee, "Ethics Guidelines" (June 2011), online: The Canadian Association of Journalists <<http://www.caj.ca/?p=1776>>.

### PART III: THE CANADIAN APPROACH TO BALANCING COMPETING VALUES

Although private law does not directly engage the *Charter*,<sup>60</sup> the Supreme Court of Canada has consistently held that the common law should be developed in a manner consistent with *Charter* values and principles.<sup>61</sup> Indeed, the analysis in *Jones* was largely influenced by the recognition of privacy as a fundamental Canadian value enshrined in the *Charter*.<sup>62</sup> While not addressing the issue in detail, the Court in *Jones* also recognized that the right to privacy is not absolute, but must be balanced against competing rights, including the *Charter* guarantees of free expression and free press.<sup>63</sup> The Court's words necessarily imply that neither value should receive automatic preference over the other. On the facts of a particular case, a court must determine whether the competing values of free press and free expression warrant a limitation on privacy interests. This contextual analysis will depend on the nature of the information and the circumstances of those involved.<sup>64</sup> Prior to discussing this delicate balance in further detail, it is important to first explore the role and importance of each value in Canadian society.

#### A. The *Charter* Right to Privacy

The *Charter* does not explicitly guarantee a right to privacy. However, the Supreme Court of Canada has recognized an individual's right to a reasonable expectation of privacy in the context of the s 8 right to be secure against unreasonable search and seizure by the state. In *Hunter v Southam*, Dickson J (as he then was) held the purpose of s 8 was "to protect individuals from unjustified state intrusions upon their privacy."<sup>65</sup> An individual's s 7 right to "life, liberty, and security of the person" has also been held to enshrine a right to privacy at the heart of liberty in a democratic society.<sup>66</sup>

The Supreme Court has frequently emphasized the societal importance of privacy.<sup>67</sup> In *R v Dyment*, La Forest J commented, "Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual."<sup>68</sup> In *Vickery v Nova Scotia Supreme Court (Prothonotary)*, Cory J described privacy as a principle of

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<sup>60</sup> *RWSDU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 599.

<sup>61</sup> *Ibid* at 603; *R v Salituro*, [1991] 3 SCR 654 at 666, 675.

<sup>62</sup> *Jones*, *supra* note 2 at para 39.

<sup>63</sup> *Ibid* at para 73.

<sup>64</sup> *Aubry v Éditions Vice-Versa*, [1998] 1 SCR 591 at para 58 [*Aubry*].

<sup>65</sup> *Hunter v Southam*, [1984] 2 SCR 145 at 160, 1984 CanLII 33.

<sup>66</sup> *Ruby v Canada (Attorney General)*, [2003] 3 FC 589 at para 165 (Fed CA); *R v O'Connor*, [1995] 4 SCR 411; *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519; *R v Morgentaler (No 2)*, [1988] 1 SCR 30.

<sup>67</sup> *Canadian Broadcasting Corporation v New Brunswick (Attorney General)*, [1996] 3 SCR 480 at para 40 (per La Forest J) [*CBC*].

<sup>68</sup> *R v Dyment*, [1988] 2 SCR 417 at para 17.

fundamental importance in our democratic society found in the basic dignity of an individual.<sup>69</sup> In his view, the right of privacy “is of intrinsic importance to the fulfillment of each person, both individually and as a member of society.”<sup>70</sup>

## B. Freedom of Expression and Freedom of the Press

Within a functioning free and democratic society, freedom of the press is vitally important.<sup>71</sup> Section 2(b) of the *Charter* provides constitutional protection for free expression and specifically addresses the press: “Everyone... has the freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.” According to the Supreme Court, the specific reference to freedom of the press in s 2(b) establishes the special role for media in our society, and confirms the media’s right to constitutional protection.<sup>72</sup>

Three core rationales have been articulated in support of freedom of expression and the press: (1) seeking and attaining the truth; (2) participation in social and political decision-making, and; (3) individual self-fulfillment.<sup>73</sup> The media encourage truth seeking by reporting facts and opinions and by offering comments on events and ideas.<sup>74</sup> The media encourage social and political decision making by acting “as the agent of the public in monitoring and reporting on governmental, legal and social institutions.”<sup>75</sup> Most importantly, the public relies on the media to fully and accurately report government activities in order to register informed opinions and vote intelligently.<sup>76</sup> Furthermore, individual self-fulfillment and human flourishing are encouraged through the diversity of media publications in arts, culture, sports, and policy.<sup>77</sup>

The Supreme Court has noted on several occasions that in order to serve these critical purposes, the media must have the ability to gather, analyze, and disseminate information.<sup>78</sup> In *Canadian Broadcasting Corp. v Lessard*, Cory J held that the “freedom to disseminate information would be of little value if the freedom under 2(b) did not also encompass the right to gather news and other information.”<sup>79</sup>

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<sup>69</sup> *Vickery v Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 SCR 671 at para 17 (QL).

<sup>70</sup> *Ibid.*

<sup>71</sup> *Canadian Broadcasting Corporation v Lessard*, [1991] 3 SCR 421 at para 1 (QL) [*Lessard*]; *CBC*, *supra* note 59.

<sup>72</sup> *Lessard*, *ibid* at para 63 (per McLachlin J).

<sup>73</sup> *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 976; *Lessard*, *ibid* at para 62.

<sup>74</sup> *Lessard*, *ibid* at para 65.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Cox Broadcasting Corp v Cohn*, 420 US 469 (1975) at 491–492.

<sup>77</sup> *Lessard*, *supra* note 71 at para 65.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid* at para 2. See also *Moysa v Alberta (Labour Relations Board)*, [1989] 1 SCR 1572.

### C. The Canadian Approach to Balancing Competing *Charter* Values

In the context of media intrusions on privacy, the relationship between freedom of the press and an individual's right to privacy is such that neither can be given full effect without restricting the other.<sup>80</sup> The *Charter* itself provides no solution to reconciling these two competing values.<sup>81</sup>

When conflicts between *Charter* rights arise, the Supreme Court of Canada has expressly rejected a technique of narrowing and accommodating.<sup>82</sup> Instead, Canadian law has adopted an ad hoc balancing approach that independently defines each *Charter* right and deals with conflict through the justificatory principles in s 1.<sup>83</sup> This approach was emphasized by Chief Justice Lamer in *Dagenais v CBC*:

... it would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by 11(d) over those protected by 2(b). A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.<sup>84</sup>

Any balancing approach may be criticized under a "rights-based" analysis of private law. From this legal perspective, liability should depend solely on whether a defendant has violated a plaintiff's private right, rather than on other policy considerations.<sup>85</sup> This is a corollary of the belief that legal rights are derived from or give effect to moral rights.<sup>86</sup> However, Canadian private law has clearly embraced the relevance of public policy considerations.<sup>87</sup> Continuing this trend, where *Charter* values collide in private disputes, courts are likely to develop the common law in a manner consistent with an ad hoc balancing approach.

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<sup>80</sup> *Campbell*, *supra* note 28 at para 55 (per Lord Hoffman).

<sup>81</sup> See Andrew Petter & Allan Hutchinson, "Rights in Conflict: The Dilemma of Charter Legitimacy" (1989) 23 UBCL Rev 531; *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835 [*Dagenais*].

<sup>82</sup> Peter Hogg, *Constitutional Law of Canada 2011 Student Edition* (Thomson Reuters Canada: Toronto, 2011) at 36-35. See, e.g., *R v Keegstra*, [1990] 3 SCR 697 at para 18, 311 WCB (2d) 352 (QL).

<sup>83</sup> Hogg, *ibid* at 36-35.

<sup>84</sup> *Dagenais*, *supra* note 81 at 877. See also *R v Mills*, [1999] 3 SCR 637 at paras 61, 62.

<sup>85</sup> See discussion in Donal Nolan and Andrew Robertson, *Rights and Private Law* (Oxford: Hart Publishing, 2011) at 1-33.

<sup>86</sup> *Ibid* at 22.

<sup>87</sup> Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (New York: Cambridge University Press, 2003) at 205.

## PART IV: DEVELOPING THE TORT OF INTRUSION UPON SECLUSION IN THE CONTEXT OF NEWSGATHERING ACTIVITIES

### A. Competing Values in Private Law

The tension between individual privacy, free press, and free expression was exemplified in the case of *Aubry v Éditions Vice-Versa [Aubry]*.<sup>88</sup> The plaintiff brought an action against an arts magazine for taking and publishing a photo of her sitting on the front steps of a public building in Montreal, without her permission.<sup>89</sup> The photo was taken while she was a teenager but was published nearly ten years later, in an article about urban living conditions.<sup>90</sup> While decided in the context of the Quebec *Charter of Human Rights*<sup>91</sup> rather than the Canadian *Charter*, the Supreme Court strove to balance the plaintiff's right to privacy with the public interest.<sup>92</sup>

The public's right to information, supported by freedom of expression, places limits on the right to respect for one's private life in certain circumstances. This is because the expectation of privacy is reduced in certain cases. A person's right to respect for his or her private life may even be limited by the public's interest in knowing about certain traits of his or her personality.<sup>93</sup>

Finding that the plaintiff's right to privacy had been infringed, the Court stressed that there should be no presumption in favour of free expression, even when information is in the public interest. Rather, the nature of the information was only one factor in a contextual balancing of rights.<sup>94</sup>

### B. Striking the Balance: Lessons from *Grant v Torstar*

While the Court in *Aubry* attempted to balance competing values, its approach also appears unstructured and unpredictable. The law must provide courts with flexibility in unique cases, while providing individuals certainty about the limits of their actions. In the context of the common law of defamation, the Supreme Court has long struggled to develop a nuanced and principled framework that achieves these mutual goals.

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<sup>88</sup> *Aubry*, *supra* note 64.

<sup>89</sup> *Ibid* at para 40.

<sup>90</sup> *Ibid*.

<sup>91</sup> *Charter of Human Rights*, RSQ, c C-12.

<sup>92</sup> Marguerite Russell "The Impact of the Charter of Rights on Privacy and Freedom of Expression in Canada" in Madeline Colvin, ed, *Developing Key Privacy Rights* (Portland, Oregon: Hart Publishing, 2002) 99 at 123–124.

<sup>93</sup> *Aubry*, *supra* note 64 at para 57.

<sup>94</sup> *Ibid* at para 58.

Culminating with the decision in *Grant*, the Court has put in place a structured framework to balance the competing societal importance of individual reputation and free expression. In the first stage of analysis, a plaintiff must show that a published statement referring to him or her was defamatory. Upon this showing, there is a presumption of falsity and damage, and the defendant is liable unless he or she can raise a defence.

Traditionally, once a case of *prima facie* defamation had been established, media defendants had only a narrow set of defences available: statements of opinions (fair comment), statements of fact that are substantially true (justification), and statements made in a protected context (privilege). These defences were largely ineffective in protecting media defendants who, despite having acted reasonably, erred on the facts or were unable to prove the truth of their statements in court.<sup>95</sup> Accordingly, the law was criticized for muzzling press attempts to publish on matters of public interest where reputations were at stake.

In *Grant*, the Supreme Court re-engaged a *Charter* balancing exercise and gave stronger weight to the fundamental importance of free press and freedom of expression.<sup>96</sup> The Court expanded the second stage of the analysis by recognizing a new, broad defence for media defendants. Under the new defence of "Responsible Communication on Matters of Public Interest,"<sup>97</sup> a media defendant in a defamation action can be absolved of liability where the publication (1) was on a matter of public interest, and (2) was published in a responsible manner by diligent attempts to verify the information, having regard to all the relevant circumstances.<sup>98</sup> The Court concluded that the new defence "represents a reasonable and proportionate response to the need to protect reputation while sustaining a public exchange of information that is vital to modern Canadian society."<sup>99</sup>

### C. Introducing a Working Framework and Media Defence

The foundational framework and new principles articulated by the Supreme Court in *Grant* can be extended to develop a working framework for the new tort of intrusion upon seclusion. In parallel to the tort of defamation, Canadian privacy law requires a delicate balance between two critically important societal values. Accordingly, I suggest that courts analyze the intrusion tort with a similar two-stage inquiry. In the first stage, the plaintiff must establish a *prima facie* invasion of privacy, by demonstrating an intentional intrusion into his or her solitude or private affairs that

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<sup>95</sup> Charles Tingley, "Reputation, Freedom of Expression and the Tort of Defamation in the United States and Canada: A Deceptive Polarity" (1999) 37:3 *Alta L Rev* 620 at 621, 624.

<sup>96</sup> *Grant*, *supra* note 7 at para 65.

<sup>97</sup> *Ibid* at para 97.

<sup>98</sup> *Ibid* at para 98.

<sup>99</sup> *Ibid* at para 86.

would be highly offensive to a reasonable person.<sup>100</sup> Once proven, the law may presume damage to the plaintiff as a result of the invasion. In the second stage, the burden shifts to the defendant to justify the intrusion.

Canadian courts have yet to consider the types of defences that may be raised under the brand new tort of intrusion upon seclusion. Considering the development of the tort from the perspective of the media, and mirroring the delicate balance struck in *Grant*, I further argue that Canadian law should recognize a defence of “Responsible Newsgathering on Matters of Public Interest.” A media defendant engaged in newsgathering should escape liability for a *prima facie* intrusion where: (1) the information gathered was a matter of public interest, and (2) the newsgathering methods adopted were no more intrusive than necessary, having regard to the entire context, in order to obtain the information.

Although this proposed two-stage framework could apply broadly to intrusions in all contexts, the defence is specific to news media. In order to further develop this suggestion, we should anticipate several difficult media-related issues which will arise at each stage of the tort.

## PART V: EXPLORING THE TWO-STAGE FRAMEWORK AND MEDIA DEFENCE

### **A. Stage 1: Important Media Issues in Establishing a *Prima Facie* Case of Intrusion**

The long history of the privacy torts in American law may provide considerable guidance to Canadian courts on what amounts to a *prima facie* intrusion upon seclusion by the media. However, American jurisprudence should be approached with caution in this regard. As one commentator describes, the American rules regarding intrusion are “intricate, complex, and even downright inconsistent” and beyond universal rules, “the road can be treacherous.”<sup>101</sup> While exploring what might constitute a *prima facie* intrusion in the media context, I consider major themes of the American experience as useful guideposts for illuminating issues that may confront Canadian courts, and I offer criticisms where Canadian *Charter* values favour an alternative course.

#### *1. Separating Out Considerations of Free Expression and Free Press*

As an initial note, courts should avoid attempting to balance intrusions into the plaintiff’s private life with the societal importance of newsgathering and free press at

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<sup>100</sup> *Jones, supra* note 2 at para 72.

<sup>101</sup> Roy Moore, *Mass Communication Law and Ethics* (Hillsdale, NJ: Lawrence Erlbaum Associates, 1994) at 344 [Moore].



the *prima facie* stage of analysis. Only once a plaintiff has established a *prima facie* intrusion should courts decide whether competing values justify a defence to liability.

On occasion, American courts have tempered what constitutes an intrusion through consideration of the importance of the free press. In *Lee v The Columbian, Inc.*,<sup>102</sup> the Washington Supreme Court ruled that aggressive phone calling to obtain comments on newsworthy events was not intrusive because it constituted "routine newsgathering activities."<sup>103</sup> By conflating the analysis in this manner, courts inevitably fail to respect the social importance of privacy as a value worthy of protection. Instead of considering the importance of the privacy interest engaged, the court is forced to develop variable definitions of "intrusion" which will be triggered only in specific contexts. Following the approach of our Supreme Court in *Aubry*, information does not lose its privacy quality merely because it falls under the category of "socially useful information."<sup>104</sup>

Divorcing the *prima facie* inquiry from a balancing of competing values does not mean that the media reporting context will not factor into the first stage of the intrusion analysis. The identity of the intruder and his or her motivation will be important considerations in determining whether a certain activity is highly offensive and, in many instances, whether it is an intrusion at all. The fact that the intruder is a member of the media seeking a juicy story may often lead a reasonable person to regard an otherwise normal activity as an offensive intrusion.<sup>105</sup>

## 2. Intrusions in Public Places

The first apparent challenge for Canadian courts under the first stage will be to delineate the scope of an individual's right to privacy in public places. What does it mean to have a right to privacy when one ventures out into the world?

The American jurisprudence generally clings to the notion that privacy cannot be invaded in public places.<sup>106</sup> The American *Restatement* states that a defendant is only liable "when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs."<sup>107</sup> This statement implies that those in public places have no reasonable expectation of privacy. Upon leaving the private sphere, persons implicitly waive any right to privacy and voluntarily

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<sup>102</sup> *Lee v The Columbian, Inc.*, 16 Media L Rep 1264 (Wash Sup Ct 1989), cited in Kent Middleton, William Lee & Bill Chamberlin, *The Law of Public Communication*, 6th ed (Boston: Pearson Education, 2004) at 195 [Middleton, Lee & Chamberlin].

<sup>103</sup> *Ibid.*

<sup>104</sup> *Aubry*, *supra* note 64 at para 61 (per L'Heureux-Dubé J).

<sup>105</sup> See, e.g., *Sanders v ABC*, 978 P 2d 67 (Cal 1999) [*Sanders*].

<sup>106</sup> Andrew Jay McClurg, "Bringing Privacy Theory out of the Closet: A Tort Theory of Liability for Intrusions in Public Places" (1995) 73 NCLR 989 at 990 [McClurg].

<sup>107</sup> *Restatement*, *supra* note 3, § 625 comment (c); Prosser, *supra* note 12 at 391–392.

assume the risk of scrutiny.<sup>108</sup> Under this American approach, individuals are not generally liable for observing, following, or photographing someone in a public place, unless, under the tort of "public disclosure of embarrassing or private facts", these activities further culminate in a "highly offensive" publication that is not of legitimate concern to the public.<sup>109</sup> Plaintiffs have been denied a remedy for these acts on the street, in shops, laundromats, restaurants, health spas, parking lots, airports, common areas of cruise ships, and school buildings.<sup>110</sup> Nevertheless, other American courts as well as commentators have noted that while location may be critical in determining an individual's reasonable expectation of privacy, the inquiry should not be a binary, all-or-nothing distinction.<sup>111</sup>

In my view, the latter approach is more consistent with Canadian *Charter* values. There are degrees and nuances regarding how much privacy persons expect in a given setting. An expectation of something less than complete privacy does not render that expectation unreasonable or less worthy of protection.<sup>112</sup> The concept of "seclusion", like the concept of "privacy", is relative and highly contextual.<sup>113</sup> Simply because persons are visible to others does not mean they voluntarily give up their otherwise inherent right to privacy.<sup>114</sup> Strict adherence to a public-private dichotomy would impose a disproportionately narrow scope on the right to privacy.

The Supreme Court decision in *Aubry* is further proof that Canadian courts should refrain from adopting this approach. As the sole issue before the Court was the objectionable publication of the plaintiff's photograph without her permission,<sup>115</sup> the Court expressly limited its discussion to this matter.<sup>116</sup> Nevertheless, the Court's analysis provides a useful perspective on the expectations of privacy in public places. Writing for the majority, L'Heureux-Dubé J described a number of scenarios involving public settings in which expressive interests prevail over individual privacy rights.

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<sup>108</sup> Elizabeth Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000) 50:3 UTLJ 305 at 310–13 [Paton-Simpson].

<sup>109</sup> *Restatement, supra* note 3, §652D; W Page Keeton et al, *Prosser & Keeton on Torts*, 5th ed (St Paul: West, 1984) at 859. There are, however, recognized exceptions for persisted hounding and harassment, discussed in the following section (*Wolfson, supra* note 14), and observation of matters not exhibited to the public gaze, such as "underwear or the lack of it" (*Restatement, supra* note 3, § 625, comment (c)).

<sup>110</sup> Paton-Simpson, *supra* note 108 at 310–311, citing *United States v Vazquez*, 31 F Supp 2d 85 (1998); *Mark v Seattle Times*, 635 P 2d 1081 (Wash 1981); *Dempsey v National Enquirer*, 702 F Supp 927 (D Me 1988), and others.

<sup>111</sup> See, e.g., McClurg, *supra* note 106; *Hill v Colorado*, 530 US 703 (2000) at 716; and Paton-Simpson, *ibid*, citing Raymond Wacks, *The Protection of Privacy* (London: Sweet & Max, 1980) at 103.

<sup>112</sup> *Sanders, supra* note 105, cited in Solove & Schwartz, *supra* note 4 at 96.

<sup>113</sup> Solove & Schwartz, *ibid*.

<sup>114</sup> *Ibid*.

<sup>115</sup> A majority of the Quebec Court of Appeal found liability not in the taking of the photograph but in its publication. In the Court of Appeal's view, the taking of a photograph could not, on its own, constitute an invasion of privacy since the plaintiff was in a public place. This finding was not under appeal before the Supreme Court (*Aubry, supra* note 64 at para 44).

<sup>116</sup> *Ibid* at para 50.

These include where an individual's own actions accidentally place him or her in a photograph in an incidental manner, where a photograph of a crowd at a sporting event or demonstration places a person inadvertently in the limelight, and where a person appears in an incidental manner in a photograph of a public place.<sup>117</sup> Nevertheless, the Court noted that "the public nature of the place where a photograph was taken is irrelevant if the place was simply used as background for one or more persons who constitute the true subject of the photograph."<sup>118</sup> The Court's exceptions and dicta necessarily imply that expectations of privacy in public places are worthy of protection. Canadian courts should undertake a contextual approach to defining the scope of an individual's privacy interests in a public place based on all of the relevant circumstances including the place, time, and amount of exposure or seclusion.<sup>119</sup>

### 3. Extensive and Exhaustive Monitoring

Despite the American *Restatement's* general denial of privacy rights in public settings, individuals are given additional protection in circumstances of prolonged hounding and harassment. Even in public, a right to privacy may be invaded "through extensive or exhaustive monitoring and cataloguing of acts normally disconnected and anonymous."<sup>120</sup>

Competition for viewers often encourages the overzealous pursuit of news targets by the media.<sup>121</sup> Borrowing from the American experience, a *prima facie* intrusion should be easily made out against members of the Canadian media who stake out a private residence,<sup>122</sup> constantly watch movements of targets and their families,<sup>123</sup> conduct "ambush interviews" at homes and places of business,<sup>124</sup> follow targets in vehicles,<sup>125</sup> and capture private functions with telephoto lenses and shotgun microphones.<sup>126</sup> Acts of this nature may amount to the "exceptional circumstances" envisioned by Sharpe JA in *Jones* to warrant elevated aggravated or punitive damages, above mere symbolic vindication of the victim's privacy rights.<sup>127</sup>

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<sup>117</sup> *Ibid* at paras 58–59.

<sup>118</sup> *Ibid* at para 59 [emphasis added].

<sup>119</sup> Paton-Simpson, *supra* note 108 at 321. Paton-Simpson addresses several factors other factors including "anonymity and the limitation of attention paid, various social rules, the dispersion of information over space and time, and the ephemeral nature of our use of public space." But see *United Food and Commercial Workers, Local 401 v Alberta (Attorney General)*, 2012 ABCA 130 at para 77, 57 Alta LR (5th) 249.

<sup>120</sup> *Nader*, *supra* note 14 at 772 (per Brietel J.).

<sup>121</sup> Moore, *supra* note 101 at 461.

<sup>122</sup> *Galella*, *supra* note 14.

<sup>123</sup> *Ibid*.

<sup>124</sup> *Wolfson*, *supra* note 14.

<sup>125</sup> *Ibid*.

<sup>126</sup> *Ibid*.

<sup>127</sup> *Jones*, *supra* note 2 at para 88.

#### 4. *The Additional Intrusiveness of Video, Photography, and Sound Recording*

Whether in public or private, new technologies introduce a new level of issues for intrusions by the media. American courts frequently make no distinction between observing a person with the naked eye and capturing the person on film or video.<sup>128</sup> In the view of Dean Prosser, a photograph is “nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see.”<sup>129</sup> However, for a variety of reasons, visual and auditory records may increase the offensiveness of an intrusion to the reasonable person.

When a permanent record is made, the usual limits of point in time observation are eliminated and the victim loses a degree of control of his or her self.<sup>130</sup> As scrutiny can extend indefinitely, subtleties not noticeable in the moment may become discernible through study at a later time.<sup>131</sup> Permanent records can be widely disseminated to others, potentially exposing persons to a much larger and different audience.<sup>132</sup> Further, despite opportunities for manipulation, permanent visual and auditory records corroborate reports which individuals might prefer to deny.<sup>133</sup>

In order to address the role of technology in media invasions of privacy, Canadian courts should acknowledge the additional intrusiveness of film, photos, and sound recordings, particularly in spaces with heightened privacy interests, including homes,<sup>134</sup> offices with limited public access,<sup>135</sup> hospital rooms, and the scenes of accidents.<sup>136</sup>

#### 5. *Third-Party and Participant Monitoring*

“Third-party monitoring” has been the subject of recent controversy regarding the invasiveness of media reporting practices.<sup>137</sup> Broadly speaking, this term embraces situations in which a person records or monitors private communication or interaction

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<sup>128</sup> Lyrisa Barnett Lidsky, “Prying, Spying and Lying: Intrusive Newsgathering and What the Law Should Do About It” (1999) 73 Tul LR 173 at 212 [Lidsky]; see, e.g., *Gill v Hearst Publishing Co*, 253 P 2d 441 at 445 (Cal 1953).

<sup>129</sup> Prosser, *supra* note 12 at 392.

<sup>130</sup> McClurg, *supra* note 106 at 1041–1043.

<sup>131</sup> *Ibid* at 1042.

<sup>132</sup> *Ibid* at 1042–1043.

<sup>133</sup> *OBG*, *supra* note 22 at para 288.

<sup>134</sup> See *Dietemann*, *supra* note 14.

<sup>135</sup> See *Sanders*, *supra* note 105.

<sup>136</sup> See *Shulman*, *supra* note 14.

<sup>137</sup> The recent photo-hacking scandal in Britain brought these concerns to the forefront. Reporters and private investigators illegally accessed the voicemail messages of celebrities, politicians, and the victims of murder and terrorism. The scandal resulted in the arrest of reporters and editors, the folding of *The News of the World*, a major tabloid newspaper, and to the launch of a public inquiry into the “culture, practices, and ethics of the press.” See The Levinson Inquiry, online: <<http://www.levesoninquiry.org.uk>>; and Jobb, *supra* note 58.

that it is not a part of.<sup>138</sup> This includes bugging, wiretapping, eavesdropping, surveillance, and hacking into previously recorded conversations.

While the *Criminal Code of Canada* already prohibits phone and computer hacking and similar third-party monitoring offences,<sup>139</sup> *Jones* has now given victims the ability to sue privately for an intrusion upon their seclusion. The invasiveness of these activities may make them the sort of “exceptional cases” contemplated by Sharpe JA in *Jones* as calling for “exceptional remedies.”<sup>140</sup> The American jurisprudence reflects a strong willingness to protect private communication and interaction from the intrusion of a third-party.<sup>141</sup> As noted by one American judge, third party monitoring is a particularly offensive intrusion as it “intrudes upon the privacy of those not even suspected of crime and intercepts the most intimate conversations.”<sup>142</sup>

A more difficult and controversial question arises in the context of “participant monitoring,” wherein at least one party to a private communication is aware of a secret recorder, transmitter, or hidden camera.<sup>143</sup> In the media context, journalists sometimes surreptitiously record interviews to establish a verifiable record without inhibiting candor or whilst uncovering misconduct.<sup>144</sup> Participant monitoring is excluded as an offence under the *Criminal Code*,<sup>145</sup> the *Radiocommunications Act*,<sup>146</sup> and *PIPEDA*.<sup>147</sup> Furthermore, certain provincial privacy statutes either implicitly or expressly create an exemption for participant monitoring.<sup>148</sup>

The extent to which victims now retain a common law action for intrusion upon seclusion remains to be decided. American jurisprudence, being highly inconsistent, is of little help.<sup>149</sup> In *Saccone v Orr*,<sup>150</sup> an Ontario case, the defendant recorded his private

<sup>138</sup> Middleton, Lee, & Chamberlin, *supra* note 102 at 196.

<sup>139</sup> *Criminal Code*, RSC, 1985, c C-46, Part VI, Invasion of Privacy, and s 342.1 (“Unauthorized use of computer”) [*Criminal Code*].

<sup>140</sup> *Jones*, *supra* note 2 at para 88.

<sup>141</sup> Hacking: *Ventura v The Cincinnati Enquirer*, 396 F 3d 784 (1998), discussing how a reporter stole confidential employee voice mail messages from Chiquita Brands International, Inc; Surveillance: *Hamberger v Eastman*, 206 A 2d 239 (NH 1964), landlord installing a secret recording device in husband and wife’s bedroom; *Sanders*, *supra* note 105; Wiretapping: *Peavy v WFAA-TV, Inc*, 221 F 3d 158 (5th Cir 2000), cert den 532 US 1051, 121 S Ct 2191 (2001).

<sup>142</sup> *Berger v New York*, 388 US 41, 64–65 (1967) (per Douglas J), cited in Middleton, Lee & Chamberlin, *supra* note 102 at 197.

<sup>143</sup> Middleton, Lee & Chamberlin, *ibid* at 198.

<sup>144</sup> *Ibid*.

<sup>145</sup> *Criminal Code*, *supra* note 139, s 184(2)(a).

<sup>146</sup> *Radiocommunications Act*, RSC 1985 c R-2, s 9(2).

<sup>147</sup> In the context of a recording made for personal/domestic or journalistic purposes (*PIPEDA*, *supra* note 16 at s 4).

<sup>148</sup> See, e.g., SPA, *supra* note 23, s 3(b); MPA, *supra* note 23, s 3(b); NFLDPA, *supra* note 23, s 4(b). British Columbia’s statute (*supra* note 23) does not mention participant monitoring.

<sup>149</sup> Middleton, Lee & Chamberlin, *supra* note 102 at 198. See *Dietemann*, *supra* note 14, a case in which the Ninth Circuit Court of Appeals held that a reporter and photographer violated the privacy of a “quack” doctor in California when they surreptitiously photographed and transmitted a conversation in the den of the “doctor’s” home.

conversations with the plaintiff and then played them at a municipal council meeting. Jacobs Co Ct J wrote, “[I]t’s my opinion that certainly a person must have the right to make [a claim of invasion of privacy] as a result of a taping of private conversations without his knowledge [...]”<sup>151</sup> In the context of police investigations, the Supreme Court has held that unregulated electronic surveillance would “annihilate any expectation that our communications will remain private” and would destroy individual privacy.<sup>152</sup>

I suggest that Canadian courts avoid an all-or-nothing dichotomy between third-party and participant monitoring. Careful consideration should be paid to the entire context and circumstances of a conversation.<sup>153</sup> Where a conversation is truly public, the added social distance often leads to deception, coercion, and one-upmanship, and individuals develop a healthy skepticism and distrust of others.<sup>154</sup> In contrast, in truly private interactions, individuals must feel free to let their guard down and share intimacies without fear that they will later be exposed to the public.<sup>155</sup> While conversations with reporters who have disclosed their identities may be considered public,<sup>156</sup> those who assume false identities and surreptitiously record unknowing victims should be more susceptible to civil liability.

## **B. Stage 2: The Defence of Responsible Newsgathering on Matters of Public Interest**

Under the proposed two-stage framework, once a plaintiff has established a *prima facie* invasion of privacy, the defendant may justify the intrusion by raising a defence. In the newsgathering context, the competing values of free press and free expression warrant such limitation on privacy interests. The current provincial *Privacy Acts* contain broad “public interest” defences.<sup>157</sup> However, these statutory formulations are limited to the publication of private matters and do not extend to newsgathering activities.<sup>158</sup> It will thus fall to Canadian courts to carefully craft a defence which can properly recognize the importance of newsgathering and reporting practices in our society.

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<sup>150</sup> *Saccone v Orr*, (1982), 34 OR (2d) 317 (QL).

<sup>151</sup> *Ibid* at 5.

<sup>152</sup> *R v Duarte*, [1990] 1 SCR 30 at paras 19, 22 (per La Forest J).

<sup>153</sup> See Kent Middleton, “Journalists and Tape Recorders: Does Participant Monitoring Invade Privacy?” (1980) 2 *CommEnt* LS 287.

<sup>154</sup> *Ibid* at 324, 325.

<sup>155</sup> *Ibid* at 323, 324.

<sup>156</sup> As was illustrated in *Deteresa*, *supra* note 14.

<sup>157</sup> BCPA, *supra* note 23, s 2(3)(a); SPA, *supra* note 23, s 4(2)(a); MPA, *supra* note 23, s 5(f); NFLDPA, *supra* note 23, s 5(2)(a).

<sup>158</sup> BCPA, *ibid*, s 2(4); SPA, *ibid*, 4(2); NFLDPA, *ibid*, s 5(2).

First, we should avoid creating a blanket defence for intrusions that generate information of "public interest." In the American context, a broad "newsworthiness" defence, available for the tort of "public disclosure of embarrassing or private facts," has occasionally been extended to the intrusion tort.<sup>159</sup> The *Restatement* provides that "When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy." In my view, such a sweeping defence would fail to protect individual privacy interests in Canada. Critically, it fails to address the reality that matters may be both private and of "public interest" simultaneously.<sup>160</sup> For example, as noted by the Supreme Court in *Aubry*, the "private life of a person who is engaged in a public activity or has acquired a certain notoriety can become matters of public interest."<sup>161</sup> While the nature of the information sought by the media should clearly be relevant, a "public interest" defence, like the American "newsworthiness" inquiry, lacks the nuance necessary to deal with a complex problem: balancing two valuable but conflicting societal interests.<sup>162</sup>

Mirroring the approach of the Supreme Court in *Grant*, the proposed defence of "Responsible Newsgathering on Matters of Public Interest" contains the necessary nuance to address this tension. Under this proposal, after determining that the information sought was in the public interest, a court would engage a proportionality analysis between the plaintiff's privacy interests and the importance of free press in the circumstances.

### *1. Matters of Public Interest*

The Supreme Court in *Grant* held that no single test could define information of public interest.<sup>163</sup> The subject matter "must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached."<sup>164</sup> The mere fact that much of the public would not be interested does not remove a matter from the public interest, so long as some segment of the community has a genuine stake in knowing about the matter.<sup>165</sup> But simple "curiosity or prurient interest" is insufficient.<sup>166</sup> Fundamentally, "public interest is not synonymous with what interests

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<sup>159</sup> See, e.g., *Cassidy supra* note 14; *Barber v Time Inc*, 159 SW 2d 291 at 295, 1 Media L Rep 1779 (Mo 1942).

<sup>160</sup> Lidsky, *supra* note 128 at 235.

<sup>161</sup> *Aubry, supra* note 64 at para 58.

<sup>162</sup> *Ibid* at 61.

<sup>163</sup> *Grant, supra* note 7 at para 103.

<sup>164</sup> *Ibid* at para 105.

<sup>165</sup> *Ibid*.

<sup>166</sup> *Ibid*.

the public.”<sup>167</sup> The public’s desire for information on a given subject, such as the private lives of individuals, does not alone render an essentially private matter public.<sup>168</sup>

With these comments, there is essentially no limit to the range of matters that could be considered to be in the public interest. Beyond government or political matters, the public may have a genuine stake in a variety of matters including science, art, the environment, religion, and morality.<sup>169</sup> This broad conception of public interest would similarly recognize the importance of free press and free expression under the proposed defence of Responsible Newsgathering.

## 2. Responsible Newsgathering

Even if a media defendant can establish that the information it sought was in the public interest, the methods it employed may still render the newsgathering illegitimate. In the second step of the defence, a defendant must show its newsgathering activities were responsible, in that it did no more than was necessary in order to gather the information, having regard to all the circumstances.

In determining whether newsgathering was responsible, courts should consider all of the relevant circumstances of the case, including the importance of the information sought, the extent and duration of the intrusion, and the means used.<sup>170</sup> Ultimately, a court must decide whether the public importance of the information and the societal importance of free press outweigh the plaintiff’s privacy interest. This proportionality analysis recognizes the importance of the press, while protecting victims from overzealous intrusions into their private lives.<sup>171</sup>

In certain cases, almost any information gathering activity will excessively intrude on the plaintiff’s private life.<sup>172</sup> Given the importance of individuals’ homes to their dignity, autonomy, and personal development,<sup>173</sup> most, if not all, intrusions into a home will be unjustifiable. More difficult questions may arise, however, in public settings where individuals expect less privacy, but, as discussed above, should not be considered to have waived their right altogether. The protection afforded to a plaintiff in this case will depend heavily on context. In certain public locations, such as locker rooms or secluded parks, individuals maintain a reasonable expectation of privacy and deserve greater protection. In other locations, such as public streets and department

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<sup>167</sup> *Ibid* at para 102.

<sup>168</sup> *Ibid*.

<sup>169</sup> *Ibid* at para 106.

<sup>170</sup> Lidsky, *supra* note 128 at 243.

<sup>171</sup> *Ibid*.

<sup>172</sup> *Ibid*.

<sup>173</sup> Margaret Jane Radin, “Property and Personhood” (1982) 34 Stan LR 957 at 991–992.



stores, individuals have lower expectations of privacy and will be entitled to less protection under the balancing exercise.<sup>174</sup>

From the media defendant's perspective, the importance of the information sought to the public may justify more or less intrusive activity. As noted in *Grant*, "not all matters of the public interest are of equal importance."<sup>175</sup> Information regarding threats to the health, safety, and well-being of others, is of higher public interest and thus media defendants should be entitled to greater deference. On the other hand, matters of less public importance, such as everyday politics, will warrant a more stringent standard.

While the means employed by the media to gather the information may establish a *prima facie* intrusion, they should also receive careful, further consideration under the proportionality analysis. Generally, newsgathering activities that involve deception and intricate schemes to mislead others are more offensive. The use of photography, video, and sound recording can be more intrusive than mere observation.<sup>176</sup> Courts should stay cognizant, however, that the impact and credibility of a news story is often enhanced by video or photos;<sup>177</sup> seeing is often believing. Courts should thus consider whether the story would have the same impact and credibility if less intrusive means were used.<sup>178</sup>

#### **D. Application & Analysis: Investigative Reporting in Canada**

Canada has a long and largely undocumented history of investigative journalism that has served an important function in our society. It has been responsible for uncovering wrongdoing, exposing government activities, holding powerful interests accountable, infiltrating criminal networks, and exonerating the wrongly accused.<sup>179</sup> The question arises, therefore, whether and to what extent the new Canadian privacy tort may apply against these publicly beneficial activities. I suggest that the proposed two-stage framework and media defence of Responsible Newsgathering can recognize the potential intrusiveness of the practice, while preserving its legitimacy as an essential tool of newsgathering.

In most cases, subjects of investigative reporting will have little difficulty establishing a *prima facie* intrusion under the *Jones* test. Investigative reporters lie about their intentions, create false identities, surreptitiously film and record, and employ a multitude of other deceptive tactics. It would be difficult to argue that these activities would not be intrusive and highly offensive to a reasonable person. Applying the

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<sup>174</sup> Lidsky, *supra* note 128 at 244.

<sup>175</sup> *Grant*, *supra* note 7 at para 112.

<sup>176</sup> Lidsky, *supra* note 128 at 246.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> See Cecil Rosner, *Behind the Headlines: A History of Investigative Journalism in Canada* (Toronto: Oxford University Press, 2008).

proposed two-stage framework, it will thus fall to the defendant to raise the defence of Responsible Newsgathering on Matters of Public Interest.

Two recent instances of investigative reporting highlight the potential applications of the defence for a media defendant in this regard. In one case, a *Globe and Mail* reporter went undercover as a domestic cleaner in Toronto with the pretense of researching the living conditions of the working poor in Canada.<sup>180</sup> She falsely represented herself to families as a domestic cleaner and failed to disclose her true purpose, and was allowed entry into their homes with the opportunity to observe private details of their lives.<sup>181</sup> In a series of articles entitled “Maid for a Month,” the reporter described her experiences and, on one occasion, she described a home with enough detail to make its occupants identifiable. She published personal details including a “urine-stained toilet seat” and the father’s 42 inch waistband,<sup>182</sup> which the family alleged harmed their dignity interests and personal autonomy, and caused them to experience embarrassment and mental distress.<sup>183</sup>

The newsgathering activities of the reporter in this case were intrusive and would undoubtedly be considered highly offensive by any reasonable homeowner. Under the defence of Responsible Newsgathering, the plight of low-income Canadians may be asserted as an important matter of public interest. However, at the proportionality stage, there is a strong disconnect between the public’s interest in the information, and the nature of the intrusion. The reporter could have researched the “hard lessons one learns living at minimum wage”<sup>184</sup> through alternative and less invasive employment. Furthermore, the intrusion in this case was into a private home where individuals have strong expectations of privacy. In this case, the balance likely favours denying the defence.

In a second investigative report by the *Toronto Star*, a reporter went undercover as an elderly man in need of care to investigate the living conditions in a Toronto retirement home.<sup>185</sup> The final report described other residents being left in filthy diapers for hours, washrooms without toilet paper, unhealthy food, understaffing, and no stimulation. The article also contained dramatic photos including one of an 82-year old man, in diapers and suffering from dementia, who had fallen to the floor and who did not receive help for twenty minutes.

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<sup>180</sup> Jim Sheppard “Jan Wong discusses her ‘Maid for a Month’ series”, *The Globe and Mail* (11 April 2006), online: The Globe and Mail <<http://www.theglobeandmail.com>> [Sheppard].

<sup>181</sup> Nitsopoulos, *supra* note 27 at para 18.

<sup>182</sup> Betsy Powell, “Family sues Globe over tales from ‘maid’”, *The Toronto Star* (28 August 2008), online: The Toronto Star <<http://www.thestar.com>>.

<sup>183</sup> Nitsopoulos, *supra* note 27 at paras 18–20.

<sup>184</sup> Sheppard, *supra* note 180.

<sup>185</sup> Dale Brazao & Moira Welsh, “Seniors at risk in retirement home, investigation reveals”, *The Toronto Star* (1 October 2010), online: The Toronto Star <<http://www.thestar.com>>.

The reporter's actions, including creating a false identity, using phoney papers, making up a story, and clandestinely photographing and recording residents and the owner, would likely be considered highly offensive. As the information is clearly of public interest, it would fall to the defendant to demonstrate that the means it employed were not unduly intrusive in the circumstances. Arguably, much of the story could have been garnered through an external investigation. In fact, a second *Star* reporter conducted an external investigation that included interviewing residents and their families, uncovering several public health violations,<sup>186</sup> delving into landlord-tenancy proceedings, and exposing assault allegations.

In favour of the defence, the home was publicly accessible by any senior person or visitor. Furthermore, if the reporter had announced his visit, staff might have deviated from their regular behaviours. The gravity of the harm and the importance of the information to society support greater deference to the methods adopted by the media to expose the state of mistreatment of residents in the retirement home. The story, particularly the photographs taken, had a dramatic impact on readers, and ultimately led to an outcry for reforms that are currently pushing their way through the Ontario legislature.<sup>187</sup>

## CONCLUSION

The Ontario Court of Appeal decision in *Jones* has modernized privacy law in Ontario and for the rest of Canada. As defined, the new tort of intrusion upon seclusion will have a profound impact on the Canadian media as they investigate and report on the private affairs of individuals. I have suggested that, in order to properly respond to the ramifications of this shift in the Canadian common law of privacy, Canadian courts should develop the tort of intrusion upon seclusion in a manner that reconciles and balances societal values of privacy and free press. To this end, drawing from the analysis of the Supreme Court of Canada in *Grant*, I have proposed a two-stage framework for principled application of the tort. First, the plaintiff must establish a *prima facie* intrusion based on the test set out in *Jones*. Then, the onus shifts to the defendant to justify the intrusion. Engaging the media perspective on this proposed framework, I argue that Canadian courts should recognize a defence of Responsible Newsgathering on Matters of Public Interest and engage a proportionality analysis in light of the particular circumstances of an invasion of privacy.

While new and difficult issues confront courts, a clear statement of a principled approach to the tort will ensure that the competing interests of privacy and free press are

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<sup>186</sup> Including food risks, pet control, lack of washroom supplies, inadequate lighting, and a failure to sterilize utensils.

<sup>187</sup> Tanya Talaga, "Liberals unveil regulations to oversee retirement homes in Ontario", *The Toronto Star* (26 January 2012), online: The Toronto Star <<http://www.thestar.com>>.

reconciled appropriately. My proposal for a defence of Responsible Newsgathering could provide courts with the necessary nuance and flexibility to distinguish between legitimate newsgathering in the public interest and unjustifiable invasions of privacy. At the same time, the framework is sensitive to the realities of the media business.

This analysis only begins the debate. As the tort of intrusion upon seclusion is considered and applied in other Canadian courts, new concerns or approaches are sure to arise. Nevertheless, the introduction of this tort should be heralded with immediate discussion on how to best foster its growth with *Charter* values.