THE EVOLUTION OF THE RIGHT OF PRIVACY IN QUÉBEC

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While the importance of privacy has been debated in Common Law countries since the famous Warren and Brandeis article (1) , the question has interested quebecers only very lately.

One reason can explain this disinterest: before the Quiet Revolution, "la nation québécoise" was a very monolithic group. Worshippers were Roman Catholics of strict observance, morality was strongly shared by all and, on the political scene, uniformity was the rule. In such social tranquility, the need of privacy was not a priority.

Indeed, the necessity of a private sphere only occurs when one has a differentiation to hide: it may be opposing views on politics, religion or morality; it may be because one's field of research does not have general approval of the society one lives in. It is always because one is different from the majority that he values his privacy.

Where uniformity is the rule, privacy has no standing. Monasteries (2) and communist cells (3) often insist on public confession of guilt. Neither the platonic republic (4) nor the christian paradise have a place for privacy. It is plurality which creates the necessity of privacy!

Since 1960, Québec's Quiet Revolution has encouraged pluralism, which has in turn generated a new interest in privacy. On the political scene, loyalties are now strongly divided between federalist liberals who are now in power and independentists who collected nearly half of French-speaking québécois' votes at the last provincial election. Unfortunately, the stiffening of their views leads many of both groups to consider the opponents as traitors to their country. So, because they fear economical retaliation or the loss of their job, members of the silent majority insist very strongly on the secrecy of their political allegiance. Electronic espionage and other means of invading privacy would be sure to deter such persons from democratic participation (5) .

Another modification in Quebec's social structure which has created a new need for privacy is the recent radicalization and extreme politicization of trade unions toward the independentist and socialist ideals. This new tendency has often encouraged disrespect of political authorities and, inversely, stronger surveillance of workers by police officials. This new propensity, accompanied by the technological revolution in eavesdropping, creates a serious threat for the right to free expression of employees.

Thirdly, Québec has become a religious kaleidoscope. Since the Roncarelli affair, the Roman Catholic Church has lost its monopolistic status and even inside the Church, there is a deep division between traditionalists

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(1) Warren, Brandeis, **The Right of Privacy**, (1890) 4 Harvard L.R. 193.

(2) Rule of St. Benedict, chap. XLVI

(3) P. J. Hollander, **Privacy: A Bastion Stormed**, in Mores and Morality in Communist China, 12 Problems of Communism No. 6, Nov. - Dec 1963, 1-9.

(4) Plato, Republic 519 E.

(5) Edward F. Ryan, **Privacy, Orthodoxy and Democracy**, 1973 Can. B. Rev. 84.
Frank Askin, **Surveillance, The Social Science Perspective**, 1972 Colum. Human Rights L. Rev. 59.
Pierre Patenaude, **Le droit de l'exécutif à l'audio-surveillance lors d'activités subversives: Porte ouverte à l'arbitraire**, (1973) 8 R.J.T. 282.

and modernists. The believer has passed from uniform orthodoxy to personal faith, and he desires intimacy in his beliefs.

But the most important sociological change which affects the privacy of ordinary citizens comes from the profound evolution in morality: divorce is now part of the Quebec way of life! This change which has made divorce more permissible, encourages matrimonial partners to invade their spouse's privacy either to gather necessary evidence or only to investigate suspicions.

Recent adaptation of the civil law to the social evolution

To meet the challenge of protecting privacy in society, the legislators and the judiciary had to recognize a new protection. Yet, in Quebec the general structure of the Right of Civil Responsibility (Tort Law) made this adaptation easy.

In Quebec civil law, there is no such thing as a characterization of torts: a general principle of civil liability is included in the Quebec Civil Code under section 1053, which covers the complete field of tort law. It declares that:

> "Every person capable of discerning right from wrong is responsible for the damages caused by his fault to another, whether by positive act, imprudence, neglect or want of skill".

So, if fault or negligence causes any type of damage, there can be a civil liability. Furthermore, even when there is no evidence of material damage, the civil law allows compensation for purely moral prejudice (6).

These general principles were first applied to privacy in the *Robbins* v. *Canadian Broadcasting Corporation* case in 1957 (7). Doctor Robbins had written a strong criticism to the producer of a television program, insisting that his letter should be read to telespectators. It was done. But subsequently, the address and telephone number of Doctor Robbins were given to the listeners, so that they could "cheer him up".

Having had his solitude greatly disturbed by telephone calls, Doctor Robbins sued the Canadian Broadcasting Corporation and was awarded $3,000.00 as compensatory damages for *inter alia,* invasion of privacy. The two prerequisites for the application of the right to civil liability existed: a fault and a prejudice caused by that fault.

This existence of the right to privacy was sanctioned subsequently by two recent decisions concerning unauthorized publication of a plaintiff's likeness (8). What is interesting to note is that, in the *Rebeiro* case, compensatory damages were accorded because the right of personality had been infringed, not because there had been a violation of property rights (9).

But even with this jurisprudential evolution, privacy is not effectively protected by the general principles of the law of civil responsibility. To succeed, one has to prove fault or negligence (10) and real prejudice, be it

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(6) J. L. Baudouin, **La responsabilité civile délictuelle**, P.U.M. 1973, 567 p. nos 160 a 185.

(7) (1958) C.S. ?é; 12 D.L.R. (2d) 35.

(8) **Descamps v. Automobile Renault Canada**, C. S. Mtl. 05-818-140-71, 24 fév. 1972.
Rebeiro v. Shawinigan Chemicals Limited, (1973) C.S. 389. H. Patrick Glenn, **Comment**, 1974 Canadian Bar Review 297.

(9) In Ontario, while specifying that no right to privacy existed, Mr. Justice Haines in **Krouse v. Chrysler Canada** (1971) 25 D.L.R. (3d) 49, awarded damages to a professional football player for unauthorized appropriation of his likeness, because it was a violation of the plaintiff's property right. Even that award was denied on appeal: (1974) 40 D.L.R. (3d) 15. H. Patrick Glenn, **Le secret de la vie privée et le droit québécois**, Rapport au congrès Henri Capitant, mais 1974, inédit nos. 13-14.

(10) J. L. Baudouin, **La responsabilité civile délictuelle, op. cit.**, p. 41.

material or moral [11] . Often there is no fault or negligence and unless there has been publication of what has been heard, damage is difficult to prove.

However, law has to protect man from investigation and intrusion, because once privacy has been invaded, it is often too late to compensate for the wrong. Moreover, the intrusion, as such is inherently wrongful [12] . The only remedy is by a legislative consecration of a general subjective right to privacy, giving it the status of a fundamental value! [13]

The National Assembly has recently included such a formal recognition of the importance of privacy in the new Québec Bill of Rights, which has just passed its first reading and is now being studied by a Parliamentary commission [14] . It recognizes that privacy is a fundamental value, and that every infringement of it is a *"malum in se"*.

Three consequences will derive of such a consecration of the paramount importance of privacy:

1. If it is recognized that privacy is essential to the development of personality, it will be presumed that every invasion of it is harmful. So as soon as that fundamental right were transgressed, a loss would be presumed. As a matter of fact, it has been affirmed in French cases that every interference with privacy creates *ipso facto* a prejudice [15] .
2. The judiciary would have the means to stop every invasion of privacy by injunction, even when such invasion was non-malicious or when no proof of anticipated damages was presented.
3. Evidence obtained by an illegal intrusion into personal privacy would, in ordinary situations, be excluded in civil cases, according to the adage *"Nemo auditur propriam turpitudinem alegans"*. Indeed, the judiciary would hesitate to take profit of an infringement of such a fundamental value [16] .

Difficult adaptation of the Common Law

It is interesting to note that in spite of the fact that Canadian common lawyers were interested in the creation of a general right of privacy much before Quebec civil lawyers, two characteristics of the Canadian common law of torts still prevent the recognition of such a right to privacy. The first, and most important, is the impossibility to grant compensatory damages for purely moral suffering. This greatly limits the protection that could be provided against invasions of privacy because such invasions ordinarily create only non-material damages. The second characteristic is the common law's classification of torts: this heritage of the ancient writs renders it more difficult for judges to create new torts.

To obtain compensation for invasion of privacy, one has to use torts as "defamation", "trespass", "nuisance" or even sometimes "breach of confidence".

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(11) J. L. Baudouin, **supra**, p. 77.

(12) Alan F. Westin, **Privacy and Freedom**, Atheneum, New York, 1967, 487 p.

(13) Pierre Patenaude, **Le protection civile des conversations privées**, à paraître. Titre 1, chapitre 2.

(14) **Loi sur les droits et libertés de la personne**, Projet de loi 50, 1ère Lecture, Assemblée nationale du Québec, 2e session, 30e Législature, article 5:
"Toute personne a le droit au respect de sa vie privée".

(15) **Epoux de Lartigue v. Soc. Geveart et de Sazo**, Trib. Civ. Seine, 4 fév. 1956; Gaz. Pal. 1956.1.284.
Marlene Dietrich v. Journal France, Dimanche, Paris, 16 mars 1955, D.1955, 295.
Soc. F.E.P. v. Epoux Tenebaum, Cour d'Appel de Paris 15 mai 1970; D.1970.1.469.

(16) Pierre Patenaude, **De l'admissibilité devant les tribunaux civils, des preuves illégalement obtenues**, 1973, 33 Revue du Barreau, 27.

Unfortunately, certain situations cannot be classified under these headings: wiretapping is such a case! If wiretapping is done on telephone lines outside of private property, how will the victim obtain compensation?

He is not the owner of the telephone lines, and as such cannot plead "trespass" or "nuisance"; if the conversation that is overheard is not publicised, he cannot plead "defamation". And even if he could, because often no material loss arises from this intrusion on his privacy, no compensation can be awarded except for the types of defamation that are actionable per se.

The solution to this dilemma resides in the enactment of statutory protection of privacy. This has been done lately in Manitoba [17], Saskatchewan [18] and British Columbia [19].

Privacy has been recognized as a fundamental value, essential for the progress of mankind [20]. It is the duty of jurists to see that internal law protects this right efficaciously. The federal Parliament has recently made an effort to do so [21], it is now for the provinces, in their sovereign jurisdiction over civil protection, to legislate on privacy.

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(17) Privacy Act, 1970, S.M. 74.

(18) **An Act respecting the Protection of privacy**, 1973-74 S. Sask. 80

(19) **An Act for the Protection of Personal Privacy**, 1968 S.B.C. 39.

(20) Déclaration universelle des droits de l'homme, a. 12 Convention européenne des droits de l'homme, a. 8

(21) **Protection of Privacy Act**, R.S.C. 34, s. 178.

(22) **Protection of Privacy Act**, R.S.C. c-34, c. 178, 21-22 Eliz II, ch. 50.