

The Privacy Issue

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Humans are faced with a puzzling dilemma in the age of technology. Do we conform to societies terms accepting technology or do we disregard societal norms and leave everything behind, commencing the hermit life. While the latter has its merits the trade off is unacceptable to most, the loss of relationships and being in the know is too much to stomach. Humans like normal and thrive off what they know. But what happens when we allow governments to go too far and use technology for their advantage against the layperson. In the first chapter of *The Disappearance of Criminal Law*, the authors explore Canadians deteriorating privacy rights. With increasing capability in surveillance technology, the government can utilize that power to maintain order and justice. But how far is too far?

Privacy is defined as the state of being free from being observed or disturbed by others. The *Charter*¹ guarantees that Canadians will be protected against unreasonable intrusion from the state.² Reasonableness is determined by what is correct under the eyes of the law. usually reasonable breaches of privacy would be allowed when the police obtain a warrant. They need to ask for permission from the Court to create a relationship of good faith. When they obtain the warrant then the extent of the police's power is far reaching. The term unreasonable is vague for a reason. This makes breaching it strenuous to prove. To breach the term unreasonable police will have to do something considerably wrong. For example: the police going into someone's private home without any just cause or warrant. However, the Courts allow the police to get away with many things. This is due to the nature of the job, creating situations. In *R v Edwards* the Court outlined 7 factors to determine whether someone has the right to reasonable expectation of privacy.³ the factors include your ownership in relation to the property and then the court examines a subjective and objective test.

The test from *Edwards* can be summarized as: "1) the existence of a subjective expectation of privacy; and 2) the objective reasonableness of the expectation."⁴ This means that each privacy case will be highly fact dependent, the Courts will have discretion in exercising judgment as to what an "expectation of privacy is". However, the right to privacy ends when detachment from the body/property occurs. And the right to privacy will be lessened when the intrusion is minimal. For example: sniffer dogs.⁵ Once the object in question leaves your property your right to privacy has been expunged.

Further the only way this issue of privacy is brought up in Court is if the accused shows that the administration of justice would be brought into disrepute if allowed to pass. This is a large wall to jump over. And will only be seen if there was a right to privacy to begin with. The police have increasing search powers in day to day affairs. In the cases of *R v Le*⁶ and *R v Grant*⁷, the police officers were

¹ *Charter of Human Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

² Richard Jochelson, Kristen Kramar, *The Disappearance of Criminal Law: Police Powers and the Supreme Court*, (Halifax & Winnipeg: Fernwood Publishing 2014) at 23.

³ *R v Edwards*, 1996 SCR 128 at para 45.

⁴ Jochelson, *supra* note 2 at 27.

⁵ *Ibid* at 30.

⁶ *R v Le*, 2019 SCC 34 [*Le*].

⁷ *R v Grant*, 2009 SCC 32 [*Grant*].

allowed to search into a man's bag and used what they found as evidence (drugs and firearms). the police will be able to gain much from interactions with unsuspecting citizen who do not understand the law. they will use their unrelenting presence to psychologically coerce the minds of those untrained in their rights.

The government wants to ensure public safety and maintain order for all citizens. But have the Courts given too much power to the police? the public is protected by the term unreasonable. However, the crown will continue to push the boundaries of the term in order to serve the police's agenda. Different judges will interpret the word how they see fit and if they lean towards the side of the state they will allow the police to gain more power when it comes to invading citizen's privacy.

The problems Canadian citizens will face if the government continues to loosen restrictions on privacy law will be dramatically consequential. With current technology the governments can, among other things, tap into phones, access computers remotely and use surveillance to track people's movements. This will not be pleasant to those who enjoyed their freedom. Anyone who commits or speaks about committing even a petty crime may be liable for their actions.

A new problem Canadian citizens face is that with the increasing use of new technology the question is one of: where will the line be drawn? For example: if the police gain access to sent emails to incriminate an accused, can they justify the invasion of privacy because the email has left the accused's possession. Or will the email be considered private information. More troubling scenarios will arise.

This is why the government must tread careful in the age of technology. We must not let the state succumb to the atrocities outlined in Orwell's book 1984. Nor should we give discretionary power to state officials like China has. This will create an oppressive system. Giving unprecedented power to state officials will make citizens weary and distrustful. To maintain balance they must use discretion, slowly integrating new technology for police to use while being mindful of the serious effects it may have on public welfare. A complete surveillance system may intrude on citizens *Charter* rights. a sever enough breach will limit the power police have in catching criminals. However, the Court has been favourable to the police. Tipping towards the side of police and allowing them great discretion. This problem will develop with the passage of time, as new technology begins to surface that can be used for policing tactics more people will question its viability. In conclusion, the Court must continue using discretion when dealing with citizens privacy rights.