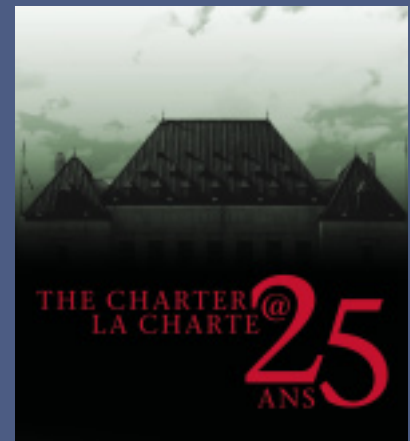


THE CHARTER DOES NOT PROTECT PRIVACY

Jennifer Stoddart

While the Charter of Rights does not cover privacy rights, privacy issues have become ever more important in the information age and with the emergence of security issues since the events of September 11, 2001. Canada's Privacy Commissioner, Jennifer Stoddart, notes that "nothing should be changing faster than my expectation of privacy," in a world where computer programs track everything she downloads from the Internet, and where "vast data banks store my phone records obtained by extra-territorial entrepreneurs." As for security versus privacy, she notes that we live "in a new surveillance society." She concludes that "the Charter is not the place to look for the kind of privacy protection that most of us need."

La Charte des droits et libertés ne garantit pas la protection des renseignements personnels, mais les questions de confidentialité ont acquis une importance clé en cette ère de l'information et plus encore depuis le 11 septembre. Selon la commissaire à la protection de la vie privée du Canada, Jennifer Stoddart, « rien ne devrait évoluer plus vite que nos attentes en matière de confidentialité » à l'heure où des logiciels peuvent dépister tout ce que nous téléchargeons et où « d'énormes banques de données stockent nos registres d'appels obtenus auprès d'entreprises extraterritoriales ». Examinant le rapport entre sécurité et confidentialité, la commissaire estime que nous vivons désormais dans une « société de surveillance » et qu'il faut « chercher ailleurs que dans la Charte la protection dont la majorité des gens ont besoin ».



From a Privacy Commissioner's perspective, it is remarkable that we have two Charters in Canada, only one of which expressly provides for the protection of privacy. Nonetheless, they are born of the same intellectual origin, namely, Frank Scott, who was a McGill constitutionalist in the 1950s and 1960s. The battle came to a head in *Roncarelli v. Duplessis* in 1959; it was a historic moment for this generation, whose main priority was to define the state's power and prevent a shift toward totalitarianism.

It is also remarkable that the protection of privacy — along with the protection of personal information — is one of the most frequently neglected rights at the federal level. Although it was omitted from the Charter of Rights and Freedoms, it was put in place through a piece of legislation adapted to the particular needs of the federal bureaucracy. It should also be noted that what was contained at the outset in the *Canadian Human Rights Act* in 1977 has become a standard that is distinguished by its flexibility and its opacity.

Since September 11, 2001, experts have been telling us that people's safety is increasingly reliant on the close monitoring of individuals and the enlightened juxtaposition of information, specifically, personal information. And

Canada is following suit. However, it has not implemented any counter-measures to reinforce rights that prevent government intrusion in private life. There is no public accountability for the influx of information and the way it is used.

For an example of this trend toward customary secrecy, consider this: at the time of the 2005 creation of the new super-department, Public Safety and Emergency Preparedness Canada (PSEPC) — which is the portfolio department responsible for some 10 agencies, including the RCMP, Correctional Services and CSIS — this department refused to accept the obligation to report annually to Parliament on how personal information is handled.

In this new surveillance society, it is not surprising to learn that a recent Queen's University study found that 48 percent of Canadians do not trust the government with their personal information. It is interesting to note that in Quebec, where the Charter recognizes privacy and provides a direct right of action (as evidenced in the *Vice-versa* and the *City of Longueuil* cases), people are more confident about the control they have over their information.

At the same time it adopted the Charter, the federal government, like Quebec, passed privacy and access-to-information legislation. In the federal *Privacy Act*, personal information collected by one agency can be used, without consent, for any use or purpose consistent with the purpose of the collection. A broad and very adaptable criteria. As approved in the *Smith* case (snowbirds), circulation of personal information for consistent use is now so extensive as to defy any schematic tracing of its flow.

That the *Privacy Act* no longer really protects citizens' privacy very well is generally acknowledged, but no government has yet put it on its legislative renewal agenda. Private sector legislation is a generation or two more recent in its approach, yet it underestimated the fluid and even changing patterns that follow trans-border data flows.

But back to the 25 years of Charter struggles with this unnamed right.

The expectation of privacy has been a relative norm that could accommodate the many colours and shapes of the changing cultural and institutional practices found under the aegis of privacy. However, the subjective view of the privacy an average citizen can expect in a variety of situations has been challenged by the proliferation of surveillance technology available and used, more or less surreptitiously, ranging from digital face recognition cameras in airports to global positioning systems (GPS) in fleet vehicles to radio frequency identification devices (RFIDS) in our access cards. Soon, nanotechnology will scan our bodies, allowing for all types of biometric monitoring, including DNA analysis.

In trying to categorize this expectation and thus the possible constitutional infringement of it, our courts are labouring over ways to appropriately define the categories of information our lives

secrete, such as the heat patterns emanating from our dwellings. This was most recently debated in the *Tessling* case, where advanced thermo-analysis to gather evidence for an investigation of a marijuana front operation technology was used to detect temperature differences outside a house. The evidence led to the conclusion that a person should not have a reasonable expectation that external indicators of energy consumption on the outside of this house should remain private and thus had no reasonable expectation of privacy.

As several commentators have noted, nothing should be changing faster than my expectation of privacy, whittled down almost daily by computer programs that track what I download from the Internet, cameras that capture my image as I walk to my office, vast data banks that store the details of my consumer habits, without mentioning my phone records obtained by extra-territorial entrepreneurs. My expectations are rapidly diminishing with the knowledge that I cannot exist without leaving an informational trail. And hot on this trail are not just governments and marketers but identity thieves and fraudsters that

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Expectations of privacy will have to be refined to embrace core Charter values of proportionality, autonomy, dignity, personal integrity, and control

of information about oneself in a constantly moving digital environment.

One of the challenges the constitutional Charter is ill-equipped to address is the dilemma posed by privacy as a right, which is very difficult to quantify and whose loss can almost never be remedied. Yet many of the current threats to personal information protection come from the commercial and civilian world, where templates for damage assessment are familiar. Only four Canadian provinces have statutory privacy torts, and regrettably, very little use has been made of them. Of all the provinces, only Quebec has recognized privacy as a fundamental right applying to government and private action, to civil and penal law. That citizens need some direct remedy for privacy breaches is shown by the recent case in Quebec where damages were awarded to a woman whose pictures were posted, without her consent on the Internet by her ex-boyfriend. It is shown as well by the efforts of some applicants to find a common-law tort of privacy, as recent cases in Ontario illustrate.

The world is rapidly changing in a way that makes how we define and use the law more and more open to

debate. Definitional silos of public and private action become hollow when information about us moves instantly from one to another without our knowledge or consent.

The Charter does not apply to corporate action except in the defined



Policy Options Photo

When Parliament adopted the Charter of Rights and Freedoms, it made no specific provision for privacy rights. Since then, multiplying information technologies have made it easy to obtain everything from phone records to consumer shopping trends. And since 9/11, Parliament has passed legislation in which security trumps privacy in what Jennifer Stoddart terms “a new surveillance society.”

circumstances that we know. Yet global corporations are increasingly influencing governments and populations by the array of consumer goods, the new services and the increased knowledge that they can provide. Governments use private sector databases known as data-miners, data-aggregators and data-brokers to gain information on their citizens indirectly. And data-miners purchase Statistics Canada surveys to refine their knowledge of the population.

Individuals who wish to snoop on neighbours and acquaintances can readily purchase the means to do so, confident that the legal apparatus will only catch up with them in the most extreme scenarios.

Canadian Charter values are subject to the pressures of the global market for labour and consumption. The extent to

which even government-regulated information can escape the new information order, with its emphasis on global exchange and knowledge, is debatable. The open court principle, one of the foundations of our legal system, has been turned on its head by the Internet, despite attempts to set principles and rules to protect individuals' personal information in on-line court decisions and rulings (e.g., the Canadian Judicial Council's recommended protocol on Internet access to court decisions).

After 25 years, the Charter is not the first place to look for the kind of privacy protection that most of us need. Some of its compelling definitions by the courts over the past few years still inspire us to remember how important this increasingly fragile freedom is. Those of us who are not likely to be accused of criminal

activities or to come under particular national security surveillance had better look elsewhere than to the Charter for help with our concerns. Even the most creative and informed member of the judiciary cannot, institutionally speaking, address the erosion of privacy alone. We readily give up our privacy for the illusion and sometimes the reality of physical security. We give it up for a few cents on the dollar and the perfect product. We give it up for the satisfaction of seeing the transgressors punished, smug in our belief that it will never be us.

Jennifer Stoddart is Canada's Privacy Commissioner. This article was prepared for The Charter @ 25, a conference held in Montreal on February 14-16 and organized by the McGill Institute for the Study of Canada.