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Privacy dealt with in the open

Bryan Schwartz

PRIVACY is an area where the law has developed since 1982 almost entirely outside of the Constitution. The Charter of Rights and Freedoms does not deal much with privacy. The word does not actually appear anywhere. The charter guarantee against "unreasonable search and seizure" implicitly protects privacy against heavy-handed tactics by law enforcement agencies. Otherwise, the concept does not arise very much.

The law has developed very rapidly, however, since 1982. Governments have responded to the challenge created to personal privacy by the ease with which it can be invaded in the information age.

A turning point was in 1995. The impetus was surprisingly exotic.

The European Union enacted the Data Protection Directive. It applied to both government and private-sector actors who deal with the personal information of individuals. The directive set out a broad set of principles that must be observed. Personal information should generally not be collected or distributed without consent. It should be kept accurate and up-to-date, and subject to review and correction by the individual to whom it relates. And it should not be sent outside of Europe (e.g., for processing) to anyone unless they could be counted on to live up to the same high standards.

The Government of Canada decided that it would be good for Canadian business if Canada were seen by the EU as a privacy-safe destination. The federal government was also concerned with privacy as a Canadian policy issue. So in 2001, it enacted a federal statute that extended privacy protection to the federally regulated businesses. The law also stipulated that each province had a choice: pass a "substantially similar" law or the federal law would apply as of 2004 directly to the province's business sector -- but only in relation to the privacy of customers, not to employees.

Many provinces did craft their own distinctive privacy statutes. In doing so, they built on lessons learned from the federal statute and the experience with it. They addressed situations outside of the federal statute, including privacy protection by non-profit organizations. Employees were included in the scheme of protection.

Manitoba has declined to follow suit. So privacy protection here is less complete and up-to-date than in many other parts of Canada. Private member's bills are introduced once in awhile to bring Manitoba up to speed, but the government has swatted them away. The Personal Health Information Act does, however, address privacy in the health-care sector.

The protection of privacy against government, rather than business or private non-profits, is covered in Canada and Manitoba by separate statutes. These statutes also post-date the charter.

Privacy laws are not part of the Sacred Text. They can be passed and repealed like ordinarily laws. They have a somewhat higher status than most laws. The Supreme Court of Canada calls such laws "quasi-constitutional." They deal with human rights and they prevail over all other laws, unless the legislature clearly says otherwise.

The story of privacy protection in Canada illustrates how a pervasive issue involving the protection of individual dignity can and has been addressed in a useful way outside of the Sacred Text. It also shows how government can play a useful role without becoming excessively meddlesome or heavy-handed. The federal privacy law leaves it to individual firms to craft their respective privacy policies, as long as they comply with certain broad principles. The dispute-settling mechanism aims to provide a lost-cost mechanism for solving problems in a constructive manner, rather than one that is punitive or dictatorial.

Bryan Schwartz is a professor of constitutional law at the University of Manitoba. He has written seven books on Canadian constitutional reform.