Conceptualizing the Right to Privacy in Canada

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> *Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual ... the right 'to be let alone'.*
> Warren and Brandeis, "The Right to Privacy", 1890 (4:5) Harvard Law Review 193

1. What is the nature of the right to privacy? Is it simply a value or is it a constitutionally protected human right? The concept of a right to privacy is often invoked before Courts and administrative tribunals, yet the etiology of this right is rarely explored in such contexts. This paper traces the Supreme Court of Canada's jurisprudence under the Canadian *Charter of Rights and Freedoms* to demonstrate that the right to privacy is not only a human right, it is a human right protected by the *Charter*. Moreover, like human rights protected by legislation other than the *Charter*, it is submitted that privacy rights protected by public and private sector privacy legislation are quasi-constitutional. While the legislative framework for privacy rights may not be as elegant as it is for human rights, both reflect the legislatures' intent to protect these fundamental rights which are key to the functioning of liberal democracy in Canada.

2. This nature of the right must be kept in mind when Courts and tribunals are applying Canadian public and private sector privacy legislation. It is of particular importance when considering the balance to be struck between an open, public process before an administrative tribunal and the privacy rights of the people appearing before the tribunal. In striking this balance, it is important that enough weight be given to the privacy *right*, a constitutional right.

A. Privacy as a Fundamental Human Right

3. The right to privacy is a fundamental human right that is protected by sections 8 and 7 of the *Charter*, fundamental to freedom of expression, and reflected in international covenants. The right is multifaceted, and linked to bodily integrity, dignity, liberty, and autonomy.

i) The Right to Privacy is a Fundamental Right Protected by s. 8 of the *Charter*

4. The right to privacy, particularly informational privacy, is frequently addressed under s. 8 of the *Charter*. In its seminal decision of *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, the

Supreme Court of Canada made clear that the s. 8 protection against unreasonable search and seizure protects, at a minimum, the right to privacy (at 159). Subsequently, in *R. v. Dyment,* [1988] 2 S.C.R. 417, Justice LaForest held that the underlying purpose of s. 8 is to protect the right to privacy which is more than just a physical right as it includes the privacy in information about oneself and protects individual dignity and integrity (at 426-429). In *Dyment*, Justice La Forest identified the three aspects of human experience to which the privacy protections of s. 8 attach: i) those relating to territorial or spatial experiences, ii) those relating to the person, and iii) those relating to information about oneself (at 428; see also *R. v. Tessling*, [2004] 3 S.C.R. 432 at para. 20).

5. In *R. v. Genest*, [1989] 1 S.C.R. 59, the Court similarly recognized the fundamental nature of the right to privacy as a basic human right, encompassing individual security and integrity, when it adopted the following excerpt:

> The privacy of a man's home and the security and integrity of his person and property have long been recognized as basic human rights, enjoying both an impressive history and a firm footing in most constitutional documents and international instruments.
> (at 63, citing P.G. Polyriou, *Search and Seizure*: *Constitutional and Common Law* (London: Duckworth, 1984) at vii)

6. Subsequently, in *R. v. Plant*, [1993] 3 S.C.R. 281, the Supreme Court noted that s. 8 fosters "dignity, integrity and autonomy" (at 293). That s. 8 fosters these values by protecting the right to control the dissemination of information about oneself is reflected in *R. v. Mills,* [1999] 3 S.C.R. 668 and *R. v. Duarte*, [1990] 1 S.C.R. 30. As the Court explained in *Duarte*:

> ... it has long been recognized that this freedom not to be compelled to share our confidences with others is the very hall mark of a free society. Yates J., in Millar v. Taylor (1769), 4 Burr. 2303 at p. 2379, 98 E.R. 201 at p. 242: "It is certain every man has a right to keep his own sentiments, if he pleases: he has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends."
> (at 53 – 54, cited with approval in *Mills* at para. 80)

7. More recently, the Supreme Court affirmed that privacy is the "dominate organizing principle" in an analysis under s. 8 of the *Charter* (*R. v. Tessling*, [2004] 3 S.C.R. 432 at para. 19). Thus, by protecting individuals from unreasonable searches and seizures by the state, s. 8 provides constitutional protection to the right to privacy.

ii) The Right to Privacy is a Fundamental Right Protected by s. 7 of the *Charter*

8. The Supreme Court of Canada has linked the right to privacy with human dignity, liberty and security in its reflections on s. 7 of the *Charter*. In this regard, the Court recognized the role privacy plays in protecting other fundamental human rights. This link exists irrespective of whether there has been a search and seizure.

9. Writing for the Court in *R. v. Beare*, [1988] 2 S.C.R. 387, Justice La Forest expressed "considerable sympathy" for the proposition that s. 7 includes a right to privacy (at 412). Although the issue before the Court in *R. v. Dyment* was whether there had been a breach of s. 8, Justice La Forest alluded to s. 7 when he referred to privacy as being "at the heart of liberty", being "grounded in man's physical and moral autonomy", having "profound significance for the public order" and going "to the essence of a democratic state" (at 427-8).

10. This link between privacy and the liberty and security interests protected by s. 7 is more clear in decisions addressing the right to make personal and private decisions free from state interference. In cases such as *R. v. Morgentaler*, [1988] 1 S.C.R. 30, per Justice Wilson at 166-167; *Rodriguez v. British Columbia*, [1993] 3 S.C.R. 519, per Justice McLachlin (as she then was) at 618; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at 368-369; and *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, per Justice La Forest at paras. 63-69, members of the Court explained that s. 7 protects the right to make private and autonomous decisions. Such comments are also found in *Aubry v. Éditions Vice-Versa*, [1998] 1 S.C.R. 591, where the Court considered the right to privacy protected by the Quebec *Charter of Human Rights and Freedoms*. The Court explained that the right to privacy guarantees "a sphere of individual autonomy for all decisions relating to 'choices that are of a fundamentally private or inherently personal nature'" (para. 52). This approach to the right to privacy recognizes that s. 7 protects the freedom of action and personal autonomy associated with liberty, security, and dignity.

11. The Supreme Court has also recognized that state action interfering with the right to privacy may threaten an individual's mental integrity and thus engage the security interest

protected by s. 7 (*R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 112 per L'Heureux-Dubé; *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 85). In both *O'Connor* and *Mills*, members of the Court considered the threat to a sexual assault complainant's mental integrity occasioned by the compelled disclosure of his or her therapeutic records. Lisa Minuk explains this link between privacy and security:

> Privacy can also be crucial for preserving mental health and supporting one's sense of personal identity or, put another way, for facilitating emotional and ontological security. When a person feels spatially alone and secure from the prying eyes of others, then she is able to truly relax and, relatedly, to engage in intimate activities and develop intimate relationships ... The more private and "safe" the space is the freer one is from fear of being watched (with all the judgment and social censure that implies), and therefore the freer one feels to engage in those activities that we experience as individuating us and enriching our lives.
> L.Minuk, "Why Privacy Still Matters: The Case Against Prophylactic Video Surveillance in For-Profit Long-Term Care Homes (2006) 32 Queen's L.J. 224 at 251-252

12. Section 7 also protects informational privacy. In this context, the liberty and security interests are associated with the freedom to engage in private and personal communications without fear that the nature of those communications will be revealed without consent. This link was made explicit in *R. v. O'Connor*, [1995] 4 S.C.R. 411. In that case, Chief Justice Lamer (as he then was) and Justice Sopinka referred to the "constitutional right to privacy" in information (para. 17). Justice L'Heureux-Dubé, writing for three of the nine judges, specifically located the reasonable expectation of privacy in the liberty and security interest s. 7 of the *Charter* protects. She explained that the right to privacy is an essential aspect of liberty in a free and democratic society and its breach infringes on the dignity and self-worth of the individual (paras. 113, 119). Justice McLachlin (as she then was), as well as Justice Cory writing for himself and Justice Iacobucci, and Justice Lamer who wrote for himself and Justice Sopinka, agreed with Justice L'Heureux-Dubé's conclusions regarding privacy and privilege (paras. 2, 189, 191).

13. One year later, in her dissent in *M.(A.) v. Ryan* (1996), [1997] 1 S.C.R. 157, Justice L'Heureux Dubé explained that in *O'Connor* she was writing for the Court when she held that the liberty and security interests protected in s. 7 encompasses the right to privacy. She went on to note:

> That privacy is essential to human dignity, a basic value underlying the *Charter*, has also been recognized. Our right to security of the person under s. 7 has been found to include

> protection from psychological trauma which can be occasioned by an invasion of our privacy. ... Section 8 also reveals that the *Charter* is clearly premised on a respect for the interests of individuals in their privacy. Finally, the common law torts of defamation and trespass further recognize the validity of an individual's claim to fundamental privacy interests (para. 80).

14. The Supreme Court referred to privacy in similar terms when addressing public sector privacy and access legislation. In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, Justice La Forest explained the importance of privacy and, although he was writing in dissent, he wrote for the whole Court on this point (See: *Lavigne v. Canada*, [2002] 2 S.C.R. 773 at para. 25). Justice La Forest described privacy as a "fundamental value", "grounded on physical and moral autonomy – the freedom to engage in one's own thoughts, actions and decisions" (para. 65). He explained that informational privacy encompasses the right of an individual to determine when, how, and to what extent personal information about himself is revealed (at para. 67). In concluding that the federal *Privacy Act* protects the privacy of information, he adopted the following comments from *R. v. Dyment*:

> Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force put it (p. 13):
>
> > "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.
>
> (*Dagg,* at para. 67, citing *Dyment*, at 429-30)

In this way, it has been repeatedly recognized that the right to privacy is a fundamental, constitutionally protected human right, closely related to liberty, security, integrity and dignity.

15. In *Cash Converters Canada Inc. v. Oshawa (City)*, [2007] O.J. No. 2613 (C.A.), the Ontario Court of Appeal reached this same conclusion regarding the Supreme Court of Canada's jurisprudence. The Court commented that the Supreme Court has found privacy to be a fundamental value in modern democracies that is enshrined in both ss. 7 and 8 of the *Charter* (para. 29).

16. Moreover, the Ontario Superior Court conclusively found that a breach of the right to informational privacy can violate s. 7 of the *Charter*, irrespective whether there had been a search or seizure. In *Cheskes v. Ontario (Attorney General)*, [2007] O.J. No. 3515 (S.C.J.), the Court considered new Ontario legislation which retroactively allowed information in previously confidential adoption records to be provided to an adult adoptee or to a birth parent, without the consent of the person identified in the record. In a review of the case law regarding the right to privacy, the Court commented that it "should now be beyond dispute" that privacy is a fundamental value protected by both ss. 7 and 8 of the *Charter* (para. 80).

17. In *Cheskes*, the Court found that the applicants had a reasonable expectation of privacy in the birth and adoption records, the disclosure of which without their consent would violate their dignity, self-worth, and right to liberty, an essential aspect of which is the right to privacy (paras. 69, 83). Citing *Dyment*, the Court agreed that "all information about a person is in a fundamental way her own, for her to communicate or retain for herself as she sees fit" (para. 90). It concluded that the new law disclosing adoption records infringed s. 7's guarantee of the right to liberty. It also contravened the principle of fundamental justice in that "where an individual has a reasonable expectation of privacy in personal and confidential information, that information may not be disclosed to third parties without his or her consent" (para. 132). The breach could not be saved by s. 1 and thus the Court struck down the legislation.

18. Based on the above cases, it now seems beyond doubt that the right to privacy is protected under both sections 7 and 8 of the *Charter*. The nature of the particular breach at issue will determine whether there has been an unreasonable search and seizure and/or an unreasonable infringement of individual liberty and security.

19. In a broader sense, protection of the right to privacy is consistent with the *Charter's* underlying values. The Supreme Court of Canada has explained that the underlying purpose of the *Charter* as a whole is to protect individual freedom, human dignity, liberty, autonomy, and democracy (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 336-337; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at paras. 76 – 78 and the cases cited therein; *Health Services and Support – Facilities Subsector Bargaining Assn. v. British*

Columbia, 2007 SCC 27 at para. 81). Academics have comprehensively explained the importance of the right to privacy to these values. In his article titled "Privacy as an Aspect of Human Dignity", Edward Bloustein explained the importance of privacy to freedom of thought, speech and action:

> The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity... His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and become the feelings of every man.
> (E.J. Bloustein, "*Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*" (1964) 39:6 New York University Law Review 962 at 1003).

20. The right to privacy also protects human dignity. Lisa Minuk explains the importance of privacy to human dignity by observing that one's dignity is devalued by a privacy breach, irrespective of whether one knows about the breach:

> Whereas autonomy and personhood are only really compromised if one is aware that one is being watched or could be watched, dignity is implicated even when the subject of observation is completely oblivious to the surveillance.
> ... At bottom, the surveillance is distasteful because it offends a broad, semi-Kantian type notion of dignity. In the act of objectifying, spying and paying attention to, the watchers treat the watched as means rather than as ends in themselves – and that is morally offensive.
> (at 253 - 254 (citations omitted))

21. In sum, the right to privacy is a fundamental human right. It is protected by sections 7 and 8 of the *Charter* and fosters the values underlying the *Charter* as a whole. It is this right which Canadian public and private sector privacy legislation seeks to protect.

iii) The Right to Privacy and Freedom of Expression

22. Others have pointed out the importance of privacy to the freedom of expression protected by s. 2(b) of the *Charter*. In his article, "Privacy and freedom of speech", Eric Barendt explains that privacy is essential to the ability to communicate freely with another person or in a small group of people. By way of example, he points out how an employer's monitoring of its employees' computers or phones interferes not only with the employees' right to privacy, but

also with the employees' ability to read, hear, compose and communicate messages of their choosing (E. Barendt, "Privacy and freedom of speech" in A.T. Kenyon and M. Richardson, *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge: Cambridge University Press, 2006) 11 at 15-16, 24). In such cases, the expression itself is not being directly condemned or regulated, but the act of listening or monitoring has the indirect effect of curtailing expression. We may feel unable to express ourselves if we fear that our modes of private expression could become available to those outside of our private sphere, exposing us to ridicule or critique (See: R. Gavison, "Too Early for a Requiem: Warren and Brandeis Were Right on Privacy versus Free Speech" (1992) 43 S. Cal. L.R. 437 at 461-462).

23. The Supreme Court of Canada recognized the link between privacy and freedom of expression in *R. v. Sharpe*, [2001] 1 S.C.R. 45. The majority commented that privacy "may also enhance freedom of expression" and that "freedoms of conscience, thought and belief are particularly engaged in the private setting" (para. 26). This link between freedom of expression and the right to privacy is implicit in *R. v. Big M Drug Mart Ltd.*, [1995] 1 S.C.R. 295 at 336-7. In that case, the Court explained that the *Charter* protects freedom by protecting individuals from both blatant forms of compulsion and restraint and "indirect forms of control which determine or limit alternative course of conduct available to other." Interference with the right to privacy alone, either by the state or a private entity, is a means of compelling individuals to self-censure. Thus, the right to privacy is not only protected by sections 7 and 8 of the *Charter* and inextricably linked to human dignity, it is integral to other human rights such as freedom of expression.

iv) International Covenants Protect the Right to Privacy

24. The Supreme Court of Canada recently reiterated that Canada's international obligations assist in interpreting the rights the *Charter* guarantees (*Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para. 69). In this case, Canada's international commitments also provide a backdrop to the interpretation of legislation Canadian privacy legislation.

25. On the international stage, the conviction that privacy is a fundamental right, closely related to human dignity and integrity, was reflected early on. It is reflected in the same terms in Article 12 of the Universal Declaration of Human Rights (1948), Article 17 of the International Covenant on Civil and Political Rights (1966), and Article 16 of the Convention on the Rights of the Child (1990). Canada is a signatory to all of these agreements which protect individuals from, "arbitrary interference with his or her privacy, family, home or correspondence" and from "attacks upon his honour and reputation". These agreements go on to provide that "[e]veryone has the right to the protection of the law against such interference or attacks".

26. Canada is also a signatory to the Organisation for Economic Co-operation and Development's Guidelines on the Protection of Privacy and Transborder Flows of Personal Data. Through these guidelines, OECD members adopted the following principles governing the collection, use and disclosure of personal information: Collection Limitation, Data Quality, Purpose Specification, Use Limitation, Security Safeguards, Openness, Individual Participation, and Accountability. These are the same principles reflected in Canadian public and private sector privacy legislation such as the *Personal Information and Electronic Documents Act*, S.C. 2000, c. 5 ("*PIPEDA*"), the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 (private sector privacy legislation) ("Alberta's *PIPA*"), and the *Freedom of Information and Protection of Privacy Act*, R.S.A 2000, c. F-25, ss. 33 - 43 (public sector privacy and access legislation) ("Alberta's *FOIP*").

27. Canada's adherence to the above international covenants reflects its commitment to protect the right to privacy. This commitment plays a role in the interpretation of Canadian privacy legislation that is aimed at protecting this same right.

B. Purpose of Privacy Legislation

i) Public and Private Sector Privacy Legislation Protects the Right to Privacy

28. Canadian privacy legislation reflects the growing consensus that the right to privacy is a fundamental human right in need of protection. Such legislation generally falls into three categories:

(1) those applicable to the public sector which address both access to information and privacy such as Alberta's *FOIP*; the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165; the *Freedom of Information and Protection of Privacy Act*, S.M. 1997, c. 50; the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; and together, the *Privacy Act*, R.S., 1985, c. P-21 and the *Access to Information Act*, R.S., 1985, c. A-1;

(2) those applicable to the private sector such as *PIPEDA*, Alberta's *PIPA*; the *Personal Information Protection Act*, S.B.C. 2003, c. 63; and *An Act respecting the protection of personal information in the private sector*, R.S.Q., c. P-39.1; and

(3) those applicable to health information such as the *Health Information Act*, R.S.A 2000, c. H-5 ("*HIA*"); *The Personal Health Information Act*, S.M. 1997, c. 51; the *Personal Health Information Protection Act*, 2004, S.O. 2004, c. 3; and *The Health Information Protection Act*, S.S. 1999, c. H-0.021.

The conceptual basis for Canadian privacy legislation, both public and private sector, is rooted in the individual dignity, autonomy, liberty, and security that the right to privacy brings.

29. Private sector privacy legislation such as *PIPEDA* and Alberta's *PIPA*, codify one of the philosophical bases for the right to privacy: the right to control the dissemination of information about oneself, or informational privacy. As the above discussion makes clear, this is one facet of the constitutionally protected right to privacy. Rather than protecting individuals from intrusions into the right of privacy emanating from the state, such legislation protects individuals from intrusions into the right by private actors, in much the same way that provincial human rights legislation protects human rights in the private sector.

30. Such legislation balances the right of an individual to have his or her personal information protected from disclosure, with the need of organizations to collect, use or disclose personal information for purposes that are reasonable (See, *PIPEDA*, s.3; *PIPA*, s. 3). A cornerstone of the legislation is that the individual must consent to the collection, use and disclosure of their personal information. They also give an individual the right to access all of the personal information that an organization holds about that individual (See *PIPEDA*, Sch. 1 clause 4.9, ss. 8, 9; *PIPA*, s. 24). For instance, s. 24(1) of *PIPA* provides that, on an individual's request for access to personal information about himself/herself in an organization's possession, the organization *must* provide that individual with access unless an enumerated exception applies (s.

24(2); s. 24(3)). *PIPEDA* and *PIPA* also give an individual a right to request a correction to his or her personal information (*PIPEDA*, Sch. 1 clause 4.9, s. 8; *PIPA*, s. 25).

31. Whether the privacy legislation at issue applies to the public sector, the private sector, or to health information, it must be interpreted in a way that is consistent with its purpose. This purpose is to protect aspects of a fundamental human right.

ii) Private Sector Privacy is as Important as Public Sector Privacy

32. It is important to note here that protection of privacy in the private sector is as important as the protection of privacy in the public sector. In private sector privacy legislation such as *PIPEDA*, Parliament and provincial legislatures have sought to ensure that protection of the constitutionally entrenched right to privacy is extended to the private sector.

33. In *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, this issue divided the lower courts but the Supreme Court of Canada did not address it ([2005] F.C.J. No. 406 (T.D.), rev'd: [2006] F.C.J. No. 1544 (C.A.), aff'd: [2008] S.C.J. No. 45). The Trial Division characterized *PIPEDA* as quasi-constitutional and gave it a corresponding weight in the balance with solicitor-client privilege (para. 20). The Court of Appeal explicitly disagreed with this approach and commented that *PIPEDA* had its genesis from an international trade agreement and therefore was to be accorded little weight (paras. 23, 25).

34. The Supreme Court of Canada has recognized the threat modern technology poses to individual privacy. In *R. v. Duarte*, [1990] 1 S.C.R. 30, the Court commented that, if unregulated, electronic surveillance has the potential to "annihilate any expectation that our communications will remain private" (at 44). In *R. v. Wong*, [1990] 3 S.C.R. 36, the Court similarly commented that surveillance technology makes it possible to record virtually every conversation such that, as Professor Amsterdam has noted, "we can only be sure of being free from surveillance today if we retire to our basements, cloak our windows, turn out the lights and remain absolutely quiet" (at 45).

35. These cases demonstrate the Supreme Court of Canada's acknowledgement of the gravity of the threat to personal privacy which an unregulated state could pose. However, this threat is at least equally grave when the collection, use and disclosure of personal information is motivated by private commercial interests or personal gain. In his text, *Privacy and Free Enterprise*, Ian Lawson explains the enormous potential the private sector has to abuse personal information:

> Not only is information circulated from unknown or out-of-date sources, but it is mixed and matched with other information purportedly relating to the same individuals. Digitalized attributes of one consumer may be mixed and matched with those of others who subjectively appear to belong to the same category of socioeconomic behaviour. Few data "subjects" ever see the information being held and exchanged under their names; fewer still are able to correct this information or have it withdrawn from circulation.
> *Privacy and Free Enterprise,* 2nd ed. (Ottawa: Public Interest Advocacy Centre, 1997 at 32

36. The threat to individual privacy posed by the private sector is reflected in the array of issues privacy commissioners have already addressed under private sector privacy legislation:

- An employer's attempt to surreptitiously record employee conversations by hiding a digital tape recorder in a "smoke room" accessible to its employees and the public: *PIPEDA Case Summary #268*, [2004] C.P.C.S.F. No. 13, upheld: *Morgan v. Alta Flights (Charters) Inc.*, 2005 FC 421, aff'd 2006 FCA 121;

- An employer's video surveillance of its employees while at work: *R.J. Hoffman Holdings Ltd.*, [2005] A.I.P.C.D. No. 49;

- An employer's seizure of an Event Data Recorder from an employee's vehicle: *Precision Drilling Corporation*, [2005] A.I.P.C.D. No. 46;

- An employer's collection of voiceprints from its employees: *PIPEDA Case Summary #281*, [2004] C.P.C.S.F. No. 26, upheld: *Wansink v. Telus Communications Inc.*, 2005 FC 1601; aff'd 2007 FCA 21;

- The use of video surveillance in a men's locker room at a sports centre: *Lindsay Park Sports Society*, [2007] A.I.P.C.D. No. 16; and

- A retail business's collection of the following information from customers applying for a credit card: names, birthdates, addresses, phone numbers, whether they owned their own homes, time at residence, employers, the number of years employed, net income, and social insurance numbers: *Urban Audio Video Inc. (Re)*, [2007] A.I.P.C.D. No. 20.

37. Employment records alone may include references to performance reviews, medical information, psychological testing, marital status, religious background, disciplinary history, attendance records, letters of recommendation, reports on suspected misconduct, sick leave, comparisons with co-workers, and future promotion chances (see: J. deBeer, "Employee Privacy: The Need for Comprehensive Protection", 66 Sask. L. Rev. 383 at 387-8; Information and Privacy Commissioner of Ontario, Workplace Privacy: A Consultation Paper (1992) at 11).

38. The above threats to privacy are equally obtrusive whether the personal information is collected, used and disclosed by a public entity or private one. Indeed, private sector organizations increasingly may access a wide range of personal information collected by such things as video surveillance in shopping malls, event data recorders in vehicles, key stroke logging software on employee computers, internet search engine records, health records disclosed to an employer, biometric scans used for corporate security, and financial information disclosed to obtain credit. These records can contain detailed information about one's lifestyle, work habits, finances, consumer choices, intimate relations, physical and mental health, politics and religion. This information may have been gathered from a variety of sources and, in the absence of private sector privacy legislation, an individual would not be able to discover that his or her personal information has been collected, make an access request for that information, challenge its accuracy, or prevent its collection, use and disclosure without his or her consent.

39. The nature of privacy as a fundamental right remains, irrespective of whether the threat to it is posed by the state or by private interests. With respect to the analysis of human rights legislation, the Supreme Court of Canada has made clear that the determination of whether there has been a breach of a human right does not depend on whether that right has been breached by the state or by a private entity. Equality rights, for instance, are equally deserving of protection, whether their legislative protection derives from the *Charter* or from provincial human rights legislation. On this same note, private sector privacy legislation must be interpreted in a manner that recognizes that personal privacy, as a fundamental human right, is worthy of the same degree of protection irrespective of whether the threat to that right is posed by a public actor or a private one. Its breach similarly impacts individual liberty, autonomy, dignity and security.

C. Privacy Legislation Must be Interpreted in Light of the *Charter*

40. Public sector privacy legislation is subject to the *Charter* and it must also be interpreted within the rights and values contained in, and reflected by, the *Charter*. Private sector privacy legislation must also be interpreted consistently with the *Charter*. Although legislation such *PIPEDA* and *PIPA* regulate private actions, as legislation they are subject to *Charter* scrutiny. Thus, both the explicit provisions in these statutes and their omissions cannot be contrary to the *Charter* (See: *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at paras. 65-66). As the Supreme Court commented in *Vriend*, "It would lead to an unacceptable result if any legislation that regulated private activity would for that reason alone be immune from *Charter* scrutiny" (para. 65).

41. Moreover, the Supreme Court of Canada has repeatedly emphasized that legislation that protects human rights in the private sector must be interpreted in light of the *Charter* (*British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 S.C.R. 3 at paras. 47-8). To do otherwise would result in human rights being disparately protected whether they are violated by the state or by a private actor. Where legislation governing the private sector is aimed at the "same general wrong" as a *Charter* provision, the analysis under the legislation should be similar to that under the *Charter* (*Meiorin*, para. 48).

42. Consistent with this approach, the Supreme Court of Canada has held that differences in wording between human rights legislation governing private actors "should not obscure the essentially similar purposes of such provisions" and that human rights legislation should be interpreted in a purposive manner (*University of British Columbia v. Berg*, [1993] 2 S.C.R. 353 at 373). Only in this way can human rights, including privacy rights, be similarly protected across Canada.

43. For these reasons, the privacy rights granted under private sector privacy legislation must be interpreted such that they are consistent with the *Charter* and with the rights granted under similar legislation protecting privacy in the public sector.

D. Conclusion

44. The *Charter*, international covenants to which Canada is a signatory, and Canadian privacy legislation are collective reflections of Canadian values demonstrating that the right to privacy is a fundamental human right in need of protection. Canadian privacy legislation must be construed in light of their underlying purpose which is to protect this right. To this end, such legislation should be given a broad, liberal and purposive interpretation which reflects that it protects a fundamental human right which is as worthy of protection in the private sector as it is in the public sector. When administrative tribunals are dealing with privacy rights procedurally, or as an issue before them, the fundamental nature of the right must be kept in mind.

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