

Privacy and freedom of expression

The right to be forgotten in Canada

David Fraser

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Nature of rights

- Privacy is an emerging and evolving “right”
 1. **Right** to privacy against state intrusion, usually in criminal context: *Charter*
 2. *Right* to privacy against bureaucratic overcollection and overuse: *Privacy Act*
 3. Right to privacy against unreasonable intrusions by private actors: Provincial *Privacy Acts* and common law
- Only in #1 is the right constitutionally entrenched.

Charter right to privacy

LEGAL RIGHTS

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Charter right to privacy

- *Charter* s 8 only ties the hands of government actors conducting searches or seizures.
- The *Charter* does not limit intrusions by private actors.
- Statutory privacy rights are said to be quasi-constitutional in nature (as recently as SCC in *UFCW* case).

Charter right to freedom of expression

FUNDAMENTAL FREEDOMS

2. Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Charter right to freedom of expression

- While *Charter* s 2(b) only expressly applies to government actors, caselaw is clear that the common law and statutes that affect private rights must take freedom of expression into account.

Torts must accommodate s. 2(b)

***Grant v. Torstar Corp.*, 2009 SCC 61 – defamation case**

[3] Two conflicting values are at stake — on the one hand freedom of expression and on the other the protection of reputation. While freedom of expression is a fundamental freedom protected by s. 2 (b) of the Charter , courts have long recognized that protection of reputation is also worthy of legal recognition. The challenge of courts has been to strike an appropriate balance between them in articulating the common law of defamation. In this case, we are asked to consider, once again, whether this balance requires further adjustment.

Torts must accommodate s. 2(b)

***Grant v. Torstar Corp.*, 2009 SCC 61 – defamation case**

[44] The constitutional status of freedom of expression under the *Charter* means that all Canadian laws must conform to it. The common law, though not directly subject to *Charter* scrutiny where disputes between private parties are concerned, may be modified to bring it into harmony with the Charter . As Cory J. put it in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 97, “Charter values, framed in general terms, should be weighed against the principles which underlie the common law. The Charter values will then provide the guidelines for any modification to the common law which the court feels is necessary.”

Torts must accommodate s. 2(b)

***Grant v. Torstar Corp.*, 2009 SCC 61 – defamation case**

Freedom of expression necessitated amending the common law tort of defamation to include a defence of responsible communication: a right to comment on matters of public interest.

Not a privacy case, but interestingly instructive

Privacy rights must accommodate s. 2(b)

Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401, 2013 SCC 62 (UFCW)

- Started as a judicial review of a decision of the Office of the Information and Privacy Commissioner, which had held a trade union violated PIPA by videotaping at a picket line.
- PIPA allows the collection, use and disclosure of personal information that is "publicly available", which is very narrowly defined in the Act and its regulations.
- Act does not apply to information that is collected for journalistic purposes "and for no other purpose".
- Information from a public protest or picket line does not fit within the definition of "publicly available". In addition, the information collected by the union was collected for journalistic purposes, among others, which meant that exception was not available.

Privacy rights must accommodate s. 2(b)

Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401, 2013 SCC 62 (UFCW)

[38] This conclusion does not require that we condone all of the Union's activities. The breadth of PIPA's restrictions makes it unnecessary to examine the precise expressive activity at issue in this case. It is enough to note that, like privacy, **freedom of expression is not an absolute value and both the nature of the privacy interests implicated and the nature of the expression must be considered in striking an appropriate balance.** To the extent that PIPA restricted the Union's collection, use and disclosure of personal information for legitimate labour relations purposes, the Act violates s. 2 (b) of the Charter and cannot be justified under s. 1 .

The right to be forgotten (RTBF)

- In Europe, privacy rights have been extended to include a “right to be forgotten”.
- Spanish case brought by Mario Costeja González, who requested the removal of a link to a digitized 1998 article in *La Vanguardia* newspaper about an auction for his foreclosed home, for a debt that he had subsequently paid.
- Spanish DPA found the newspaper’s report was lawful and accurate, but accepted a complaint against Google and asked Google to remove the results when you searched for his name.
- European Court of Justice ruled in *Costeja* that search engines are responsible for the content they point to and thus, Google was required to comply with EU data privacy laws and would have to remove it from search results.

RTBF and freedom of expression in Canada

Discussion

- *Costeja* case stands for the proposition that the privacy rights of Mario Costeja González override the freedom of expression rights of a search engine.
- RTBF censors a search result because it is unfavourable to an individual.
- Is a search result even within PIPEDA? Arguably not as “literary, journalistic or artistic”
- A search result is a factual statement, regardless of whether what it leads to is true.
- RTBF forces a search engine to intentionally lie to users. A search is “tell me what is out there about X” and an omission without notice is a lie.

Discussion

Can *Charter* s. 2(b) allow a
“right to be forgotten” in
Canada?

Would RTBF be sustainable
under s. 1?

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